THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: *A Commentary*

EDITED BY
ALESSANDRA SILVEIRA
LARISSA ARAÚJO COELHO
MARIA INÊS COSTA
TIAGO SÉRGIO CABRAL

Universidade do Minho
Escola de Direito

JusGov
RESEARCH CENTRE FOR JUSTICE AND GOVERNANCE

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: *A COMMENTARY*

EDITORS:
Alessandra Silveira
Larissa Araújo Coelho
Maria Inês Costa
Tiago Sérgio Cabral

EDITORIAL ASSISTANCE:
Ana Cardoso
Gonçalo Martins de Matos

PUBLISHED BY:
JusGov/ UMinho Law School | Escola de Direito da Universidade do Minho

ISBN:
978-989-35054-8-9

Braga (Portugal), July 2024

This book is financed by national funds through the National Agency for Science and Technology, FCT (Fundação para a Ciência e a Tecnologia – FCT I.P.), under the project Ref. UID/05749/2020

Fundação
para a Ciência
e a Tecnologia

LIST OF CONTRIBUTORS

ALESSANDRA SILVEIRA
ALEXANDRA ARAGÃO
ANA RITA GIL
ANABELA MIRANDA RODRIGUES
ANDRÉ PAULINO PITON
ANTÓNIO ARAÚJO
ANTÓNIO MANUEL HESPANHA
CARLOS PAMPLONA CORTE-REAL
CATARINA GOUVEIA ALVES
CATARINA SAMPAIO VENTURA
CLÁUDIA VIANA
EMILIANO GARCÍA COSO
FERNANDO DE GRAVATO MORAIS
FILIPE GUERRA
FLÁVIA NOVERSA LOUREIRO
FRANCISCO PEREIRA COUTINHO
GONÇALO SARAIVA MATIAS
HELENA PEREIRA DE MELO
J. CUNHA RODRIGUES
JOANA COVELO DE ABREU
JOANA GAMA GOMES
JOANA NUNES VICENTE
JOÃO LEAL AMADO
JOÃO NUNO CALVÃO DA SILVA
JOAQUIM FREITAS DA ROCHA
JORGE LEITE
JOSÉ CARAMELO GOMES
JOSÉ JOÃO ABRANTES
JOSÉ LUÍS DA CRUZ VILAÇA
JOSÉ SILVA PEREIRA
JÚLIO MANUEL VIEIRA GOMES
LARISSA ARAÚJO COELHO
LUÍS COUTO GONÇALVES
LUÍS MENESES DO VALE
MARGARIDA SANTOS
MARIA ANA FERRAZ
MARIA DO ROSÁRIO PALMA RAMALHO
MARIA INÊS COSTA
MARIA JOSÉ RANGEL DE MESQUITA
MARIA LUÍSA DUARTE
MARIA MIGUEL CARVALHO
MARIANA CANOTILHO
MARIANA SOUSA E ALVIM
MÁRIO MONTE
MILENA SILVA ROUXINOL
NOÉMIA BESSA VILELA
PATRÍCIA JERÓNIMO
PAULA TÁVORA VÍTOR
PAULO RANGEL
PEDRO MADEIRA FROUFE
PEDRO MIGUEL FREITAS
RICARDO LEITE PINTO
RITA CANAS DA SILVA
ROSA CÂNDIDO MARTINS
SERGIO MAIA TAVARES MARQUES
SOPHIE PEREZ FERNANDES
TERESA COELHO MOREIRA
TERESA FREIXES
TIAGO SÉRGIO CABRAL
VITAL MOREIRA

FOREWORD

This Commentary on the Charter of Fundamental Rights of the European Union revisits and updates the Portuguese version published in 2013. Following the best academic practices, several scholars of recognised scientific knowledge – of varying ages and worldviews – were asked to and gave us the honour of contributing. The result is a comprehensive article-by-article commentary to the Charter.

Each author is fully responsible for the content of his/her commentary and one author's opinions do not bind nor necessarily reflect the opinions of the remaining authors or of the editors. Coherence, consistency, and continuity of this work is guaranteed by the thematic organisation of the Charter. When selecting authors, the editors favoured scholars of European Union law, experts in the substantive fields of the article in question, and renowned experts on fundamental rights.

In the context of "interconstitutionality" (or multi-level constitutionalism), a cornerstone of protection of fundamental rights in the European Union – which implies "reflexive interaction" between constitutional norms from different sources – there must necessarily be room for diverse perspectives. The various references to the Portuguese legal framework in the commentaries included in this work offer readers of multiple nationalities (including the ones from outside of the European Union) an opportunity to understand how the Portuguese legal community envisages European integration and fundamental rights. It also provides, in our view, an alternative and often overlooked viewpoint to the Anglo-Saxon or German-centred perspectives that are more common in similar commentaries.

The Portuguese edition of this Commentary on the Charter was a groundbreaking initiative – one that, ten years later, seems to have stood the test of time. Certainly, the circumstances are different – and, in our view, this is a new publication that builds on the work of its 2013 predecessor. This is because, although the original idea of the editors was to create a translation of the 2013 edition, a significant number of authors opted to introduce relevant updates to their original commentaries (particularly addressing the considerable activity of the Court of Justice of the European Union since 2013). In this context, it is imperative to express our gratitude to the widows of the late Professors António Manuel Hespanha and Jorge Leite – who generously authorised the publication of their commentaries expunged from outdated excerpts. For the commentaries whose text was not changed or updated from the 2013 edition, we are confident that they are as pertinent and insightful today as they were in 2013. Furthermore, for certain articles of the Charter where the editors deemed that it would be relevant (for example, because significant changes occurred in the European Union's legal framework), this edition also features various completely new commentaries, drafted from the ground up for the English edition by authors that did not participate in the 2013 work.

Reports from the European institutions show that there is still a long way to go in the implementation of the Charter. Inadequate implementation at national level frequently weakens its coherence and effectiveness. Despite clarifications by the Court of Justice of the European Union, legal practice reveals that understanding when and how the Charter should be applied is still a challenge. Here the role of European legal scholars in the defence of fundamental rights is crucial, as they are uniquely placed to be able to use all the tools that the European Union legal framework makes available to ensure the effective application of the Charter.

There are, indeed, a few more tools in the Charter's toolbox than there were in 2013. The Court of Justice of the European Union has recognised the direct effect of the rule in Article 47 of the Charter – which allows an individual to rely directly on the effective judicial protection of European Union law before national courts (*Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, par. 78). In 2022, the same Court recognised the direct effect of the rule in Article 19(1), 2nd subparagraph of the Treaty on European Union, according to which Member States are to provide sufficient remedies to ensure effective judicial protection in the fields covered by European Union law (*M.F. v J.M*, Case C-508/19, ECLI:EU:C:2022:201, par. 74), which makes it possible to rely on that provision in order to set aside national rules which hinder the effective judicial protection of European Union law.

We are confident that this Commentary on the Charter can become an instrument of support for the European legal community, whether in academia, private practice or government, as well as a source of inspiration for the broad universe of people who have to interpret and apply European Union constitutional law. This objective is the underlying reason for publishing this work in English and in open access. By making it freely available to the widest possible range of people, we hope that it can contribute to the full exercise of fundamental rights in the European Union.

Alessandra Silveira
Larissa Araújo Coelho
Maria Inês Costa
Tiago Sérgio Cabral

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CFREU or Charter	Charter of Fundamental Rights of the European Union
CHRB	Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine
CJEU	Court of Justice of the European Union
GC	General Court
CPR	Constitution of the Portuguese Republic
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSC	European Coal and Steel Community
EC	European Community
EC Treaty	Treaty establishing the European Community
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
EU or Union	European Union
EUROJUST	European Union Agency for Criminal Justice Cooperation
EUROPOL	European Union Agency for Law Enforcement Cooperation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
OECD	Organisation for Economic Co-operation and Development
OJEU	Official Journal of the European Union
RSICC	Rome Statute of the International Criminal Court
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

COMMENTARY TO THE PREAMBLE TO THE CHARTER OF FUNDAMENTAL RIGHTS

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION*

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

1. Introduction

The fact that the CFREU acquired the legal value of a Treaty with the entry into force of the Treaty of Lisbon constitutes a major milestone in the history of European integration. To be sure, the establishment of guarantees for fundamental rights has been present in the entire evolution the EU has undergone since the end of the Second World War. Nevertheless, it has taken a long time, and many difficulties

* Published in the OJEU C 326, of 26 October 2012.

have had to be overcome, until the EU was finally able to introduce an instrument of its own recognising subjective rights with the corresponding legal guarantees.

Considering the different phases through which the integration process has progressed, guaranteeing these rights represents an important landmark in the configuration process of the Union that will strengthen political integration, and not just economic integration. In this respect, it should be recalled that even though the CFREU constitutes the first catalogue of legal guarantees in the EU, the idea of adopting a "Charter of Human Rights" has been one of the principal aspirations of the European Movement in the context of its federal conception of Europe ever since the Hague Congress (1948).[1]

From this starting point, Europe began to define itself in many areas, converging around the goal, among others, to guarantee rights, albeit through complex methods of *juridification* of rights, parallel to the idea of constitutionalisation. In the field of rights, Europe was being shaped simultaneously by means of the Council of Europe, with the ECHR being guaranteed by the Strasbourg Court (the ECtHR), and the EU (initially the European Communities), where the basic freedoms and rights that were progressively recognised in the Treaties were guaranteed and, in some cases, created by the Court in Luxembourg. With respect to constitutionalisation, fundamental rights have always been at the heart of the European legal debate; since the Study Committee for the European Constitution was set up in the 1950s,[2] then the Spinelli Project[3] regulating both community institutions and fundamental rights, up to the moment when the basis for the adoption of a Rights Charter and the start of the constitutionalisation process was laid in Cologne, Tampere and Helsinki. The European Parliament itself adopted a report in which it linked the elaboration of the Charter to the constitutionalisation process of the Union. Thus, after congratulating itself on the decision to draft a Charter on Fundamental Rights, it considered that the elaboration of the Charter formed part of this constitutional process.[4] Therefore, it is not surprising that when the CFREU was prepared, it was conceived to be the "dogmatic part" of a Constitution, to be accompanied by a Preamble.

In this way, the elaboration of the CFREU was clearly part of the constitutional debate. The reluctance of various EU Member States, in particular the United Kingdom, France, Denmark, Ireland, Finland, Sweden and the Netherlands, meant that the heads of State and Government simply gave their agreement, proclaiming the final text of the Charter elaborated by the Convention created for this purpose, yet rejecting its incorporation into the Nice Treaty that was adopted on 6 December 2000.[5]

Almost simultaneously, at its meeting in Laeken, in December 2001, the European Council convened the Convention on the Future of Europe, that was given

---

[1] *La documentation française. Notes et études documentaires* no. 1081, 26 February 1949, 9. Contains an important review of the foundational objectives of a united Europe.

[2] Committee presided over by Paul-Henry Spaak, which contributed to strengthening the idea that Europe had to adopt a federal Constitution.

[3] Report approved by the European Parliament on 10 February 1984 (Resolution A3-064/84).

[4] A brief overview of all this is included in the *Report on the Constitutionalisation of the Treaties*, submitted by the Committee on Constitutional Affairs of the European Parliament (rapporteur: O. Duhamel) dated 12 October 2000 (A5-0289/2000/FINAL), drafted alongside the CFREU.

[5] Regarding this process, see Teresa Freixes, Juan Carlos Remotti, *El futuro de Europa. Constitución y derechos fundamentals* (Joint edition of the University of Valencia, the University of Santiago de Compostela and the Instituto Europeo de Derecho, 2002).

the mission to prepare the reform of the Treaties and to submit proposals, especially yet not exclusively regarding the institutional framework, in order to respond to the enlargements leading to the EU-27. The result of the Convention's work was the Draft Treaty establishing a Constitution for Europe, which was signed by all the Member States, and which was expected to enter into force on 1 November 2006. The negative outcome of the referenda held in France and the Netherlands, however, interrupted the process of ratifications in such a way that the European Constitution was abandoned (only the European Parliament, which had consistently adopted a clearly favourable stance to the constitutionalisation of the Union, presented proposals to avoid this new obstacle to the constitutionalisation process).

In response to this situation, starting from the so-called Declaration of Berlin of 25 March 2007, issued in the framework of the commemoration of the fiftieth anniversary of the Treaties of Rome, which proclaimed the need to embark upon a new route in order to overcome the deadlock produced by the '*de facto*' abandonment of the European Constitution, conversations commenced at different levels leading to the European Council meetings of 21 and 22 June 2007. The road map agreed upon by the Council contained a mandate for a classical Intergovernmental Conference that would have to reform the existing Treaties on the basis of the Constitutional Treaty, to which very specific and minimal, yet very significant, modifications were made. These modifications led to the Treaty of Lisbon, which, while suppressing all constitutional symbols, in effect retained the bulk of the European Constitution, creating a constitutional structure for both institutions and legal guarantees.[6]

In this respect, returning to the legal debate prompted by the White Paper on European Governance, one of the main focal points of which was to bring Europe closer to its citizens, we can say that although the Treaty of Lisbon (including the CFREU) is not formally a Constitution in the strict sense, both the Treaty and the Charter are clear examples of so-called multilevel constitutionalism. On the one hand, the Union Treaties (Union law, including the CFREU with Treaty value) constitute the highest legal level, applied on the basis of the principle of primacy of Union law over national law. On the other hand, the Constitutions of the EU Member States form a body of rules. The interaction of these rules with the Union Treaties is determined by Article 6 TEU. Moreover, in multi-layered States (federal, regional, autonomous...) the basic institutional rules regulating sub-State entities (the Constitutions of the German *Länder*, the Spanish "*Estatutos de Autonomía*") are simultaneously related to the Constitutions of the Member States and the Union Treaties, as the complex sets of rules and competences that have been established in the EU cannot be conceived nor understood without the existence of a harmonious and coherent system of multilevel constitutionalism. The Treaty of Lisbon, both in the body of the Treaty itself and in the Protocol on the Role of the National Parliaments and the Protocol on the Application of the Principles of Subsidiarity and Proportionality, regulates the relationships between the different constitutional levels, including the preparation and implementation of European rules with the participation of the various national and regional levels.

In this context, the Preamble of the CFREU appears, within the multilevel European legal system, as the Preamble to an instrument with Treaty value (the Charter), not only in the classical international legal framework, but also as part of a complex

[6] Teresa Freixes, "El Tratado de Reforma: Ratificaciones y entrada en vigor", *Revista de las Cortes Generales*, no. 70-71-72 (monographs on the Treaty of Lisbon), Madrid (2007): 215-236.

legal system composed of different levels, within which the Preamble of the Charter acquires considerable importance, both with regard to its contents and its effects.

2. The drafting of the Preamble to the CFREU

The Preamble to the CFREU was drafted by the Convention that also prepared the text of the Charter, using the procedures established by the European Council meeting in Tampere. In fact, it was in Tampere the composition of the body that was to elaborate the Charter was determined. This nameless entity decided by a large majority to call itself a Convention during its second meeting on 21 February 2000.[7] At its first meeting, the Convention decided to proceed "as if" the Charter would be included in the Treaties, considering that as the drafting body it could not predetermine the legal value of the new text, as the Council in Cologne had decided that the legal value of the Charter would be established at the Nice summit.[8] At the same time, as the idea began to take hold that the Charter was to be incorporated into the Treaties, essentially as the dogmatic part of a constitution, an increasing majority of the members of the Convention were of the opinion that a Charter that was to be part of a series of Treaties possibly leading to a Constitution for Europe would have to be preceded by a Preamble.

The Convention was composed of members designated by different political bodies: the European Parliament designated 16 MEPs taking into account its composition; the parliaments of the EU Member States appointed two members each (representing the upper and the lower house or, in the case of unicameral assemblies, the governing majority and the opposition), in total 30 representatives; the governments of the Member States designated one representative each, *i.e.*, 15 governmental delegates. Other members of the Convention were designated by other institutions or organs of the Union: 2 representatives of the European Commission, 2 of the Court of Justice, 4 of the Economic and Social Committee, 3 of the Committee of the Regions and the European Ombudsman, and 2 representatives of the Council of Europe.[9] This composition reflected several kinds of balances: between institutions and organs, between the Union and the Member States, and between the major political forces in Europe. Balances of all kinds, except that between women and men, given that of all the members of the Convention, 119 in total with full and alternate members combined, only 24 were women (10 full members and 14 alternate members). This caused tense debates, especially between the members of the Convention and civil society organisations.

For the purpose of coordinating the work of the Convention, a *Praesidium* was established. This organ, which acted as a collective drafting committee, prepared the texts to be presented to the plenary session of the Convention, which debated them and, where applicable, approved them. Little by little, after intense debates, both internally due to discrepancies between the Convention members and externally

[7] *Record of the second meeting of the Convention to draw up a draft Charter of Fundamental Rights of the European Union*. Brussels, 21 February 2000 (25.02) (OR.FR). CHARTE 4134/00. CONVENT 6.

[8] *Record of the first meeting of the Body to draw up a draft Charter of Fundamental Rights of the European Union* (Brussels, 17 December 1999). CHARTE 4105/00. BODY 1.

[9] In addition, alternate members were designated, organisations, associations and groups that wanted to present their position to the Convention during the so-called hearings were consulted, and a website was created to allow the public to stay informed regarding what was being done and to express opinions.

through public hearings and contributions of persons[10] and organisations,[11] the texts of the Preamble and the body of the Charter slowly took shape.

2.1. The first references to the Preamble in the draft text of the CFREU

It should be noted, however, that the first version of the Draft CFREU (15 February 2000)[12] only contained a proposal with articles recognising rights, but no formal Preamble. However, in the second part, aimed at presenting the "horizontal provisions" to be studied later on, reference is made to the fact that the Charter would have a Preamble[13] when mentioning that one of these horizontal provisions might be included in the Preamble. On the other hand, no reference whatsoever was made to the Preamble in the Draft list of fundamental rights published on 27 January 2000.[14]

Several references were made to a still non-formal Preamble in the explanatory memorandums preceding the text of various proposals for provisions. This may be observed in the Presidency Note that included a new proposal for several provisions for the Draft Charter in relation to Article 1 regarding dignity, where in the explanatory memorandum it is suggested that this provision might be included in the Preamble.

2.2. The first drafts of the Preamble

The first public draft of the Preamble to the Charter is dated 14 July 2000, when a Presidency Note included a Draft Preamble[15] with the following content (the French version is the original):

PREAMBULE

1. Les peuples européens ont établi entre eux une union sans cesse plus étroite et partagent désormais le même destin;

2. Cette Union est fondée sur les principes indivisibles et universels de dignité de la personne humaine, de liberté, d'égalité entre toutes les personnes, hommes et femmes, et de solidarité; elle repose sur les principes de démocratie et de l'État de droit;

---

[10] With regard to the Preamble, mention should be made of the proposal presented by Prof. Dr. Jürgen Meyer of the German Bundestag, which introduced a Preamble on the basis of the Declaration of fundamental rights and freedoms of the European Parliament of 12 April 1989. It referred to the common constitutional traditions, the ECHR and other international treaties and conventions, case-law, etc., in a text similar to Recital 5 of the Preamble to the Charter. See Forwarded contribution. *Subject: Draft Charter of Fundamental Rights of the European Union*. Brussels, 6 January 2000 (14.1) (OR.F) CHARTE 4102/00. CONTRIB 2.

[11] The Permanent Forum of Civil Society also presented a Draft Charter, which included a Preamble. Some basic ideas included in this draft were the conception of the Charter as a "founding pact of a Community of Peoples and States reflecting the humanism characteristic of European civilization." See Forwarded contribution. *Subject: Draft Charter of Fundamental Rights of the European Union - Contribution of the Permanent Forum of Civil Society*. Brussels, 20 January 2000 (25.01) (OR.F) CHARTE 4104/00 ADD1. CONTRIB 4.

[12] Note from the *Praesidium*. *Subject: Draft Charter of Fundamental Rights of the European Union - New proposal for Articles 1 to 12 (now 1 to 16).* Brussels, 8 March 2000 (13.03) (OR.F) CHARTE 4149/00. CONVENT 13.

[13] Note from the *Praesidium*. *Subject: Draft Charter of Fundamental Rights of the European Union - Draft articles.* Brussels, 15 February 2000 (16.02) CHARTE 4123/1/00. REV 1. CONVENT 5.

[14] Presidency note. *Subject: Draft list of fundamental rights.* Brussels, 27 January 2000 (31.01) (OR.f). CHARTE 4112/2/00. REV 2. BODY 5.

[15] Note from the *Praesidium*. *Subject: Draft Charter of Fundamental Rights of the European Union - Draft Preamble.* Brussels, 14 July 2000 (14.07). CHARTE 4400/00. CONVENT 43.

3. L'Union contribue au développement de ces valeurs communes dans le respect de la diversité des cultures et des traditions des peuples européen ainsi que de l'identité nationale des Etats membres et de leur organisation constitutionnelle au niveau national, régional et local;
4. Afin d'affermir la protection des droits fondamentaux dans l'Union et de les rendre visibles pour chacun, il est nécessaire de les ancrer dans une charte des droits fondamentaux de l'Union Européenne;
5. Cette charte réaffirme les droits qui résultent notamment des principes constitutionnels communs aux Etats membres, du traité sur l'Union européenne et des traités communautaires, de la Convention européenne des droits de l'homme, des chartes sociales adoptées par la Communauté et par le Conseil de l'Europe ainsi que de la jurisprudence de la Cour de justice des Communautés européennes et de la Cour européenne des droits de l'homme;
6. Elle adapte le contenu et la portée de ces droits à l'évolution de la société, au progrès social et aux développements scientifiques et technologiques;
7. La jouissance de ces droits entraîne des responsabilités et des devoirs tant à l'égard d'autrui qu'à l'égard de la communauté humaine;
8. La Charte n'accroît, ni modifie les compétences et tâches de la Communauté et de l'Union européenne telles que définies dans les traités. Les institutions et organes de l'Union ainsi que les Etats membres lorsqu'ils mettent en oeuvre le droit de l'Union garantissent à chacun, dans le respect du principe de subsidiarité, les droits et libertés énoncés ci-après.

The first amendments to the contents of the Preamble appear in the Presidency Note of 28 July 2000 with the complete text of the Charter proposed by the *Praesidium*.[16] In this new version only Recitals 1 and 2 remain intact. The remaining recitals are modified as follows:

- Recital 3 includes an additional statement, which establishes that the Union "*ensures balanced and sustainable development through the free movement of persons, goods, capital and services.*"
- The text of Recital 4 is changed by including part of the previous Recital 6: "*In adopting this Charter the Union intends to enhance the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible.*"
- Recital 5 includes the text of the previous version, to which the text of the previous Recital 8 is added, after which it reads as follows: "*This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.*" In this respect, it should be noted that this version no longer speaks of "common constitutional principles", but of "common constitutional traditions", and that the reference to the scope of application of the Charter from the previous version of Recital 8 also disappears in this version of the Preamble (currently, this reference is included directly in the articles of the Treaty of the European Union).
- Recital 6 contains the text of previous Recital 7, adding the responsibilities with regard to "future generations."

[16] Note from the *Praesidium*. *Subject: Draft Charter of Fundamental Rights of the European Union - full text of the Charter proposed by the Praesidium.* Brussels, 28 July 2000 (OR.fr) CHARTE 4422/00. CONVENT 45.

• Recital 7, which is the last, simply provides that the Charter "*guarantees the rights and freedoms set out hereafter*."

Various organisations made proposals for amendments regarding concrete issues in the Preamble, in accordance with their own goals, by submitting them to the internet forum created for this purpose or presenting them during the hearings the Convention organised for civil society, allowing associations, groups, etc. to put forward their point of view on the contents of the Charter. The European Parliament, which offered its premises for the Convention to do its work and hold the hearings, positively valued the contributions of the social debate in several reports.[17]

2.3. The great debate on the European heritage in the final proposal for the Preamble

This draft, from July 2000, did not provoke any resistance from the members of the Convention itself, nor from the Member States, unlike the new text proposed by the *Praesidium* on 21 September 2000,[18] which included a new paragraph on the "cultural, humanist and religious heritage" of Europe. In addition to these changes, the new text of the Preamble, this time without numeration, contained several other modifications.

• In its first Recital it is stated, "*The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.*" The reference to peace ("peaceful future") also seems to be a new element in this version.

• The following Recital, which is the most controversial, reads as follows: "*Taking inspiration from its cultural, humanist and religious heritage, the Union is founded on the indivisible, universal principles of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*" The reference to citizenship of the Union is also new, as well as the reference to the area of freedom, security and justice.

• The third Recital preserves, albeit with several style variations, the text proposed in the second version published. It speaks of common values in the framework of diversity and multilevel administrative organisation, and of sustainable development in the framework of the basic freedoms.

• The fourth recital remains practically the same, with some minor style variations.

• The fifth Recital literally replicates the previous proposal.

• The sixth Recital is also identical to the one proposed in the previous version of the Preamble.

• The seventh Recital, though, is significantly different: While in the previous version the Union "guaranteed" the rights and freedoms set out thereafter, in this version it is stated that the Union "recognises" these rights and freedoms. This is not just a semantic change. It probably reflects the fact that the authors,

[17] See in this respect, the *European Parliament resolution on the drafting of a European Union Charter of Fundamental Rights* [C5-0058/1999 - 1999/2064 (COS)]. See also the *Opinion of the Committee on Employment and Social Affairs of the European Parliament* (rapporteur: Ieke van den Burg) of 15 February 2000.

[18] Note from the *Praesidium*. *Subject: Draft Charter of Fundamental Rights of the European Union - Full text of the Charter following the meeting of the Lawyer-Linguists Group.* Brussels, 21 September 2000 (OR. fr). CHARTE 4470/1/00 REV 1. CONVENT 47.

as the drafting process advanced, were more and more aware of the increasing difficulty of incorporating the Charter in the Treaties. For this reason, they tried to tone down the categorical wording of the text, replacing the term "guarantees", which implies the obligation of upholding the legal effectiveness, with the term "recognises", which entails a declaratory effectiveness without major consequences.

It should be noted at this point that the reference to religious heritage prompted a confrontation that might have proven an insuperable obstacle in this phase of the preparation of the Charter, which was already nearing its completion. This reference had not appeared during the entire process of deliberation and emerged when the text was published in what was, in theory, to be the final version. France emphatically rejected this expression as the reference to religion was diametrically opposed to its secular republican tradition, firmly established in the Constitution. The French rejection was so strong that it threatened to veto the Charter at the Council of Nice if the expression was not deleted from the Preamble.[19] As a matter of fact, if this wording had been maintained, France would have had to change its Constitution once the Charter acquired the status of hard law. After all, the Convention was carrying out the drafting process "as if" the Charter would be incorporated into the Treaties.

2.4. The final version of the Preamble proposed by the Convention preparing the Charter

In response to the debate sparked by the latest version with regard to the religious heritage of Europe, the Convention decided to adapt the wording of the second recital of the Preamble of the Charter, trying to mitigate the tensions brought about by the previous proposal.[20] For this purpose, it replaced the text of the mentioned recital, which started by saying "*Taking inspiration from its cultural, humanist and religious heritage [...]*", with the phrase "*Conscious of its spiritual and moral heritage [...]*", thus ending a passionate debate that was about to scupper the adoption of the Charter. During this episode, the most reluctant sectors of those opposed to a further deepening of the political integration of the Union repeatedly used the "attempt" to introduce religious values into the European sphere as part of their propaganda against the integration process, arguing that it would conflict with the heritage of the Enlightenment, multiculturalism, etc.

The Convention reached a final agreement on the content of the Charter on 26 September 2000. On 2 October 2000 a solemn session of adoption was held at the European Parliament, which declared itself in favour of directly including the Charter in the Treaties. The President of the Convention, however, limited himself to inviting the leaders of the European government to adopt the Charter. Various Member States in fact showed themselves resistant to the incorporation into the Treaties. Even though the United Kingdom showed itself to be most strongly opposed, it should be noted that in France, Denmark, Ireland, Finland, Sweden and the Netherlands there was also certain opposition to this idea.[21] As a result, during

[19] The documentation made public by the Convention did not reflect these discussions, which at the time nevertheless filled many pages of the press in practically all Member States.

[20] Note. *Subject: Draft Charter of Fundamental Rights of the European Union.* Brussels, 28 September 2000 (OR.fr). CHARTE 4478/00. CONVENT 50.

[21] See European Parliament, Committee on Constitutional Affairs, *Working document on the Nice*

the Council of Biarritz (15 October 2000) the heads of State and government only gave the "green light" to the content of the Charter and refused to include it in the Treaties. Subsequently, during the Nice summit (6 December 2000) the Charter was therefore simply adopted.

This is essentially how the text of the Preamble of the CFREU reached its current wording, with the exception of the second part of Recital 5, which was added by the Intergovernmental Conference that prepared the Treaty establishing a Constitution for Europe in 2004.

2.5. The text of the Preamble to the CFREU agreed by the Intergovernmental Conference of 2004. The incorporation of the interpretation of the Praesidium

As is well known, the CFREU was not incorporated into the Treaty of Nice, but only proclaimed as a non-binding instrument. Nonetheless, the intention to give full legal effect to the Charter was maintained when the Treaty establishing a Constitution for Europe (hereafter, to simplify: European Constitution) was prepared.

The European Constitution was drafted by a Convention similar to the one that proposed the CFREU. This Convention also elected a *Praesidium* to coordinate its activities and besides organising hearings and civil society consultations, created various Working Groups, amongst others Group II, dedicated specifically to fundamental rights, as it was necessary to decide the future of the Charter in the new European constitutional order. Group II prepared a report[22] in which it declared itself in favour of fully incorporating the text of the Charter, including the Preamble, into the future European Constitution, albeit with certain "technical drafting adjustments". One of these would be to give more relevance to the "Explanations" regarding the Charter, which had been elaborated by the *Praesidium* of the Convention and which had not been formally adopted or mentioned in the text of the Charter adopted in Nice. Moreover, Group II decided to update and adapt the text of the Explanations to the new situation.[23] We will not go into the content of the Explanations, as they do not affect the contents of the Preamble. However, we must point out how unusual it is to include in a Treaty the formal reference to a purely doctrinal text (the Explanations) elaborated by the authors of another instrument (the Charter), even within the context of a preamble. It was the problem of determining the exact degree of effectiveness of the entire body of rights included in the Charter, in particular of the so-called "social rights" that require the granting of benefits or other interventions by the public authorities, that prompted the *Praesidium* of the Charter Convention to elaborate the Explanations, which basically distinguish between rights that may be exercised directly and principles that require further action by the legislator or

---

Treaty and the future of the European Union, 27 February 2001. PR 294.750.

[22] European Convention. Secretariat. Report. From: President of Group II - "Incorporation of the Charter/adhesion ECHR." To: The members of the Convention. Subject: *Final report Group II.* Brussels, 22 October 2002 (24.10). (OR. en). CONV 354/02. WG II 16.

[23] These "Explanations" were drafted at the request of the *Praesidium* of the Convention on the Charter (although they were not submitted to the Plenary Meeting of the previous Convention, they played a role in ensuring the consensus of the Convention on the text of the Charter). According to the 2004 Convention, they constitute an important instrument for interpretation that ensures a correct understanding of the Charter. See European Convention. Secretariat. Note. From: *Praesidium*. To: The Convention. Doc. no.: Charter of Fundamental Rights, OJ C 364 of 18.12.2000. *Subject: Draft text of Part II with comments.* Brussels, 26 May 2003 (27.05). (OR. en). CONV 726/03.

other kinds of political interventions.[24] Once the Charter became part of the text of a Treaty, the Explanations would no longer have this function, as in the end it would be up to the judicial organs to determine the legal effect of each of the rights recognised in the Charter.

As a result, the *Praesidium* of the Convention for the Future of Europe decided on 9 July 2003 to include the reference to the Explanations in the Preamble to the Charter that would constitute Part II of the European Constitution. The Explanations would be updated by the intervention of the President of Group II and the approval of the *Praesidium*.[25] More specifically, a provision is added to Recital 5 of the Preamble that obligates the interpretation of the Charter in accordance with these Explanations: "*the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter.*" Later on, a second document by the *Praesidium* regarding the Charter, dated 18 July 2003, again stressed the inclusion of the Explanations in the text of the Preamble of the Charter, and considered that "*although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.*"[26]

In this way, an attempt was made to consolidate a text, which was also unusual because it implied incorporating a Preamble (that of the Charter) into a Treaty (the European Constitution), already in turn preceded by the Preamble to the Treaty establishing a Constitution for Europe. There are no known precedents of this legislative technique, which, moreover, was applied to an instrument that never entered into force, as the European Constitution was rejected in referenda by France and the Netherlands, after which the proposal to formally constitutionalise the EU was abandoned.

2.6. The Preamble to the CFREU and the Treaty of Lisbon

The failure of the European Constitution led, after considerable hesitation,[27] to the convening of a new Intergovernmental Conference, to salvage all that could be preserved from the Constitutional Treaty.[28] Leaving aside the constitutional terminology, it returned to the classical procedure for treaty reform, without using any sort of Convention. This ICG received an explicit mandate adopted by the Council of the European Union[29] under which the CFREU, in its version agreed by the Convention in 2004, would acquire the legal status of a Treaty by means

[24] See Gráinne de Búrca, "Fundamental Rights and Citizenship", in *Ten Reflections on Constitutional Treaty of Europe*, ed. Bruno de Witte (Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003).

[25] European Convention. Secretariat. Note. From: *Praesidium*. To: The Convention. Doc. no.: WD Nº 27 WGII. *Subject: Updated explanations on the text of the Charter of Fundamental Rights.* Brussels, 9 July 2003. (OR. en). CONV 828/03.

[26] European Convention. Secretariat. Note. From: *Praesidium*. To: The Convention. Doc. no.: WD Nº 27 WGII. *Subject: Updated explanations on the text of the Charter of Fundamental Rights.* Brussels, 18 July 2003. (OR. en). CONV 828/1/03. REV 1.

[27] Teresa Freixes, "El Tratado de Reforma: Ratificaciones y entrada en vigor".

[28] It is estimated that the Treaty of Lisbon has maintained 90% of the European Constitution, shedding formal aspects to preserve the substantive provisions. See José María Gil-Robles and Gil-Delgado, "Tratado de Lisboa: un paso adelante en la evolución del sistema institucional europeo", *Revista de las Cortes Generales*, no. 70-71-72 (2007).

[29] Council of the European Union. Note. From: General Secretariat of the Council. To: The delegations. *Subject: Mandate of the ICG of 2007*. Brussels, 26 June2007. (OR: en). 11218/07. POLGEN 74.

of referral in the articles of the Reformed Treaty, meeting by way of Protocols and Declarations the objections presented by some of the Member States, such as Poland or the United Kingdom, to its complete insertion into the text of the Treaty.[30] In other words, the Charter would not be reproduced in the Treaty of the European Union, but would be included by way of referral, which at the same time would solve the previously mentioned issue, *i.e.* the adoption of a European Treaty containing two Preambles.

Thus, Article 6 of the TEU adopted in Lisbon provides in paragraph 1 that "*The Union recognises the rights, freedoms and principles set out in the CFREU of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*" The problem with this solution, however, was the visibility of the rights included in the Charter as a document with the legal status of a Treaty, given the fact that the TEU only included a reference to it. The rights of the Charter needed to be made more easily accessible to the addressees. This problem, in its turn, was resolved by publishing the CFREU following the consolidated text of the Treaties, in the same way as the Protocols and Declarations. By including a peculiar "Note to the reader", the publication that contains the consolidated text of the Treaty of Lisbon states the following:

> *This publication also contains the Charter of Fundamental Rights of the European Union which was proclaimed at Strasbourg on 12 December 2007 by the European Parliament, the Council and the Commission (OJ C 303, 14.12.2007, p. 1). This text repeats and adapts the Charter proclaimed on 7 December 2000, and replaces it with effect from 1 December 2009, the date of entry into force of the Treaty of Lisbon. By virtue of the first subparagraph of Article 6(1) of the Treaty on European Union, the Charter proclaimed in 2007 has the same legal value as the Treaties.*

In fact, no such adaptation took place, as the text of the Charter of 2007 is the same as the one deriving from the Convention for the Future of Europe that was included in the European Constitution.

Consequently, the text of the Preamble to the CFREU, as currently in force, reads as follows:

> *The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.*
>
> *Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*
>
> *The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.*
>
> *To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.*

[30] See Marta Maria Carla Cartabia, "I diritti fondamentali e la cittadinanza dell'Unione", in *Le nuove istituzioni europee. Commento al Trattado di Lisbona*, ed. F. Bassanini and G. Tiberi (Bologna, 2008), 90.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

3. Nature and legal value of the Preamble of the CFREU

It has already been pointed out that the drafting of the CFREU cannot be understood outside the context of the constitutionalisation process which, despite the existing problems, forms part of the current phase of European integration. The Charter was drafted "as if" it was going to be included in a number of Treaties that were supposed to be rapidly converted into a European Constitution. In spite of the fact that the European Constitution did not enter into force, the multilevel approach that is inherent to current constitutional thinking about complex legal systems makes it possible to insert the Charter (including the Preamble) into this constitutional framework.[31] To do so, it is necessary to analyse the nature and the legal value of the Charter's Preamble, taking into account that we are dealing with a Charter that forms part of multilevel constitut ional system and to which the TEU attributes the legal status of a Treaty. In addition, we will also have to examine the nature and value of the preambles of constitutions in general, as well as the preambles to international treaties.

3.1. The CFREU as part of the multilevel constitutional system

Without entering into an exhaustive analysis of constitutionalism at different levels,[32] we will start from the ever more accepted assertion that the European legal system is a complex system. This system is made up of both the legal level deriving from the European integration process and the legal level corresponding to the Member States (be they unitary or composite), so that a multilevel, comprehensive approach including both the Treaties of the European Union and the constitutions of the Member States is the only way to correctly understand the constitutional reality across the Union.

---

[31] M. D'amico, «Trattato di Lisbonna: Principi, diritti e "tono costituzionale"», in *La nuova Europa dopo il Trattato di Lisbona*, ed. P. Bilancia and M. D'Amico (Milan: Giuffrè Editore, 2009).

[32] It is also worth consulting works such as the one coordinated by Paola Bilancia and Eugenio De Marco, *La tutela multilevello dei Diritti* (Milan: Giuffrè Editore, 2004), with the participation, among others, of Teresa Freixes, Gustavo Zagrebelsjy, Augusto Barbera. See also Pasquale Policastro, Joakim Nergelius and Kenji Urata (eds.), *Challenges of Multi-Level Constitutionalism* (Krakow: Polpress, 2004). These publications had a profound impact on the debate on multilevel constitutionalism, extending it to the new Member States that entered the EU in 2004 and 2008, as well as Japan. In the United States, Weiler also took an interest in the debate, as shown by the joint publication with Wind: Joseph Weiler and Marlene Wind, *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2004).

Much has been written about the constitutional value of the Union Treaties, especially after the attempt to approve the Treaty establishing a Constitution for Europe, which eventually led to the adoption of the Treaty of Lisbon, to which the vast majority of provisions contained in the aborted European Constitution were transferred. Although the Treaty of Lisbon is not formally speaking a constitution, in practice it does act as such, being an instrument that is equivalent to Kelsen's basic norm[33] or to Hart's rule of recognition[34] in the sphere of the EU, as it constitutes a norm that is the foundation for the remaining European norms and which is binding for the legal systems of the EU Member States. Its application is supervised by way of a kind of "constitutional review" on the part of the CJEU, thus ensuring the primacy of EU law.

In addition, multilevel constitutionalism can also be analysed on the basis of the interaction, as established through referral, between the various legal subsystems, governed by the law of the EU as the prevalent legal order, but which also implies the integration of international law into national law. In the case of composite States this entails a double legislative level derived from the distribution of competences between the institutions of the central State and those at regional level. The Treaty of Lisbon, for example, refers to the Geneva Convention on refugees in order to specify the rights accruing to them (Art. 78 TFEU). It also refers to the common constitutional traditions and the ECHR [Art. 6(3) TEU], and considers that the CFREU, to which Article 6(1) of the current TEU refers, has the legal value of a Treaty.

This legal *corpus* formed by the Treaties of the European Union (including referrals) has already been considered, outside the debates of the Convention on the Future of Europe, as the equivalent of a multilevel constitutional system in conjunction with the constitutions of the Member States; suggesting that it was not necessary to elaborate a European Constitution as there already existed a "constitutional *corpus*" made up by the Treaties and the national constitutions.[35] The failed consolidation of the constitutional Treaty and its effective substitution by the Treaty of Lisbon in this sense has not affected the constitutional function that a considerable proportion of scholars already attributed to the Union Treaties.[36]

It is therefore in this context of multilevel constitutionalism that the Preamble to the CFREU should be considered. In effect, the entire Charter, including the Preamble, has the same legal value as the TEU, by the latter's express provision. Furthermore, the Treaty of Lisbon, which comprises the TEU and its referrals (among others to the Charter) as well as the TFEU, forms part of the multilevel constitutional system as a norm with constitutional functions in spite of not formally being a constitutional text. For this reason, the Preamble to the CFREU should on the one hand be analysed with regard to constitutional preambles, and on the other hand, with regard to its quality as a preamble to an international treaty.

---

[33] Hans Kelsen, *Teoría pura del Derecho* (Madrid: Revista de Derecho Privado, 1933).

[34] Herbert Lionel Adolphus Hart, *Law, liberty and morality* (Stanford: Stanford University Press, 1963).

[35] See the debate in the following works: Ingolf Pernice, *Fondements du droit constitutionnel européen*, collection "Cours Et Travaux" (Pédone, 2004). Dieter Grimm, "Does Europe need a constitution?", *European law journal: Review of European law in context*, 1(3) (1995). Jürgen Habermas, "Remarks on Dieter Grimm's "Does Europe need a constitution?"", *European law journal: Review of European law in context*, 1(3) (1995).

[36] For all, see Ingolf Pernice, "The Treaty of Lisbon: Multilevel Constitutionalism in Action", *Columbia Journal of European Law*, vol. 15, no. 3 (2009).

3.2. Constitutional preambles

Although in practice few Constitutions have Preambles, much discussion has been devoted to the legal value of constitutional preambles. Starting with the famous *"We, the people..."* of the United States Constitution of 1877, up to the preambles of more recent constitutions, scholars and judges have constantly raised questions about the legal effectiveness of these texts preceding the articles of instruments with constitutional value.

It has also been necessary to clarify the nature of the preamble in relation to explanatory memorandums in order to distinguish between the two. Both have legal value, yet are not directly operative or normative,[37] given that they precede a body of provisions with constitutional, legal or regulatory value. Their purpose however differs notably. Thus, preambles contain the legal bases and the ontological principles underlying the norms they precede, and act as criteria for their interpretation. Explanatory memorandums, on the other hand, explain the reasons for the provisions, justify their content, clarify their position within the legal order, and delimit the reforms being introduced into the current legal system. In this sense, preambles provide a framework for the entire instrument they precede, while explanatory memorandums tend to justify specific issues. As a consequence, in the case of preambles the hermeneutic value extends to the full content of the provisions, while explanatory memorandums provide criteria for the interpretation of individual aspects. In the case of the CFREU, an examination of the documents produced by the two Conventions that participated in the drafting[38] shows clearly that the Preamble of the Charter seeks to offer a foundation for the entire content. The explanatory memorandums, on the other hand, were used by the respective *Praesidiums* to justify the content of specific articles.

On some occasions, the constitutional courts or councils have been required to give their opinion on the value of constitutional preambles. One of the most notable decisions was reached by the Constitutional Council of France, which considered that the preambles to the French Constitutions of 1958 and 1946, as well as the Declaration of the Rights of Man and of the Citizen of 1789, the fundamental principles proclaimed by the laws of the Republic and, presently, the Charter on the Environment, form part of the so-called "constitutional block" that constitutes a key parameter in establishing the constitutionality of laws regulating fundamental rights. The French Constitutional Council moreover used the wording of both Preambles to identify new fundamental rights that were not provided for in the Constitution itself, considering that these specifically derive from the Preambles or the referrals that these contain.[39]

The Spanish Constitutional Court was required, in Judgment 31/2010 on the constitutional challenge regarding the Statute of Autonomy of Catalonia,[40] to pronounce on the nature and legal effects of the Preamble of this Statute. Even though

---

[37] The Spanish Constitutional Court considered, when addressed on the issue, that preambles and explanatory memorandums "lack normative value" (judgment 150/1990 of the Constitutional Court, legal ground no. 2). Later on, as we will see, it qualified this statement.

[38] As shown by the websites of the European Union on the activities of the Convention on the Charter of Fundamental Rights and the Convention on the Future of Europe.

[39] Paradigmatic in this respect is the decision of the Constitutional Council of 16 July 1971, which was repeatedly confirmed (*Journal Officiel*, 18 July 1971, 7114). In this decision, the Constitutional Council interprets the freedom of association on the basis of the fundamental principles of the Republic invoked by the Preamble of the Constitution of 1946, as referred to by the Preamble of the Constitution of 1958, currently still in force after several modifications.

[40] Judgment of the Constitutional Court no. 31/2010, 28 June 2010.

the Statute of Autonomy is not a constitution, but a norm deriving from the Spanish Constitution, is does constitute an instrument that forms part of the constitutional block, as expressly stated by the Constitutional Court itself.[41] In consequence, it is also part of the multilevel constitutional system as a constitutional norm of the second degree. This status seems relevant for the case at hand, as it concerns a decision of the Spanish Constitutional Court on the nature and legal value of the preamble to an instrument that is part of the constitutional corpus of a legal system with several levels. In this judgment, the Constitutional Court considered that "*the lack of normative value [of the Preamble] is not tantamount to a lack of legal value, in the same way as the impossibility to be the direct object of a constitutional challenge does not mean that the Constitutional Court cannot give opinions on preambles, as they may the accessory object of a procedure essentially referring to a normative provision*" (Legal Ground 7). The Constitutional Court further recognised that preambles "*have a specific legal value as a guideline for interpretation*" (Legal Ground 7). In this way, the Court recognised that preambles have the status of hermeneutic criteria aimed at ensuring an adequate interpretation of the normative provisions.

Given that the Preamble to the CFREU is a preamble preceding the articles of an instrument with an established legal value (that of a Treaty), which moreover forms part of the multilevel constitutional system as a functionally constitutional norm, we may conclude, following the reasoning of the Spanish Constitutional Court, that the Preamble contains the hermeneutical criteria that must govern the interpretation of any of the provisions of the CFREU, both when applied by the institutions and organs of the European Union in the framework of their respective competences, and by the organs and institutions of the Member States when applying EU law.

In addition, however, we may observe the existence of different interpretations by the organs for constitutional review with regard to constitutional preambles. The French Constitutional Council has attributed direct normative value to preambles and not just, as in the case of the Spanish Constitutional Court, interpretive value. In terms of further clarity, however, it will be necessary to wait for the CJEU to establish consolidated criteria on the legal value of the CFREU, considering that it is the Court that has the last word on the effectiveness of Union law. If the Court were to use the criterion of the French Constitutional Court, the Preamble would have normative legal value, and could perhaps become a source of new rights or legal institutions in the legal system of the Union. If, on the other hand, it were to apply criteria similar to those used by the Spanish Constitutional Court, the hermeneutical value of the Preamble would be reinforced.

3.3. The preambles of international treaties

As repeatedly noted, the Preamble of the CFREU is part of a text that, by express provision of Article 6(1) TEU, has the same legal value as the TEU itself. Consequently, if the CFREU has the value of an international treaty, its Preamble should receive the same legal treatment as any preamble of an international treaty.

[41] Although it takes its inspiration from France, the Spanish constitutional block is not applied to fundamental rights, as in France, but to determine the distribution of competences between the central State and the autonomous communities. The concept, which still today continues to be a key hermeneutical criterion in this regard, was introduced for the first time by the Constitutional Court in a judgment concerning the LOAPA (Organic Act on Harmonisation of the Autonomic Process), which was declared largely unconstitutional. Judgment of the Constitutional Court no. 76/1983, 5 August 1983 (BOE 187 of 1983).

Unlike the preambles of instruments with constitutional value, regarding which no general rule exists to determine their legal value and where each case must be analysed in accordance with the provisions of each constitutional text, the legal value of international treaties is regulated under the Vienna Convention on the Law of Treaties, which contains explicit and very specific rules in this regard.

In effect, the Third Section of the Vienna Convention is dedicated to the regulations on the interpretation of treaties; Article 31 refers to the value of treaty preambles. More specifically, it provides that treaties shall be interpreted "in good faith", in accordance with the "ordinary meaning" of its terms "in their context", where the context shall include, among others, both its preamble and its annexes. In addition, it provides that recourse may be had to supplementary means of interpretation, described in Article 32. It may therefore be observed that the preambles of international treaties have a clear and unquestionable interpretive legal value.

Moreover, given the special characteristics of treaties, the Vienna Convention attributes special importance to the "context" in which they were concluded. In this regard, it establishes how to determine the "context", providing a series of indicators:

a) Ordinary indicators: To be applied in all cases. These are (Article 31):
- The text of the treaty.
- Its preamble.
- Any annexes attached to the treaty.

b) Supplementary indicators: Although they might reinforce the interpretation arrived at under Article 31, these are to be applied when the interpretation using the ordinary indicators leaves the meaning of the treaty ambiguous or obscure, or where it "*leads to a result that is manifestly absurd or unreasonable.*" These are (Article 32):
- The preparatory work of the treaty.
- The circumstances of its conclusion.

As a consequence, by virtue of Article 31 of the Vienna Convention, the Preamble to the CFREU, being a Charter with the value of an international treaty, constitutes an important legal benchmark for the interpretation of the entire Charter.

It is also important to note that considering the express provision of Article 32 of the Vienna Convention regarding the supplementary means that may be used to improve the interpretation, the preparatory work carried out by the Convention on the Charter, the Convention on the Future of Europe, and the Intergovernmental Conferences of 2004 and 2007, that were all fundamental in establishing the text of the Preamble, may also prove useful.

In fact, the CJEU has systematically used the preambles of international treaties as elements of interpretation regarding the relationship between these treaties and Union law.[42] Thus, for example, since the entry into force of the Treaty of Lisbon it has repeatedly referred to the Preamble to the Charter of the UN in the framework of the interpretation of certain provisions or decisions concerning the external action of the Union.[43] Albeit until now there has been no clearly distinguishable interpretive approach as the result of the entry into force of the Treaty of Lisbon, the CJEU

[42] It also uses the preambles of rules of secondary law (regulations, directives, decisions...) as elements for their interpretation.

[43] For all instances, see the Judgment *Yassin Abdullah Kadi v. European Commission supported by the Council, France and the United Kingdom*, 30 September 2010, Case T-85/09, ECLI:EU:T:2010:418.

has already started to quote the Preamble to the CFREU when interpreting certain provisions of the Treaty, *e.g.* in order to establish the existence (or not) of a common constitutional tradition regarding a specific issue.[44]

3.4. Nature and legal value of the Preamble of the CFREU

Based on the above analysis, the Preamble to the CFREU is shown to be a legal norm of EU law with clear interpretive effects, derived from its position in the multilevel constitutional system as the preamble to an instrument with the value of an international treaty fulfilling constitutional functions.

In this context, in the same way as the preambles to constitutions, it contains the principles and values that constitute the foundation of the articles, and by virtue of the Vienna Convention on the Law of Treaties has a specific hermeneutic legal value with particular effects on the interpretation of the instrument containing the Preamble.

We are therefore not dealing with a Preamble without legal effects. Quite the contrary: its specific value derives from the fact that its final content as well as the preparatory work carried out to achieve it, and the circumstances surrounding its adoption, provide very precise indicators for the interpretation of an instrument with the value of a treaty, which in turn must be applied by the institutions and organs of the EU in the exercise of their respective competences, and by the Member States when applying EU law.

Teresa Freixes

[44] It is peculiar that the reference to the common constitutional traditions has been taken from the Preamble to the Charter and not from Article 6 of the Treaty of the European Union, but this has been the interpretive technique used by Advocate General Mengozzi in a number of his opinions. See the Opinion of Advocate General Paolo Mengozzi, delivered on 2 September 2010. Judgment *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, Case C-279/09, ECLI:EU:C:2010:811 (Judgment); ECLI:EU:C:2010:489 (Opinion).

ARTICLE 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

1. *General considerations*. As detailed in the "Explanations relating to the Charter of Fundamental Rights" prepared under the authority of the *Praesidium* of the Convention that drew up the Charter, and revised under the responsibility of the *Praesidium* of the European Convention, human dignity is more than a fundamental right: it is the very basis for fundamental rights. Along these lines, Article 1 of the Charter, in conjunction with Article 2 of the TEU,[1] serves as the foundation for the entire system of fundamental rights' protection in the European Union's legal order. Accordingly, it may be said that human dignity is an intrinsic part of the essence of the fundamental rights enshrined in the Charter.

Human dignity cannot therefore be violated, nor harmed, even when it is admitted that a fundamental right can be subjected to compression. This dignity constitutes, thus, the limit of possible compression. In other words, no human being can be deprived of dignity, without which the "essential nucleus" of every right will not be preserved.

Article 1 echoes the idea already expressed in the Charter's Preamble, in which the value of "human dignity" figures as the first of the "indivisible, universal values" upon which the Union itself is founded, alongside liberty, equality and solidarity. Ultimately at stake is the enshrinement of a particular idea of Humankind embodied over the centuries in the universal conscience, rooted in the modern culture of civilised societies.[2]

Although it may not be subsumed into any of the fundamental rights enshrined in the Charter's other provisions, the notion of human dignity is, however, made concrete in the implementation of these rights (be they those that the Charter includes in Chapter I – Dignity, be they those that it classifies as "liberties", or those fitted into the categories of equality, solidarity, citizenship and justice) and constitutes, in relation to them, an evaluation and interpretation criterion that confers a "unity of meaning" upon them.

Ultimately, the concept of "human dignity" – much like that of "human being", to which it refers directly – constitutes a generic expression, whose contents are to be implemented through judicial decisions issued in concrete cases.[3] This is to say

---

[1] Article 2 TEU: "*The Union is founded on the values of respect for human dignity...*"

[2] See José Carlos Vieira de Andrade, *Os direitos fundamentais na Constituição portuguesa de 1976* (4th ed., Coimbra: Almedina, 2010), 80. As José Manuel Cardoso da Costa wrote, ["O princípio da dignidade da pessoa humana na Constituição e na jurisprudência constitucional portuguesas", in *Direito Constitucional - Estudos em homenagem a Manoel Gonçalves Ferreira Filho* (São Paulo: Dialética, 1999), 191], the emphatic proclamation of the value of human dignity corresponds to that "*profound humanist and personalist idea of the State – that the State exists because of man, and that man does not exist because of the State – which is in line with the West's cultural tradition and characterises its democratic constitutionalism.*"

[3] See the Opinion of Advocate General Stix-Hackl of 18 March 2004, in *Omega*, 14 October 2004, Case C-36/02, recital 85, ECLI:EU:C:2004:162 (Opinion).

that human dignity does not refer to an abstract notion of a person, but it is the prerogative of each individual human being, in his or her personal and social life.[4]

Human dignity constitutes, furthermore, the foundation of the principle of equality, in the sense that it is not possible to weigh or grade types of dignity: all people are worthy of recognition, not just those who are deemed to fall within what the majority of society considers to be the parameters of "normal" or even "acceptable". This includes, of course, disabled people, criminals and others who in any manner deviate from the norm. In the EU, human dignity must be recognized not just for national and European citizens, but also foreigners, refugees, exiles and the stateless.[5]

The prominent position of the value of human dignity in Article 1 ultimately entails the subordination of the EU to the fulfilment of human aspirations and potential, excluding any interpretation to the contrary.[6]

As a result, the EU is incompatible with any display of totalitarianism harmful to human dignity, whatever its concrete manifestation. This same requirement of the protection of human dignity underpins the EU as a union based on the rule of law, which respects personal rights and promotes social rights without discrimination (see Articles 2, 6, 7 and 9 to 11 TEU, as well as 8 to 10 and 16 TFEU).

The requirement that human dignity should be "respected and protected" applies to all institutions and bodies of the Union, as well as to the Member States when they are implementing EU law (see Article 51 of the CFREU). On the one hand, the "duty to respect" human dignity corresponds to every person's right to require it; on the other, the obligation to "protect" it commands an active attitude of guardianship and the promotion of the conditions for its fulfilment in the face of potential offences, of whatever origin.

More generally, it represents what Gomes Canotilho and Vital Moreira[7] identify by distinguishing three dimensions in human dignity: dignity as an intrinsic dimension of being human; dignity as a source of entitlement to certain provisions; dignity as an expression of mutual recognition.

The first dimension calls for the elimination of the death penalty, the establishment of limits to medical and biological practices, the prohibition of torture, ill-treatment and inhuman punishments, as well as the abolition of slavery, servitude and forced labour and human trafficking (Articles 2 to 5 of the CFREU).

The second dimension imposes minimal standards for a dignified existence, as well as the protection of persons who are in special situations of risk and need (Articles 18 and 19, 24 to 26, 32, 34 and 47 to 50 of the CFREU).

---

[4] Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada*, Tomo I (2nd ed., Coimbra: Wolters Kluwer/Coimbra Editora, 2010), 80-82. In the words of J. M. Cardoso da Costa, *op. cit.*, 191, "t*o affirm the 'dignity of the human person' is to recognise human beings' ethical independence, that of each singular and concrete human, bearer of a vocation and of a destiny, unique and unrepeatable, of a free and responsible implementation, which must be fulfilled in a social relation (and of communitarian solidarity) based on a radical equality between all humans – such that no one will be reduced to being a mere instrument or servant of the 'other' (be it another human person, be it the State).*"

[5] See J.J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa – Anotada*, vol. I (4th ed., Coimbra: Coimbra Editora, 2007), 198-199.

[6] The underlying character of human dignity does not exclude, however, a margin of discretion for the legislative authorities when selecting the means that they consider to be most adequate for the safeguarding of that dignity (provided that such selection does not jeopardise the substance of the highest value deserving protection). See Jorge Miranda and Rui Medeiros, *op. cit.*, 77-78.

[7] Gomes Canotilho and Vital Moreira, *op. cit.*, 199.

The dimension of intersubjective recognition legitimates inter alia the principles of *nulla poena sine culpa* and resocialization in the criminal justice system [Article 48(1) of the CFREU].

2. *Constitutional sources.* Article 1 of the Charter has as its source Article 1, § 1 of the 1949 Constitution of the Federal Republic of Germany.[8]

Various references to the value of human dignity are to be found also in several of the constitutional frameworks of EU Member States, typically in the form of a general proclamation or as a basic and guiding principle, frequently developed in the case-law, but not as a specific legal norm capable of being relied on independently.[9]

In the Spanish Constitution of 1978,[10] Article 10, paragraph 1, under the heading Fundamental Rights and Duties, refers to "human dignity" in relation to a human being's inherent, inviolable rights.[11]

In turn, Article 1 of the CPR,[12] in considering Portugal to be "*a sovereign Republic, based on the dignity of the human person and the will of the people*", recognises the essential nature of human dignity. The enshrinement of the principle appears disconnected from the Constitution's section on fundamental rights and duties, which includes a provision (Article 18) on the scope and legal force of those rights.[13]

Moreover, as a corollary of this principle in its relational or community dimension, the CPR affirms the equal "social dignity" of all persons (Article 13). It refers to protecting "human dignity" against misappropriation and misuse of information regarding persons and families (Article 26, paragraph 2) as well as to guaranteeing the "personal dignity and the genetic identity of the human being" as regards the use of technology and scientific experimentation (Article 26, paragraph 3).

---

[8] Article 1, § 1 of the German Constitution: "*Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.*" In the original German wording: "*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*" Available in English at: https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.

[9] For an analysis of the role of human dignity in the constitutional orders of the Member States, see J. Meyer, in *Kommentar zur Charta der Grundrechte der Europäischen Union*, ed. Jurgen Meyer (Baden-Baden, 2003), 48 *et passim*; see also Rau and Schorkopf, "Der EuGH und die Menschenwürde", *Neue Juristische Wochenschrift (NJW)* (2002).

[10] Available in English at: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

[11] Article 2, paragraph 1: "*The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.*" In the original version: "*La dignidad de la persona, los derechos inviolables que le son inherentes, el libre desarrollo de la personalidad, el respeto a la ley y a los derechos de los demás son fundamento del orden político y de la paz social.*" Article 2 of the Constitution of the Italian Republic, in turn, which "*recognises and guarantees the inviolable rights of the person*", and its systematic insertion give no firm indication of an underlying conception, but seemingly point to a connection – at least an implicit one – between the notion of dignity and the fundamental rights and duties of persons. In the original version: "*La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.*"

[12] Available at: http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf.

[13] However, it appears to result in an identical outcome as other constitutions and the Charter, not only due to the imperative nature of the provisions of the Charter, but also by affirming in Article 25 the "*inviolable*" character of the "*moral and physical integrity of people.*" What is more, Article 16 of the CPR establishes, on the one hand (paragraph 1), that the "*fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable international laws and legal rules*", and on the other (paragraph 2), that "*The constitutional precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights.*"

The Portuguese Constitutional Court sought to clarify the meaning of the principle in various instances, by stating that it constitutes a "supreme value",[14] "in effect, a pivotal and central value in the CPR"[15] and a "*fundamental principle of law presiding over the interpretation of constitutional norms, in particular those relating to rights, freedoms and guarantees.*"[16] Moreover, for the Portuguese Constitutional Court, human dignity constitutes "*the foundation of our entire legal framework, on which the State is based, which unifies all the fundamental rights and that touches also upon social rights.*"[17]

The Portuguese Constitutional Court also clarified that, in the CPR, "*the principle of human dignity emerges not as a specific fundamental right that may serve as the basis for invoking subjective legal positions, but rather as a legal principle that may be used to define and enforce the contents of fundamental rights that are constitutionally enshrined, or to reveal unwritten fundamental rights.*"[18]

In its report to the 9th Trilateral Conference of the Constitutional Courts of Portugal, Spain and Italy[19] the Portuguese Court also held the principle of human dignity to be "*the ultimate criterion of legitimacy of the political power of the State.*"[20]

It is therefore no surprise that in the Portuguese Constitutional Court's case-law, the guarantee of respect for human dignity appears to have been made explicit and enforced in response to the analysis of other rights enshrined in the Constitution.[21]

---

[14] A value that ought to take precedence in cases of rights in conflict. Ruling no. 349/91 (Second Section), Case 297/89, of 3 July 1991 – conflict between a creditor's right to collect his credit and a pensioner's right to subsistence.

[15] Ruling no. 105/01 (First Section), Case 531/00, of 14 March 2001. Or, as in the ruling of 17 January 2007, no. 28/07 (Second Section) Case 893/5, an "*axiological vector that structures the very Constitution.*"

[16] Ruling no. 25/84 (Plenary), Case 38/84 (the inviolability of human life, including intrauterine life), 19 March 1984.

[17] Ruling no. 951/96 (First Section), Case 481/94, of 10 July 1996.

[18] Ruling no. 101/2009 (Plenary), Case 963/06, of 3 March 2009.

[19] Constitutional Court, "O princípio da dignidade da pessoa humana na jurisprudência constitucional", Rapporteur Justice Maria Lúcia Amaral, 2007, 2, available at: www.tribunalconstitucional.pt.

[20] In italics in the original.

[21] In particular, the rights to life, to personal integrity and development, to freedom of expression and information, to the guarantees afforded to those involved in criminal proceedings, and also to certain social rights. See, among the others already cited, the Constitutional Court rulings nos. 19/83 (Second Section), Case 61/83, of 3 November 1983 (amnesty for acts which were not legally proven, given the defendant's opposition); 16/84 (Second Section), Case 27/83, of 15 February 1984 (no punishment can involve the loss of civil, professional or political rights); 85/85 (Plenary), Case 95/84, of 29 May 1985 (prioritising the protection of prenatal life in case of a conflict with a woman's right to dignity); 81/84 (Second Section), Case 22/84, of 18 July 1984, and 185/85 (Second Section), Case 23/85, of 23 October 1985, (limits on the exercise of free expression); 40/84 (First Section), Case 69/83, of 3 May 1984; 55/85 (First Section), Case 42/84, of 25 March 1985; and 192/85 (Second Section), Case 27/85, of 30 October 1985 (the right to defence and reply); 43/86 (Second Section), Case 100/85, of 19 February 1986 (the principles of guilt and resocialisation); 49/86 (Plenary), Case 200/85, of 4 March 1986 (the defendant's right to a public defender); 147/86 (Second Section), Case 198/85, of 30 April 1986 (guarantee of defense/protection of an extradited person); 417/95 (Plenary), Case 374/94, of 4 July 1995 (prohibition of extradition when the extradited person's right to life is at risk); 474/95 (Second Section), case 518/94, of 17 August 1995; and 1/01 (Plenary), Case 742/99, of 10 January 2001 (application of the punishment of life in prison and extradition); 288/98 (Plenary), Case 340/98, of 17 April 1998 (referendum on the voluntary interruption of pregnancy); 144/04 (Second Section), Case 566/03, of 10 March 2004, 196/04 (Second Section), Case 130/04, of 23 March 2004; 303/04 (First Section), case 922/03, of 5 May 2004 (criminalisation of pimping); 617/2006; (Plenary), Case 924/06, of 15 November 2006 (proposal of a referendum on the voluntary interruption of pregnancy within the first ten weeks); 101/2009 (Plenary), Case 963/06, of 3 March 2009 (medically-assisted

Nonetheless, this has not prevented the Portuguese Constitutional Court from, at times, admitting the possibility to rely on the principle of respect for human dignity "*of itself, [as] a standard or criterion which may be used to support a judgment of constitutionality of legal norms.*"[22]

The French Constitutional Council (*Conseil constitutionnel*) has also been called upon on various occasions to enforce the duty of respect owed to human dignity, namely in connection with the law on reproductive medicine,[23] the constitutional right to appropriate housing,[24] prison law[25] or the rights of persons hospitalised without consent.[26]

The Italian Constitution,[27] after proclaiming, in Article 2, that "*The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed*", strongly emphasises in Article 3 the different dimensions of the principle of human dignity both as an individual right capable of enforcement and as a duty to protect imposed on the State: "*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.*"

---

procreation); 359/2009 (First Section), Case 779/07, of 9 July 2009 (marriage as a union between people of a different gender); 222/2011 (First Section), Case 635/2009, of 3 May 2011 (prohibition of social regression and the necessary minimum for respect for human dignity); and 335/2011 (Third Section), Case 714/10, of 7 July 2011.

[22] Ruling no. 105/90 (Second Section), Case 39/88, of 29 March 1990 (the possibility of obtaining a divorce, regardless of the other spouse's will, upon the conclusion of a certain period of de facto separation). But shortly afterward, the same ruling stresses that from this principle "no 'direct', 'concrete legal solutions' may be deduced as a rule." Following a similar reasoning to that indicated in the text, reference may be made to rulings no. 6/84 (Second Section), Case 42/83, of 18 January 1984 (limits on the right of persons to determine their external appearance when it can harm human dignity); 130/88 (Plenary), Case 110/86, of 8 June 1988 (right to the disposal of one's own corpse); 232/91 (Second Section), Case 279/89, of 23 May 1991; 349/91 (Second Section), Case 297/89, of 3 July 1991; 411/93 (Second Section), Case 434/91, of 29 June 1993; 130/95 (First Section), Case 513/94, of 14 March 1995; 62/02 (Second Section), Case 251/01, of 6 February 2002; 177/02 (Plenary), Case 546/01, of 23 April 2002; and 509/02 (Plenary), Case 768/02, of 19 December 2002 (the guarantee of a subsistence minimum); and 121/2010 (Plenary), Case 192/2010, of 8 April 2010 (civil marriage of a same-sex couple); as well as rulings no. 83/95 (Second Section), Case 512/93, of 21 February 1995; 95/01 (Third Section), Case 626/00, of 13 March 2001; 548/01 (Third Section), Case 777/00, of 7 December 2001; 70/02 (First Section), Case 626/00, of 19 February 2002; 22/03 (Second Section), Case 654/02, of 15 January 2003; 163/04 (Second Section), Case 948/03, of 17 March 2004; and 124/04 (Plenary), Case 924/03, of 2 March 2004 (a penal law system which is anchored in human dignity has guilt as a basis and limits on punishment).

[23] Ruling no. 94-343/344, of 27 July 1994 (the protection of human dignity as a constitutional principle that precludes any form of subjugation or degradation).

[24] Ruling no. 94-359, of 19 January 1995.

[25] Ruling no. 2009-593, of 19 November 2009 – the safeguarding of personal dignity against all forms of servitude and degradation is among the inalienable and sacred rights of the human being, as follows from the Preamble to the 1964 Constitution, and constitutes a principle of constitutional value, which should be respected in the moment of defining and putting into practice the modalities of the penal system.

[26] Ruling no. 2010-71, of 26 November 2010.

[27] Available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

The German Constitution most emphatically places human dignity at the heart of fundamental rights and appears, for that reason, to constitute in this respect a case apart among the constitutions of the Member States.[28]

The German Constitutional Court's (*Bundesverfassungsgericht*) case-law has sought, on various occasions, to densify the protective content of the notion of "human dignity" enshrined in Article 1, § 1 of the Basic Law.[29]

In this way, in 1992,[30] following penal sanctions applied in cases of publications or films that presented acts of violence and cruelty in a form capable of harming human dignity,[31] the Court clarified that the expression "human dignity" means that every human being has the right to respect and recognition for their "social value", regardless of their characteristics, achievements or social status.

Already in 1977,[32] when assessing the constitutionality of a life sentence, the German Constitutional Court had stressed that serving such a custodial sentence could not entail infringement of the rule that even a criminal should be recognised as a morally responsible person, with his or her own value as a "moral subject."[33] Any person sentenced to life imprisonment should, therefore, have an opportunity to regain their freedom one day, and the legislature should set the conditions by which such a sentence can be suspended. For this Court, "*the heart of human dignity suffers a blow when a convicted person, regardless of any personal development, has to abandon the hope of returning to liberty.*"

It was on the basis of identical considerations[34] that the *Bundesverfassungsgericht* stated that each human being has the right to an existence compatible with human dignity, that is, a minimum standard of living in case of material difficulties.[35/36]

With regard to the constitutional and legal provisions authorising the police, within certain limits, to carry out domestic wiretapping in the context of the fight against serious crime, the German Constitutional Court held that it would be incompatible with human dignity for a person to become a mere object of the State or to be subjected to treatment which calls into question his or her quality as a human being, the essence of which must be preserved.[37]

The *Bundesverfassungsgericht* has also examined the question of the beginning and the end of life in order to regonise the need to protect human dignity. On

---

[28] Or even exceptional. In this regard, see the Opinion of Advocate General Stix-Hackl, of 18 March 2004, in Case C-36/02, already cited, ECLI:EU:C:2004:162, recital 84; see also W. Brugger, *Menschenwürde, Menschenrechte, Grundrechte* (*v.* 21, Baden-Baden: Nomos Verlag, 1997), 9 and following.

[29] On the case-law of the German Constitutional Court, see Wolfgang Heyde, "Article 1 – Human Dignity", in *Commentary of the Charter of Fundamental Rights of the European Union*, EU Network of Independent Experts on Fundamental Rights*/Réseau d'experts indépendants en matière de droits fondamentaux*, June 2006, 26-27. The author mentions more than thirty decisions of the *Bundesverfassungsgericht* that refer to respect for human dignity, including to its particular aspects.

[30] Ruling of 20 October 1992, *BVerfGE* 87, 209.

[31] As established in Section 131 of the German Penal Code.

[32] Ruling of 21 June 1977, *BVerfGE* 45, 187.

[33] See also the ruling of 11 October 1978, *BVerfGE* 49, 286 (recognition of a change of sex according to medical criteria).

[34] Namely, regarding the necessary conditions for the exercise of the proper moral responsibility.

[35] Ruling of 18 June 1975, *BVerfGE* 40, 121; ruling of 10 November 1998, *BVerfGE* 99, 216 (limitations on the tax burden).

[36] In the same sense, Article 34, paragraph 3 of the Charter of Fundamental Rights.

[37] See also the ruling of 31 January 1973, *BVerfGE* 34, 238 (conditions under which secret recording is permitted in criminal proceedings), and of 14 September 1989, *BVerfGE* 80, 367 (conditions for the use of a personal diary in criminal proceedings).

the one hand, it held that a life in the making – that is, an embryo – deserves protection: where there is life, human dignity must be recognised, on the basis of its potential, regardless of whether the person carrying it is aware of it or not.[38] On the other hand, it stated that human dignity does not end with death, and that the State should ensure that people are not banned, neglected, ridiculed or otherwise degraded after death.[39]

Nevertheless, it must be acknowledged that there is no consensus on the scope of legal binding force and precise meaning of the fundamental dignity of the human person, despite its widespread recognition by the constitutional systems of the various Member States. In practice, the scope of the recognition of this dignity is often linked[40] to moral, theological or religious concerns[41] that prevent its status as a fundamental legal concept from being clearly established.

With the adoption of the Charter, however, a certain harmonisation of the concept in the constitutional systems of the Member States may occur, spurred on by the evolution of international law and by the case-law of the CJEU and the ECtHR.

3. *International law*. In international law, the Preamble of the 1945 Charter of the UN reaffirmed the faith of signatory States in "*fundamental human rights, in the dignity and worth of the human person.*"

The 1948 UDHR added weight to that declaration by establishing, in the Preamble, that "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*"

Furthermore, Article 1 of the Declaration proclaims that "*All human beings are born free and equal in dignity and rights.*"[42] This formulation, with the addition of the reference to "dignity", follows the content of the first article of the Declaration of the Rights of Man and of the Citizen, of 26 August 1789.[43]

The Preamble to UNESCO's 1945 Constitution, for its part, makes several references to respect for human dignity and its implications for education and culture.

In addition, while not enshrining human dignity as a separate fundamental right, the 1966 UN international Covenants on human rights refer to it in their respective preambles, which emphasise the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family*" and the fact that the recognised inalienable rights "*flow from the inherent dignity of the human person.*"

Accordingly, Article 10 of the ICCPR guarantees for all persons deprived of liberty the right to be "*treated with humanity and with respect for the inherent dignity of the human person.*"

Similarly, Article 13(1) of the ICESCR proclaims that "*education shall be directed to the full development of the human personality and the sense of its dignity.*"

---

[38] Ruling of 25 February 1975, *BVerfGE* 39, 1; ruling of 28 May 1993, *BVerfGE* 88, 203.

[39] Ruling of 24 February 1971, *BVerfGE* 30, 173; ruling of 5 April 2001, *NJW*, 2001, 2957.

[40] In particular, in those countries where such questions are the object of more intense public debate.

[41] Such as, for example, the question of the exact point at which life begins.

[42] The Declaration bases the equal dignity recognised to all in the fact that all human beings are "*endowed with reason and conscience.*" We also find references to "dignity" and "human dignity" in Articles 22 and 23, paragraph 3, of the Declaration.

[43] So reads the first line of Article 1 in the Declaration of the Rights of Man and of the Citizen: "*Men are born and remain free and equal in rights.*" In the original French text: "*Les hommes naissent et demeurent libres et égaux en droits.*" The text was retained in its original form.

The 1989 UN Convention on the Rights of the Child also emphasises "*the human dignity of the child*" [see Preamble and Article 28(2)].

Likewise, we find explicit references to the value of human dignity in the preambles and the provisions of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Article 3: "*Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity*"), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1993 Declaration on the Elimination of Violence against Women.

However, the ECHR, drawn up in Rome, under the auspices of the Council of Europe on 4 November 1950, contains no explicit provision recognising or requiring respect for human dignity.

Nevertheless, the Preamble to the ECHR makes explicit reference to the 1948 Universal Declaration. Moreover, it could be said that the catalogue of rights and guarantees enshrined in the Convention has its basis in the recognition of human dignity, upon which the entire edifice of protection erected by the Convention ultimately rests. The case-law of the ECtHR is, in many instances, an expression of the same.[44]

The CHRB, which came into force on 1 December 1999, repeatedly emphasises, both in its Preamble and in Article 1, the importance of protecting the dignity, identity and integrity of the human beings within the scope of the Convention.

4. *Case-law of the European Union courts.* The CJEU (a term which in this commentary we will use to refer both the "Court of Justice" and the "General Court") has on various occasions referred explicitly to the "dignity of the human being."

In cases *Di Leo*[45] and *Arben Kaba*[46] judgments, both in response to references for a preliminary ruling on the interpretation of Regulation no. 1612/68,[47] the CJEU pointed out that free movement of workers within the EU requires, in order to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the worker's family into the society of the host country.

---

[44] As an example, take the ECtHR judgment *Pretty v. United Kingdom*, 29 April 2002 (Fourth Section), no. 2346/02, Rep. 2002-III (§ 65: "*The very essence of the Convention is respect for human dignity and human freedom*"). See also the following judgments: *Valasinas v. Lithuania*, 24 July 2001 (Third Section), no. 44558/98, Rep. 2001-VIII, § 102; *Goodwin v. United Kingdom*, 11 July 2002, no. 28957/95, Rep. 2002-VI, § 90.

[45] Judgment CJEU *Carmina di Leo*, 13 November 1990, Case C-308/89, ECLI:EU:C:1990:400, paragraph 13. The case concerned the fate of an Italian national, the daughter of another Italian national who was working in the Federal Republic of Germany, who had been refused an education grant to study at an Italian medical faculty under the same conditions as those granted to German and other foreign nationals, or stateless persons.

[46] Judgment CJEU *Arben Kaba*, 11 April 2000, Case C-356/98, ECLI:EU:C:2000:200, paragraph 20. The questions examined by the Court in this case related to the conditions of residence imposed by United Kingdom legislation for the acquisition, by the foreign spouse of a migrant worker, of a permanent residence permit in the territory of the host Member State. The case involved a Yugoslav national who had married a French national working in the United Kingdom.

[47] Regulation (EEC) no. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

Furthermore, in a 1996 decision[48] on the interpretation of Directive 76/207/EEC,[49] the CJEU held that tolerating discrimination against a transsexual person dismissed from employment simply for having undergone or intending to undergo gender reassignment would be tantamount to failing to respect the dignity and freedom to which that person is entitled.

Until then and in the absence of a specific provision, the CJEU seemed to follow a logic according to which human dignity, as a general principle of Community law, served as a reference and criterion for assessing the legality of Community acts, rather than as a fundamental right in itself and an autonomous legal basis for protection.[50]

Since 2001, however, human dignity has been recognised in the case-law not only as a general principle of EU law but also as a fundamental right in its own, in line with Article 1 of the European Charter and the German model that inspired it.

Thus, in a 2001 judgment[51] on the validity of the directive on the legal protection of biotechnological inventions,[52] the CJEU – in response to the applicant's claim that the patentability of elements of the human body, provided for in the directive, amounted to an exploitation of living human matter was contrary to human dignity – held that "*it is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed*."[53]

In his Opinion in this case, Advocate-General Francis Jacobs forcefully argued that the right to human dignity (now enshrined in Article 1 of the Charter) "*is perhaps the most fundamental right of all.*"[54]

Similarly, in *Omega*,[55] the Court pointed out that the "*Community legal order must undeniably guarantee respect for human dignity as a general principle of law*", the

---

[48] Judgment CJEU *P v S and Cornwall County Council*, 30 April 1996, Case C-13/94, ECLI:EU:C:1996:170, paragraph 22.

[49] Council Directive 76/207/EEC, of 9 February 1976, regarding the implementation of the principle of equal treatment between men and women as regards access to employment, vocational training and promotion, as well as labour conditions.

[50] See the Opinion of Advocate-General Stix-Hackl, of 18 March 2004, in Case C-36/02, recital 90.

[51] Judgment CJEU *Netherlands v. Parliament and Council*, 9 October 2001, Case C-377/98, ECLI:EU:C:2001:523, paragraphs 69-70.

[52] Directive 98/44/EC, of 6 July 1998, regarding the legal protection of biotechnical inventions.

[53] In this case, the Court ultimately dismissed the application for annulment of the Directive, on the grounds that it contained provisions ensuring adequate protection of human dignity, inter alia by prohibiting the human body, in its various stages of formation and development, from constituting a patentable invention, and by considering as contrary to public policy and morality, and therefore non patentable, processes whose application would constitute an offence against human dignity. Recital 16 in the Preamble to the Directive states that patent law must be applied in a manner consistent with the fundamental principles that guarantee dignity and integrity of the human person. Accordingly, the Court concluded that, "*as regards living matter of human origin, the Directive frames the law on patents in such a way as to ensure that the human body remains effectively unavailable and inalienable and that human dignity is thereby safeguarded*" (paragraph 77). See also the Judgment CJEU, *Oliver Brüstle*, 18 October 2011, Case C-34/10, ECLI:EU:C:2011:669, paragraphs 32 and following, and the Opinion of Advocate General Yves Bot, of 10 March 2011, recitals 46, 76, and 96, on the interpretation of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ L 213/13, 30.7.1998), concerning the question of the patentability of the usage of human embryos with therapeutic objectives or for industrial or commercial purposes. See also Judgment CJEU *International Stem Cell Corporation*, 18 December 2014, Case C-364/13, ECLI:EU:C:2014:2451, paragraph 24.

[54] Opinion of Advocate-General Francis Jacobs, of 14 June 2001, recital 197.

[55] Judgment CJEU *Omega*, 14 October 2004, Case C-36/02, ECLI:EU:C:2004:614, paragraph 35.

protection of which "*constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services*" or the free movement of goods.[56]

The CJEU therefore concluded that "*Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.*"[57]

In his Opinion of 5 May 2011, in Joined Cases C-244/10 and C-245/10, *Mesopotamia Broadcast*,[58] Advocate-General Yves Bot discussed the relationship between freedom of expression and the protection of human dignity and non-discrimination in relation to Article 22a of Directive 89/552/EEC.[59] According to the Opinion, television broadcasts of Member States must not contain any incitement to hatred on grounds of race, sex, religion or nationality. In his Opinion, Advocate-General Bot also examined the question of how to determine whether that prohibition applies to a broadcast which infringes the principle of international understanding laid down by German law.[60]

Similarly, in his Opinion of 19 October 2010, in Case C-249/09, *Novo Nordisk*,[61] Advocate-General Niilo Jaaskinen argued that the protection of public health is necessary to guarantee human dignity amongst other fundamental rights[62] with regard to the advertising of medicinal products and the interpretation of Directive 2001/83/EC.[63]

In *Aranyosi and Căldăraru*,[64] the Court emphatically stated that: "*As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, that prohibition is absolute inasmuch as it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter.*"[65]

---

[56] Judgment cited above, paragraph 35. On this point, see also, in a similar context, but relating to the reconciliation of the fundamental freedoms provided for by the Treaty (in particular, the free movement of goods) with the rights of expression and assembly, the judgment *Schmidberger*, 12 June 2003, Case C-112/00, ECLI:EU:C:2002:437, paragraph 70-80. On an identical issue, see also the judgment *Laval un Partneri*, 18 December 2007, Case C-341/05, ECLI:EU:C:2007:809, paragraphs 93-95.

[57] The CJEU also included "*respect for human dignity*" among the fundamental rights in its judgment *International Transport Workers' Federation*, 11 December 2007, Case C-438/05, ECLI:EU:C:2007:772, paragraph 45-47. (Opinion of Advocate General Poiares Maduro, 23 May 2007, ECLI:EU:C:2007:292, recital 24).

[58] The CJEU ruled on these cases on 22 September 2001, but did not explicitly refer to human dignity (available at http://curia.europa.eu).

[59] Directive 89/552/EEC, of 3 October 1989, regarding the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning television broadcasting, amended by Directive 97/36/EC, of 30 June 1997.

[60] See Opinion cited above, recitals 68, 77 and 84.

[61] This case led to a judgment by the CJEU on 5 May 2011, which, however, did not address the issue from the point of view of the protection of human dignity.

[62] Directive 2001/83/EC, of 6 November 2001, establishing a Community level code regulating medicinal products for human use, as amended by Directive 2004/27/EC, of 31 March 2004.

[63] Opinion, recital 49.

[64] Judgment CJEU *Pál Aranyosi and Robert Căldăraru*, 5 April 2016, joined cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 85.

[65] See also paragraph 90 of the same judgment: "*it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity,*

Finally, in *C. K.*,[66] the Court reiterated that "*The prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is [...] of fundamental importance, to the extent that it is absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the Charter.*"

José Luís da Cruz Vilaça

that the manner in which the detention is enforced does not cause the person concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of detention, the health and well-being of the prisoner are adequately protected." See judgment ECtHR *Torreggiani and Others v. Italy*, 8 January 2013, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, § 65.

[66] Judgment CJEU *C. K. and Others v. Republika Slovenija*, 16 February 2017, Case C-578/16 PPU, ECLI:EU:C:2017:127, paragraph 59.

ARTICLE 2

Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

1. The right to life is the most preeminent of all fundamental rights; all the others rights become senseless without its effective assurance. It is not an absolute right, and it must be understood that the limitations upon it have to be interpreted strictly in the light of the principle of the inviolability of human dignity (the *Praesidium* of the Convention considered, in the explanation concerning Article 1, CFREU [CONV 828/03, of 9th July 2003], that "*the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted*"). The importance of this interpretative principle stands out with regard to the express prohibition of the death penalty in Article 2(2) (cfr. *infra*, 6).

2. Article 2 of the ECHR is the main source of inspiration for Article 2 of the CFREU. Under Article 52(3), CFREU, when the Charter contains "rights which correspond" to the rights guaranteed by the ECHR, the "meaning and scope" of those rights "shall be the same" as those conferred by the Convention. This provision does not prevent Union law from providing "more extensive protection." In addition, according to the explanations of the *Praesidium* (*cit.*), the reference to the Convention embraces not only such instrument and its protocols, but also the case-law of the ECtHR and of the CJEU. So, considering that the two provisions contain "corresponding" rights (on the issue, see the Commentary of the Charter of Fundamental Rights of the European Union elaborated by the EU Network of Independent Experts on Fundamental Rights, Article 2.II), both place under the protection of law the "right" of "everyone" to "life" [in the exact terms of Article 2(1), CFREU]. At the same time, they legitimise the infliction of death that results "from the use of force which is no more than absolutely necessary" [in the exact terms of Article 2(2), ECHR] in case of (a) defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully taken for the purpose of quelling a riot or insurrection (on the death penalty, see *infra*, 6).

It clearly appears then that the "right to life" enshrined in the present Article of the Charter is set as a subjective right, protecting the individual against the disproportionate use of force by public authorities and upholding an objective function of guiding the action of these entities. Besides, in light of the provision of Article 51(1), CFREU, it is addressed, "in accordance with their respective powers", to the "institutions, bodies, offices and agencies" of the EU and to Member States "when they are implementing Union law."

3. In the context of the reference to the ECHR and following the example of other international instruments of human rights protection, such as the UDHR and the ICCPR, the Charter takes part in a "convergence" of international instruments of fundamental rights protection, recognising the essential importance of the case-

law in which the ECtHR upholds the right to life. The ECtHR, after stating that the right to life is a "*basic value of the democratic societies making up the Council of Europe*" (judgment *McCann v. The United Kingdom*, of 27th Sep. 1995, paragraph 147), consecrated its "pre-eminence" amongst the human rights "*without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory*". Simultaneously, it underlined "*the principle of sanctity of life protected under the Convention*" (judgment *Pretty v. The United Kingdom, of 29th April 2002,* para. 37 and 65) and the fact that it is *"an inalienable attribute of human beings and [...] supreme value in the hierarchy of human rights*" (judgment *Streletz, Kessler e Krenz v. Germany*, of 22nd March 2001, para. 94).

4. The postulate of the right to life in this Article, as well as in other international texts (Article 2, ECHR; Articles 1 and 18, Oviedo Convention on Human Rights and Biomedicine, adopted 4th April 1997; see Explanatory Report, Article 1, referring to the domestic law concerning the definition of "person"), does not embrace a definition of life. Thus, it is not clear when the protection of life begins [one exception can be found in the ACHR which states that the right to life of every person shall be protected "in general, from the moment of conception" [Article 4(1)].

During the discussion of this Article of the Charter in the Convention, many attempts to assure the explicit protection of unborn children were made and there was deep controversy around the interpretation of the words "personne" and "Person" in the French and the German versions, respectively, and the expression "everyone" in the English version. The *Praesidium* of the Convention decided, however, to keep the vague provision of Article 2(1), with the explanation that it matches the first period of Article 2(1), ECHR. In this matter, the ECtHR case-law has revealed much prudence, attentive to the progress in medicine, in particular concerning the beginning of life. So, after the European Commission of Human Rights (judgments *X v. The United Kingdom*, of 13th May 1980; and *H. v. Norway*, of 19th May 1992), the ECtHR refused to "*examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2*" (judgment *Open Door and others v. The United Kingdom*, of 29th Oct. 1992, para. 66); in this case, it should be noted that the CJEU upheld that the prohibition to disclose information about the abortion cannot be considered as a limitation to the free provision of services and, hence, it does not examine its compatibility with Article 10, ECHR [see judgment *SPUC v. Grogan and others*, of 4th Oct. 1991, case C-159/90)] and it confers upon Member States a discretionary power of appreciation in this domain, which is considered "very delicate" (judgment *Boso v. Italy*, 5th Sep. 2002). Yet, if it is not precluded that the foetus may benefit from certain protection, limiting the right to respect for the private life of the pregnant woman (European Commission of Human Rights, of 12th July 1977, judgment *Bruggemann e Scheuten v. RFA*, para. 61) and the right to access a court concerning actions in wrongful life "*having regard to the moral and ethical considerations involved in this area*" [European Commission of Human Rights, 30th November 1994, judgment *Reeve v. The United Kingdom*; impossibility of a mother of a child affected by serious genetic malformations to obtain damages due to the legal prohibition of compensation action based on irregular birth (improper)], the ECtHR has already granted priority to the freedom to abort of a woman whose health, in broad terms, is in danger, over the right to life of the unborn child "*even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention*" (judgment *Boso v. Italy*, *cit.*). In this regard, it should also be noted the Resolution of 12th March 1990, of the European Parliament, under

which "*the right to dispose of her body must be guaranteed to women throughout the European Community, i.e., in this case the right to choose between maternity and the termination of an unwanted pregnancy*" [para. 1, c)]. Besides, the ECtHR in the judgment *Vo v. France* (of 8th July 2004) – on the question of the termination of pregnancy, against the will of the mother, due to a medical error – highlighting that "*there is no European consensus on the scientific and legal definition of the beginning of life*", reaffirmed the exoneration from determining whether the Article of the Convention protects the right to life of the unborn, and it refers to the margin of appreciation of the States on the question of "*the beginning of life*" (para. 82). Such referral to national law led the Court to decide – as per British law – that the right to life of the embryo cannot prevail (judgment *Evans v. UK*, of 10th April 2007, para. 56).

5. In face of recent discussions, and before the adopted legislation in Member States of the EU relating to the decriminalisation of active euthanasia, the issue of the end of life was the object of heated controversy around Article 2(1) of the Charter. However, the ECtHR has already taken a stand in that respect ("*aid to suicide*" or "*assisted suicide*").

Confronted with the claim of a right to "*choose one's own death*" or to "*die with dignity*" and with permissive legislation on the theme (Dutch and Belgian laws, respectively of 12th April 2001 and 28th May 2002), the ECtHR decided unanimously that Article 2, ECHR, which assures the right to life, "*cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die*" [judgment *Pretty v. UK*, para. 39, on the refusal of the Director of Public Prosecutions and the British courts (including the House of Lords) to concede criminal procedure immunity to the husband of the applicant so that he would assist her to commit suicide, the Court ruled that such refusal, made in accordance with the prohibition of assisted suicide under the British Suicide Act of 1961, would not constitute a breach of the right to life]. As a consequence, it repealed the attribution of the "*right to die [...] whether at the hands of a third person or with the assistance of a public authority*" (para. 40 and 54). The European Commission of Human Rights had cleared the path to this orientation upheld by the Strasbourg Court in the sense that Article 2, ECHR "*has no relation with the questions concerning the quality of life or with what a person chooses to do of its life*", namely relating to the refusal, presented by prison authorities, against the request of a detainee convicted to life imprisonment to be given the means to commit suicide (European Commission of Human Rights, 4th October 1989). The same stance was adopted by the Parliamentary Assembly of the Council of Europe in the Recommendation 1418 (1999), of 25th June 1999, in which it was in favour of the "*maintenance of the absolute prohibition of intentionally putting an end to the lives of incurable patients and the dying*" whilst supporting policies of palliative care, even if the treatment for pain may accelerate death and, thus, constitute a kind of "indirect" active euthanasia (para. 9).

From this point on, it can be concluded that national legislation which incriminates the assistance to suicide is not incompatible with the ECHR and, therefore, with the Charter. Meanwhile, the ECtHR has yet to decide clearly about the issue of knowing if such incrimination is required in face of the positive State obligation of protecting the right to life. There is no doubt that all forms of assistance to involuntary death practised by State organs contravene Article 2. However, the question of knowing if the non-incrimination of the assistance to voluntary death (that is found in the Netherlands and in Belgium) breaches

human rights remains open and depends on a very careful ponderation of the positive obligation to protect the right to life and the obligation of the States to respect the right of human beings to die with dignity. A balanced view could be derived from the right to privacy enshrined in Article 8, ECHR and Article 7 of the Charter and the emphasis put in the inviolability of human dignity in Article 1 of the Charter [it should be noted that in the judgment *Pretty v. UK cit.*, on the right to privacy, the ECtHR accepted that the refusal of the Director of the Public Prosecutions constituted an interference, in relation to Article 8(1), but it concluded that such interference was justified as "necessary" "to the protection of the rights of the others" [para. 78]. It was not made clear who the "others" were in the but it can be assumed that it was Mrs. Pretty's husband and, therefore, for the protection of his right not to be criminally prosecuted.

Meanwhile, as for passive euthanasia, which involves letting a patient die of natural causes due to absence of care, the conclusions of Strasbourg point in a different direction: it understood, not only, that lawmakers "*could not be criticized for abstaining to criminalise passive euthanasia*" (Commission, of 10 Feb. 1993, judgment *Widmer v. Suissa* no. 20527/92), but furthermore also concluded, based on Article 8 ECHR, that "*a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life*" (*Pretty v. UK*, *cit.*, para 63).

6. The foremost importance of the respect for life excludes the possibility of inclusion of the death penalty in criminal legislation. In this regard, when the CFREU consecrates the warranty that "*no one shall be condemned to the death penalty, or executed*" [Article 2(2)], it expresses the legal evolution of the Member States of the EU[1] and, more broadly, of the Council of Europe (in Portugal, the death penalty was abolished for political crimes by the Additional Act of 1852 and for private crimes by the Law of 1st July 1867, although the penalty had not been imposed since 1846).

It can be said that the EU, by prohibiting the death penalty and its enactment, even before an eventual accession to the ECHR, under Article 2(2) of the Charter, sends a clear signal of the will towards "*redoubl[ing] the efforts in favour of the universal abolition of the death penalty*" (Declaration of the Council, 10th Dec. 1998, on the occasion of the 50th anniversary of the UDHR). In spite of the heated debates in the Convention about this provision and although the explanations of the *Praesidium* show that the prohibition of the death penalty is only in force during times of peace (CONV 828/03, 9th July 2003), the systematic interpretation and the dynamics of such provision in combination with Articles 1, 3 and 4, besides Article 19(2), CFREU, and in light of the recent abolitionist developments observed in the Council of Europe (see *infra*), as well as the stringent stance of the EU towards universal abolition, it is possible to deduce that Article 2(2) contains an absolute prohibition of death penalty. It follows that anyone who was sentenced to death cannot be executed and in the future no one can be sentenced to death, either in times of peace or war. It also means that no Member State of the EU can in the future reintroduce into its punitive system the penalty of capital punishment. In these terms, the CFREU constitutes an extremely important step towards making Europe an "*area free of the death penalty.*"

[1] Declaration 1 on the abolition on the death penalty adopted by the Conference, Annex to the Treaty of Amsterdam: *"... the Conference notes the fact that since the signature of the abovementioned Protocol (Protocol no. 6 ECHR) the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them."*

As far as this subject goes, the ECtHR's case-law demonstrates a significant evolution, clearly noted in the case *Őcalan v. Turkey* (of 12th March 2003, decision of the Full Court on 12th May 2005), in which, for the first time, the court decided against a death penalty enforced in a State that is party to the ECHR. More recently, the issue was faced again in the case *Al-Saadoon and Mufdhi v. UK* (of 2nd March 2010) and in the case *Rrapo v. Albania* (of 25th September 2012). Indeed, in a first ruling (judgment *Soering v. UK*, of 7th July 1989), and given that Article 2(1), ECHR did not prevent a death penalty "*in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*", the Court in an extradition case of a German citizen, who was in prison in the UK, to the United States of America, where he faced a serious risk of being sentenced to death, considered the extradition incompatible with the Convention (para 103 and 104), with reference to the "*circumstances around a capital sentence*", in face of Article 3 of the Convention. If the death penalty was not deemed in itself an inhuman or degrading penalty, in breach of Article 3, those circumstances, on the other hand, (namely the exposure to "death row") may constitute an inhuman treatment (see also, European Commission of Human Rights, *Kirkwood v. UK*, of 12th March 1984). As for the case *Őcalan* (*cit.*), the ECtHR appreciated it within the context of the continuing evolution of the legal treatment of the death penalty (Article 6, para 2 to 6, of ICCPR, rather more restrictive than the Article of the Convention, stipulates that the capital penalty cannot be imposed other than for "the most grave crimes", committed by persons over 18 years old; adoption of the Protocols to the ECHR, no. 6, on 28th April 1983, that entered into force on 1st March 1985 and abolished the death penalty in times of peace; and no. 13 adopted in 3rd May 2002, that entered into force on 1st July 2003 and abolished the death penalty under any circumstances and, thus, also for acts committed in times of war or imminent danger of war) and international case-law (the Human Rights Committee made it clear that the validity of a death sentence was subordinated to the strict respect for all warranties of a fair trial: judgments *Carlton Reid v. Jamaica*, of 20th July 1990; and *P. Kelly v. Jamaica*, of 8th April 1991; and that a system of mandatorily imposing the death penalty in all cases of homicide, in any circumstances, regardless of the personal situation of the defendant, was incompatible with Article 6 ICCPR: judgments *Thompson v. Saint Vincent*, of 18th Oct. 2000; and *Kennedy v. Trinidad and Tobago*, 26th March 2002). So, in an evolving interpretation of Articles 2 and 3, ECHR, that has surpassed the Soering case-law, the Court having nevertheless shown some hesitation on the infraction of Article 3, decided that the death penalty in times of peace was an "*unacceptable sanction, if not inhuman, unauthorised by Article 2, ECHR*" (decision of 2003, para 196; also decision of 2005, para. 163). Moreover, it considered that the abolitionist practise in nearly all States party to the ECHR represented a consensus for the revocation of the death penalty exception provided for in Article 2(1), ECHR (para. 195 and 198). In the 2010 ruling (cit.), the Court affirmed that there was an evolution in place aiming at the complete abolition *de facto* and *de jure* of the capital penalty in the 47 member states of the Council of Europe and that, in its understanding, after the entry into force of Protocols no. 6 and no. 13, it should be considered that Article 2(1) was modified so as to forbid the death penalty in every circumstance and that, as a consequence, it must be deduced that it is in itself contrary to Article 3, ECHR.

In this context, we shall recall that Article 52(3), CFREU must be interpreted as a "dynamic clause" (see the explanation of the *Praesidium*, when providing an exhaustive list of corresponding rights, which explicitly referred to the list "*at the present time, without precluding the developments of the legislation and the Treaties*") and, therefore, Article 2(2), CFREU corresponds to Article 2, ECHR, amended by Protocols no. 6 and no. 13.

Furthermore, the ECtHR has also taken a stand in the matter of the compatibility with the Convention in the case of an extradition of a person to a State that imposes the death penalty. Hence, in the case *Soering* (*cit.*), the Court held that the State is guilty of inhuman treatment when it deliberately decides to extradite (to the USA) a foreigner because it results in a direct exposure of the individual to torture or inhuman or degrading treatment in the country of destination [para. 88 and 91; likewise, in the case of expulsion (to Chile: judgment *Cruz Varas v. Sweden*, of 20th March 1991) or repatriation of asylum seekers (to Sri Lanka: judgment *Vilvarajah v. UK*, of 30th October 1991)]. Moreover, it should be noted that the Court defends the hypothesis of a "virtual" infraction of the Convention and, then, a decision to remove from the territory made but not executed may constitute a breach of Article 3 (judgment *Soering*, *cit.*, para. 90). In accordance with its case-law, the risk of treatments contrary to Article 3 may, thus, derive, inter alia, from legislation that sets out a penalty incompatible with Article 3 if the individual is subjected to such sentence. That includes physical penalties established by the Muslim criminal law, which the Court has ruled as conflicting with Article 3 due to the violation of dignity and integrity, either physical or psychological (stoning for adultery, judgment *Jabari v. Turkey*, of 11th July 2000; flogging for fornication, judgment *D. and others v. Turkey*, of 22nd June 2006). Yet, it is mostly in question in relation to the death penalty. In this context, the *Soering* (*cit.*) case should be recalled, given that, apart from all its other considerations, the Court recognised that a State party to Protocol no. 6 that abolishes the death penalty in times of peace can be held accountable in light of such Protocol in case of the extradition of a person to a State where he/she will potentially be at risk of being sentenced to death or executed (judgments *Nivette v. France*, of 14th Dec. 2000; *Ismaili v. Germany*, of 15th March 2001; *AlShari and others v. Italy*, of 5th July 2005; and *Al-Nashiri v. Poland*, of 24 July 2014; and later, in a similar vein, in *Al Nashiri v. Romania*, of 31 May 2018, paras. 726-729; in *Al-Hawsawi v. Lithuania*, of 16 January 2024, paras. 256-259; and in *K. J. and Others v. Russia*, of 19 March 2024). Article 19(2), CFREU determines this orientation of the case-law by prohibiting in absolute terms that anyone may "*be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*" The same ban is found in the preamble of the Council Framework Decision of 13th June 2002 on the European Arrest Warrant: "*no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty [...].*" In the context of the EU's abolitionist stance, it is noteworthy that the abolition of the death penalty has become one of the most visible and respected elements of the Union's overall human rights policy. In recent decades, its external action has helped to accelerate the abolitionist movement, including by actively disseminated its values in candidate countries, where the promotion of human rights has been used as a key driver of institutional reforms. The Copenhagen criteria in 1993 (European

Council meeting in Copenhagen, June 21-22, 1993), strengthened by the Madrid European Council in 1995, emphasised democracy, rule of law and the protection of human rights as the first reference for Member States. The abolition of the death penalty, as a precondition for Union membership, became official policy, adopted in 2001 (Commission Communication to the Council and the European Parliament, the EU's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final, May 2001). But the key document of the Union's policy in the fight against the death penalty is considered to be the one defining its guidelines for relations with third countries on the issue (of the death penalty). Adopted by the Council in June 1998 and successively revised in 2008 and 2013 (Guidelines to EU Policy Towards Third Countries on the Death Penalty (2008); cf. also EU Guidelines on the Death Penalty: revised an updated version, Eur. External Action Serv.2013), it declares the EU's "*strong and unequivocal opposition to the death penalty in all times and in all circumstances*" and defines as its goal the universal abolition of the death penalty in the long term. And, as part of an overall policy strategy to spread human rights and democracy – the first European Union Strategic Framework on the Action Plan on Human Rights and Democracy, 2012 – it shares the view that the death penalty should be considered a violation of human dignity. In July 2015, the Action Plan adopted for the period 2015-2019 ensures that the EU will continue its consistent campaign against the death penalty through political dialogue on human rights. In the same vein, the EU Action Plan in Human Rights and Democracy 2020-2024, drawing on the EU Strategic Framework on Human Rights and Democracy of 2012, sets among its very first goals to «work towards the worldwide abolition of the death penalty», and, in relation to countries where it still exists, to «insist on the respect of minimum standards and work towards a moratorium on executions as a first step towards abolition» (Annex to the Joint Communication to the European Parliament and the Council - EU Action Plan on Human Rights and Democracy 2020-2024). The EU's strategy to promote the abolition of the death penalty worldwide is further evidenced by the important role the Union played in drafting the 2007 UN General Assembly Resolution on the moratorium on the death penalty (UN General Assembly Resolution 62/149, of 18 December 2007) and in strengthening successive Resolutions (the latest of which, at the time of writing, of 2022).

7. By referring to the exception clause of Article 2(2) ECHR (which does not have equivalents in similar Conventions), the Charter legitimises the infliction of death resulting from "*the use of force which is no more than absolutely necessary*" in defence of the public order. This reference indicates that it aims to embrace, in line with the case-law of Strasbourg, not only situations "*concerned exclusively with intentional killing*", but also "*the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life*" [judgments *McCann and others v. UK*, of 27th Sep. 1995, para 148: terrorists suspected of trying to execute an attack were taken down by security forces at the moment of their capture; *Andronicou and Constantinou v. Cyprus*, of 9th October 1997, which describes a case where use of force brought about death (in the context of the release of hostages whose lives are threatened): police operation aiming at freeing a young woman who was taken hostage by her fiancée who threatened to kill her and resulted in the death of the young couple shot by an automatic firearm, para 29]. In addition, the Charter implicates a double duty of control, substantial and procedural, when there is a resort to public violence that causes death.

Therefore, the substantial control must be exercised in light of the respect for the obligation to prevent the excessive use of legal force, implying, firstly, a strict interpretation of the necessity clause as "*the force used must be strictly proportionate to the achievement of the aims set out*" and that proportionality must be assessed, namely in face of the danger to human lives and physical integrity [judgments *McCann*, *cit.*: the UK was convicted for an infraction of Article 2 on grounds of poor assessment of the situation by the British government and providing its officers with inadequate information in the preparation of their action (para 149); *Natchova and others v. Bulgaria*, of 6th July 2005, para 103: death inflicted in the capture of two men of Roma origin whose committed transgressions did not represent a risk to the life or the physical integrity of anyone, "*even if it results in the impossibility of arresting the fugitive*"; while the death of a person with the exclusive goal of protecting property breaches the principle of proportionality]; and, secondly, in light of the principle of precaution, it implies the examination of the execution and organisation of the operation (to spare the life of people suspected of illegal violence: *McCann*, *cit.*; to protect the life of civilians: *Ergi v. Turkey*, 28th July 1998, para 78).

On the other hand, procedural control – which derives from the positive obligation of protecting life – implicates the duty incumbent upon national authorities to conduct an effective investigation, which allows the identification and punishment of those responsible for deaths as a result of the use of public force (judgments *McCann*, *cit.*; and *Kaya v. Turkey*, of 19th February 1998). The procedural protection of the right to life infers that the investigation is appropriate (judgment *Ramsahai and others v. The Netherlands*, of 15th May 2007, para 324: reasonably adequate measures must be taken to obtain evidence); independent (*ibid*, para 325: conducted by persons independent from the ones linked to the events, from which it can be inferred "*that there should be no hierarchical or institutional connection but also clear independence*"); and transparent, in order to retain the trust of the population and dispel fears relating to such actions (judgment *McKerr v. UK*, of 4th May 2001).

The procedural control is reinforced when it is combined with the demands of non-discrimination (Article 21, CFREU and 14, ECHR). When there is a question as to whether ethnic discrimination eventually motivated the legal violence, a duty of particular vigilance rests upon the state (judgment *Natchova and others v. Bulgaria*, of 6th July 2005, paras. 155 and 158; the procedural protection and the demand for particular vigilance is also applicable to acts committed by individuals: judgment *Angelova and Ilieve v. Bulgaria*, of 26th July 2007).

8. Although the formulation of Article 2(1) is not as clear as the provision of the first period of Article 2(1), ECHR – "right to life shall be protected by law" –, it is understood that that rule enshrines, as the ECtHR interprets, a general positive obligation for the state to protect life – that of taking "appropriate steps to safeguard the lives of those within its jurisdiction" (judgment *LCB v. UK*, of 9th June 1998, para 39) – which may include criminal law-making obligations, once it involves assuring the protection of the most fundamental of the human rights. The lack of appropriate criminal protection is more controversial normally in hard ethical and medical cases, such as abortion or euthanasia. All in all, through the positive obligations, the Court widened the scope of application (protection) of the right to life.

It has extended the right to life to situations of special vulnerability, namely of deprivation of liberty on the part of the state. In this context: judgment *Edwards v. UK*, of 14th March 2002, para 56: homicide of a detainee by his schizophrenic cellmate; ruling *Cakici v. Turkey* (8th July 1999) considered that the fact of a person going missing after being arrested by the police is a breach of the state against its obligation to protect life (the Court argued for a presumption of causality and, in the lieu of plausible explanations for the disappearance by the authorities, it considered established that the victim died in the sequence of a detention (judgment *Bazorkina v. Russia*, of 27th July 2006) or in the aftermath of his detention by non-identified members of the army (judgment *Alikhadzhiyeva v. Russia*, of 5th July 2007); a similar solution was defended in the case of a person who died during a detention (judgment *Salman v. Turkey*, of 27th June 2000) or who dies when he/she is in the custody of police officials after being arrested (judgment *Ikincisoy v. Turkey*, of 27th July 2004) or when he/she is held in administrative detention (judgment *Slimani v. France*, of 27th July 2004). Still concerning people deprived of liberty, the ECtHR has held that the positive obligation descending from Article 2 obliges the protection of their health, regardless of their situation (detained: judgments *Huylu v. Turkey*, of 16th November 2006; *Tais v. France*, 1st June 2006; and *Slimani*, *cit.*; or arrested *Saoud v. Franc*, of 9th October 2007) and it mandates the provision of diligent medical care when the health situation of the person requires care in order to prevent a fatal outcome (judgments *Angelova v. Bulgary*, 13th June 2002, para 130; and *Scavuzzo-Hager and others v. Switzerland*, 7th February 2006, para 65).

The positive obligation of protection of life extends even further into other domains that do not allude to the use coercive methods by the state: public health or the environment. Thus, the imperative of the protection of life entails an obligation on the State to take the necessary measures to prevent people's lives from being unnecessarily endangered by the negligence of public authorities in matters of public health: a substantial obligation, in the sense of requiring "*States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives*" (judgment *Calvelli and Ciglio v. Italy*, of 17th January 2002, para 49); and an obligation of a procedural nature, in requiring that the State maintains "*an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable*" (judgment *Calvelli and Ciglio*, *cit.*; see, also, judgment *Dodov v. Bulgaria*, of 17th January 2008).

Furthermore "*a violation of the right to life in terms of environmental issues*" (judgment *Oneryildiz v. Turkey*, 18th June 2002, para 64) should be considered: a substantial obligation in the sense that it is up to the public authorities to reveal the data that only they have (the State must establish proper preventive regulations and respect the public right to information); and a procedural obligation that is based on the more general duty descending from Article 13: it imposes the existence of an effective judicial system which includes, in certain circumstances, a mechanism of criminal prosecution to arbitrate the amount of appropriate compensation for the respective infraction that has transpired.

Finally, the positive obligation to protect life is also binding in the area of inter-individual relationships. Hence, the State carries the burden of taking "*appropriate steps to safeguard the lives [... and] to prevent and suppress offences against the person*" (judgment *Osman v. UK*, of 28th October 1995, paras. 115 and 116). Such obligation

is relative, depending on the concrete circumstances of the case, according to a double condition: on one hand, the existence of a "*certain and immediate risk to life that [the public authorities] had or must have had knowledge of*" and, on the other hand, that they have not taken action that reasonably could be expected from them to prevent the materialisation of that risk. Therefore, for instance, national authorities breach their obligation of prevention by not taking the necessary steps to hinder an extrajudicial execution (judgment *Akkoc v. Turkey*, of 10th October 2000, para 81), but not when a temporary permit of leave is granted to a detainee who, in that period, in the course of a theft, kills someone (judgment *Mastromatteo v. Italy*, of 24th October 2002, para 74: need to balance between an imperative of punishment and the social reintegration of the prisoner. The Court of Strasbourg has already ruled that the State has a similar positive obligation of protecting the person against his/herself (for preventing prisoners from committing suicide: judgments *Tanribilir v. Turkey*, of 16th November 2000, para 70; and *A. A. and others v. Turkey*, of 27th July 2004, para 18). In the context of the horizontal effect of the protection of life, there exists the procedural obligation of launching an effective investigation (judgments *Edwards*, *cit.*; *Mastromatteo*, *cit.*, para 89: obligation to ensure the existence of "*an effective and independent judicial system should be set in place by which the cause of a murder can be established and the guilty parties punished*"; *Gungor v. Turkey*, of 22nd March 2005: son of a congressman murdered in a professional apartment; when the homicide involves racial motivation in the sense that the inquiry must be "*pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism*": *Menson v. UK*, of 6th May 2003).

Lastly, Article 2, ECHR is "*unconcerned with issues to do with the quality of life*" (judgment *Pretty*, *cit.*, para 39). Therefore, the existence of a right to certain standard of life or decent living conditions should not be deduced (judgments *Wasilewski v. Poland*, of 20th April 1999; and *Dremlyuga v. Latvia*, of 29th April 2003). Case-law of the Court of Strasbourg meets with the traditional resistance, opposed to the jurisdictionalization of the "*fundamental right of the person to sufficient resources and social assistance for him/her and his/her family*" as stated in Articles 34 and 35, CFREU.

Anabela Miranda Rodrigues

ARTICLE 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

0. *Introduction.* Guy Braibant, vice-president of the Convention charged with drawing up a "*Charter of fundamental rights in order to make the overriding importance of those rights more visible to the Union's citizens*",[1] has stated that Article 3 of the Charter, solemnly proclaimed in Nice in December, 2000, is one of the "*most innovative and richest parts of the Charter.*"[2]

It is innovative to the extent that it is contained in a text that enshrines fundamental rights in general and not a legal mechanism that specifically regulates applications stemming from advances in biology and medicine. As such, it contributes to the consolidation of the notion that issues arising from the application of such progress are associated with the protection of fundamental rights – an idea that is expressed in the Charter's preamble, when it refers to the necessity "*to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments.*"

It is rich to the extent that it enshrines a right (the right of everyone to respect for his or her physical and mental integrity from which the free and informed consent of the person concerned in the fields of medicine and biology stems) and three prohibitions: eugenic practices, making the human body and its parts, as such, a source of financial gain, and the reproductive cloning of human beings. Recognition of both the above-mentioned right and these prohibitions has been accepted and enshrined in the current bio-law at the EU level and in the legal systems of each of the EU Member States. As such, the question then arises regarding the exact scope of enshrinement within the Charter.

1. "*Everyone has the right to respect for his or her physical and mental integrity.*" Recognition of this right is nothing new in terms of international law: it is

[1] European Council of Cologne Decision, 3 and 4 of June 1999, on the drafting of a Charter of Fundamental Rights of the European Union. This decision is published in António Goucha Soares, *A Carta dos Direitos Fundamentais da União Europeia. A Protecção dos Direitos Fundamentais no Ordenamento Comunitário* (Coimbra: Coimbra Editora, 2002), 83-84. Concerning the formal and material foundation of fundamental rights implementation of the Charter, *vide* J. J. Gomes Canotilho, "Compreensão Jurídico-Política da Carta", in *Carta dos Direitos Fundamentais da União Europeia* (Coimbra: Coimbra Editora, 2001), 13 and following pages.

[2] Guy Braibant, *La Charte des Droits Fondamentaux de L'Union Européenne* (Paris: Éditions du Seuil, 2001), 94.

specifically enshrined in a number of universal and regional mechanisms. Namely in Article 5 of the UDHR, which was adopted on 10 December, 1948, by the UN General Assembly, in Article 7 of the ICCPR, adopted by the same Assembly on 16th December, 1966, and in Article 17 of the Convention on the Rights of Persons with Disabilities, adopted in New York on 30 March, 2007. At a regional level, focusing solely on Europe, there is Article 3 of the ECHR, open for signature by Council of Europe member states in Rome, on 4 April 1950.

In terms of international humanitarian law, the right is also recognised in Article 3, which is common to the four Geneva Conventions,[3] adopted on 12 August, 1949, by the Diplomatic Conference designed to draft international conventions for the protection of war victims, which met in Geneva from 21 April to 12th August, 1949. Protection of the physical and mental integrity of persons is also guaranteed by Article 11 of Protocol I of these Conventions, in relation to the Protection of Victims of International Armed Conflicts and Article 4 of Protocol II relating to the Protection of Victims of Non-International Armed Conflicts.[4]

This right is also protected under international criminal law; Articles 7 and 8 of the RSICC, open for signature on 17 July, 1998.

The content of the right is particularly broad, considering, in the words of Manfred Novak, that "*it includes the prohibition of physical and mental torture, inhuman and degrading treatment and punishment as well as a broad range of less serious forms of interference with a person's body and mind which have traditionally been covered by the right to privacy*." Consider – he adds – "*mandatory treatment with psychoactive drugs and other forced psychiatric interventions, 'brain washing', body searches, strong noise and similar environmental risks, compulsory vaccinations, the forced taking of mandatory blood samples for the purpose of determining paternity or any form of medical treatment absent or against the will of the patient*."[5]

Within the scope of the content of paragraph 1 of Article 3, other provisions of the Charter must be considered, such as Article 1 ("Human dignity"), Article 4 ("Prohibition of torture and inhuman or degrading treatment or punishment"), Article 7 ("Respect for private and family life"), Article 13 ("Freedom of the arts and sciences") and Article 21 ("Non-discrimination"). As these articles will be subject to specific commentaries, we will limit ourselves to analysing the issues highlighted by the need to respect this right in the specific area of application of advances in medicine and biology to humans.

As highlighted by William Schabas, prohibition of torture in the UDHR and, subsequently, in the ICCPR was a "*reaction to the atrocities committed by the Nazi regime.*"[6] For this reason, Article 7 of the Covenant states that "*no one shall*

[3] These are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War and the Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Regarding these Conventions, *vide*, for all, Jorge Bacelar Gouveia, *Direito Internacional Humanitário – Introdução Textos Fundamentais* (Coimbra: Almedina, 2006).

[4] These additional protocols were adopted on 8 June 1977, by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to armed conflict.

[5] Manfred Novak, "Article 3 – Right to the Integrity of the Person", in *Commentary of the Charter of Fundamental Rights of the European Union*, EU Network of Independent Experts on Fundamental Rights, June 2006, 36, http://ec.europa.eu.

[6] William Schabas, "Article II-64", in *Traité Établissant une Constitution pour L'Europe Commentaire Article par Article*, Partie II, ed. Laurence Burgorgue-Larsen, Anne Levade and Fabrice Picod (Brussels: Bruylant, 2005), 66.

be subjected without his free consent to medical or scientific experimentation." We find the same prohibition in Article 15 of the Convention on the Rights of Persons with Disabilities.

Undertaking such experiments, even with the consent of the person concerned, is also prohibited by Article 11 of Protocol I Additional to the Geneva Conventions, in the case of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation of war or occupation of the territory of the State where they find themselves. Protocol II Additional to these Conventions also prohibits persons deprived of liberty due to a non-international armed conflict from being subject to "*a medical procedure unrelated to their health and in conformity with generally accepted medical standards and applied in similar medical circumstances to free people*" (Article 5, paragraph 2). Similarly, and finally, the RSICC qualifies the submission of people who are under the control of a Party to the conflict to "*any type of medical or scientific experiments that are not motivated by a medical, dental or hospital treatment, nor carried out in the interest of people, and causing death or seriously endanger their health*" as a "war crime" [Article 8, paragraph b)].

Given these provisions, one may ask if anything new is obtained with the inclusion of this right in the Charter. At the very least, its meaning and scope are the same as those conferred by Article 3 of the ECHR. Concerning the level of protection provided by the Charter's provision, Article 53 of this legally-binding text stipulates that it cannot be interpreted in terms of restricting or adversely affecting the human rights recognised in international treaties to which "the Union, the Community or all Member States" are party. Restrictions on exercising the right to the integrity of the person must be provided by law, respecting its essential content and observing the principle of proportionality (Article 52 of the Charter). Therefore, such inclusion can add little in practical terms to the protection resulting from application of the other previously mentioned provisions, which also recognise the right in question. It is, however, and as Novak highlights, "*important for symbolic and systematic reasons in the context of the first Chapter on Dignity, to provide for a specific right to personal integrity as a link between the inviolability of human dignity in Article 1 and the prohibition of torture in Article 4.*"[7]

2. "*In the fields of medicine and biology, the following must be respected in particular*":

- the free and informed consent of the person concerned, according to the procedures laid down by law;
- the prohibition of eugenic practices, in particular those aiming at the selection of persons;
- the prohibition on making the human body and its parts as such a source of financial gain;
- the prohibition of the reproductive cloning of human beings.

Non-binding list of prohibitions. The use of the expression "in particular" clearly conveys that the principles to be respected in the fields of biology and medicine are not only those listed in paragraph 2 of the Article being analysed.

If we consult the explanations designed to clarify the Charter's provisions made by the *Praesidium*, we will conclude that "*the principles set out in Article 3 of the Charter are already included in the Convention on Human Rights and Biomedicine, adopted within the Council of Europe (ETS 164 and additional protocol ETS 168)", and that "the*

[7] Manfred Novak, *op. cit.*, 37.

present Charter does not intend to derogate from those provisions (...)."[8] As such, we have an indication (given that the above-mentioned explanations have no legal value) that, in the field of biology and medicine, in addition to the principles set out expressly in the provision under analysis, there must be respect for the other principles enshrined in the CHRB, open for signature by Council of Europe member states in Oviedo on 4 April, 1997, and the Additional Protocol to this Convention, which prohibits the Cloning of Human Beings, open for signature by member states of that international organisation in Paris on 12 January, 1998.

In relation to the other Additional Protocols to this Convention, open for signature at a later date to the drafting of the Charter,[9] it is uncertain that the principles contained therein are implicitly covered by the provision in question, as Article 52 ("Scope of guaranteed rights") of the Charter refers only to the rights guaranteed by the ECHR and these protocols were not unanimously signed and/or ratified by all the Member States of the EU.[10]

However, there is no doubt that the following principles must be respected in the field of biology and medicine:

- The primacy of human beings over the sole interest of society or science;
- Equitable access to health care;
- Non-discrimination regarding genetic heritage;
- The inadmissibility of medically assisted procreation techniques for the purpose of selecting the sex of unborn children.[11]

Equally, the principles contained in primary or secondary Community law texts will have to be respected. For example:

- Article 168 of the TFUE, which determines that the European Parliament and the Council will adopt "measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives";
- Directive 98/44/EC, 6 July, 1998, on the legal protection of biotechnological inventions;
- Directive 2004/23/EC, 31 March, 2004, on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells;

---

[8] The explanations regarding the full text of the Charter, which are the *Praesidium's* responsibility, in the Doc. Charte 4487/00 Convent 50 version, are published, for example, *in* António Vitorino, *Carta dos Direitos Fundamentais* (Cascais: Principia, 2002), 79 and following pages. According to Article 6 of the TEU, with the changes resulting from the Treaty of Lisbon, the interpretation of the rights enshrined in the Charter must have "due regard" to the explanations.

[9] These are: the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, open for signature in Strasbourg, on 24 January 2002; the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, open for signature in Strasbourg, on 25 January 2005; the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes, open for signature in the same city, 27 November 2008.

[10] As mentioned by Loïc Azoulai in his explanation on this Article of the Charter, "*of the conventions signed by the Member States on the subject, only one is given particular importance: the ECHR (...). There is no problem in allowing the same importance to be given to other conventions that provide protection in this area, if they are unanimously ratified*" – cf. "Article II-113", in *Traité Établissant une Constitution pour L'Europe Commentaire Article par Article*, Partie II, ed. Laurence Burgorgue-Larsen, Anne Levade and Fabrice Picod (Brussels: Bruylant, 2005), 708.

[11] Cf. Articles 2, 3, 11 and 14 of the Convention on Human Rights and Biomedicine.

• Directive 2006/17/EC, 8 February, 2006, implementing Directive 2004/23/EC as regards certain technical requirements for the donation, procurement and testing of human tissues and cells;

• Directive 2006/86/EC, 24 October, 2006, implementing Directive 2004/23/EC as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells.

Therefore, the following principles have to be considered in the interpretation of paragraph 2 of Article 3 of the Charter:

• the non-patentability principle of the human body at the different stages of its formation and development;[12]

• the principle of traceability of tissues and cells procured, processed, stored or distributed on their territory Member States.[13]

As all Member States of the EU are members of the UN, the norms included in the following declarations of UNESCO must be considered when interpreting the provision in question as rules of non-binding international law, *i.e.*, of soft law:

• the Universal Declaration on the Human Genome and Human Rights;[14]

• the Declaration on the Responsibilities of the Present Generations Towards Future Generations; [15]

• the International Declaration on Human Genetic Data;[16]

• the Universal Declaration on Bioethics and Human Rights.[17]

From these Declarations stem several fundamental principles of bioethics and biolaw, which the Member States of this international organisation undertake to respect and apply, such as:

• the principle of maximising beneficial effects and minimising harmful effects when applying new scientific knowledge to the sick and those participating in research;

• the principle of respect for human vulnerability in the application and advancement of such knowledge;

• the principle of respect for cultural diversity and pluralism;

• the principle of solidarity and international cooperation;

• the principle of respect for the protection of future generations.[18]

The provision in question refers to other principles, such as the principle that the procurement of organs and tissues in living donors for transplant can only occur in the therapeutic interest of the receiver.

3. *The free and informed consent of the person concerned, according to the procedures laid down by law.* This provision of the Charter underlines the provisions of Article 5 of the Convention on Human Rights and Biomedicine (CHRB): "*An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it*." Consent will only be free if it is informed and, as such, this

[12] Cf. Article 5 of Directive 98/44/CE, 6th July 1998.

[13] Cf. Article 8 of Directive 2004/23/CE, 31st March 2004.

[14] Adopted on 11 November 1997, by the General Conference of UNESCO.

[15] Adopted on 12 November 1997, by the General Conference of UNESCO.

[16] Approved unanimously and by acclamation on 16 October 2003, by the General Conference of UNESCO.

[17] Adopted by acclamation in October 2005, by the General Conference of UNESCO.

[18] Cf. Articles 4, 8, 12 and 16 of the Universal Declaration on Bioethics and Human Rights and Article 1 of the Declaration on the Responsibilities of the Present Generations Towards Future Generations.

article recognises that the person will be entitled "*beforehand to be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.*" As stated in the Explanatory Report of the Convention, this rule "*makes clear patients' autonomy in their relationship with health care professionals and restrains the paternalist approaches which might ignore the wish of the patient*."[19] Consent will also be free only if it can be withdrawn at any time, something that is foreseen in the same Article.

According to the above-mentioned Explanatory Report, the word "intervention" applies to all medical acts, whether carried out for the purposes of prevention, diagnosis, treatment, rehabilitation or research. The CHRB requires that the necessary consent be given expressly and specifically in written form in case of procurement of organs or tissue from a living donor for a transplant (Article 19) and in the case of scientific research in the fields of biology and medicine (Article 16).

In contrast to the provisions of Article 7 of the ICCPR, the CHRB allows scientific research to be undertaken on a person without the capacity to consent under certain conditions, such as the results of the research providing a "real and direct benefit to his or her health" and the research "of comparable effectiveness cannot be carried out on individuals capable of giving consent" (Article 17).

The Convention contains other special protection rules which apply to persons who are unable to give their consent due to the fact they are minors or have a physical or mental disability. The rule applicable here is that any intervention in these cases can only be carried out "for his or her direct benefit" (Article 6). This treaty also provides for the possibility of presumed consent in emergency situations and gives an indicative value to previously expressed wishes in relation to a medical intervention for a patient who, at the time of the intervention, is not in any condition to express their wishes (Articles 8 and 9).

In addition to reaffirming the principle of the need to obtain free and informed consent of persons in relation to medical interventions, the Charter formulates a *renvoi* clause for the domestic law of each Member State concerning the content of this principle. This clause implies that, in addition to the minimum level of protection stemming from the CHRB rules on the matter, different national solutions are possible regarding the rules that govern consent and its effectiveness. As Stéphanie Hennette-Vauchez highlights: "*It would have been interesting if the exact content of the doctor's obligation to obtain the informed consent of the patient had been defined: does this obligation exist in every case? Can the preservation of life be a 'higher purpose' to allow the disregard of such consent? The Charter is silent on these key issues that shape shadow areas of the concept of informed consent.*"[20]

The most difficult questions concern previously expressed wishes: what value is given to an advance healthcare directive or the appointment of a healthcare proxy by a person who is unable to give their free and informed consent at the time when he or she needs medical care? We find different solutions in the different Member States of the EU.

---

[19] The Explanatory Report of the CHRB was drafted under the aegis of the Secretary General of the Council of Europe and includes information that makes its provisions easier to understand. Publication of the report was authorised by the Committee of Ministers on 17 December 1996. This document is available at http://conventions.coe.int/treaty.

[20] Stephanie Hennete-Vauchez, "Article II-63", in *Traité Établissant une Constitution pour L'Europe Commentaire Article par Article*, Partie II, ed. Laurence Burgorgue-Larsen, Anne Levade and Fabrice Picod (Brussels: Bruylant, 2005), 55-56.

As stated by the above-mentioned author, the principle of obtaining free and informed consent in the field of biology and medicine is "*the cornerstone of Medical Law in general and the law of Bioethics Law in particular*",[21] which is repeatedly outlined in various national and international legal mechanisms. Regarding the latter, we shall consider the previously mentioned secondary Community legislation texts[22] and UNESCO Declarations.[23]

The ECtHR, whose case-law should be considered when determining the meaning and scope of the rights recognised in the Charter, also underlined the importance of this principle in its judgment *Pretty v. The United Kingdom*, 20 April, 2002, which reads: "*In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention.*"[24]

The Declarations of the World Medical Association[25] and the Council for International Organizations of Medical Sciences,[26] which contain ethical standards to which doctors are bound under the provisions of Article 4 ("Professional standards") of CHRB, may also be taken into consideration regarding the obtainment of consent for medical treatment.

4. *The prohibition of eugenic practices, in particular those aiming at the selection of persons.* This prohibition is not expressly stated in the CHRB, despite this international treaty including rules that indirectly prohibit certain eugenic practices: those contained in Article 11 ("Non-discrimination"), Article 13 ("Interventions in the human genome") and Article 14 ("Non-selection of sex").

The inclusion of this prohibition in the Charter resulted from a proposal made by the European Group on Ethics in Science and New Technologies, contained in the report it issued on the Charter, at the request of the then President of the European Commission, Romano Prodi. The Group suggested that a new article should be added to the text of the Charter, entitled "Prohibition of eugenics" with the following wording: "*Eugenic practices aimed at organising the selection and the instrumentalisation of persons are prohibited.*" As such, it was based on the idea that the word "eugenics", over the last two centuries, "*has a wide and controversial meaning, which has changed across the ages*" and that, during this period, it was always associated with human genetics. It highlights that the initial understanding of eugenics was that "*society must foster the breeding of those who possessed favourable traits and to discourage the breeding of those who did not.*" After World War II and the end of

[21] Stephanie Hennete-Vauchez, *ob. cit.*, 55.

[22] Cf. recital 26 of Directive 98/44/CE, 6th July 1998, on the legal protection of biotechnological inventions; Article 13 of Directive 2004/23/CE, 31st March 2004, on setting quality and safety standards for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

[23] Cf. Articles 8 and 9 of the International Declaration on Human Genetic Data, Article 9 of the Universal Declaration on the Human Genome and Human Rights and Articles 6 and 7 of the Universal Declaration on Bioethics and Human Rights.

[24] Judgment ECtHR *Pretty v. The United Kingdom*, 29 April 2002, no. 2346/02, 35.

[25] Cf., for instance, the Helsinki Declaration, which defines the ethical principles applied to medical research, adopted by the 18th General Assembly of the World Medical Association in June 1964.

[26] Cf., for instance, the International Ethical Guidelines for Biomedical Research Involving Human Subjects, prepared jointly by the Council for International Organizations of Medical Sciences and the World Health Organization in 1982, and subsequently amended in 1993 and 2002.

the Third Reich, this understanding of eugenics was no longer considered as "an acceptable social theory." With the progress of genetics in the late 20th century, the question has been raised again and, according to the Group, the following eugenic practices should be condemned:

- practices which involve, for instance "*forced sterilisation, forced pregnancies or abortions, ethnically enforced marriages, etc., all acts which are expressly regarded as international crimes by the Statute signed in Rome on 18 July, 2000 to create the permanent International Criminal Court*";
- practices which "*involve genetic manipulations on human beings such as the modification of the germ line in view of enhancement, without any therapeutic aim.*"[27]

This wording, which is inspired by the French law on bioethics of 1994,[28] was not adopted in the Charter, which is less precise. The Charter limits itself to establishing a generic prohibition of eugenic practices, alluding, as examples, to those practices "aimed at the selection of persons."

The concept of eugenics (which etymologically means "noble origin") is polysemic and very broad, varying over the centuries, depending on the archetypes of "good birth" that exist in every society.[29]

Eugenic practices designed to control the transmission of hereditary characteristics can be defined – according to Luís Archer – as "*the set of techniques that favour the propagation of genes considered beneficial (positive eugenics) or disfavour the propagation of genes considered harmful (negative eugenics).*"[30] As underlined by Stéphanie Hennette-Vauchez, whatever the definition of eugenic practices adopted, these always lead to practices that "*aim to select people with the objective of improving the bloodline.*" To this end, we may ask if practices such as pre-implantation genetic diagnosis or pre-natal diagnosis followed by abortion due to eugenic recommendation are covered by the prohibition contained in the Charter. As highlighted by the author, "*prenatal medicine has a eugenic dimension when it seeks to avoid gestation (in the case of pre-natal diagnosis) or the conception (in the case of pre-implantation diagnosis) of children with birth defects or severe disabilities. (...) These legally sanctioned practices aim to select people based on genetic data.*"[31]

If we analyse the explanations of the *Praesidium* for paragraph 2 of Article 3, we will find that the intention was to cover "possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be

---

[27] European Group on Ethics in Science and New Technologies, *Citizens Rights and New Technologies: A European Challenge. Report of the European Group on Ethics in Science and New Technologies on the Charter on Fundamental Rights related to Technological Innovation as requested by President Prodi on 3rd February, 2000*, Doc. Charte 4370/00, 21.

[28] Cf. Loi no. 94-653 du 29 juillet 1994 relative au respect du corps humain, which added the following new article to the Code Civil: "*Art. 16-4. Nul ne peut porter atteinte à l'intégrité de l'espèce humaine. Toute pratique eugénique tendant à l'organisation de la sélection des personnes est interdite. Sans préjudice des recherches tendant à la prévention et au traitement des maladies génétiques, aucune transformation ne peut être apportée aux caractères génétiques dans le but de modifier la descendance de la personne.*"

[29] This aspect is further developed in Helena Pereira de Melo, *Manual de Biodireito* (Coimbra: Almedina, 2008), 15 and following pages.

[30] Luís Archer, "O progresso da ciência e o espírito", in *Cadernos de Bioética*, no. 10 (Coimbra: Edição do Centro de Estudos de Bioética, 1995), 74.

[31] Stephanie Hennete-Vauchez, *op. cit.*, 57-58. See, also, Rui Nunes, "O diagnóstico pré-natal da doença genética", in *Genética e reprodução humana*, ed. Rui Nunes and Helena Melo (Porto: Serviço de Bioética e Ética Médica da Faculdade de Medicina do Porto, 2000), 81 and following pages.

international crimes in the Statute of the International Criminal Court adopted in Rome on 17 July, 1998 [see its Article 7(1)(g)]." As such, the Article of the Charter under review prohibits all practices that involve "forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."[32]

Practices similar to the German *Lebensborn* programme ("fount of life"), which consisted of selecting women considered remarkable for their Aryan qualities and inciting that, under medical supervision, they had sex with men of the same race, would today be punished as a crime against humanity. Led by Himmler, it is estimated that approximately ten thousand children were born as a result of the programme and it was intended to boost the number of people belonging to the Aryan race.

However, as the use of the expression "in particular" suggests, other practices are covered by this rule. This will be the case whenever eugenic practices offend human rights and principles recognized in other provisions of the Charter or the CHRB – for example, in Articles 7 ('Respect for private and family life"), 9 ("Right to marry and right to found a family"), 21 ("Non-discrimination") and 35 ("Health care") of the Charter or in the above-mentioned Articles 11, 13 or 14 of the CHRB.

5. *The prohibition on making the human body and its parts as such a source of financial gain.* This prohibition is an application of the principle of respect for human dignity set out in the preamble and Article 1 of the Charter and contained in other international legal mechanisms, in particular:

- Article 21 ("Prohibition of financial gain") of the CHRB;
- Articles 21 ("Prohibition of financial gain") and 22 ("Prohibition of organ and tissue trafficking") of the Additional Protocol to the CHRB concerning Transplantation of Organs and Tissues of Human Origin;[33]
- Article 7 ("Prohibition of financial gain") of Recommendation Rec (2006) 4 of the Committee of Ministers to member states on research on biological materials of human origin;
- Article 13 ("Principles governing organ donation") of Directive 2010/45/UE, 7th July, 2010;
- Article 12 ("Principles governing tissue and cell donation") of Directive 2004/23/CE, 31 March 2004;
- Article 4 of the Universal Declaration on the Human Genome and Human Rights;
- Guiding principle 5 of WHO on human cell, tissue and organ transplantation.[34]

This provision of the Charter is based on the French Law 94-653, 29 July, 1994, concerning Due Respect for the Human Body,[35] and enshrines a general principle that the human body and its parts may not, as such, be a source of any profit. This implies, as indicated in the Explanatory Report of the CHRB regarding Article 21 of this international treaty, the content of which is very similar to the content of the Article in question, that "*organs and tissues should not be bought or sold or give*

[32] Cf. no. 1, paragraph *g)*, of Article 7 of the RSICC.

[33] This Protocol, which came into force on 1st May 2006, was signed and ratified by the following EU Member States: Bulgaria, Estonia, Finland, Hungary and Slovenia. It was signed and not ratified by Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain. Cf. http://conventions.coe.int.

[34] These principles were accepted by the 63rd World Health Assembly, 21 May, 2010.

[35] Article 3 of the mentioned *Loi no. 94-653, du 29 juillet 1994, relative au respect du corps humain* adds a new Article to *Code Civil*, Article 16-1, according to which "*Le corps humain, ses éléments et ses produits ne peuvent faire l'object d'un droit patrimonial.*"

rise to direct financial gain for the person from whom they have been removed for a third party",[36] physical or legal, like a hospital, for example.

This principle of prohibiting financial gain applies to the human genome in its natural state, biological material of human origin, and, primarily, in the field of organs and human tissues transplants. For example, Directive 2010/45/EU indicates that organ donation by living donors or *post mortem* donors should be free, as a prerequisite for guaranteeing the security of these organs. If this does not occur, "*the quality of the process of donation could be jeopardised because improving the quality of life or saving the life of a person is not the main and/or the unique objective" and clinical history obtained from either a potential living donor or the relatives of a potential deceased donor who are seeking financial gain "might not be sufficiently accurate in terms of conditions and/or diseases potentially transmissible from donor to recipient.*"[37]

The formation of this principle in the Charter was considered overly vague by the doctrine.[38] However, its content was explained in detail in Article 21 of the Additional Protocol to the CHRB concerning the Transplantation of Organs and Tissues of Human Origin, according to which "*the human body and its parts shall not, as such, give rise to financial gain or comparable advantage.*" According to the Explanatory Report to this Protocol, a comparable advantage to a financial gain may consist of "*benefits in kind or promotion for example.*"[39] As such, neither the donor of the organ or tissue nor any third party (such as a health professional or a tissue bank or a relative of a deceased person, in the case of a *post mortem* removal) may gain from organs or tissues, considered as such.

Similarly, in paragraph 2 of this Article, public dissemination of the need for or the availability of organs or tissues, where the objective is to offer financial gain or comparable benefit, is forbidden.[40] In the following Article – 22 – it is also prohibited to traffic organs and tissues, which is, as is highlighted in the above-mentioned Explanatory Report, an important example of an organ and tissue transaction with a view to obtaining direct financial gain. Taking into account that organ trafficking is often associated with inducements to donors and coercion to donate, according to the Council of Europe, this matter causes "*particular concern because they exploit vulnerable people and may undermine people's faith in the transplant system.*"[41] Similarly, the World Health Organization highlights the need for UN member states to combat tourism for transplants.[42]

However, the moral principle of transactions regarding the human body or its parts is not without exceptions. The very way it is stated – using the expression "as such" – paves the way to seemingly legitimate exceptions. In the words of Stéphanie Hennete-Vauchez, "*we should not be fooled by the wording used in this article and believe*

---

[36] Conseil de L'Europe, *Rapport Explicatif à la Convention pour la Protection des Droits de L'Homme et de la Dignité de l'Être Humain à l'Égard des Applications de la Biologie et de la Médecine: Convention sur les Droits de l'Homme et la Biomédecine* (Strasbourg: Conseil de l'Europe, 1997), 28.

[37] Cf. Recital 19 of the Directive. See, for the same purposes, Recital 19 of Directive 2004/23/CE, *cit.*

[38] See, for all cases, Stephanie Hennete-Vauchez, *op. cit.*, 59-60.

[39] Council of Europe, *Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine* (Strasbourg: Council of Europe, 2001), 18. See, for the same reason, the Guiding Principle no. 5 of the WHO on human cell, tissue and organ transplantation.

[40] Cf., equally, Article 12 of Directive 2004/23/CE.

[41] Council of Europe, *cit.*, 18.

[42] Cf. Point 2 of the Resolution adopted on the 63rd World Health Assembly, May 21, 2010 (WHA63.22).

that, at all times and places, medical uses of the body are completely free of any financial dimension or compensation whatsoever."[43]

The Additional Protocol to the CHRB on Transplantation of Organs and Tissues of Human Origin and the Directive 2004/23/EC offer important guidelines on this matter. Both indicate that the principle of free donation does not prevent a living donor from receiving compensation, provided that this compensation only covers expenses (*e.g.* those resulting from medical examinations related to the donation) and the loss of income incurred (*e.g.* due to a period of hospitalisation) related to the donation. Equally, the two legal mechanisms exclude from the concept of profit or comparable advantage the amounts paid for the provision of any medical services or techniques that are provided during the process of procurement and transplantation of organs and tissues. These include, as stated in the Explanatory Report to the Additional Protocol, the "*cost of retrieval, transport, preparation, preservation and storage of organs or tissues, which may legitimately give rise to reasonable remuneration.*"[44] The prohibition of profit is not applicable to compensation for undue damage (which is not a normal consequence of the transplant procedure) caused by the removal of organs or tissues from living donors.[45]

Equally, the principle of non-profit does not apply to the purchase and sale of products such as hair and nails, which are parts separate from the human body, the sale of which is not considered an affront to human dignity.[46]

The prohibition under review also does not preclude the patentability of new inventions which imply an inventive activity and which can have an industrial application on "*an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene*", according to the provisions of paragraph 2 of Article 5 of Directive 98/44/EC, 6 July, 1998, regarding the legal protection of biotechnological inventions. Only "*the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene*" and the inventions "*where their commercial exploitation offends against ordre public or morality*"[47] are excluded from patentability.

To this end, the CJEU gave its opinion in its judgment of 9 October, 2001, in response to the request made by the Kingdom of the Netherlands to annul the said Directive. One of the reasons for this request was the violation of the basic right of respect for human dignity, considering that, according to the applicant, the patentability of isolated parts of the human body foreseen by Article 5 (2) of the Directive "*reduces living human matter to a means to an end, undermining human dignity.*"[48]

The Court considered that the protection provided by the Directive covers "*only the result of inventive, scientific or technical work, and extends to biological data existing in their natural state in human beings only where necessary for the achievement and exploitation of a particular industrial application*", excluding from patentability those processes which

[43] Stephanie Hennete-Vauchez, *op. cit.*, 59.
[44] Council of Europe, *cit.*, 18.
[45] Cf. Articles 21 and 25 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin.
[46] Council of Europe, *cit.*, 18.
[47] Cf. Articles 5 and 6 of the Directive 98/44/CE.
[48] Cf. §§ 12 and 69 of CJEU judgment *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, 9 October 2001, Case C-377/98, ECLI:EU:C:2001:523.

offend human dignity, which "*as regards living matter of human origin, the Directive frames the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded.*"[49]

6. The prohibition of the reproductive cloning of human beings. The Charter only prohibits reproductive cloning: cloning whose purpose is to create a human being that is genetically identical to another person, living or deceased.

As stated by GUY BRAIBANT, this solution resulted from the fact that the Convention chose an intermediate position: it did not accept "*one of the solutions proposed by the European Group on Ethics, which was to stay silent on such a serious issue, which could change human evolution and allow the worst manipulations*", but it accepted another position taken by this Group: which consisted of "prohibiting the reproductive cloning of human beings."[50]

The Group of Advisers on the Ethical Implications of Biotechnology commented on cloning at the request of the European Commission, on 28 February, 1997. It concluded that human cloning for reproductive purposes, whether by use of embryonic duplication, or somatic cell nuclear transfer, should be prohibited, because it raises "*serious ethical issues, concerned with human responsibility and instrumentalization of human beings*." Another ethical objection was "*these techniques entail increased potential risks, safety considerations constitute another ethical objection.*"[51]

Again, the Group commented on the issue when the Charter was being drafted, showing itself to be more divided than previously. «*The Group has not substantially changed its Opinion, although however, some members believe that it is not appropriate to forbid cloning in the Charter itself, and one member is opposed to use of the term "reproductive cloning", preferring a prohibition against "cloning of human beings." However, all members of the Group "agree that the dignity of the person born by cloning, would not be in question, but they consider that the act of producing such a human being might be contrary to dignity*."»[52]

The prohibition of human cloning for reproductive purposes was already included in the Additional Protocol to the CHRB on the Prohibition of Cloning in Human Beings because it considered that "*the instrumentalisation of human beings through the deliberate creation of genetically identical human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine.*"[53]

This creation – according to the Explanatory Report of this Protocol – "*is a threat to human identity, as it would give up the indispensable protection against the predetermination of the human genetic constitution by a third party.*" This is because, according to the same report, "*naturally occurring genetic recombination is likely to create more freedom for the human being than a predetermined genetic make up, it is in the interest of all persons to keep the essentially random nature of the composition of their own genes.*"[54]

Only the deliberate creation of genetically identical human beings is prohibited, and adoption of the Protocol does not aim to establish any form of negative discrimination against natural monozygotic twins, despite the fact that these are

[49] Cf. §§ 75, 76 and 77 of the judgment.
[50] Guy Braibant, *op. cit.*, 99-100.
[51] The Group of Advisers on the Ethical Implications of Biotechnology to the European Commission, *Opinion on the Ethical Aspects of Cloning Techniques* (Rapporteur: Dr. Anne McLaren), 1997, 5.
[52] European Group on Ethics in Science and New Technologies, *cit.*, 18-19.
[53] Cf. the Preamble of this international Treaty.
[54] Council of Europe, *Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings*, Paris, 1998, 1-2. This report is available at https://rm.coe.int/16800ccde9.

genetically identical in the sense identified in Article 1 (2) of the Protocol. According to this definition, a human being is genetically identical to another human being whenever they share the "*same nuclear gene set*". Nuclear genes are understood to be only the genes contained in the nucleus and not mitochondrial genes. This means that a clone and a cloned individual, although not, as a rule, 100% identical in relation to their genetic make-up (due to the influence of mitochondrial genes and changes in the nuclear genes during the clone development process), will be considered as "*genetically identical*" for the purposes of applying the aforesaid protocol.

According to the UN, the reproductive cloning of human beings should not be permitted under Article 11 of the Universal Declaration on the Human Genome and Human Rights, due to the fact that it constitutes a practice "*contrary to human dignity*" and the UN Declaration on Human Cloning, 8 March, 2005.[55]

Similarly, human cloning processes are regarded as unpatentable due to Article 6 of the above-mentioned Directive 98/44/EC, due to its commercial exploitation being "*contrary to public order or morality.*"

The Charter only prohibits the reproductive cloning of human beings, neither authorising nor prohibiting – as outlined by the Praesidium – other forms of cloning. These consist of cloning cells and tissues for therapeutic or research purposes and of cloning human embryos for the above-mentioned purposes.

The use of cloning techniques in order to replicate cells and tissues is considered ethically and legally acceptable in most countries in which it occurs. [56] The cloning of human embryonic cells has already raised ethical and legal problems associated with the status to be attributed by law to embryos produced in vitro. The solution for these problems is referred by the Charter to the national legislator, which is not prevented from prohibiting (as occurs in France)[57] or permitting (as occurs in the United Kingdom)[58] the practice of this type of cloning for non-reproductive purposes.

However, national legislators' freedom is limited by the provisions of different articles of the CHRB: in Article 1 (Parties shall protect the dignity and identity of all human beings); Article 13 (prohibition of intervention on the human genome to introduce any modification in the genome of any descendants) and Article 18 (which prohibits the creation of human embryos for research purposes and creates for the national legislation, when allowing for this type of research, the obligation to ensure "*adequate protection of the embryo*"). Thus, as Manfred Novak highlights regarding the article of the Charter in question, "*If one interprets the term 'human embryo' in Article 18(2) of the Biomedicine Convention in a broad sense, cloning of human beings for research purposes seems, in principle, to be prohibited*." Equally – he continues –

[55] This declaration is published as an annex to United Nations General Assembly Resolution 59/280 of 8 March 2005.

[56] Cf. in this sense, for instance, the Council of Europe, *cit.*, 1.

[57] Cf. Article 214 (2) of *Code Penal*, in the words provided by *Loi 2004-800*, 6 August 2004, which punishes any intervention whose goal is to "create a human being that is genetically identical to another human being, whether alive or dead" with a sentence of 30-year imprisonment and a fine of EUR 7,500,000.

[58] The *Human Reproductive Cloning Act 2001*, 4th December, only prohibits cloning for reproductive purposes, *i.e.*, placing in a woman a human embryo that has not been created by fertilisation. Cf., on this issue, Helena Pereira de Melo, *Clonagem e Direito* (Porto: Serviço de Bioética e Ética Médica da Faculdade de Medicina do Porto, 2007), 60 and following pages.

"*Insofar as therapeutic cloning can only be achieved by means of biomedical research, Article 18(2) might also prevent those techniques of therapeutic cloning.*"[59]

The use of cloning for non-reproductive purposes for therapeutic reasons may also be covered in the content of Articles 13 ("Freedom of the arts and sciences") and 35 ("Health care") of the CFREU. As such, the EU Member States have a great degree of freedom to assess the implementation of Article 3 of the Charter regarding cloning for non-reproductive purposes.

The wording adopted in the Charter reflects – as highlighted by STEPHANIE HENNETTE-VAUCHEZ – "*a very rapid evolution of mentality on the issue of cloning*", which is particularly associated with the progress of research on embryonic stem cells, which led "*to so-called regenerative medicine exerting pressure in favour of therapeutic cloning.*"[60] The undeniable advantages for human health stemming from such research have meant that, in the Charter, the prohibition of cloning techniques did not include cloning without reproductive purposes, *i.e.*, so-called "therapeutic" cloning.

Helena Pereira de Melo

[59] Manfred Novak, *op. cit.*, 41.
[60] Stephanie Hennete-Vauchez, *op. cit.*, 60-61.

ARTICLE 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

In Chapter 1 of the CFREU – "Dignity" – the prohibition of torture and inhuman or degrading treatment or punishment is included as one of the most fundamental human rights, along with the right to dignity, the right to life, the right to integrity, and the prohibition of slavery.[1] As understood by the CJEU, Articles 1 and 4 of the CFREU and Article 3 of the ECHR enshrine one of the fundamental values of the Union and its Member States.[2] Article 4 of the CFREU not only encompasses the practice of torture, but also ill-treatment that is considered severe yet not classified as torture when examining the intensity and purpose of such conduct.[3]

The rule that Article 4 establishes is precisely the same as the one that was already stipulated in Article 3 of the ECHR.[4] However, as stated in Article 52(3) of the CFREU *"(...) the meaning and scope of those rights [contained in the Charter] shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*."[5] Moreover, Alessandra Silveira explains that Article 52(1) provides for a general clause restricting the exercise of fundamental rights recognised in the CFREU. In other words, the general restriction clause in Article 52(1) CFREU applies to all fundamental rights and freedoms set out therein. In any case, the wording of some of the provisions of the CFREU – namely the use of the expression "no one" – suggests that some restrictions are excluded, as would be the case of Article 4 ("*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*").[6]

Cases of actual torture are of course the most grave and acute forms of the violation of Article 3 of the ECHR, from which Article 4 of the CFREU is drawn, however the protection it provides is against many different types of assault on human dignity and physical integrity.[7] As for the specific prohibition of torture, it

---

[1] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, European Commission DG Justice, Freedom and Security, June 2006, 43.

[2] Judgment CJEU *WM v Stadt Frankfurt am Main*, 2 July 2020, Case C-18/19, ECLI:EU:C:2020:511. Opinion of Advocate General Pikamäe delivered on 27 February 2020 in *WM v Stadt Frankfurt am Main*, ECLI:EU:C:2020:130, recital 79.

[3] Aisling Reidy, *The prohibition of torture – A guide to the implementation of Article 3 of the European Convention on Human Rights*, Human Rights Handbook, no. 6 (Strasbourg: Council of Europe, 2002), 16.

[4] José Manuel Sobrino Heredia, "Artículo 4", in *Carta de los Derechos Fundamentales de la Unión Europea*, ed. Araceli Mangas Martín (Bilbao: Fundación BBVA, 2008), 165.

[5] EU Charter of Fundamental Rights, TITLE VII – General provisions, Article 52 – Scope and interpretation.

[6] Alessandra Silveira, "Artigo 52.º", in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira, Mariana Canotilho (Coimbra: Almedina, 2013), 592.

[7] Aisling Reidy, *The prohibition of torture*, 9.

should be noted that this constitutes no novelty, since it had already been the subject of previous international standards. In this context, one must consider the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the UN General Assembly resolution 39/46 in 1984. This Convention was adopted taking into consideration Article 5 of the *Universal Declaration of Human Rights*, Article 7 of the *International Covenant on Civil and Political Rights,* and the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[8]

In its Article 1, that Convention proceeds to define "torture" – *"[it] means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes (...) or intimidating or coercing him or a third person (...) when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (...)."* Moreover, Article 1 clarifies what torture does not mean – "*It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*"

Regarding other "*cruel, inhuman or degrading treatment or punishment*", this has been defined as "*any act by which pain or suffering attaining a minimum level of severity, whether physical or mental, is inflicted on a person, when such pain or suffering is inflicted either by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not, however, include pain or suffering arising only from, inherent in or incidental to, lawful penalties*."[9]

Hence, the practice of torture or other cruel, inhuman or degrading treatment or punishment is that which is deliberate, and, since it is determined that what results from lawful sanctions cannot amount to such practices, there are scholars who point out that this clause opens the door to diluting the protection the Convention is supposed to ensure – for example, traditional sanctions in Islamic signatory states are allowed as long as they are authorised by their national laws.[10]

Danilo Zolo noted that one must ask what the expressions "inhuman treatment or punishment" and "degrading treatment or punishment" provided in the CFREU might mean in the main European languages, since it is not easy to understand and semantic and exegetical uncertainty results inevitably in normative indeterminacy.[11] Indeed, its vagueness and lack of robust definition raises questions about the arbitrary assessment of what is, or is not, inhuman and/or degrading treatment.

In this context, the topic of incarceration is relevant – an intricate reality that is not infrequently the subject of analysis and scrutiny. In some EU Member States detention standards reportedly fall short of international laws and standards, including those on human rights, and this seriously undermines mutual recognition in the area of freedom, security and justice.[12] For example, overcrowding can undermine any efforts to give practical meaning to the prohibition of torture and other forms of

[8] Adopted by the General Assembly on 9 December 1975.

[9] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, Chapter I – Article 2(b), OJEU.

[10] Joachim Herrmann, "Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany", *Hastings Int'l & Comp. L. Rev.*, v. 31, no. 1 (2008): 441-442.

[11] Danilo Zolo, "Artigo 4.º", in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira, Mariana Canotilho (Coimbra: Almedina, 2013), 78.

[12] Piotr Bąkowski, Katrien Luyten, "Common standards for prisons and for detention conditions", Area of Justice and Fundamental Rights, Legislative Metadata, European Parliament, 20 May 2022.

ill-treatment, and the resultant lack of personal space and privacy puts all prisoners at risk, especially the most vulnerable.[13] Furthermore, when taking a look at certain types of conduct that are imposed on prisoners, one can regard them as a grave and depressing violation of human identity, an example of which is the ancillary penalty of sexual abstinence.[14]

As Tom Daems observed, in the West, we openly express revulsion at torture and degrading treatment or punishment and want to be seen as civilised and living up to the highest standards. Nevertheless, at the same time we find it hard to abandon resorting to interrogation techniques and penal practices that clearly do not live up to such standards[15] – an ambivalence that requires resolution.

Hence, case-law offers us a further elaboration of Article 4, considering in which cases and in which sense it has been referred to, and towards which conclusions. The ECtHR has confirmed the absolute character of the right guaranteed in Article 3,[16] from which Article 4 of the CFREU derives, whose scope and meaning are equivalent. It has been referenced in the context of war and political instability, as well as in context of removal from the national territory.[17] Indeed, in the EU context, the provision has so far had relevance mainly in extradition and asylum cases.[18]

The ECtHR's case-law in these domains, concerning Article 3 of the ECHR, has established a number of conclusions, which tend to be echoed by the CJEU. In *Chahal v. United Kingdom*, regarding the applicability of Article 3 in expulsion cases, the ECtHR reiterated in Recital 74 that "*it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country.*"[19]

In the same vein, in CJEU Case C-515/17 of 2020 – *Milkiyas Addis v Bundesrepublik Deutschland* – one can read in Recital 49 that "*the personal interview on the admissibility of the application [for international protection] is intended to give the applicant the opportunity (...) to present all of the factors which differentiate his or her specific situation in order to enable the determining authority to rule out the possibility that the applicant, if transferred to that other Member State, would be exposed to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 (...).*"

Furthermore, the CJEU understood, as previously stated in other cases, "*that the particularly high level of severity required by Article 4 of the Charter will be attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding him or herself, irrespective of his or her wishes and his or her personal choices, in a situation of extreme material poverty that does not allow him or her to meet his or her most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that*

[13] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), "31st General Report of the CPT", Council of Europe, April 2022, 25.
[14] Danilo Zolo, "Artigo 4.º", 78.
[15] Tom Daems, "Slaves and Statues: Torture prevention in contemporary Europe", *The British Journal of Criminology*, v. 57, issue 3 (2017): 627 and following.
[16] Judgment *H.L.R. v. France*, 29 April 1997, no. 24573/94, recital 40.
[17] See EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, 45-46.
[18] Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press, 2019), 2106.
[19] Judgment *Chahal v. The United Kingdom,* 15 November 1996, no. 22414/93, recital 74.

undermines his or her physical or mental health or puts him or her in a state of degradation incompatible with human dignity" (Recital 51).[20]

In CJEU Case C-18/19 of 2020 – *WM v. Stadt Frankfurt am Main* – Recital 79 states that *"(...) in any circumstances, including those of the fight against terrorism and organised crime, the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned*",[21] considering the interrelated nature of Articles 1 and 4 of the CFREU and Article 3 of the ECHR. This suggestion of the prohibition of torture, as well as inhuman, degrading treatment or punishment, whatever the circumstances, provides once again for its non-derogable and absolute character: its infringement is never justified.

Case-law references to Article 4 of the CFREU tend to refer with greater emphasis to the second half of the Article's formulation: "*no one shall be subjected to (...) inhuman or degrading treatment or punishment.*" Conversely, the interpretative scope of the right not to be subjected to torture has been a deeply significant issue subject to varying interpretations in the history of case-law. Not infrequently scholars highlight the close connection between the prohibition of torture and the right to dignity and it is often assumed that a very basic dimension of the meaning of dignity inhabits the sphere of this right – a sense that undermining dignity means treating a human person as if she/he were not a human person.[22]

In this context, Danilo Zolo pointed out that in order to provide meaning to Article 4, it would have been necessary to make a reference to the Council of Europe Committee and its surveillance and denunciation powers and bearing in mind the continued perpetuation of acts of violation of human dignity by police forces and even in prisons, the author asserts that Article 4 can only be considered a laconic declaration that reiterates previous texts.[23]

The very real possibility of a wide margin of arbitrariness in the interpretation of torture means that work must be done to render its definition more effective. To that extent, as Elaine Webster has asserted, unpacking the question of what dignity requires in this context is at the heart of understanding the scope of meaning of the terms that constitute law – ideas such as humiliation, injury to a sense of self-worth, and denial of a capacity for self-direction are alternative means of expressing how dignity is assaulted and these ideas need to be substantiated, and more needs to be said regarding which expression best reflects the case-law of the prohibition of torture.[24]

More recently, *"freedom from inhuman or degrading treatment"* was brought forward in connection with a pending case in the ECtHR – *Duarte Agostinho and Others* –,[25] whose main subject matter is climate change. Briefly, this case consists of a complaint filed by six Portuguese youngsters to the ECtHR against 33 countries, which alleges that the respondents have violated human rights by not taking sufficient action

[20] Judgment CJEU *Milkiyas Addis v Bundesrepublik Deutschland*, 16 July 2020, Case C-517/17, ECLI:EU:C:2020:579.

[21] Judgment *WM v Stadt Frankfurt am Main*. Opinion of Advocate General Pikamäe delivered on 27 February 2020 in *WM v Stadt Frankfurt am Main*.

[22] Elaine Webster, "Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk", *Hum. Rights Rev.*, v. 17 (2016): 375, DOI: https://doi.org/10.1007/s12142-016-0405-7.

[23] Danilo Zolo, "Artigo 4.º", 80.

[24] Elaine Webster, "Interpretation of the Prohibition of Torture", 386.

[25] *Duarte Agostinho and Others v. Portugal and 32 Other States*, 2 September 2020, no. 39371/20 (Pending – ECtHR).

on climate change, thus seeking an order compelling them to take more ambitious measures. The same complaint is based on Articles 2 (right to life), 8 (right to respect for private and family life) and 14 (non-discrimination) of the ECHR and focuses on the fact that young people are failing to achieve high levels of physical and mental well-being and are suffering the worst consequences of climate change.

Turning to this specific case, a third party intervention by the Council of Europe Commissioner for Human Rights highlights that *"living in an environment that is unhealthy or otherwise negatively affected by human intervention, including by climate change, may result in violations of human rights (...)"* and that *"environmental degradation may not only affect the substantive human rights intuitively linked to it, such as the right to life, to private and family life, to peaceful enjoyment of the home, or freedom from inhuman or degrading treatment."*[26] The degrading treatment is linked to the increasingly felt "eco-anxiety" – the anxiety about climate disruption that has multi-level effects on the current generation. Thus, as Weronika Galka asserts, *"the question (...) is whether the fear and anguish – that is, eco-anxiety – related to states' contributions to the climate crisis amount to degrading treatment. The difficulty lies in the Court's* [ECHR] *tendency to adjust the threshold in response to two considerations: the presence of a direct state wrong and the presence of specific vulnerability."*[27]

Even though climate change has a universal impact on societies and among all people, young generations are, in fact, particularly vulnerable in the face of possible irreversible damage caused by climate disruption,[28] compared to other demographic groups. This is relevant when addressing the issue of degrading treatment, considering that in *Duarte Agostinho and Others*, the specific vulnerability of the current generation to the risks posed by climate change, namely forest fires in Portugal, is pointed out, and in the absence of fulfilment of positive obligations by States to mitigate this situation – measures that specifically include decreasing emissions, prohibiting the export of fossil fuels, offsetting their emissions from the import of goods and restricting the release of emissions abroad – the consequences will continue to be increasingly felt at a physical, mental and emotional level. If, in the future, the CJEU were to hold in this case that the negative experience of these young people constitutes a form of inhuman and/or degrading treatment, this could contribute to emerging forms of interpretation of Article 4 of the CFREU.

Moreover, the CJEU rendered a decision that breaks new ground in this area, notably on health issues, in Case C-699/21.[29] In the present case, the reasonableness

[26] Council of Europe, Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights – Application no. 39371/20 – *Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States*, Strasbourg, 5 May 2021, 2.

[27] Weronika Galka, "Apocalypse Now: climate change, eco-anxiety and Art.3 ECHR's prohibition of degrading treatment", *Oxford University – Undergraduate Law Journal*, Blogpost, 28 December 2022.

[28] "Taken as a whole, no group is more vulnerable to environmental harm than children (persons under the age of 18), who make up 30 per cent of the world's population. Environmental harm has especially severe effects on children under the age of 5. Of the 5.9 million deaths of children under the age of 5 in 2015, the World Health Organization (WHO) estimates that more than one quarter – more than 1.5 million deaths – could have been prevented through the reduction of environmental risks (...) Childhood exposure to pollutants and other toxic substances also contributes to disabilities, diseases and premature mortality in adulthood." See John H. Knox, "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", Human Rights Council, 24 January 2018, A/HRC/37/58, 5.

[29] Judgment *E.D.L.* (Ground for refusal based on illness), 18 April 2023, Case C-699/21,

of issuing a European arrest warrant against an individual (E.D.L.) was at stake, considering that the subject in question suffered from a psychotic disorder, which required treatment with medication and psychotherapy, and to that extent his detention could be harmful, amounting to a form of exposure to the risk of suffering inhuman or degrading conditions of detention. The CJEU was presented with the question by the Italian Constitutional Court whether, in the light of Articles 3, 4 and 35 of the CFREU, Framework Decision 2002/584[30] must be interpreted as meaning that, where the executing judicial authority considers that the surrender of a person suffering from a serious and potentially irreversible chronic illness may expose that person to the risk of suffering serious damage to his health, i) it must request the issuing judicial authority to provide information excluding the existence of such a risk and ii) refuse to surrender the person concerned if it does not obtain assurances to that effect within a reasonable period of time.

The CJEU, interpreting Articles 1(3)[31] and 23(4)[32] of Framework Decision 2002/584, read in the light of Article 4 of the CFREU, concluded, among other statements, that "*where there are substantial grounds to believe that the surrender of a requested person in execution of a European arrest warrant* ***manifestly risks endangering his or her health****, the executing judicial authority may, exceptionally, postpone that surrender temporarily*" (author's bold). Here, we are faced with a scenario in which Article 4 of the Charter is invoked in a case involving a person suffering from a mental health condition, which is relevant to assess to what extent the measure at hand may constitute degrading treatment – this being a novel interpretation of that Article. Indeed, a favourable assessment by the CJEU can be observed with a view to avoiding exposure to a situation potentially detrimental to a fundamental right, and this is relevant because it illustrates how case-law approaches certain contexts from a fresh perspective – in this instance, the interconnection between the prohibition of inhuman or degrading treatment and health matters, specifically mental health.

On a final note, it could be said that in a world where dehumanising practices have not disappeared and are becoming more and more complex, the work to actualise this principle, making it less susceptible to a mere expression of *law in books*, is an urgent undertaking in the EU.

Maria Inês Costa

EU:C:2023:295. See Nuno Piçarra and Sophie Perez, "Summaries of judgments: E.D.L. (Ground for refusal based on illness) | TAP Portugal (Death of the co-pilot)", *The Official Blog of UNIO - Thinking and Debating Europe*, July 21, 2023.

[30] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, 2002/584/JHA.

[31] "*This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU.*"

[32] "*The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*"

ARTICLE 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

1. The prohibitions contained in Article 5 stem directly from the principle of human dignity set forth in Article 1, and it was even discussed during the drafting of the Charter whether or not they should be treated autonomously. The decision to partition the prohibition of slavery and forced labour reflects, above all, the new forms of slavery that are of concern to the Member States today. This Article is considered *lex specialis* in the light of the previous precept, which prohibits torture and inhuman or degrading treatment or punishment.

2. Article 5 (1) of the CFREU does not contemplate any definition of slavery or servitude. Freedom from slavery was for the first time assured through an international treaty, the Berlin Treaty of 1885, in the course of the discussion of the occupation of Africa by the colonial powers. This was followed by the 1926 Geneva Convention on Slavery, adopted by the League of Nations, which defines slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised (Article 1). The signatories to the Geneva Convention undertook, in accordance with Article 2 of the Treaty, to prevent and repress the slave trade and to promote the complete abolition of slavery in all its forms, progressively and as rapidly as possible.

3. The UDHR has also affirmed, in its Article 4, that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. In 1956, the Supplementary Convention on the abolition of slavery, trafficking in human beings and institutions and practices similar to slavery was adopted, with a view to strengthening the fight against slavery and identifying similar forms of exploitation. The States that were party to the Convention undertook to completely abolish and abandon *a)* debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined; *b)* serfdom, that is to say, the condition of the person who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status; *c)* any institution or practice whereby 1) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or 2) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or 3) a woman on the death of her husband is liable to be inherited by another person; *d)* any institution or practice whereby a child or young

person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

4. The ICCPR, in turn, states in Article 8 that no one shall be subjected to slavery, underlining that all forms of slavery and slave-trade in human beings are prohibited (paragraph 1). Likewise, it provides that no one shall be held in servitude (paragraph 2) and that no one shall be required to perform forced or compulsory labour [paragraph 3 *(a)*]. With regard to this last point, however, it states that such a provision cannot be interpreted as prohibiting, in certain countries where crimes may be punishable by imprisonment accompanied by hard labour, the execution of a sentence of hard labour imposed by a competent court [Article 8 (3) *(b)*]. It further clarifies [subparagraph *(c)* of the same provision] that forced or compulsory labour is not considered to be 1) any work or service, not referred to in subparagraph *(b)*, normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; 2) any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; 3) any service exacted in cases of emergency or calamity threatening the life or well-being of the community; 4) any work or service which forms part of normal civil obligations.

5. It should be noted that in the ICCPR a distinction is made between the concepts of slavery and servitude, which are accordingly treated in separate paragraphs. Slavery was considered as a technical and limited notion, implying the destruction of the legal personality of the victim, while servitude corresponded to a more general idea that encompassed all forms of domination of one person over another. This distinction was not observed in the CFREU.

6. Against this backdrop, the rights enshrined in paragraphs 1 and 2 of this Article correspond to those contained in the same paragraphs of Article 4 of the ECHR, and therefore, under Article 52 (3) of the Charter, they have at least the same scope of protection. Thus, the right provided for in paragraph 1 of the precept cannot be limited in any way [see the ECtHR judgments *Siliadin v. France*, 26 July 2005, no. 73316/01, paragraph 112; and *Rantsev v. Cyprus and Russia*, 7 January 2010, no. 25965/04, paragraph 283].

7. Article 4 (2) of the ECHR prohibits forced or compulsory labour. For the definition of forced or compulsory labour, the ILO Conventions are instrumental, and emphasis is here given to Convention no. 29 of 28 June 1930, on forced labour, and Convention no. 105 of 25 June 1957 on the abolition of forced labour. That Convention requires the abolition of forced or compulsory labour in all its forms [Article 1 (1)] by defining forced or compulsory labour as "*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*" Article 2 (2) provides for certain exceptions, namely military service, the work of persons sentenced in court under appropriate supervision, or cases of force majeure, such as war, fires and earthquakes. Convention no. 105 prohibits the use of any form of forced or compulsory labour as a measure of coercion or political education, as a sanction for the expression of political or ideological opinions, as a method of mobilisation and use of labour, as a means of labour discipline, as punishment for participation in strikes or as a measure of discrimination (Article 1).

8. In the interpretation of Article 4 (2) of the ECHR, the ECtHR has emphasised the importance of the abovementioned ILO Conventions, and in particular Convention no. 29 [see, for example, the ECHR judgments *Van der Mussele v. Belgique*, 23 November 1983, Case 8919/80, paragraph 32; and *Siliadin v. France*, Case 73316/01, 26 July 2005, paragraph 115]. As pointed out in *Van der Mussele v. Belgique*, cit., paragraph 32, there is a striking similarity between Article 4 (3) of the ECHR and Article 2 (2) of Convention no. 29 which does not appear to be accidental. The definition of *forced or compulsory labour* contained in this Convention may therefore, according to this Court, be a starting point for the interpretation of Article 4 of the ECHR. In its judgment the Court also emphasised that it is important to take into account the main features of that Convention and that it is a living instrument which must be read in the light of the notions currently in force in democratic States.

9. The contribution of the European Social Charter and the interpretation of the European Committee on Social Rights should also be taken into account. In accordance with Article 1 (2) of the European Social Charter, the Parties undertake *to protect effectively the right of the worker to earn his living in an occupation freely entered upon*. The European Committee on Social Rights (Complaint no. 7/2000, *International Federation of Human Rights v. Greece* of 28 June 2000) stresses that the *freely entered upon* formula constitutes a guarantee against forced labour, which is defined as coercion to force the worker to perform work against his will and without any freely expressed consent. The Committee has also interpreted this provision as prohibiting all coercion exercised in order for the worker to continue to perform work which he had previously committed to, but which he no longer wishes to perform (Complaint no. 7/2000, *International Federation of Rights Human v. Greece*, of 28 June 2000).

10. In this context, it is relevant to interpret Article 4 (2) of the CFREU in connection with Article 15 (1) of the same document, according to which *everyone has the right to engage in work and to pursue a freely chosen or accepted occupation*. According to Article 4 (3) of the ECHR, forced or compulsory labour shall not include: *a)* any work normally required of a person under detention imposed according to the provisions laid down in Article 5 (establishing the right to liberty and security) of the Convention, or while on conditional release; *b)* any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; *c)* any service exacted in case of an emergency or calamity threatening the life or well-being of the community; *d)* any work or service which forms part of normal civic obligations.

11. In addition, in accordance with the derogation granted by Article 15 of the ECHR, applicable *ex vi* Article 52 (3) of the Charter, the prohibition of forced or compulsory labour may be restricted in case of war or emergency, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law. It should be borne in mind that the ECtHR has emphasised in its case-law (see, for example, *Stummer v. Autriche*, 7 July 2011, Case 37452/02) that Article 4 of the ECHR enshrines one of the fundamental values of democratic societies.

12. Paragraph 3 of the Article, according to the declarations of the *Praesidium* of the Convention, stems directly from the dignity of the human being and takes into account the new forms of organized crime, such as the organization of clandestine immigration or sexual exploitation networks for profit. The Europol Convention contains in its Annex the following definition of trafficking in human beings:

subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children. In Chapter VI of the Convention implementing the Schengen Agreement, which is part of the *acquis communautaire*, in Article 27 (1) the wording on illegal immigration networks is as follows: [t]he Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.

13. The express prohibition of trafficking in human beings is ground-breaking. Although the will of the States to counter trafficking in human beings is erstwhile (see, for example, the International Agreement for the suppression of the White Slave Traffic of 4 May 1910, the International Convention for the Suppression of the Traffic in Women and Children, of 30 September 1921, the International Convention for the Suppression of the Traffic in Women of the Full Age, of 11 October 1933, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, of 21 March 1950), the fact is that the express prohibition of trafficking in human beings has not been reflected in the classical texts for the defence of human rights, nor in the constitutions of the various Member States. In this context, the prohibition of trafficking in human beings would implicitly result from the prohibition of slavery or forced labour.

14. The prohibition in paragraph 3 is based on the understanding that trafficking in persons should be treated as a particularly reprehensible form of organised crime, given its special ability to deny human dignity, since no person should be downgraded to private or State property, or treated as something acquired, used or marketed, as is the case of slave labour, forced labour or trafficking in human beings. Since trafficking in human beings is the act of subjection exercised by one person over another, against his will, using violence, threat, fraud or abuse of authority with exploitative purposes, it is particularly sensitive in the EU as regards cases of exploitation for prostitution, exploitation of minors or sexual violence against minors. In this context, the express prohibition of trafficking in human beings heralds a new approach, not limited to prohibiting the acquisition of human beings, which requires a more comprehensive, and even multidisciplinary, scope.

15. As trafficking in human beings particularly affects certain vulnerable groups, such as women and children, the EU, aware of this problem, has launched initiatives aimed at protecting these groups and preventing and combating this phenomenon. Particular emphasis should be given namely to Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; Commission Decision 2007/675/EC of 7 October 2007 on setting up the Group of Experts on Trafficking in Human Beings, amended by Decision 2008/604/EC, 22 July 2008; Decision no. 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme Fundamental Rights and Justice; Decisions no. 2006/618/EC and 2006/619/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol supplementing the UN Convention against Transnational Organised Crime adopted

by the General Assembly of the UN on 15 November 2000 and on trafficking in human beings; Decisions no. 2006/616/EC and 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention against Transnational Organised Crime; Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; the European Union Plan on best practices, standards and procedures for combating and preventing trafficking in human beings; Decision no. 1351/2008/EC of the European Parliament and of the Council of 16 December 2008 establishing a multiannual Community programme on protecting children using the Internet and other communication technologies; Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.

16. In the period after the completion of the work on the CFREU, the UN adopted the first legally binding instrument against global organized crime and trafficking in human beings, the Palermo Convention of 15 November 2000, which also focuses on the problems of trafficking and smuggling of migrants.

Flávia Noversa Loureiro & *Margarida Santos*

ARTICLE 6

Right to liberty and security

Everyone has the right to liberty and security of person.

1. The precept inscribed in Article 6 is, according to legal doctrine, the most basic and elementary right, the recognition of which in the range of fundamental rights goes back to the origins of liberal constitutionalism.[1] The right to freedom in a general sense has historical significance, in "*protection against the tyranny of the political rulers*"[2] and, for this reason, has risen to the level of a "*cornerstone of the social edifice, an element on which the whole system of law must be structured*",[3] indispensable for the constitution and development of the human being and for the defence of his/her dignity.

Because it serves as a parameter – and due to its role as a cornerstone of fundamental rights – its position as the first provision of Title II of the Charter, composed of other fundamental rights of liberal and democratic inspiration, was justified.[4] However, the right to liberty forces us towards a rigorous determination, that is, through its manifestation as *freedoms*, which correspond to "*aspects of the same human freedom in the various sectors or aspects of the social life of Man.*"[5]

For this reason, the identification of the right to liberty in Article 6 is achieved by reading this phrase in conjunction with the subsequent wording – *security* – which, being less indeterminate, tends to "*give its normative content to the protection against arbitrary acts of arrest or detention (...) carried out by the State, which claims a monopoly on legitimate violence, namely for the purpose of fighting crime and ensuring public order and security.*"[6] From a technical-legal point of view, security does not constitute a right to security for the purpose of the article under analysis; therefore, the EU's area of security would not be at stake, since the term is applied as an integral part of the notion of freedom[7] – and, as such, security can be understood as a good[8] and not as

---

[1] Tom Bingham, "Personal freedom and the dilemma of democracies", *The International and Comparative Law Quarterly*, v. 52, no. 4 (2003): 842. The author classifies freedom as "*the most fundamental and probably the oldest, the most hardly won and the most universally recognized of human rights.*"

[2] John Stuart Mill, *Sobre a liberdade* (Lisbon: Edições 70), 28.

[3] Ruling of the Portuguese Constitutional Court no. 1166/96, November 20, 1996.

[4] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, European Commission DG Justice, Freedom and Security, June 2006, 67. In this sense we find in the case-law of the CJEU the judgment *Hungary v. Parliament and Council*, of February 16, 2022, Case C-156/21, ECLI:EU:C:2022:97, which presents an up-to-date reading of Article 6 of the Charter as a means to achieve the values established in Article 2 of the TEU.

[5] José Lobo Moutinho, "Artigo 27.º", in *Constituição Portuguesa Anotada*, v. I, ed. Jorge Miranda and Rui Medeiros (Lisbon: Universidade Católica Editora, 2017), 464.

[6] Nuno Piçarra, "Artigo 6.º", in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 102.

[7] José Martín and Pérez de Nanclares, "Artículo 6", in *Carta de los Derechos Fundamentales de la Unión Europea*, ed. Araceli Mangas Martín (Bilbao: Fundación BBVA, 2008), 197 e 201.

[8] Luis de la Corte Ibáñez and José Maria Blanco, "Prólogo: un tema de nuestro tiempo", in *Seguridad nacional, amenazas y respuestas* (Madrid: LID, 2014).

national security. Its meaning corresponds to personal security that aims to protect the individual against physical and psychological harm or damage to integrity and morale.[9]

Hence, Article 6 is dedicated to what is known as *individual liberty* or *physical freedom*, whose purpose is to protect the individual against the risks of arbitrary action by public authorities, and should therefore be understood differently from the freedom of movement and of residence, provided for in Articles 45 of the Charter and 21(1) of the TFEU, as part of European citizenship and as an integral part of the fundamental economic freedoms.

Therefore, liberty for the purposes of Article 6 comprises the freedom of movement, popularly called the ability to "come and go" freely, whose restriction acts directly on the physical, that is, it corresponds to a measure of confinement adopted without personal consent, which allows this limitation upon liberty to be clearly and directly perceived, the most severe restriction of which currently accepted is the sentence of imprisonment.[10] This is due to the evolution of methods to combat crime, initially centered on corporal punishment and capital punishment, whose legitimacy was gradually replaced by imprisonment, which represents a procedural guarantee and a mechanism whose purpose would be social reintegration.[11]

Thus, liberty is understood as a guarantee of criminal procedure, which protects the application of both the order and the execution of the sentence of arrest or detention, as well as the rights of those who are detained, subsumed under the principle of legality.[12] Consequently, it relates to the rights provided for in Title VI of the Charter, which is dedicated to the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50). It also entails the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50), integrating the area of Justice within the construction of the Area of Freedom, Security and Justice (Article 3, paragraph 2 of the TEU).

2. Historically, personal liberty is indebted to English law, whose main documents were responsible for enshrining, in the form of law, such principle. Thus, one should go back to the *Magna Charta Libertatum* (1215), which established the right not to be arbitrarily detained or imprisoned, and any prison sentence should result from a fair trial, under the prism of the law. This right would also be safeguarded years later in the *Petition of Rights* (1628) and in the *Habeas Corpus Act* (1679), the latter being the highest expression of this guarantee by creating an instrument – the *habeas*

[9] UN Human Rights Committee (HRC), "General comment no. 35, Article 9 (Liberty and security of person)", 16 December 2014, CCPR/C/GC/35, 1.

[10] José Lobo Moutinho, "Artigo 27.º", 464 and EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 67. The restriction on freedom implies a deprivation of movement in a space that is also limited. Thus, in addition to imprisonment resulting from a final conviction, examples of typical situations would be pre-trial detention, home detention, administrative detention, involuntary hospitalisation, confinement of minors in institutions, detention in temporary facility centres in airport zones, as well as transfer against the will of the individual. See UN Human Rights Committee (HRC), "General comment no. 35", 2.

[11] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 67.

[12] Jorge de Jesus Ferreira Alves, *A Convenção Europeia dos Direitos do Homem Anotada e Protocolos Adicionais Anotados* (Porto: Legis Editora, 2008), 43.

corpus – which consisted in "*determining that, upon the complaint or written request of any individual or on behalf of any individual arrested or accused of the perpetration of a crime, the competent judicial authority shall grant a writ of* habeas corpus *for the benefit of the arrested person, which is immediately enforceable.*"[13] This formula would also feature in the Virginia Declaration of Rights (1776), the fourth amendment of the American Constitution (1787), the Declaration of the Rights of Man and of the Citizen (1789),[14] as well as in the various European constitutions of the 19th century, being elevated in the 20th century to an intrinsic element of the concept of rule of law and of the inalienable and irrevocable core of individual rights.[15] For its part, *security* – understood as the protection granted by society to each member for the preservation of his or her person, rights, and property – appeared in the Declaration of the Rights of Man and of the Citizen integrated into the Constitution of the Year I of 1793.[16]

The more contemporary protection of freedom – and jointly regulating freedom and security, correlated to the right to life – resulted from developments in public international law and international human rights law after World War II. At the global level, the main instrument is the UDHR (1948), which dedicates Article 3 to life, liberty and security of person. However, the understanding deriving from historical law is apparent in the body of Article 9, through the maxim "*no one shall be subjected to arbitrary arrest, detention or exile*", a premise that would be developed in Article 9 of the ICCPR (1976). At the regional level, protection results from Article 5 of the ECHR (1950), which served as a source of inspiration for the ICCPR, with the exception that it lists the grounds on which the loss of liberty is justified. Following on from this, the right to liberty and security is also enshrined in Article 7 of the ACHR (1969) and in Article 6 of the African Charter on Human and Peoples' Rights (1981).

3. Given the historical and international background, the inclusion of the protection of both liberty and security in the present Charter was a consensual matter – which is reflected in the preparatory documents and in the first sessions devoted to the discussion of content, starting in February 2000.[17] The discussion on its drafting stemmed from the initial idea of reproducing the full content of Article 5 of the ECHR until it reached the current rather brief wording. These deliberations sought to identify the purposes and standard situations that should be covered, which for some meant expressly adopting the terms "detainee", "prisoner", "offence" and "offence", views which were not reflected in the final text. The final

[13] Nuno Piçarra, "Artigo 6.º", 103.

[14] The French Declaration distinguishes between the right to liberty (in the broad sense) and the right to personal liberty, notably through the wording of its Article 4, according to which liberty (in the broad sense) consists in being able to do everything that does not harm one's neighbour, while personal liberty derives from the expression "no man can be indicted, arrested, or held in custody except for offenses legally defined, and according to specified procedures", provided in the first part of Article 7.

[15] José Martín and Pérez de Nanclares, "Artículo 6", 196.

[16] Nuno Piçarra, "Artigo 6.º", 104.

[17] The wording in the proposal for discussion of the Charter presented in February 2000 transposed the content of Article 5 of the ECHR to the then Article 3. In this proposal, the right to liberty and security was understood as a general principle, since the European project lacked penal competence at that historical moment, the consequence of which was the inability of the Union to be directly responsible for the practical implementation of this precept. Draft Chater of Fundamental Rights of the European Union, CHARTE 4123/1/00 REV 1 CONVENT 5, Brussels, 15.02.2000, https://www.europarl.europa.eu/charter/activities/docs/pdf/convent05_en.pdf.

solution reflected a simplified wording, and the adoption of the term *security* was also a matter of discussion, as well as the connection of this precept with the right to asylum.[18]

The conclusions of these meetings can be summarised as follows: (i) it was noted that there was no uniform substantive content of this right in the legal systems of the Member States; (ii) it became evident that there was a need to simplify the wording, so that it would not be as extensive as Article 5 of the ECHR; and, finally, (iii) the growth of international terrorism required additional attention to be placed on the freedom-security dialectic.[19]

4. However, as the Explanations to Article 6 state, by virtue of Article 52(3) of the Charter, the meaning and scope of this article correspond to the rights guaranteed by Article 5 of the ECHR, *i.e.*, the reading of its application and the restrictions that may be imposed in the context of the EU on the right to liberty and security may not exceed those permitted by the ECHR.[20]

5. Nonetheless, since the Charter is, by virtue of Article 51(1), addressed to the Member States (when they are implementing Union law) and to the institutions, bodies, offices and agencies of the Union, its content is not intended directly to deprive a person of his or her liberty by arrest or detention, but rather to condition the actions of those to whom the Charter is addressed – who must respect the rights and principles it lays down, promoting their application in accordance with the respective competences and limits conferred on the Union by the Treaties.

Thus, Article 6 constitutes a compliance parameter for measures adopted by national authorities – whether central, regional or local – as well as by any public body. According to the doctrine, three possible scenarios for the exercise of coercion in the European Union context emerge from this provision: *"(i) to enforce acts of the Union itself; (ii) so that officials or agents of the Union can perform their duties; (iii) so that national authorities can apply Union law.*" However, the conformity parameter of Article 6 is not restricted to the actions of administrative authorities but is also a benchmark for legislative actions aimed at framing "*in general and abstract terms the power to deprive a person of his or her liberty, by virtue of the principle of the rule of law and one of its corollaries, which is the principle of legality.*"[21]

6. Accordingly, as also stated in the Explanations, Article 6 must be respected in particular when the European Parliament and the Council "*adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the TFEU, notably to define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.*"[22] In light of this understanding, Article 6 is a parameter of validity for the following types of Union legislative acts: (i) acts aiming to facilitate judicial cooperation in criminal matters; (ii) acts aiming to harmonise the criminal and procedural laws of the Member States; (iii) acts aiming to establish minimum rules concerning the definitions of criminal offences and sanctions in the area of cross-border crime; and (iv) acts

[18] Draft Charter of Fundamental Rights of the European Union, Brussels, 24 and 25.02.2000, https://www.europarl.europa.eu/charter/activities/docs/pdf/informal_cr1_es_es.pdf.
[19] José Martín and Pérez de Nanclares, "Artículo 6", 197.
[20] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007 and EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 68.
[21] Nuno Piçarra, "Artigo 6.º", 106.
[22] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007.

aiming to ensure the effective implementation of a policy in an objective area of harmonisation measures.[23]

The first type of act, aimed at judicial cooperation in criminal matters, is based on Article 82(1), second paragraph, TFEU. This provision gives effect to the mutual recognition principle, the purpose of which was to overcome the differences between the Member States' judicial systems, an essential step towards the development of the common area of justice, linked to a high level of mutual trust. Currently this field has taken on a new dimension with the development of the digitalisation of justice, with ongoing discussion of a Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters with cross-border implications since December 2021.[24]

The second type of act promoting the approximation of criminal law and criminal procedural law in the Member States is provided for in Article 82(2) TFEU – which provides for the adoption of directives to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in cross-border criminal matters. These Directives should establish minimum rules concerning: (i) mutual admissibility of evidence between Member States; (ii) the rights of individuals in criminal procedure; (iii) the rights of victims of crime; and (iv) other specific aspects of criminal procedure, which the Council has identified in advance by a decision.

The third type of act is provided for in Article 83(1) of the TFEU, according to which minimum rules must be established concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, identifying the main areas for such action, which are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. This listing of the areas upon which the acts should focus is not exhaustive, as established in the 3rd paragraph of the aforementioned Article 83(1), which presents an open clause that determines the possibility of identifying new areas, which are constantly being updated, depending on the evolution of crime. According to doctrine, the identified offenses are considered "*crimes against the European Union.*"[25]

The fourth and last type of act, according to Article 83(2) TFEU, must be read in conjunction with Article 85 TFEU, since it establishes the creation of minimum standards which are essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. In this area, Eurojust was created and given the task of promoting coordination and improving cooperation between national authorities in the context of investigations and prosecutions in criminal matters, corresponding to a "*definitive overcoming of the logic of classic cooperation by giving it a European dimension.*"[26] In this same vein, it is worth highlighting the materialisation of the project of the European Public

[23] Nuno Piçarra, "Artigo 6.º", 107 and following.

[24] Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, Brussels, 1.12.2021, COM/2021/759 final.

[25] Nuno Piçarra, "Artigo 6.º", 108.

[26] José Luís Lopes da Mota, "Eurojust", in *Enciclopédia da União Europeia*, ed. Ana Paula Brandão *et. al.* (Vila Franca de Xira: Petrony, 2017), 181.

Prosecutor's Office responsible for investigating, prosecuting and bringing to judgment the authors and accomplices of offenses against the Union's financial interests (Article 86, paragraph 2 of the TFEU), with the initiation of the activities of this institution in June 2021.

7. Regarding the meaning and scope, in compliance with Article 52(3) of the Charter, the rights guaranteed in Article 6 are identical to those contained in Article 5 of the ECHR, an understanding that has been underlined by the case-law of the CJEU,[27] except in cases where EU law may confer more extensive protection, in accordance with the last part of the aforementioned Article 52(3).

On the other hand, resorting to the ECHR results in a major contribution from the development of the case-law of the ECtHR, which considers the right to liberty and security as inalienable in a democratic society.[28] This understanding, according to the doctrine, currently serves as a limit to possible excesses from compensatory measures in security matters aimed at fighting terrorism and organised crime.[29]

Article 5 of the ECHR sets the limits of the right to liberty, and the meaning of these limits is determined by the interpretative exercise carried out by the ECtHR.[30] Thus, the case-law clarifies that the list in the subparagraphs of Article 5(1) ECHR is exhaustive and the interpretation must be strict.[31] This understanding stems from the notion that a measure depriving a person of liberty must be classified as serious and is only justified when another, less severe, measure is considered insufficient to safeguard the interests at stake.[32] Thus, Article 5(1) aims to protect the individual against any form of control of his physical movements by a public authority,[33] that is, against the execution of unlawful or arbitrary arrests or detentions,[34] of adults or minors,[35] which must apply to both those who are free and those who are detained. Therefore, the doctrine holds that the result of the combined reading

---

[27] In this regard see the conclusions of Advocate General Eleanor Sharpston, Judgment *Radu*, 18 October 2012 (Opinion), Case C-396/11, ECLI:EU:C:2012:648, recitals 52, *et seq*.; Judgment *Lanigan*, 16 July 2015, Case C-237/15 PPU, ECLI:EU:C:2015:474, and Judgment *Spetsializirana prokuratura*, 28 January 2021, Case C-649/19, ECLI:EU:C:2021:75.

[28] Judgment ECtHR *Winterwerp v. the Netherlands*, 24 October 1979, no. 6301/73, Recital 37, reiterated by the ECtHR in *Imakayeva v. Russia*, 9 November 2006, no. 7615/02, recital 171 and *Belozorov v. Russia and Ukraine*, 15 October 2015, no. 43611/02, recital 111.

[29] José Martín and Pérez de Nanclares, "Artículo 6", 198.

[30] The ECtHR's interpretative exercise is intended to ensure that the act of deprivation of liberty is subject to independent judicial scrutiny, ensuring the accountability of the competent authorities involved in criminal proceedings and prosecutions. See ECtHR, *Imakayeva v. Russia*, recital 171.

[31] Judgment ECtHR *Engel and Others v. the Netherlands*, 8 June 1976, nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, recital 58.

[32] Judgment ECtHR *Witold Litwa v. Poland*, 4 April 2000, no. 26629/95, recital 78.

[33] Judgment ECtHR *Weeks v. the United Kingdom*, 2 March 1987, no. 9787/82, recital 40 and Judgment *Lazariu v. Romania*, 13 November 2014, no. 31973/03, recital 100.

[34] Judgment ECtHR *Manzini v. Italy*, 2 August 2001, no. 44955/98, recital 16. For the ECtHR, arbitrariness means acting beyond a lack of compliance with national law, as in certain situations the deprivation of liberty may be considered lawful under national law, but arbitrary and contrary to the ECHR – this scenario occurs in the face of elements of bad faith or deception on the part of the national authorities. Thus, the ECtHR considers it necessary to carry out an assessment of the necessity of detention in order to verify whether the measure is appropriate to achieve the stated objective. In this sense see the Judgments *Lazariu v. Romania*, recitals 102-104; *Saadi v. the United Kingdom* [GC], 29 January 2008, no. 13229/09; *Bozano v. France*, 18 December 1986, no. 9990/82; *Čonka v. Belgium*, 5 February 2002, no. 51564/99; *Denis and Irvine v. Belgium*, 1 June 2021, no. 62819/17, and no. 63921/17.

[35] Judgment ECtHR *Nielsen v. Denmark*, 28 November 1988, no. 10929/84, recital 58.

between the Charter and the ECHR establishes a standard as to what restrictions are permitted and to which Union law is bound.[36]

In addition to enshrining the right to liberty and security, the first paragraph of Article 5 ECHR further provides that deprivation of liberty must be in accordance with a procedure prescribed by law – an expression that has been interpreted by the ECtHR as a reference to the domestic law of the States as signatories to the ECHR in order to bring national rules of criminal procedure into conformity with the spirit and purpose of the Convention.[37]

Thus, Article 5(1) of the ECHR allows for six cases in which a custodial sentence should be used: (i) as a consequence of the lawful detention of a person after conviction by a competent court; (ii) in case of non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (iii) in cases where it is necessary to bring the person detained before the competent legal authority and there is a risk of flight or reasonable grounds to believe that it is necessary to prevent the committing of an offence;[38] (iv) when it involves a minor for the purpose of educational supervision; (v) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; and, lastly,[39] (vi) the lawful arrest or detention of a person to prevent his effecting an

---

[36] José Martín and Pérez de Nanclares, "Artículo 6", 204.

[37] Judgment ECtHR *Brogan and Others v. the United Kingdom* of 29 November 1988, nos. 11209/84; 11234/84; 11266/84; 11386/85, recital 40; Judgment *Jackal v. the United Kingdom*, 15 November 1996, no. 22414/93, recital 118 and Judgment *Lukanov v. Bulgaria*, 20 March 1997, no. 21915/93, Recital 41. The need for the substantive and procedural rules prescribed by national law to pursue the same objective as Article 5 of the ECHR was reiterated by the ECtHR in *Imakayeva v. Russia*, recitals 171-172. Since the purpose of this provision of the Convention would be to protect the individual against arbitrary detention, this guarantee includes the prohibition of unrecognised or unrecorded detention, a practice that entails a very serious violation of Article 5. In the same sense see Judgments ECtHR *Belozorov v. Russia and Ukraine*, recitals 111-113 and *Baysayeva v. Russia*, 5 April 2007, no. 74237/01, recital 146, which establish that it is the States' responsibility to adopt effective measures to protect against the risk of disappearance of detained individuals and to conduct a prompt and effective investigation.

[38] The ECtHR clarifies in *Razvozzhayeu v. Russia and Ukraine* and *Udaltsov v. Russia*, 19 November 2019, no. 75735/12, recital 200, that the "risk of flight" cannot alone serve to justify long periods of detention, whereas in *Belozorov v. Russia and Ukraine*, recital 132, the ECtHR clarifies which factors should be weighed for an assessment of the risk of absconding: (i) the character of the person involved, (ii) his morals (iii) his home, (iv) his occupation, (v) his assets, (vi) his family ties, and (vii) all kinds of links with the country in which he is being prosecuted. By "reasonable grounds," the ECtHR clarifies (*Imakayeva v. Russia*, Rec. 173) that the expression comprises the existence of facts or information that satisfy an objective observation that the person in question may have committed the offence. Thus, according to the *Razvozzhayeu v. Russia and Ukraine* and *Udaltsov v. Russia* judgments, the seriousness of the charges, the possession of a passport or other travel document, and the temporary residence of family members in another state are not considered reasonable grounds (recital 215).

[39] Concerning confinement at the hospital when there is no psychiatric medical history, the ECtHR considers that a prior consultation is necessary in addition to observing the following minimum requirements: (i) the mental illness must be proven on the basis of objective medical expertise; (ii) the mental incapacity must be of a type and degree that warrants compulsory internment; and (iii) the validity of the confinement is dependent on the persistence of such a disorder. See Judgment ECtHR *Lazariu v. Romania*, recitals 123-124. In the context of deprivation of liberty for mental health reasons, the ECtHR considers that detention occurs even if the hospital provides for the possibility of daily walks and unsupervised visits. The concept of deprivation of liberty in this case should not be based only on objective aspects, since it requires that the person whose

unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.[40]

Within this framework, the case-law of the ECtHR considers that home detention and pre-trial detention are also subject to the purpose of Article 5 of the ECHR and that relevant and sufficient reasons must be given for the adoption of both measures.[41]

Of the standard situations identified, those that are of greater relevance to the European Union are the cases indicated at (i), (ii) and (iii) in the context of the development of competences in the field of judicial cooperation in criminal and police matters; and the case indicated at (vi), with regard to the European Union's competence in the area of asylum, migration and borders, provided for in Articles 77 to 80 of the TFEU.[42] With regard to the sixth case, the CJEU highlights the need to state reasons when detaining third-country nationals for the purpose of

liberty has been deprived must present a valid consent agreeing to the internment. Therefore, in cases of detention on the basis of mental health, a subjective aspect must be considered. In this framework the ECtHR classifies the following situations as deprivation of liberty: (i) when the individual declared incapable presents, through his legal representative, a petition to the hospital administration in which he requests his release and the same is denied; (ii) when the individual, even if he has initially consented to the internment, tries at a later moment to escape; (iii) when there are adults, even if there is no risk of escape, who are incapable of giving their consent; (iv) if identification documents are withheld from the hospital administration; and (v) if it is necessary to request permission from the hospital administration to take daily trips. The reasons considered valid for hospitalisation are (i) submission for receipt of therapy, medication or other clinical treatment with a view to cure or improvement of the condition; and (ii) surveillance aimed at preventing the individual from harming himself or others. See Judgments *Stanev v. Bulgaria*, 17 January 2012, no. 36760/06, recitals 116-118, 126 and 146; *Dennis and Irvine v. Belgium*, recital 135 and *M.B. v. Poland*, 14 October 2021, no. 60157/15.

[40] Detention with a view to extraditing the individual may only be accepted while the extradition procedure is in progress and is no longer justified under Article 5 (1) (f) of the ECHR if the procedure is not diligently pursued. Thus, to avoid detention being classified as arbitrary, the conditions of detention must be appropriate, and the duration must not exceed reasonable time. See Judgment ECtHR *Shiksaitov v. Slovakia*, 10 December 2020, no. 56751/16 and no. 33762/17, recitals 53-55.

[41] Judgment ECtHR *Razvozzhayeu v. Russia and Ukraine* and *Udaltsov v. Russia*, recital 212. Regarding pre-trial detention, the ECtHR makes clear that the length of time that may be considered reasonable in pre-trial detention cannot be assessed in the abstract, so the decision is dependent on a factual analysis and must therefore be made on a case-by-case basis. As a result, the extension of pre-trial detention can only be considered justified if there is concrete evidence of a public interest requirement – which, notwithstanding the presumption of innocence, overrides the rule of respect for individual liberty enshrined in Article 5, and the grounds cannot simply be based on the severity of the offense. On the other hand, it is also necessary to verify that the competent national authorities have shown due diligence in the conduct of the proceedings. See Judgment ECtHR *Belozorov v. Russia and Ukraine*, recitals 124-125.

[42] As to the latter case, which corresponds to Article 5 (1) (f) of the ECHR, the ECtHR has ruled out the possibility that in the context of an expulsion procedure, the public administration may act in order to mislead the illegally staying third-country national as to the purpose of his summons to the police establishment, see Judgments *Slivenko v. Latvia*, 9 October 2003, no. 48321/99 and *Čonka v. Belgium*. In the same sense, it is considered a violation of the ECHR to refuse access to the right to appeal by third-country nationals detained in temporary accommodation centres in the international zones of airports, see *Amuur v. France*, 25 June 1996, no. 19776/92. See also Nuno Piçarra, "Artigo 6", 111.

preventing their entry into a Member State or for the purpose of expulsion.[43] To date, the situations described in (iv) and (v) do not fall within the EU's competence.

The ECtHR further clarifies that Article 5(1) of the ECHR has three implied general principles, namely the principle of the rule of law, the principle of legal certainty and the principle of proportionality.[44]

As for the other paragraphs of Article 5 of the ECHR, these correspond to expressions subsumed to effective judicial protection, a principle regulated in Articles 19, paragraph 1, paragraph 2 of the TEU and 47 of the Charter. In this sense, in commenting on the aforementioned Article 5, the doctrine has clarified that the content of paragraphs 2 to 5 aims to "*strengthen the protection of persons against arbitrary deprivation of liberty*", emphasising that the ECtHR favours a "*teleological interpretation capable of safeguarding to the full extent this objective of protection.*"[45] Building on this understanding, Article 5(2) enshrines the right of a person arrested or detained to be provided with information about the reasons for his or her arrest and/or prosecution in a language he or she understands.[46] The purpose of this measure is to allow the assessment of the validity and grounds for the arrest and/or detention, which cannot be justified by a mere reference to a legal provision, since the legal framework is no substitute for an adequate assessment as to the grounds for suspicion.[47]

Article 5(3) provides that any person arrested or detained shall be brought promptly before a judge, or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to be released pending trial. The purpose of this right is to carry out judicial supervision. This right is not

---

[43] Judgment CJEU *Mahdi*, 5 June 2014, Case C-146/14 PPU, ECLI:EU:C:2014:1320, recitals 43 *et seq*. Under EU law, this matter is regulated in Article 15 of Directive 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. On this directive, the CJEU ruled in *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, Case C-249/13, ECLI:EU:C:2014:2431, recitals 28-35, that prior to a decision of repatriation, the third-country national has the right to express his or her opinion on the lawfulness of the stay and against the removal procedure (in this same sense, see also Judgment ECtHR *Khlaifia and others. v. Italy*, 15 December 2016, no. 16483/12, recitals 41-43), the CJEU stating that the right to be heard, in accordance with Articles 41, 47 and 48 of the CFREU, lacks an express provision in Directive 2008/115, adopting a similar position in Judgment *M.G. and N.R. v. Staatssecretaris*, 10 September 2013, Case C-383/13 PPU, ECLI:EU:C:2013:533, recital 32 and *Sophie Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis*, judgment of 5 November 2014, Case C-166/13, ECLI:EU:C:2014:2336, recitals 42-45.
According to CJEU case-law, the right to be heard is a guarantee that extends to all persons, so that they can express their views effectively when an administrative or judicial procedure is brought against them before a decision is taken that adversely affects their interests. Compliance with this formality enables the competent authority to make a decision on the basis of relevant information and to give reasons for its decision, taking into account the comments of the person concerned. The CJEU concluded in *M.G and N.R. v. Staatssecretaris* in Recitals 38-44 that, while the right to be heard may be restricted on the basis of public interest objectives, failure to comply with it in an administrative procedure entails the annulment of the act.

[44] Judgment ECtHR *Dennis and Irvine v. Belgium*, recital 127. These three general principles are also reflected in CJEU case-law when interpreting Article 6 of the Charter, with emphasis on its adoption as a requirement for the rule of law in *Hungary v. European Parliament and Council of the European Union*, 16 February 22, case C-156/21, ECLI:EU:C:2022:97 and with an associated reading of the principle of proportionality in *Digital Rights*, 8 April 2014, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[45] Nuno Piçarra, "Artigo 6.º", 112.

[46] Judgment ECtHR *Fox and Others v. the United Kingdom*, 30 August 1990, nos. 12244/86; 12245/86; 12383/86, recital 40.

[47] Judgment ECtHR *Imakayeva c. Russia*, recitals 175-176.

dependent on a request being made by the interested party, and the independence and impartiality of the magistrate must be guaranteed. However, the ECtHR case-law holds that the term "reasonable time" in Article 5 (3) does not refer to the length of the proceedings, but to pre-trial detention.[48]

Article 5(4) provides for habeas corpus, which states that a detained or imprisoned person has the right to take proceedings before a court in order that the court may rule, within a short period of time, on the lawfulness of his detention.[49] This right arises from the moment of arrest. Thus, the ECtHR makes clear that the absence of records such as the date, time and place of arrest, but also of the identification of the detainee and of the person who carried out the arrest must be considered incompatible with the purpose of Article 5.[50] This guarantee has been understood as a remedy related mainly to Article 5(1)(d), (e) and (f) cases where the deprivation of liberty results from an administrative decision.

Focusing on the guarantees in Article 5 (3) and (4), the most recent case-law of the ECtHR has emphasised that promptness and judicial review are of particular importance in safeguarding the rule of law. With this statement the ECtHR makes clear that the intention of the authors of the Convention was to strengthen the protection of individuals with a view to minimizing the risk of arbitrary action by the competent authorities – especially with regard to the prevention of ill-treatment that, once verified, would amount to a violation of the fundamental rights contained in Articles 2 and 3 of the ECHR.[51]

Finally, Article 5(5) corresponds to the right to compensation, which obliges the EU and its Member States to provide for liability actions with a view to compensation in case of violation of Article 6.[52] The right to obtain this reparation provided for in Article 5, paragraph 5 of the ECHR arises from proof of the existence of a violation of the previous paragraphs, and it is also necessary to verify whether it might not have been possible to apply for compensation before the national courts.[53]

8. In view of the identification of the meaning and scope resulting from the combined reading between Article 6 of the Charter and Article 5 of the ECHR, the ECtHR case-law must be understood as enshrining a minimum standard of protection within the EU – which may, in certain circumstances, offer a higher standard of jusfundamentality, as determined by Article 52(3) of the Charter. With the safeguard that any limitation to the right to liberty and security in the European context, in addition to the requirement of legality, is bound to respect proportionality – which means that the limitations to this right must be supported by the criterion of necessity, responding to the objectives of general interest of the European Union and/or the protection of other rights and freedoms, according to Article 52, paragraph 1 of the Charter.[54] From the above we can ascertain that the standard arising from the ECHR harbours conditions regarding the form, effects,

[48] Judgment ECtHR *Wemhoff v. Germany*, 27 June 1968, no. 2122/64.
[49] The ECtHR has ruled on the violation of the guarantee contained in Article 5(4) in *Solovyevy v. Russia*, 24 April 2021, no. 918/02; *Idolovc v. Russia* [GC], 22 May 2012, no. 5826/03 and *Pyatkov v. Russia*, 13 November 2012, no. 61767/08.
[50] Judgment ECtHR *Imakayeva v. Russia*, recitals 175-176.
[51] Judgment ECtHR *Belozorov v. Russia and Ukraine*, recital 112.
[52] Nuno Piçarra, "Artigo 6.º", 114.
[53] Judgment ECtHR *Belozorov v. Russia and Ukraine*, recital 112.
[54] José Martín and Pérez de Nanclares, "Artículo 6", 206.

duration and limits of the actions allowed to state authorities in cases of detention and deprivation of liberty,[55] whose implications directly affect the development of the European area of justice, specifically downstream of judicial cooperation in criminal and police matters.[56]

Larissa Araújo Coelho

[55] José Martín and Pérez de Nanclares, "Artículo 6", 200.
[56] Judgment CJEU *Maria Pupino*, 16 June 2005, Case C-105/03, ECLI:EU:C:2005:386.

ARTICLE 7

Respect for private and family life

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

Inserted in Chapter II of the CFREU dedicated to "Freedom", Article 7, entitled "Respect for private and family life", essentially corresponds to Article 8 ECHR. The right to respect for private and family life is also enshrined in other instruments of international law, including the UDHR (Article 12) and the ICCPR (Article 17). Article 7 CFREU is, however, almost umbilically connected with Article 8 ECHR.

First, some differences notwithstanding, the wording of Article 7 CFREU is very similar to Article 8(1) ECHR, according to which "Everyone has the right to respect for his private and family life, his home and his correspondence." The word "correspondence" has been replaced by "communications" to take into account the evolution and proliferation of new communication technologies, so that, under Article 7 CFREU, the right to respect for communications covers all types communications, regardless of the technical means used.

Furthermore, and as the CJEU recalled in *Dereci*, in so far as Article 7 CFREU "*contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights*"[1] – without prejudice to the higher level of protection resulting from the CFREU or other legal instruments of the Union, under Article 52(3) CFREU. In this regard, as noted in the Explanations relating to the CFREU, the limitations which may legitimately be imposed on the right to respect for private and family life are the same as those allowed by Article 8 ECHR under which "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*"

In the context of introductory remarks, a short note to emphasize two points: as in the ECHR, the CFREU does not distinguish "private life" from "family life";[2] however, in contrast to the ECHR, the right to protection of personal data becomes autonomous within the framework of the CFREU, being expressly enshrined in Article 8, to which the reader is referred.

The ECtHR ruled on the subject of the respect for private life in the famous case dating from the 1990s brought by Princess Caroline of Monaco and Prince Ernst August von Hannover against the Federal Republic of Germany, concerning the publication of certain photographs in the German press.[3] The ECtHR noted

[1] Judgment CJEU *Dereci*, 15 November 2011, Case C-256/11, EU:C:2011:734, para. 70.

[2] The intention was, as far as possible, to ensure proximity between both provisions and thus avoid uncertainties and jurisprudential differences – Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne* (Paris: Seuil, 2001), 111.

[3] Judgment ECHtR *Von Hannover v. Germany I*, 24 June 2004 (final: 24 September 2004), no.

that the guarantee afforded by Article 8 ECHR is primarily intended to ensure the development, without outside interference, of the personality of each individual – or "*the private dwellings of natural persons*" in the formulation of the CJEU[4] –, but also covers the right of individuals to build relationships with others; there is, therefore, a zone of interaction of a person with others which, even in a public context, may fall within the scope of "private life". The ECtHR also recalled that, while the essential object of Article 8 ECHR is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to these negative obligations, there may be positive obligations, such as the adoption of measures designed to secure the effective respect for private life.[5]

Prior to the proclamation of the CFREU, the CJEU stated that "*the right to respect for private life, embodied in Article 8 of the EHRC and deriving from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the legal order of the Community.*"[6] The CJEU has had occasion to rule on elements inherent to private life, though not always referring to the right to respect for private life enshrined in Article 8 ECHR and / or Article 7 CFREU.

Concerning the right to respect for private life in relation to the processing of personal data, this right stands on the border between Article 7 and Article 8 CFREU. The CJEU has thus already stated that the fundamental right enshrined in Article 8 CFREU is "*closely connected with the right to respect of private life*" enshrined in Article 7 CFREU.[7] Yet it also closely relates to the right to respect for communications. In its case-law, the CJEU ruled for the first time on the issue of confidentiality of correspondence/communications in the specific context of the powers of inspection conferred upon the Commission to, among others, examine the books and other records related to the business of undertakings in order to detect any agreements between undertakings, decisions by associations of undertakings and concerted

---

59320/00; and in *Von Hannover v. Germany II*, 7 February 2012, nos. 40660/08 and 60641/08.

[4] Judgment CJEU *Hoechst*, 21 September 1989, joined cases 46/87 and 227/88, EU:C:1989:337, para. 17.

[5] Referring to the case at hand, the ECtHR goes on to state that the same reasoning applies to the protection of one's image against abuse by others; it reiterates its case-law according to which, in certain circumstances, even where a person is known to the general public, he or she may rely on a legitimate expectation of protection and respect for his or her private life; publication of a photo may thus intrude upon a person's private life even where that person is a public figure – see *Von Hannover v. Germany II*, paras. 95-99. The ECtHR concluded that there was no violation of the right to respect for private life, for the national courts had struck a fair balance between the applicants' right to respect for their private life and the right of the publishing company to freedom of expression; the ECHtR considered, in particular, that the second group of photos published, in the light of the articles that accompanied them, contributed to a debate of general interest because they had been taken in a particular context (the illness affecting Prince Rainier III, the reigning sovereign of the Principality of Monaco at the time) qualified as an event of contemporary society (see paras. 95-126). On the contrary, in 2004, the ECtHR found that, concerning the first group of photos published, a violation of the right to respect for private life, in its positive dimension, had occurred: after considering both fundamental rights in conflict, the right to respect for private life and freedom of expression (Article 10 ECHR), the ECtHR concluded that the photographs published did not contribute to a debate of general interest since the photos and accompanying articles related exclusively to details of the applicants' private life – see *Von Hannover v. Germany I*, paras. 56-80.

[6] Judgment *X v. Commission*, 5 October 1994, Case C-404/92 P, EU:C:1994:361, para. 17.

[7] See Judgment *Volker und Markus Schecke*, 9 November 2010, Joined cases C-92/09 and C-93/09, EU:C:2010:662, para. 47.

practices or the possible abuse of a dominant position prohibited by Articles 101 and 102 TFEU.[8] Without referring specifically to the right to respect for private life, the CJEU considered in *AM & S Europe Limited v. Commission* the confidentiality of written communications between lawyer and client as a principle generally recognized in all Member States likely to limit the powers of inspection conferred upon the Commission.[9]

With regard to the disclosure of personal data, the CJEU stated that "*[the] right to respect for private life and, as one of its aspects, the right to the protection of medical confidentiality constitute fundamental rights protected by the legal order of the Community.*"[10] The CJEU therefore considered that the right to respect for private life enshrined in Article 8 ECHR entails the "*person's right to keep his state of health secret.*"[11] Likewise, in *Rechnungshoff*, the CJEU held that "*the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8 [ECHR].*" Thus, "*while the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, [such as] a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 [ECHR].*" Furthermore, to establish the existence of such an interference, it suffices to identify the data relating to the remuneration received by an individual that have been communicated by the employer to a third party/a public authority, without importance being attached to "*whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way.*"[12]

It was on the basis of the right to protection of personal data, "*closely connected*"[13] with the right to respect of private life, that the CJEU declared in *Volker und Markus Schecke* the invalidity of certain provisions of EU law, regarding the financing of the common agricultural policy (CAP), which imposed the publication of information on the beneficiaries of certain European funds. Referring to ECtHR's case-law, the CJEU clarifies that "*the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual.*"[14] However, as the right to the protection of personal data is not an absolute right, but "*must be considered in relation to its function in society*", limitations may lawfully be imposed, which correspond, in accordance to Article 52(1) CFREU, to those tolerated in relation to Article 8 ECHR.[15] As regards the case under examination, the CJEU not only considered that "*the publication of data by name relating to the beneficiaries concerned and the precise amounts received by them from the [funds] constitutes an interference, as regards those beneficiaries, with the rights recognised*

[8] See Article 20(2/c) of the Council Regulation (EC) no. 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU, OJ L 001, 04/01/2003, 1-25.

[9] See Judgment *AM & S Europe Limited v. Commission*, 18 May 1982, Case 155/79, EU:C:1982:157, paras. 18-21 and 27-28; see also Judgment *Akzo Nobel Chemicals*, 14 September 2010, Case C-550/07 P, EU:C:2010:512, paras. 40-51 and 69-77.

[10] See Judgment *Commission v. Germany*, 8 April 1992, Case C-62/90, EU:C:1992:169, para. 23.

[11] See Judgment *X v. Commission*, 5 October 1994, Case C-404/92 P, EU:C:1994:361, para. 17.

[12] See Judgment *Rechnungshoff*, 20 May 2003, joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paras. 73, 74 and 75.

[13] See Judgment *Volker und Markus Schecke*, para. 47.

[14] See Judgment *Volker und Markus Schecke*, para. 52.

[15] See Judgment *Volker und Markus Schecke*, paras. 48 and 50-52.

by Articles 7 and 8 of the Charter", but also concluded that, although the measures at issue pursued an objective of general interest recognised by the EU law – "*to increase the transparency of the use of funds in the context of the CAP*" –, it did not appear that the Council and the Commission sought to strike a proper balance between *"the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds (...) and the fundamental rights enshrined in Articles 7 and 8 of the Charter."*[16] However, with regard to legal persons, the obligation to publish which followed from the provisions of the EU law at issue did not, according to the CJEU, go beyond the limits imposed by compliance with the principle of proportionality, as the seriousness of the breach of the right to protection of personal data manifests itself in different ways depending on whether natural or legal persons are concerned.[17]

In addition to this dimension relating to the communication and processing of personal data, there is also case-law of the CJEU relating to other elements of private life, including sexual life, name and home.

Issues relating to sexual life, such as sexual orientation and gender reassignment, are not always considered in the Court's case-law in the light of the right to respect for private life. Differences in treatment based on sexual orientation have often been addressed by the CJEU in the light of the rules on non-discrimination on grounds of sex, examples of which are the judgments in *Grant,*[18] *Maruko*[19] and *Römer.*[20] The *D and Kingdom of Sweden v. Council* judgment concerned the refusal to award an allowance by the administration of the Council of the EU to one of its officials, a Swedish national working at the Council living in a registered partnership with another Swedish national of the same sex. On appeal, after assessing the decision of the Council in the light, in particular, of the principles of equal treatment and non-discrimination on grounds of sex, the CJEU also assessed whether the refusal constituted an interference in the private (and family) life within the meaning of Article 8 ECHR. According to the CJEU, the "*refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration*"; thus, the contested decision was not "*capable of constituting interference in private and family life" within the meaning of Article 8 ECHR.*[21]

On the other hand, the CJEU, in *P v. S*, condemned the dismissal of a person on the grounds of gender reassignment, on the basis of the principle of equal treatment and non-discrimination on grounds of sex as fundamental human rights. According to the CJEU, the scope of the principle of equal treatment and non-discrimination on grounds of sex is not confined to "*discrimination based on the fact that a person is of one or other sex*", but also includes "*discrimination arising (...) from the gender reassignment*" as such discrimination is based essentially, if not exclusively, on the sex of the person concerned: *"[where] a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by*

[16] See Judgment *Volker und Markus Schecke*, paras. 64, 71 and 80, and also paras. 81-86.
[17] See Judgment *Volker und Markus Schecke*, para. 87.
[18] See Judgment *Grant*, 17 February 1998, Case C-249/96, EU:C:1998:63.
[19] See Judgment *Maruko*, 1 April 2008, Case C-267/06, EU:C:2008:179.
[20] See Judgment *Römer*, 10 May 2011, Case C-147/08, EU:C:2011:286.
[21] See Judgment *D and Kingdom of Sweden v. Council*, 31 May 2001, joined cases C-122/99 P and C-125/99 P, EU:C:2001:304, paras. 59 and 60.

comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment." The CJEU concludes stating that *"[to] tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard*."[22]

Questions regarding the name of a person were only put before the CJEU, under the aegis of the right to respect for private life. In *Konstantinidis*, *Garcia Avello* and *Grunkin and Paul*, for instance, such questions were examined in the light of the fundamental freedoms, as well as the principle of non-discrimination on grounds of nationality.[23] In *Ilonka Sayn-Wittgenstein*, however, delivered after the CFREU acquired the status of binding primary law under Article 6(1) TEU, the CJEU stated that "*a person's name is a constituent element of his identity and of his private life*", the protection of which is enshrined in Article 7 CFREU and Article 8 ECHR. The CJEU also stressed that a person's name concerns his or her private and family life, "*as a means of personal identification and a link to a family*", thus also enhancing its connection with the right to respect for family life.[24]

In this judgment, the CJEU reiterated its case-law settled in *Garcia Avello* and *Grunkin and Paul*. The CJEU started by pointing out that, although "*as European Union law stands at present, the rules governing a person's surname (...) are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with European Union law.*"[25] Just as in those earlier judgments, the CJEU also assessed the situation at issue essentially in the light of the freedom to move and to reside in another Member State. Thus, "*obliging a person who has exercised his right to move and reside freely in the territory of another Member State to use a surname, in the Member State of which he a national, which is different from that already conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in Article 21 TFEU, to move and reside freely within the territory of the Member States.*"[26]

It is, however, possible to draw some relevant conclusions from those judgments with regard to the right to respect for private life. In both *Garcia Avello* and *Ilonka Sayn-Wittgenstein*, the CJEU held that "*a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in the Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the name recognised in another Member State of which they are also nationals.*"[27] In *Grunkin and Paul*, the CJEU recognised that "*many everyday dealings, in both the public and the private spheres, require proof of identity*", thus a discrepancy in surnames is liable to create "*doubts concerning his identity and suspicions of misrepresentation*", without overlooking that "*the number of documents, for instance*

[22] See Judgment *P v. S*, 30 April 1996, Case C-13/94, EU:C:1996:170, paras. 19-22; see also Judgment *Sarah Margareth Richards*, 27 April 2006, Case C-423/04, EU:C:2006:256, paras. 20-38. As regards the legal recognition of gender reassignment, see Judgment *K.B.*, 7 January 2004, Case C-117/01, EU:C:2004:7, paras. 34 and 36.

[23] See Judgments *Konstantinidis*, 30 March 1993, Case C-168/91, EU:C:1993:115, *Garcia Avello*, 2 October 2003, Case C-148/02, EU:C:2003:539, and *Grunkin and Paul*, 14 October 2008, Case C-353/06, EU:C:2008:559.

[24] Judgment CJEU *Ilonka Sayn-Wittgenstein*, 22 December 2010, Case C-208/09, EU:C:2010:806, para. 52.

[25] See Judgments *Ilonka Sayn-Wittgenstein*, para. 38; *Grunkin and Paul*, para. 16; and *Garcia Avello*, para. 25.

[26] See Judgment *Ilonka Sayn-Wittgenstein*, para. 54.

[27] See Judgments *Ilonka Sayn-Wittgenstein*, para. 55, and *Garcia Avello*, para. 36.

attestations, certificates and diplomas, on which there is a difference in the surname (...) is likely to increase with the passing years."[28]

It should be noted that, in *Ilonka Sayn-Wittgenstein*, after concluding that there was a restriction on the freedom of movement and residence enjoyed by citizens of the Union,[29] the CJEU considered such restriction justified by reference to the Austrian constitutional situation. Though not referring to Article 52(1) CFREU, the CJEU recalled its settled case-law according to which a restriction to the freedom of movement of persons can be justified "*only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions.*"[30] In the case under examination, Austrian law on the abolition of the nobility, "*as an element of national identity*", and its purpose of implementing the principle of equal treatment, were held as legitimate justifications. The CJEU further noted that, "*in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.*"[31]

Regarding other constituent elements of private life, an explicit reference to the home is made in Article 7 CFREU. Issues relating to the right to the inviolability of the home have so far been essentially raised before the CJEU on competition cases, in the specific context of the powers of inspection conferred upon the Commission to, among others, access the premises of undertakings in order to detect any agreements between undertakings, decisions by associations of undertakings and concerted practices or the possible abuse of a dominant position prohibited by Articles 101 and 102 TFEU.[32] As already mentioned by the Court, "*the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings.*"[33]

However, the initial case-law of the CJEU was to the effect that the right to the inviolability of the home did not apply to business premises. In *Hoechst*, the CJEU held that, "*although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities*"; a different conclusion did not stem from Article 8 ECHR as *"[the] protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises.*"[34]

In *Roquette Frères*, however, the CJEU declared the existence of a "*general principle of Community law affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal*", which also extended to the "home" of legal persons. This was due to the consideration

[28] See Judgments *Grunkin and Paul*, paras. 25-28, and *Ilonka Sayn-Wittgenstein*, paras. 55 and 69.
[29] See Judgment *Ilonka Sayn-Wittgenstein*, paras. 70 and 71.
[30] See Judgment *Ilonka Sayn-Wittgenstein*, para. 81.
[31] See Judgment *Ilonka Sayn-Wittgenstein*, paras. 81-95.
[32] See Article 20(2/a) of Regulation no. 1/2003.
[33] See Judgment *Hoechst*, para. 26.
[34] See Judgment *Hoechst*, paras. 17-18; see also Judgments *Dow Chemical*, 17 October 1989, joined cases 97/87, 98/87 and 99/87, EU:C:1989:380, paras. 14-15, and *Dow Benelux*, 17 October 1989, Case 85/87, EU:C:1989:379, paras. 28-29.

of ECHtR's case-law subsequent to the judgment in *Hoechst* according to which "*the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover [business premises]*" and the right of interference established by Article 8(2) of the ECHR "*might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.*"[35]

It should be noted that, in the field of competition law, Article 21 of Regulation no. 1/2003 provides for the possibility for the Commission, after consulting the competition authority of the Member State in whose territory the inspection is to be conducted and with prior authorisation from the national judicial authority of the Member State concerned, to order an inspection to be conducted in other premises, land and means of transport, including "*the homes of directors, managers and other members of staff of the undertakings*", if a "*reasonable suspicion*" exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 101 or Article 102 TFEU, are being kept in such premises.

The protection of family as such is guaranteed by numerous international legal instruments of protection of fundamental rights, namely the UDHR (Article 16), the ICCPR (Article 23) and the ICESCR (Article 10). In these instruments, the family is regarded as "*the natural and fundamental group unit of society.*" The protection of family is also guaranteed by the ECHR, which, in Articles 8 and 12, protects, respectively, the right to respect for private and family life and the right to marry – provisions that are, in turn, the basis of Articles 7 and 9 CFREU (right to marry and right to found a family). Apart from this last provision, Article 7 CFREU is closely connected with Article 24 CFREU, concerning the rights of the child, and Article 33 CFREU, which not only enshrines, in its paragraph 1, a general principle of legal, economic and social protection of family, but also, in its paragraph 2, a set of rights aimed at reconciling family and professional life. It should be noted that both Article 8 ECHR and Article 7 CFREU protect, not the family itself, but *family life*. Also, "*respect for family life*" was held by the CJEU as "*one of the fundamental rights which (...) are recognized by Community law*" even before the CFREU had been proclaimed.[36]

Since *Mary Carpenter*, the CJEU has emphasized the importance of ensuring the protection of family life of nationals of the Member States "*in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty*"[37]. The question at issue in the judgment concerned a deportation order against Mary Carpenter, a national of the Philippines, married to a British citizen resident in the United Kingdom who provided services in other Member States. In the judgment, the CJEU posited the argument according to which "*the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life*",[38] then deduced from this "*right to live with one's close family*" a set of "*obligations*

[35] See Judgment *Roquette Frères*, 22 October 2002, Case C-94/00, EU:C:2002:603, paras. 99 and 29.
[36] See Judgment *Commission v. Germany*, 18 May 1989, Case 249/86, EU:C:1989:204, para 10.
[37] See Judgment *Mary Carpenter*, 11 July 2002, Case C-60/00, EU:C:2002:434, para. 38. See also Judgments *MRAX*, 25 July 2002, Case C-459/99, EU:C:2002:461, para. 53; *Orfanopoulos*, 29 April 2004, Joined cases C-482/01 and C-493/01, EU:C:2004:262, para. 98; *Commission v. Spain*, 14 April 2005, Case C-157/03, EU:C:2005:225, para. 26; *Commission v. Spain*, 31 January 2006, Case C-503/03, EU:C:2006:74, para. 41; *Commission v. Germany*, 27 April 2006, Case C-441/02, EU:C:2006:253, para. 109; *European Parliament v. Council*, 27 June 2006, Case C-540/03, EU:C:2006:429, para. 53; and *Eind*, 11 December 2007, Case C-291/05, EU:C:2007:771, para. 44.
[38] See Judgment *Mary Carpenter*, para. 42. See also Judgments *Ackrich*, 23 September 2003, Case

for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory."[39] As for the case under examination, the CJEU stressed that "*the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.*" Thus, Article 56 TFEU (freedom to provide services), "*read in the light of the fundamental right to respect for family life*", precludes "*a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.*"[40]

A new legal environment for EU citizenship is developing,[41] in which the protection of family life has been strengthened in the CJEU's case-law.

In *Eind*, which concerned the return of a EU citizen to his Member State of nationality (the Netherlands), after having been employed in another Member State (United Kingdom), the CJEU first noted that "*the right of the migrant worker to return and reside in the Member State of which he is a national, after being gainfully employed in another Member State, is conferred by Community law.*" This not only ensures the "*useful effect*" of the right to free movement for workers (Article 45 TFEU), but has also been "*substantiated by the introduction of the status of citizen of the EU, which is intended to be the fundamental status of nationals of the Member States.*"[42] The CJEU then stressed that a EU citizen might be dissuaded from exercising his or her freedom of movement "*from the prospect (...) of not being able, on returning to his [or her] Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification*."[43] In circumstances such as those in the case under examination, Mr. Eind's daughter, who had arrived direct from Surinam, had thus the "*right to install herself with her father*" in the Netherlands. The fact that she did not, before residing in the United Kingdom with her father, have a right of residence, under national law, in the Netherlands was not relevant as "*such a requirement would run counter to the objectives of the Community legislature, which has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.*"[44]

Regarding the reverse situation – the residence in the territory of the EU of a third country national who is the carer of a minor who is a citizen of the EU –, the CJEU recognised in the *Zhu Chen* judgment that the mother, of Chinese nationality, of a child of Irish nationality, had the right to reside with her in the United Kingdom – the opposite would "*deprive the child's right of residence of any useful effect.*" According to the CJEU, "*enjoyment by a young child of a right of residence*

C-109/01, EU:C:2003:491, para. 59; *Orfanopoulos*, para. 98; and *Commission v. Germany*, 27 April 2006, Case C-441/02, EU:C:2006:253, para. 109.

[39] See Judgment *European Parliament v. Council*, para. 52.

[40] See Judgment *Mary Carpenter*, paras. 39 and 46.

[41] See José Narciso da Cunha Rodrigues, "La protection de la vie familiale dans la jurisprudence communautaire", in *Le droit dans une Europe en changement - Liber Amicorum Pranas Kūris* (Vilnius: Mykolo Romerio Universitetas, 2008), 359.

[42] See Judgment *Eind*, para. 32; see also para. 35.

[43] See Judgment *Eind*, para. 36.

[44] See Judgment *Eind*, paras. 38 and 44.

necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence."[45]

In *Zambrano*, the situation of the children, of Belgian nationality, of a Colombian couple, was not examined by the CJEU in the light of the fundamental right to respect for family life,[46] but only in the light of EU law provisions on EU citizenship. The CJEU held that the refusal to grant a right of residence to a third country national, with dependent minor children, in the Member State where those children are nationals and reside, and the refusal to grant such a person a work permit, would have the effect of "*depriving [the] citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*" as such a refusal would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents.[47]

The same jurisprudential orientation was followed by the CJEU with regard to the residence of third country nationals married to EU citizens. Following the ruling in *Mary Carpenter*, the CJEU held in *Metock* that "*if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed*", while also recalling the obligation of Member States to respect the right to respect for private and family life enshrined in Article 8 ECHR.[48] In the judgment, the CJEU stated that Member States did not have exclusive competence to grant or refuse entry into and residence in their territory to third country nationals who are family members of EU citizens as such exclusive competence would have the effect that "*the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.*"[49]

However, not all case-law, notably on EU citizenship, provides encouragement from the point of view of the fundamental right to respect for family life.

Underlying the *McCarthy* judgment was the request for a residence permit submitted by S. McCarthy, of both British and Irish nationality, to the competent authorities of the United Kingdom, the (then) Member State in which she had always resided; the request was intended to give to her spouse, a Jamaican citizen, a right of residence in the quality of family member of an EU citizen.[50] After recalling its case-law according to which "*the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation*", the CJEU concluded however that

[45] See Judgment *Zhu Chen*, 19 October 2004, Case C-200/02, EU:C:2004:639, para. 45.

[46] Contrary to the analysis proposed by Eleanor Sharpston – see Opinion of Advocate General Sharpston delivered on 30 September 2010 in *Zambrano*, Case C-34/09, EU:C:2010:560, especially paras. 62-63.

[47] See Judgment *Zambrano*, 8 March 2011, Case C-34/09, EU:C:2011:124, paras. 42-44.

[48] See Judgment *Metock*, 25 July 2008, Case C-127/08, EU:C:2008:449, paras. 62 and 79.

[49] See Judgment *Metock*, para. 67.

[50] Under the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77-123.

"*no element of the situation of Mrs McCarthy, (...), indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU*", thus being a purely internal situation.[51]

However, under Article 20(2) TFEU, EU citizens shall enjoy the rights provided for in the Treaties, among which should be included the fundamental rights as protected under the CFREU "*which shall have the same legal value as the Treaties*" (Article 6 TEU). Thus, not recognizing that S. McCarthy has a right of residence in her Member State of nationality and residence, with the consequent non-recognition of a right of residence for her spouse, might not force her to leave the territory of the Union,[52] but puts her in a situation that is difficult to reconcile with her right to respect for family life: S. McCarthy may choose to stay in the United Kingdom without her spouse or to exercise her right of free movement and leave her Member State of nationality and residence to reunite with her spouse in any other Member State of the Union.

Along the same lines, the *Dereci* judgment concerns applications for residence authorisations from five third-country nationals, members of the family of five Austrian citizens who had not exercised their right to free movement, nor depended economically on the applicants for their livelihood. Regarding the applicability of the Treaty provisions on EU citizenship, the CJEU held that "*the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the EU, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.*"[53] In consequence, as the EU citizens were not prevented from exercising the substance of the rights conferred on them by virtue of their status as citizens of the EU,[54] EU law did not preclude a Member State from refusing to allow a third country national to reside in its territory.[55] Seeking to ground the (derived) right of residence of third country nationals, family members of EU citizens, in the right to respect for family life, the CJEU stressed the need to interpret such fundamental right within the limits of the powers conferred on the Union, which is why the CJEU ruled as follows: "*if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it*

[51] See Judgment *McCarthy*, 5 May 2011, Case C-434/09, EU:C:2011:277, paras. 44-56. According to the CJEU, "*the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen*" (para. 49).

[52] Unlike the situation underlying the *Zambrano* judgment, as the CJEU pointed out in *McCarthy*, para. 50.

[53] See Judgment *Dereci*, para. 68.

[54] Unlike the situation underlying the *Zambrano* judgment, as the CJEU pointed out in *Dereci*, para. 65.

[55] See Judgment *Dereci*, para. 74.

takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR."[56]

If the CJEU does not leave the fundamental right to respect for family life unprotected, the solution enshrined in *Dereci* – and already in *McCarthy* – is not without some perplexing aspects from the (*strict*) point of view of EU law. As pointed out by Advocate General Paolo Mengozzi, it follows that, "*in order to be able actually to enjoy a family life within the territory of the Union, the Union citizens concerned have to exercise one of the freedoms of movement laid down in the TFEU.*"[57] Furthermore, the factual circumstances of the Zambrano and the Dereci families were very similar, except for one point – while the Zambrano spouses were both nationals of a third country, Mrs. Dereci was a national of a Member State –, which reveals, paradoxically, that EU citizenship may have the effect of hindering family reunification. As explained by the Advocate General, *"[whereas], following the judgment in Ruiz Zambrano, the children, who are Union citizens, of the Zambrano couple, who are both nationals of non-member countries, may immediately continue to maintain relations with their two parents*[58] *in the Member State of which they are nationals and within whose territory they reside, in contrast, the family life of the three young children of the Dereci couple is, in practice, subject to their mother exercising one of the freedoms of movement laid down in the TFEU and therefore, in all likelihood, to her movement to a Member State other than Austria*."[59] It is peculiar that, *in the abstract*, the Zambrano children and the Dereci children might be treated differently depending on the nationality of a third country or of a Member State of their parents and to the detriment of EU citizenship...

Beyond matters relating to family reunification, the right to respect for family life under Article 7 CFREU has also been brought into play by the CJEU in other areas. Thus, in *Gueye*, the CJEU reiterated its case-law to the effect that the provisions of the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings[60] must be interpreted in such a way that fundamental rights are respected, including in particular the right to respect for family and private life as set forth in Article 7 CFREU.[61] The same fundamental right must also be taken into consideration when taking a decision to expel a EU citizen from the territory of a Member State on serious grounds of public policy or public security, as follows from *Tsakouridis*,[62] for example.

Sophie Perez Fernandes

---

[56] See Judgment *Dereci*, para. 72; see also paras. 70 and 71.

[57] See View in *Dereci*, EU:C:2011:626, para. 44.

[58] The right of every child to "maintain on a regular basis a personal relationship and direct contact with both his or her parents" is expressly enshrined in Article 24(3) CFREU, subject only to cases where this would be contrary to the interests of the child.

[59] View *Dereci*, para. 45.

[60] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, 22.3.2001, 1-4.

[61] See Judgment CJEU *Gueye*, 15 September 2011, joined cases C-483/09 and C-1/10, EU:C:2011:583, para. 55.

[62] See Judgment CJEU *Tsakouridis*, 23 November 2010, Case C-145/09, EU:C:2010:708, para. 52. The expulsion of Union citizens from the territory of a Member State on grounds of public policy, public security or public health must in particular comply with the regime set out in Articles 27-33 of Directive 2004/38.

ARTICLE 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

1. *European Union's constitutional sources.* Article 8 of the CFREU complements other European Constitutional law provisions regarding the protection of personal data. These include Article 16 of the TFEU, which first states that "*everyone has the right to the protection of personal data concerning them*" and then goes on to develop that "*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities*"[1] and Article 39 of the TEU regarding personal data processing in the area of common foreign and security policy.

2. *Selected international sources.* While the ECHR does not include a specific article on the protection of personal data, it is accepted, including by the case-law of the ECtHR itself, that the protection of personal data is also protected under the "right to respect for private and family life" (Article 8 of the ECHR). Nowadays, it can be argued that CJEU is significantly more active and, arguably, more dynamic than the Strasbourg Court on the protection of the right to personal data protection (and arguably also on privacy).[2]

---

[1] While also noting that "*the rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.*"

[2] In his partly dissenting opinion in the case *Big Brother Watch and Others v. The United Kingdom*, where the ECtHR considered the UK's mass surveillance framework to infringe Article 8 of the ECHR, but validated notoriously controversial elements such as the procedures for data sharing with foreign intelligence services and the practice of indiscriminate data interception, Judge Paulo Pinto de Albuquerque noted that: "*this judgment fundamentally alters the existing balance in Europe between the right to respect for private life and public security interests, in that it admits non-targeted surveillance of the content of electronic communications and related communications data, and even worse, the exchange of data with third countries which do not have comparable protection to that of the Council of Europe States. This conclusion is all the more justified in view of the CJEU's peremptory rejection of access on a generalised basis to the content of electronic communications, its manifest reluctance regarding general and indiscriminate retention of traffic and location data and its limitation of exchanges of data with foreign intelligence services which do not ensure a level of protection essentially equivalent to that guaranteed by the Charter of Fundamental Rights. On all these three counts, the Strasbourg Court lags behind the Luxembourg Court, which remains the lighthouse for privacy rights in Europe.*" See Judgment ECtHR *Big Brother Watch and Others v. The United Kingdom*, 25 May 2021, nos. 58170/13, 62322/14 and 24960/15.

Convention 108 of the Council of Europe is also a key international source for signatory countries (extending as it does to a significant number of countries which are not Members of the EU).[3] A modernised version of Convention 108, "Convention 108+",[4] aims to adapt Convention 108 to current challenges by addressing new issues resulting from the use of new information and communication technologies and strengthening the Convention's mechanisms to ensure its effective implementation.

3. *Current sources of secondary EU law.* There are a number of significant secondary sources of EU law developing the fundamental right to the protection of personal data, particularly:[5/6]

a) 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 (hereinafter, "General Data Protection Regulation" or "GDPR");

b) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter, "e-Privacy Directive");[7/8]

---

[3] The list of countries who have signed and ratified Convention 108 can be found here: Council of Europe, 'Chart of Signatures and Ratifications of Treaty 108', accessed 17 September 2023, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=108.

[4] Modernised through the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. This Protocol will enter into force following Ratification by all Parties to treaty Convention 108, or, as from 11 October 2023, once 38 Parties to the Convention have ratified the Protocol. Nonetheless, Parties may decide to apply the provisions of the Protocol on a provisional basis [Article 37(3) of the Protocol]. The list of States that have ratified the Protocol is available here: Council of Europe, 'Chart of Signatures and Ratifications of Treaty 223', accessed 17 September 2023, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=223.

[5] In certain cases, other EU law provisions may also be relevant, in addition to those already mentioned, such as those stemming from the Data Governance Act, the Directive on Open Data and the Re-use of Public Sector Information or the Digital Services Act.

[6] As of writing the EU is also negotiating a Proposal for a Regulation laying down additional procedural rules relating to the enforcement of GDPR. If approved, this Regulation will become a significant GDPR-complementary source in what regards cross-border enforcement.

[7] As amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) no. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Directive 2006/24/EC (the Data Retention Directive) also introduced amendments to the e-Privacy Directive. However, the Data Retention Directive was invalidated by the CJEU in 2014 (see below), without reservations as to the temporal effects of its decision (*ex tunc*) in *Digital Rights Ireland* judgment and therefore neither the Data Retention Directive nor the amendments it introduced are in force. See Alessandra Silveira and Pedro Freitas, "Implications of the declaration of invalidity of the Directive 2006/24 on the retention of personal data (metadata) in the EU Member States: an approach to the judgment Tele 2 of 21 December 2016", *The Official Blog of UNIO*, January 22, 2017, https://officialblogofunio.com/2017/01/22/implications-of-the-declaration-of-invalidity-of-the-directive-200624-on-the-retention-of-personal-data-metadata-in-the-member-states-of-the-eu-an-approach-to-the-judgment-tele-2-of-21-december-20/.

[8] Commission Regulation 611/2013 of 24 June 2013 on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC of the European Parliament and of the Council on privacy and electronic communications is also relevant regarding data breach notifications under the e-Privacy Directive.

c) Regulation 2018/1725/EU of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation 45/2001/EC and Decision 1247/2002/EC;

d) Directive 2016/680/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (hereinafter, "Law Enforcement Directive").

It is important to note that, in accordance with the case-law of the CJUE, personal data protection provisions should be interpreted in accordance with the rules of the EU's legal system, not following Member States' national rules of interpretation. Unless the EU law provision makes express reference to the law of the Member States for the purpose of determining its meaning and scope.[9]

Naturally, and as the name itself states, the GDPR, as the general regime for regulating the processing of personal data in the EU, is the most important legal instrument of the above-mentioned list and, thus, will be the most developed in this commentary.[10]

4. *Scope of protection.* Only information related to natural persons can be considered as personal data, thus only natural persons can be data subjects and enjoy the right to the protection of personal data. Obligations arising from data protection rules and principles may fall upon natural or legal persons.

Personal data is defined in the GDPR, which develops the CFREU's constitutional provision. In accordance with Article 4(1) of the GDPR, "personal data" means "*any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.*"[11/12] Processing [of personal

[9] See Judgments CJEU *Latvijas Republikas Saeima (Points de pénalité)*, 22 June 2021, Case C-439/19, ECLI:EU:C:2021:504; *UI v. Österreichische Post AG*, 4 May 2023, Case C-300/21, ECLI:EU:C:2023:370; *ShareWood Switzerland*, 10 February 2022, Case C-595/20, ECLI:EU:C:2022:86.

[10] Nonetheless, the reader should note that even though the aim of the e-Privacy Directive is to "*to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community*" (Article 1), some provisions have an extended scope of application and are generally applicable to data controllers who engage in certain activities. This is the case with Article 5 of the e-Privacy Directive, which applies to the use of cookies and other tracking technologies and Article 13, applicable to direct marketing. See EDPB, "Opinion 5/2019 on the Interplay between the ePrivacy Directive and the GDPR, in Particular Regarding the Competence, Tasks and Powers of Data Protection Authorities", 12 March 2019, https://edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-52019-interplay-between-eprivacy_en.

[11] Article 4(1) of the GDPR. The same definition is included in in Article 3(1) of Regulation 2018/1725/EU and of Directive 2016/680/EU. Furthermore, this definition is also applicable to the e-Privacy Directive.

[12] WP29, "Opinion 4/2007 on the Concept of Personal Data", 01248/07/EN, 10 June 2019, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_

data] is defined in a broad manner as *"any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction"* [Article 4(2) of the GDPR]. The GDPR always applies to processing by automated means or partly by automated means, as well as to manual processing, if the personal data is contained or is intended to be contained, in a filing system [Article 2(1) and Recital 15 of the GDPR]. As clarified by Recital 15, the GDPR does not apply to files or sets of files, as well as their cover pages, which are not structured according to specific criteria.

Exceptions to the applicability of the GDPR are established in Article 2(2), with arguably the most relevant being the "household exception."[13] Under the household exception Article 2(2)(c) the rules of the GDPR are not applicable to processing by a natural person in the course of a purely personal or household activity. This provision has been interpreted strictly by the CJEU. The characteristic of being a purely personal or household activity refers to the activity itself and not to the person carrying the processing activity.[14]

Therefore the exception is not applicable to: i) the operation of a camera system, as a result of which a video recording of people is stored on a continuous recording device such as a hard disk drive, installed by an individual in his family home for the purposes of protecting the property, health and life of the home owners, but which also monitors a public space;[15] ii) the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of such data; or[16] iii) the recording of a video of police officers in a police station, while a statement is being made, and the publication of that video on a video website, on which users can send, watch and share videos.[17] National courts have also found that, at least in certain cases, posting pictures of children on social networking websites may also not be covered by this exception.[18]

---

en.pdf; Tiago Sérgio Cabral and Sophia Hassel, "T-384/20 OC v European Commission: The GC Falls out of Line on Personal Data", *European Law Blog* Blogpost 46/2022, 17 October 2022, https://europeanlawblog.eu/2022/10/17/t-384-20-oc-v-european-commission-the-general-court-falls-out-of-line-on-personal-data/.

[13] The household exception already existed under the old Data Protection Directive, as established by Article 3 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[14] See Judgment CJEU *Ryneš*, 11 December 2014, Case C-212/13, ECLI:EU:C:2014:2428. See also *Jehovan todistajat*, 10 July 2018, Case C-25/17, ECLI:EU:C:2018:551.

[15] See *Ryneš*.

[16] See *Jehovan todistajat*.

[17] Judgment *Buivids*, 14 February 2019, Case C-345/17, ECLI:EU:C:2019:122.

[18] Though this may depend, for example, on the privacy settings selected. See Cynthia O'Donoghue, "Dutch Court Holds That a Grandmother Is in Breach of the GDPR for Failing to Remove Photos of Her Grandchildren from Social Media Platforms", *Technology Law Dispatch* - ReedSmith, 28 May 2020, https://www.technologylawdispatch.com/2020/05/privacy-data-protection/dutch-court-holds-that-a-grandmother-is-in-breach-of-the-gdpr-for-failing-to-remove-photos-of-her-grandchildren-from-social-media-platforms/; See GDPR Hub, "Rb. Gelderland - C/05/368427", accessed 17 January 2022, https://gdprhub.eu/index.php?title=Rb._Gelderland_-_C/05/368427; "Netherlands: Gelderland Court Issues Judgment on Minors' Photographs on Social Media under GDPR", *DataGuidance*, 21 May 2020, accessed 17 January 2022, https://www.dataguidance.com/news/netherlands-gelderland-court-issues-judgment-minors.

The applicability of the GDPR is also not limited to the EU's borders. In fact, the GDPR has an extended territorial scope and thus it is applicable to:

a) The processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU, regardless of whether the processing takes place in the EU or not;

b) To the processing of personal data of data subjects who are in the EU by a controller or processor not established in the EU, where the processing activities are related to: i) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the EU; ii) the monitoring of their behaviour as far as their behaviour takes place within the EU.[19]

Controllers and processors are the two main parties upon whom the GDPR obligations fall (particularly the former). Controller under the GDPR means a "*natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data*"[20] and processor means a "*a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller*" [Articles 4(7 and 8) of the GDPR].

5. *General principles of personal data protection.* Article 5 of the GDPR includes seven key principles, applicable universally to personal data processing under this legal instrument. These principles are: i) lawfulness, fairness and transparency; ii) purpose limitation; iii) data minimization; iv) accuracy; v) storage limitation; vi) integrity and confidentiality; and vii) accountability.[21]

In addition, Article 25 of the GDPR includes two more core principles which should be considered by controllers when planning and establishing their data processing operations: i) data protection by design; and ii) data protection by default. These principles mean that controllers should, at the time of the determination of the purposes and means of processing and at the time of the processing itself, implement adequate technical and organisational measures to ensure the protection of personal data (*i.e.* consider data protection from the start of the design process) and ensure that, by default, only personal data necessary for a specific purpose is processed (*i.e.* by default the most protective configurations should be applied).[22]

---

[19] On this subject, see EDPB, "Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3)", 12 November 2019, https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en; EDPB, "Guidelines 05/2021 on the Interplay between the Application of Article 3 and the Provisions on International Transfers as per Chapter V of the GDPR", 14 February 2023, https://edpb.europa.eu/system/files/2023-02/edpb_guidelines_05-2021_interplay_between_the_application_of_art3-chapter_v_of_the_gdpr_v2_en_0.pdf; See Judgment CJEU *Google v. CNIL*, 24 September 2019, Case C-507/17, ECLI:EU:C:2019:772 ; Alessandra Silveira and Tiago Sérgio Cabral, "Google v. CNIL: Is a New Landmark Judgment for Personal Data Protection on the Horizon?", *The Official Blog of UNIO - EU Law Journal*, 10 September 2019, https://officialblogofunio.com/2019/09/10/editorial-of-september-2019.

[20] Where the purposes and means of such processing are determined by EU or Member State law, the controller or the specific criteria for its nomination may be provided for by EU or Member State law [Article 4(7) of the GDPR].

[21] For more information on this matter, see Cécile de Terwangne, "Commentary to Article 5", in *The EU General Data Protection Regulation (GDPR): A Commentary*, ed. Christopher Kuner, Lee A. Bygrave and Christopher Docksey (Oxford: Oxford University Press, 2020), 309-20; Lukas Feiler, Nikolaus Forgó and Michaela Nebel, *The EU General Data Protection Regulation (GDPR): A Commentary*, Second edition (Horsell, Woking, Surrey, United Kingdom: Globe Law and Business Ltd, 2021), 75-80.

[22] EDPB, "Guidelines 4/2019 on Article 25 Data Protection by Design and by Default", 1 July 2022,

6. *Legal basis for processing.* For personal data to be processed lawfully under the GDPR, a legal basis under Article 6 is required. Controllers should define and document the legal basis applicable, in accordance with the specific details of the processing, before any data processing takes place. The GDPR establishes six possible legal bases:[23/24]

> a) The data subject has provided his or her consent [Article 6(1)a of the GDPR]. Consent under the GDPR should be a freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her [Article 4(11) of the GDPR]. Controllers should also ensure that they comply with the conditions of consent established in Article 7 of the GDPR and, when applicable in Article 8;
>
> b) Processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract [Article 6(1) b)];
>
> c) Processing is necessary to comply with a legal obligation to which the controller is subject [Article 6(1) c)];
>
> d) Processing is necessary in order to protect the vital interests of the data subject or another natural person [Article 6(1) d)];
>
> e) Processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller [Article 6(1) e)]; or
>
> f) Processing is necessary to pursue the legitimate interests of the controller (or a third-party) [Article 6(1) f)].[25]

Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health[26] or data concerning a natural person's sex life or sexual orientation ("special category data") is subject to more stringent rules. By default,

---

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf.

[23] On this subject see, among others, DPC, "Guidance Note: Legal Bases for Processing Personal Data", December 2019, https://www.dataprotection.ie/sites/default/files/uploads/2020-04/Guidance%20on%20Legal%20Bases.pdf; WP29, "Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC", 10 June 2019, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf; Waltraut Kotschy, "Commentary to Article 6", in *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: Oxford University Press, 2020), 321–44.

[24] See also the compatibility test under Article 6(4) of the GDPR.

[25] This legal basis cannot be relied upon where such interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require the protection of personal data. When relying on this legal basis, controllers should carry out an assessment of legitimate interests. WP29, "Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC"; Gabriela Zanfir-Fortuna and Teresa Troester, "Processing Personal Data on the Basis of Legitimate Interests under the GDPR", 9 October 2019, https://fpf.org/wp-content/uploads/2018/04/20180413-Legitimate-Interest_FPF_Nymity-2018.pdf.

[26] Regarding the challenges and limitations on processing health data under the GDPR, see Hannah Van Kolfschooten, "EU Regulation of Artificial Intelligence: Challenges for Patients' Rights", *Common Market Law Review* 59, no. Issue 1 (1 February 2022): 81–112, https://doi.org/10.54648/COLA2022005.

the GDPR contains a general prohibition of the processing of special category data [Article 9(1) of the GDPR)], but there are a significant number of exceptions to this rule. Therefore, special category data can only be processed when: i) one of the exceptions under Article 9(2) of the GDPR; and ii) a legal basis under Article 6 (above), is applicable.

Rules are even stricter for the processing of personal data relating to criminal convictions and offences, which must be carried out only under the control of official authority or when the processing is authorised by EU or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects (Article 10 of the GDPR).

7. *Data subject rights.*[27] Chapter III of the GDPR focuses on the issue of data subject rights.[28] Under the rights established in this chapter, data subjects have the right to be transparently informed with regards to the processing of their personal data, both in cases where the controller collected the data directly from the data subject (Article 13 of the GDPR) and in cases where the controller collected the data indirectly (Article 14 of the GDPR). Additionally, data subjects have the right to i) access their personal data (Article 15 of the GDPR),[29] ii) the right to have their inaccurate personal data rectified and their incomplete personal data completed (Article 16 of the GDPR), iii) the right to request the erasure of their personal data (Article 17 of the GDPR),[30] iv) the right to request that the processing of their personal data be restricted (Article 18 of the GDPR), v) the right to request the portability of their personal data (Article 19 of the GDPR),[31] vi) the right to object to the processing of their personal data based on legitimate interests or public interest (Article 21 of the GDPR), and vii) the right not to be subject to automated decision-making (Article 22 of the GDPR).[32]

---

[27] For a more developed analysis of this right, see Alessandra Silveira, Tiago Sérgio Cabral and Joana Rita Sousa Covelo de Abreu, "Breves Apontamentos Quanto Aos Direitos Dos Titulares de Dados No RGPD", in *Direito à Informação Administrativa e Proteção de Dados Pessoais* (Lisbon: CEJ, 2021), 93-111.

[28] In fact, data subjects have more rights than those contained in this chapter, namely the rights provided for in Articles 77, 78, 79, 80 and 82 of the GDPR. However, the rights contained in Chapter III are those to which legal practice generally refers when it speaks of "data subjects rights". These are the rights that the controller must proactively fulfil or that can be exercised directly by the data subject vis-à-vis the controller.

[29] For a more developed analysis of this right, see Tiago Sérgio Cabral, "AI and the Right to Explanation: Three Legal Bases under the GDPR", in *Data Protection and Privacy, Volume 13: Data Protection and Artificial Intelligence*, ed. Dara Hallinan, Ronald Leenes and Paul De Hert (Hart Publishing, 2020), 29-55.

[30] For more development on the right to access, see Tiago Sérgio Cabral, "Forgetful AI: AI and the Right to Erasure under the GDPR", *European Data Protection Law Review* 6, no. 3 (2020): 378-89, https://doi.org/10.21552/edpl/2020/3/8; Judgments CJEU *Nowak*, 20 December 2017, Case C-434/16, ECLI:EU:C:2017:994 and *Pankki S*, 22 June 2022, Case C-579/21, ECLI:EU:C:2023:501.

[31] For a more developed analysis of the right to portability, see WP29, "Guidelines on the Right to Data Portability", 10 June 2019, https://ec.europa.eu/newsroom/document.cfm?doc_id=44099.

[32] For more development on Article 22 of the GDPR, particularly in what concerns its impact on artificial intelligence, see Cabral, "AI and the Right to Explanation: Three Legal Bases under the GDPR"; Tiago Sérgio Cabral and Alessandra Silveira, "Da Utilização de Inteligência Artificial Em Conformidade Com o RGPD: Breve Guia Para Responsáveis Pelo Tratamento", in *Inteligência Artificial Aplicada Ao Processo de Tomada de Decisões* (Belo Horizonte: Editora D'Plácido, 2020), 209-24; Alexandre Veronese, Alessandra Silveira, and Amanda Nunes Lopes Espiñeira Lemos, "Artificial Intelligence, Digital Single Market and the Proposal of a Right to Fair and Reasonable Inferences: A Legal Issue between Ethics and Techniques", *UNIO - EU Law Journal* 5, no. 2 (2 July 2019): 75-

Even though the scope of this work is limited and thus not the ideal place for a detailed analysis of all the rights above-mentioned, it is important to note that any information provided to the data subject or any communication in the context of the exercise of one of the rights above should be in a concise, transparent, intelligible and easily accessible form, using clear and plain language. In principle, the information shall be provided in writing, or by other means, including, where appropriate, by electronic means [Article 12(1) of the GDPR]. The controller has a one-month deadline to respond to any request for exercise of rights by a data subject under Articles 15 to 22 of the GDPR. This deadline can be extended until a maximum of three months where necessary taking into account the complexity and number of the requests. In this case, the controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay [Article 12(3) of the GDPR]. Data subjects should not incur any fees when exercising their rights, unless the controller is able to prove that the request is manifestly unfounded or excessive.

8. *Data transfers to third countries.* Under the GDPR personal data may flow freely through EU and EEA countries. To carry out data transfers to third countries or international organizations ("data transfers") organizations must comply with the rules under Chapter V of the GDPR. For countries who benefit from an Adequacy Decision by the European Commission (Article 45 of the GDPR) data can flow in the same manner as it would in the EU, without being subject to further restrictions (if the importer entity is under the scope of the Adequacy Decision).

However, as the number of Adequacy Decisions is, naturally,[33] limited the GDPR also makes available additional transfer mechanisms. When a country or international organization does not benefit from an Adequacy Decision, the exporter should first look into Article 46 of the GDPR establishing the rules for transfers subject to appropriate safeguards. Standard Contractual Clauses approved by the European Commission [Article 46(2)c of the GDPR] and Binding Corporate Rules [Article 46(2)b and 47 of the GDPR] are the most relied upon data transfer mechanisms by organizations in their daily activities.

If no Adequacy Decision or appropriate safeguards are available, exceptional and non-repetitive transfers can still be carried out if a derogation for a specific situation is available under Article 49 of the GDPR.[34]

91, https://doi.org/10.21814/unio.5.2.2294; WP29, "Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679", 10 June 2019, https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=49826; Diogo Morgado Rebelo, *Inteligência Artificial e Scoring no Crédito ao Consumo* (Coimbra: Almedina, 2023), 292 and ff;
Alessandra Silveira, "Profiling and Cybersecurity: a Perspective From Fundamental Rights' protection in the EU", in Francisco de Andrade, Pedro Miguel Freitas and Joana Rita Sousa Covelo de Abreu (eds.), *Legal Developments on Cybersecurity and related Fields* (Springer: New York, 2024), 251-288; and Alessandra Silveira, "Editorial of March 2024: On Inferred Personal Data and the Difficulties of EU Law in Dealing with this Matter", *Official Blog of UNIO - EU Law Journal*, 19 March 2024, https://officialblogofunio.com/2024/03/19/editorial-of-march-2024/.

[33] As of writing, the following States are recognised as adequate by the European Commission: Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom under the GDPR and the LED, the United States (commercial organisations participating in the EU-US Data Privacy Framework) and Uruguay. See European Commission, "Adequacy Decisions", accessed 16 September 2023, https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en.

[34] See WP29, "Guidelines 2/2018 on Derogations of Article 49 under Regulation 2016/679", 25 May 2018, https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en.

9. *Penalties and liability.* Article 8(3) of the CFREU establishes that rules regarding personal data protection in the EU shall be subject to control by an independent authority. The same requirement is likewise included in Article 16(2) TFEU. The GDPR[35] includes significant safeguards to ensure data protection supervisory authorities' independence (Article 52) and a robust set of powers to allow them to ensure compliance with the GDPR (Articles 58[36] and 83).[37]

Article 83 of the GDPR, lays down the general rules for imposing GDPR administrative fines. These fines may go up to €20 million, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher [Article 83(5) of the GDPR].[38/39/40] Data subjects have the right to lodge a complaint with the supervisory authority of the Member State of his or her habitual residence, place of work or place of the alleged infringement, if they believe that their data protection rights were infringed (Article 77 of the GDPR).

Data subjects may also pursue civil liability for damages resulting from breaches of the data protection rights under the rules of Articles 79 and 82 of the GDPR. According to the CJEU there is no minimum threshold for damages (material or non-material) under the GDPR.[41] This means that national procedural law cannot limit compensation under the GDPR and any damage that can be proved should be compensated. Likewise, data subjects also have the right to pursue judicial proceedings against cases of action or inaction by a supervisory authority that may affect them (Article 78 of the GDPR).

It is important to note that the GDPR allows Member States to impose other penalties, namely criminal penalties, for infringements of its rules, as long as these penalties are effective, proportionate and dissuasive. Nonetheless, any penalties established by Member States may not hinder the system of GDPR enforcement established in the Regulation (through civil liability and administrative fines).[42]

Lastly, Article 80 of the GDPR establishes rules for representation with a mandate and representation without a mandate (the latter may be established if the

[35] For Regulation 2018/1725/EU this role is exercised by the European Data Protection Supervisor.
[36] Article 58 of the GDPR includes an extensive list of investigative, corrective, authorisation or advisory powers. Some of these powers may be arguably as impactful as fines in the daily operations of entities subject to them, for example the power to impose a temporary or definitive limitation including a ban on processing [Article 58(2) f)] of the GDPR.
[37] The EDPB is responsible for ensuring coherence in the decisions adopted by the various supervisory national authorities in the EU. Diogo Matos Brandão, "The One-Stop-Shop and the European Data Protection Board's Role in Combatting Data Supervision Forum Shopping", *International Data Privacy Law*, 12 August 2023, ipad014, https://doi.org/10.1093/idpl/ipad014; Francisco Pereira Coutinho, "Comité Europeu Para a Proteção de Dados", in *Instituições, Órgãos e Organismos da União Europeia*, ed. Joana Rita Sousa Covelo de Abreu and Liliana Reis (Coimbra: Almedina, 2020), 163-68.
[38] Infringements falling instead under Article 83(4) of the GDPR are subject to administrative fines of up to €10 million, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher.
[39] For more information, see also EDPB, "Guidelines 04/2022 on the Calculation of Administrative Fines under the GDPR", 24 May 2023, https://edpb.europa.eu/system/files/2023-06/edpb_guidelines_042022_calculationofadministrativefines_en.pdf.
[40] The European Commission has also presented a Proposal for a Regulation laying down additional procedural rules relating to the enforcement of GDPR and applicable to cases where there is cross-border data processing. At the time of writing, this proposal is still under discussion.
[41] See *UI v. Österreichische Post AG*.
[42] In Portugal, for example, the national legal framework includes a number of criminal penalties for breach of data protection rules (Articles 46 to 52 of Law 58/2019, of 8 of August).

Member State opts to do so) in the exercise of the rights under Articles 77, 78, 79 and 82 of the GDPR.[43]

10. *Additional obligations to ensure the protection of personal data of data subjects.* While we cannot address them at length due to inevitable restrictions in the length and scope of this work, the GDPR also establishes a number of additional compliance obligations for controllers (and also processors) with the aim of operationalizing the principle set out in Article 8 of the CFREU. These include i) the obligation to regulate relationships between controllers and processors through a binding contract[44] (Article 28 of the GDPR); ii) the obligation to regulate, also through a contract, the relationship between joint controllers (Article 26 of the GDPR); iii) the obligation to draft records of processing activities (Article 30 of the GDPR); iv) the obligation to ensure the security of data processing activities (Article 32 of the GDPR); v) the obligation to notify certain data breaches to the supervisory authority and to data subjects (Articles 33 and 34 of the GDPR); vi) the obligation to carry out a data protection impact assessment and engage with the supervisory authority through the prior consultation procedure for certain data processing activities (Articles 35 and 36 of the GDPR); and vii) the obligation to appoint a data protection officer and provide him or her with the necessary tools to carry out their functions (Articles 37, 38 and 39 of the GDPR).

11. *Mass surveillance and data retention in the EU.* The CJEU case-law has a long tradition of normally rejecting a general, preventive and indiscriminate retention of electronic communications data, including the so-called metadata. In *Digital Rights Ireland*,[45] the CJEU invalidated Directive 2006/24/EC which regulated the matter of retention of data by service providers for the purpose of investigating, detecting and prosecuting serious crime, irrespective of any prior request by the Member States' law enforcement officers or judiciary. The Directive was applicable to traffic data and location data, relating to both natural and legal persons, including information consulted using an electronic communications network – albeit it did not apply to the content of the communication. The heart of the matter rested in the fact that the directive covered all those who used electronic communications services in Europe – even those whose data was not criminally relevant. By adopting Directive 2006/24/CE, the EU legislature exceeded the limits imposed by the principle of proportionality in the light of Articles 7 (privacy), 8 (data protection) and 52(1) (proportionality on limitations) of the CFREU, and for that reason the CJEU ruled the invalidity of that directive integrally, without reservations as to the temporal effects of its decision (*ex tunc*). The decision of the CJEU raised the problem of the effects of that invalidity in relation to the national provisions transposing the directive which had been declared invalid. Two years later, in *Tele2*[46] the CJEU was asked to clarify the consequences of the invalidity of Directive 2006/24/CE for national authorities and to determine whether a general obligation to retain data would be compatible with Article 15(1) of the e-Privacy Directive. This article allows Member States to adopt legislative measures for the retention of data for a limited period,

[43] Additionally, the GDPR is one of the legal instruments included in Annex I of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, allowing qualified entities to use the resources under this Directive to pursue remedies for infringements of the GDPR.

[44] Or other legal act under Union or Member State law.

[45] Judgment CJEU *Digital Rights Ireland*, 8 April 2014, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[46] Judgment *Tele2 Sverige*, 21 December 2016, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970.

subject to compliance with the general principles of the EU law and fundamental rights therein protected.[47] The CJEU decided that this article, read in the light of Articles 7, 8, 11 (freedom of expression and information) and Article 52(1) of the CFREU, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. In other words, data retention consistent with Article 15 the e-Privacy Directive, should be targeted and limited with respect to the categories of data to be retained, the means of communication affected, the persons concerned, and the period of retention.

Following these initial judgments, the reaction of the Member States was not consensual, which led to an unlawful differentiation of treatment between European citizens. In Portugal, even though the national metadata retention law contained rules establishing general indiscriminate retention of metadata, personal data was unlawfully retained until the Constitutional Court's judgment 268/2022 struck down the national law due to incompatibility with EU law.[48/49/50/51]

---

[47] Regarding the limitation of Charter rights in the EU, see the Commentary to Article 52 in this work. See also Hannah Van Kolfschooten and Anniek De Ruijter, "COVID-19 and Privacy in the European Union: A Legal Perspective on Contact Tracing", *Contemporary Security Policy* 41, no. 3 (2 July 2020): 478–91, https://doi.org/10.1080/13523260.2020.1771509.

[48] Portuguese Constitutional Court, Judgment 268/2022, 19 April 2022, Case no. 828/2019.

[49] Unfortunately, even with strong evidence that the Portuguese metadata retention law did not meet the standards required by EU law following the *Digital Rights Ireland* judgment, the Public Prosecutor's Office defended that it should remain applicable in Portugal and that the additional safeguards introduced by the Portuguese legislator were sufficient to address the CJEU's concerns. After the judgment of the Constitutional Court striking the Portuguese metadata retention law, the Public Prosecutor's Office went as far as to require a temporal limitation to the effects of this judgment, regardless of the fact that doing so would clearly not be compatible with EU law. In the future, to avoid such situations it would be key that Courts, when in doubt, refer their questions directly to the CJEU through the preliminary ruling mechanism. Individual public prosecutors can also play a more constructive role by requesting that Courts engage with the CJEU when there are relevant questions about whether national law is compatible with EU law. See Portuguese Constitutional Court, Judgment 382/2022, 13 May 2022, Case no. 828/2019; See Portuguese Public Prosecutor's Office, "Nota Prática N.o 7/2015 30 de Dezembro de 2015 - Retenção de Dados de Tráfego e Lei No 32/2008, de 17 de Julho", 30 December 2015, https://cibercrime.ministeriopublico.pt/sites/default/files/documentos/ pdf/nota_pratica_7_retencao_de_dados.pdf.

[50] For more development on metadata retention, see Alessandra Silveira and Tiago Sérgio Cabral, "Metadata Retention Is First and Foremost a Matter of EU Law: A Revision of the Portuguese Constitution Will Not Solve the Issue – Editorial of May 2022", *Official Blog of UNIO – EU Law Journal*, 13 May 2022, https://officialblogofunio.com/2022/05/13/editorial-of-may-2022/; Alessandra Silveira and Tiago Sérgio Cabral, "Some Additional Thoughts on Metadata Retention – Points to Consider When Adopting New Legislation [on Joined Cases C-793/19 and C-794/19 (SpaceNet) and the German Legislation on This Matter]", *Official Blog of UNIO – EU Law Journal*, 19 May 2022, https://officialblogofunio.com/2022/05/19/some-additional-thoughts-on-metadata-retention-points-to-consider-when-adopting-new-legislation-on-joined-cases-c%e2%80%91793-19-and-c%e2%80%91794-19-spacenet-and-the-german-legislation-o/; Alessandra Silveira and Tiago Sérgio Cabral, "Again: On the Prohibition of Generalised and Indiscriminate Retention of Metadata for the Purpose of Combating Serious Crime", *Official Blog of UNIO – EU Law Journal*, 6 October 2023, https://officialblogofunio.com/2022/10/06/again-on-the-prohibition-of-generalised-and-indiscriminate-retention-of-metadata-for-the-purpose-of-combating-serious-crime/; Alessandra Silveira and Pedro Freitas, "Implications of the Declaration of Invalidity of the Directive 2006/24 on the Retention of Personal Data (Metadata) in the EU Member States: An Approach to the Judgment Tele 2 of 21 December 2016", *Official Blog of UNIO – EU Law Journal*, 22 January 2017, https://officialblogofunio.com/2017/01/22/implications-of-the-declaration-of-invalidity-of-the-directive-200624-on-the-retention-of-personal-data-metadata-in-the-member-states-of-the-eu-an-approach-to-the-judgment-tele-2-of-21-december-20.

[51] After this text was originally written, Portugal adopted in 2024 a new law establishing rules for metadata

The position of the CJEU regarding data retention in *Digital Rights Ireland and Tele2* was subsequently confirmed in a significant number of other cases, including *Privacy International*, *La Quadrature du Net*, *Prokuratuur*, *G.D.*, *SpaceNet*, and *Lietuvos Respublikos generalinė prokuratūra*.[52/53]

Alessandra Silveira & *Tiago Sérgio Cabral*

retention. While this commentary will not analyse the new Portuguese law, it is important to note that compatibility with EU standards on data protection was a key point of discussion in its drafting process.

[52] See Judgments CJEU *Privacy International*, 6 October 2020, Case C-623/17, ECLI:EU:C:2020:790; *La Quadrature du Net*, 6 October 2020, joined cases C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791; *Prokuratuur (Conditions d'accès aux données relatives aux communications électroniques)*, 2 March 2021, Case C-746/18, ECLI:EU:C:2021:152; *G.D.*, 5 April 2022, Case C-140/20, ECLI:EU:C:2022:258; *SpaceNet*, 20 September 2022, joined cases C-793/19 and C-794/19, ECLI:EU:C:2022:702; *Lietuvos Respublikos generalinė prokuratūra*, 7 September 2023, Case C-162/22, ECLI:EU:C:2023:631.

[53] More recently, the CJEU considered as lawful in judgment *La Quadrature du Net v. Premier minister*, an obligation "*imposed on providers of electronic communications services, by a legislative measure under Article 15(1) of [the] e-Privacy Directive, to ensure the general and indiscriminate retention of IP addresses (...) justified by the objective of combating criminal offences in general where it is genuinely ruled out that that retention could give rise to serious interferences with the private life of the person concerned due to the possibility of drawing precise conclusions about that person by, inter alia, linking those IP addresses with a set of traffic or location data which have also been retained by those providers*" (paragraph 86 of the judgment). It is important to note that the decision rested on the conclusion that IP addresses are less sensitive than other traffic data when they are not combined with other data elements. Following this argumentation, the CJEU imposed very strict conditions regarding access to and combination of IP addresses with other data elements. In our view, it seems unlikely that the CJEU would validate bulk data retention in cases where the data elements could be used to infer relevant details about a person's private life. See Judgment CJEU *La Quadrature du Net v. Premier minister*, 30 April 2024, Case C-470/21, ECLI:EU:C:2024:370.

ARTICLE 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

*Introductory note***.** The CFREU, based on the ECHR, represents a more complete and apparently wider repository of the fundamental human rights of the European citizen. As it was not possible to create a European Constitution, we believe the range of fundamental rights expressed in the Charter does not seem to represent any significant and actual advance in the protection of fundamental rights in the European Union.

With the possible accession of the EU to the ECHR and considering the new framework given by the Treaty of Lisbon to Article 6(1) and (2) of the TEU, the result is that, on the one hand, the CFREU of 7 December 2000, as adapted on 12 December 2007, has gained the same legal value as the Treaties – meaning it is relevant as original law [Article 6(1)] – and, on the other hand, the Union becomes part of the ECHR, together with the Member States and third countries, falling under the jurisdiction of the ECtHR when it comes to the protection of fundamental rights, as it concerns conventional international law.

It is a complex system of meagre relevance to the European citizen when it comes to the protection of fundamental rights, as will be shown here below.

1. So let us formulate a commentary to Article 9 of the CFREU, which asserts "*the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*" Let us say that, briefly, and in spite of the wide-ranging nature of this principle in relation to Article 12 of the ECHR, it seems meaningless to enunciate a fundamental right through the remission to national legislations, which are varied on the protection they offer, and thus remove the reach of any protective purpose. It can only be a fundamental right if it is shaped by material content, otherwise we are before a blank cheque with no reach, lost in the heterogeneous marital and family foundation regimes of the Member States' legislation. It is stated in the notes of the CFREU, published in the *OJEU* on December 14, 2007 (C 303) and written under the responsibility of the *Praesidium* of the Convention – which wrote the Charter – that Article 9, based on Article 12 of the ECHR, has modernised the text "*in order to reach the cases in which legislations recognise other forms of starting a family beyond marriage*", stating nevertheless, in a neutral way that "*this Article does not prohibit nor imposes the concession of the status of marriage to unions between people of the same sex*", and that "*this right is thus similar to the right predicted in the ECHR, but its scope may be broader whenever national legislation includes it (?).*"

The protective scope of Article 9 of the Charter is not comprehensible. We could think, for example, about what happens if a Member State recognises marriage between two people of the same sex whereas the State of nationality of one of the spouses does not... There is in fact a *material remission* for the existing

regime within the law of the place of celebration of marriage, with no concern for the way the spouses can deal with their marital status outside the State where they got married. This is concerning within the context of a Union that sustains the primal rule of free movement of persons, even if this has mostly economical purposes. For respect and recognition of sociocultural diversity, this creates a legal provision that is void in terms of its content.

Therefore, Article 9 of the Charter guarantees the right to marriage and to found a family. With regard to Portuguese law and for Portuguese area of jurisdiction, after Law 9/2010 of May 31, the celebration of civil marriage between people of the same sex was permitted, partially annulling the former regime, following the rulings of the Constitutional Court 359/2009 of July 9, but mostly 121/2010 of April 8. The truth is that Article 9 CFREU does not foresee the need to accommodate rights related to private international law – on a devolutive level, *e.g., with the possible validation of a forum shopping type system*, more adequate to the purposes of the EU itself – but above all it does not address the need to outline a *substantial content* for the legal institution of marriage, without which, the crossing of borders within the EU will never be an act of free movement, as it may represent the violation of the marital status of the European citizen. Next, we will see if Article 9 of CFREU (see Article 12 of the ECHR), together with Article 21 (see Article 14 of the ECHR), which ratifies the principle of *non-discrimination*, mark any progress in terms of this purpose.

2. Article 9 of the CFREU eliminated the reference to "man and woman" expressed in Article 12 of ECHR when it declares the right to get married. There is wider-reaching aim of the right in question here, as recognised in the "Commentary of the Charter" written by the EU Network of Independent Experts on Fundamental Rights, in June 2006. The truth is – as verified here below – that European case-law is evasive when it comes to marriage between homosexuals.

To begin with, we recognise in the Commentary mentioned above that by having an intrinsic role in the establishment of domestic rules concerning marriage, according to each sociocultural principle, national legislation *cannot affect the true essence of the right to marry*. In this sense, the ECtHR ruled, in the case *F. v. Switzerland*, that a State cannot establish an excessively long internuptial term – in the case in question, a three-year ban on remarriage after divorce, imposed upon the guilty spouse – because this affected the rule of the right to marry.

In other words, in seeking to respect the cultural diversity of the Member States, Article 9 *cannot be voided of its own minimum content*, in an attitude of clear abstentionism, regardless of the Council's praise of this diversity when it comes to family law, in a reality which creates countless difficulties within the context of legal harmonisation.[1]

Crucial, in the context of the right to marry, is that its essence is rooted in an attainment, through a formal constitutive act, *of a full life in common between two people*. The case-law of the ECtHR points in the direction of a significant conceptual change, by accepting that, after undergoing sex change surgery to modify their previous morphologic sex, transgender people have the right to marry in their new gender. Decisions such as *Rees v. United Kingdom, Cossey v. United Kingdom, Sheffield and Horsham v. United Kingdom*, bear witness to the need to

[1] See the Council report on the need to approximate Member States' legislation in civil matters, adopted on 16 November 2001.

follow medical progression and avoid the unbearable situation of contempt for the potential feelings of vulnerability, humiliation and anxiety of transgender people.[2] The ECtHR has ruled that after changing physically from man to woman, a transgender person has acquired the gender that allows her to marry a male person, just as the inverse would also be valid, which would comply with the content of the (correspondent) Article 12 of the ECHR. The Commentary of the EU Network of Independent Experts states that these case-law decisions *have not opened the doors to marriage for same sex couples*, because the Court only mentioned "social gender" as a decisive factor: two people – being one or both of them transgender – have to be seen as being of a different sex.

This guideline of the ECtHR is not understandable, as it does not materially outline the institution of marriage, which is not held hostage to the idea of procreation but is simply the establishment of a full life in common between two people. The above-mentioned Independent Experts recognised that there have been developments in national laws in this area, *e.g.* Belgium, Holland (and more recently Spain and Portugal), which have included same sex marriage, while other countries, namely Scandinavian and Anglo-Saxon countries, admit the use of the registered civil partnership for homosexual unions (in a similar approach to the solidarity pact in French law). Nevertheless, they insist that, for the reading of Article 9 of the Charter, the traditional vision of marriage (and partnership) as a heterosexual institution prevails, evoking the decision of the CJEU in the case *D. and Sweden v. European Council.*

It is interesting to note that the same Commentary by the Independent Experts states that the formulation of Article 9 is broader than other international instruments,[3] and that, as there is no reference to "man and woman", it could be argued that there would be no obstacle to the recognition of homosexual relations within the context of marriage. In reality, they conclude that there is no imposition at a European level, in the sense that national laws facilitate same sex marriage. Nevertheless, they reticently and contradictorily mention Article 21 of the Charter, which forbids discrimination on the subject of sexual orientation and could be summoned for the comparison of the interpretative reading of Article 9, since they claim "*it may be argued that the exclusion of homosexual couples to marriage would be a discrimination precisely based on their sexual orientation, in violation of Article 21.*" It is our understanding that this will be, undoubtedly, *the correct interpretation of the material reach of the right to marry of Article 9, in conjunction and alignment with Article 21 of the Charter.*

The Independent Experts also make a significant reference to the case *Moura v. Portugal*, in which the ECtHR accepted there was a violation of Article 8 in connection with Article 14, in a court ruling that had discriminated against a homosexual father in the right to custody of his daughter, and therefore condemned Portugal. This discrimination resulted in a compensatory sanction from the Portuguese State, which seems to prove the necessary reach of the principle of non-discrimination in terms of post-marriage parental status. This is the orientation – despite the cautious conclusions of the Independent Experts – that should prevail in terms of hermeneutics related to the right to marry.

[2] See Judgment ECtHR *Christine Goodwin v. United Kingdom*, 11 July 2012, no. 28957/95.
[3] For instance, the UDHR, the ICCPR and the ECHR.

3. The right to found a family appears in Article 9 as separate from the right to marry, which clearly shows there is no necessary connection between founding a family and the institution of marriage. In fact, Article 9 refers, in its final section, to *rights*, using the plural, and the autonomy of the rights in question was already expressed in Article 16 of the UDHR, Article 12 of the ECHR and Article 23 of the ICCPR. One must identify the content and reach for the concept of *family*, or better yet, *family relation*. We have already written that a constant element of the situations considered familial "*is its virtual or effective perdurability, which underlines the presumably affective nature that is inherent to them – even if the generating factor is varied, from e.g., a biological relation to a court ruling establishing an adoptive bond.*" It was also then stated "*the gradation of the expression of the innate affection and of the different character of origin and the referred perdurability of the bond is varied. But these parameters – perdurability (virtual definitivity), more or less expressive emotional bonds, significant constitutive act: biological, daily life experience, administrative or judicially, in a complex junction (...) – which will correspond to the criteria that will allow to assess a situation as includable in Family Law.*" What has just been exposed is partly corroborated by the casuistry adopted by the Independent Experts' Commentary when characterising the institution of family. So much that they state that one of the characteristics of family is the *life in common*, for which the familial character is recognised in *de facto families* or *non-marital partnerships*, which even derives from the fact that marriage is not the exclusive source of family foundation. The EU's Member States were actually encouraged by the European Parliament – through the Resolution of July 5, 2001 – to recognise non-marital relations between people of the same or different sex, and to adopt protective measures for these situations of cohabitation, similar to those given to married couples.

The Council also establishes in Directive 2003/86/EC of 22 September 2003 on family reunification – which is based on a contemporary view of the family, covering spouse or cohabitant, including those of the same sex – *family entity* as the coexisting bond between persons of the same sex, even if detached from the celebration of a marriage ceremony.

On these guidelines one must observe that they *are revealing, on the one hand, of the legal recognition of family units, conjugal or not, of people of the same or different sex; but, on the other hand, are also revealing of the existence of a discrimination, at least nominal, regarding same sex couples when they cannot have access to marriage, but only to registered partnerships (or not).*

4. In addition to natural biological procreation, the Commentary of the Charter recognises that some European countries ensure access to infertility treatment and different means of assisted reproductive technology, namely, artificial insemination, oocyte donation, *in vitro* fertilisation, and recourse to genetic material banks. The regulation of these situations is varied, but surrogacy, besides being considered inadvisable on a European level, is normally forbidden. Some countries do not even foresee assistance in overcoming the infertility situation of a married or unmarried couple, nor adopt measures to deal with medically assisted procreation – a situation often linked to sexual orientation.

Once again, there is a question mark as to the reach of the so-called *right to procreate through* medically assisted reproduction, allowing for possible discriminatory solutions, in terms of internal legislation, related to the rights of homosexual couples, not to mention the situation of single mothers. The vagueness

of Article 9 in this area introduces the above-mentioned difficulties, inherent to the difference in procreation regimes and possibilities in the EU. Once again, in terms of civil status, there is a risk of global disarticulation in the European space, as a consequence of the issues already mentioned on the right to marry. *We insist, the consistency of an assurance of the right to procreate is not viable through the remission to a multiplicity of national regimes.* In fact, bearing in mind the relevance of Article 21 in this context, there appears to be a prohibition on any restriction regarding access to assisted reproductive techniques linked to sexual orientation, given that self-insemination or surrogacy are apparently the suitable means of procreation for lesbians and gays.

5. On the right to adopt a child, the Commentary of the Independent Experts, which dates back to 2006, states that "*it is not included de per si in Article 9 of the Charter.*" On the issue of adoption, in the opinion of the Experts, the remission to the national legislations does not seem to have been considered. However, the same Experts state clearly that the right to start a family may be interpreted as including the obligation of a State to allow adoptive procedures by couples that cannot have children (?). It incomprehensibly restricts the institution of adoption to the resolution of infertility problems, forgetting that, namely in Portugal, there are different forms of adoption (full, restricted, joint, singular, not to mention civil custody, which is close to restricted adoption but differs owing to the permanent contact between custodian and biological families), which may create many different problems, whether connected to discriminatory situations of adoptive parents, *e.g.*, related to homosexual couples, or adopted children (when a hierarchical filial status is created).

The truth is that adoption – unquestionably a dignified expression of family life – should not be, or so it is believed, disregarded in the enunciation of the fundamental rights recognised in the Charter (and in the ECHR). In 2008, in the case *E.B. v. France*, the ECtHR condemned France for not granting single adoption – an institution known to French law – to a lesbian mother living with her partner. The Court based its decision on the carelessness revealed by the French legislator regarding the indispensability of a heterosexist complementarity of parental roles, by precisely admitting the figure of single adoption. It is clearly a situation of discrimination, which naturally has to be protected by Article 9 of the Charter, *ex vi* Article 21, within the scope of the right to found a family.

The pondering of the best interests of the child and the extension of the right to adopt may create problems of intolerable disparity of regimes, and of attribution, once again flagrant, of the freedom of movement of the European citizen and family, as a result of the varied rules on marital status. The concerns expressed regarding the right to marry are entirely valid here, all the more so when some European countries allow full adoption by homosexuals, married or single, singularly or jointly. The Portuguese law, since February 29, 2016, began to allow adoption by homosexual couples, married or in a de facto relationship.

6. A critical overview of Article 9 of the CFREU confirms that, in terms of ensuring the fundamental rights to marry and found a family, we are faced with a principle that is merely remissive to national legislations, emphasising respect for the sociocultural diversity of the Member States. With this approach, Article 9 seems to renounce any material content for the fundamental rights in question.

If this were the case, it would be a guarantee practically void of content. Thus, it is necessary to match the minimum material content to the same rights, through the enunciation of basic principles specifically relevant to this subject.

7. On the material outline of the content of the fundamental rights contained on Article 9, we must take into consideration the *principle of non-discrimination* set out in Article 21 of the Charter, *maxim* in what concerns sexual orientation.

8. However, it seems possible to find the *highest common denominator of the right to marry and the right to found a family* in the following enunciation of principles:

a) Marriage would be applicable to a situation of *full partnership of two people*, not an exclusively heterosexual institution; the registered partnerships and so-called non-marital partnerships, *also corresponding to situations of familial nature*, should not discriminate against homosexual couples by admitting an equal regime as close as possible to the institute of marriage, yet always implying, at least nominally, a discriminatory attitude towards homosexual couples, if they cannot access marriage;

b) Medically assisted procreation would not injure the right to free development of personality and existential freedom, by forbidding access to single mothers and to homosexual individuals or couples, under the principle of non-discrimination present on Article 21. *For that matter, Artificial Insemination and Surrogacy would be the adequate means to ensure the right to procreate, respecting homosexual orientation;*

c) Concerning adoption, only *full adoption would be legitimate*, whilst it would not be considered compatible with the adoptive parents' dignity and with the best interests of the child to prohibit adoption by homosexuals, married or single. Likewise, discriminatory forms of adoption – undermining the legal protection of the adopted children – would not be permitted.

9. The fact is that before the mere remission of Article 9 to national legislations there is room for doubts that the decisions of the ECtHR and CJEU do not clarify, as regards the feasibility of carrying out a reading of Article 9 in the above-mentioned terms.

However, because the same normative principle requires respect for the sociocultural heterogeneity of the Member States of the EU in matters of family right, we should also legitimate the validity of a *norm*, which, in terms of private international law, would allow any European citizen to "choose" the legal system of any Member State adequate to his/her marital and family status, sheltering thus in this principle, *a circumscribed forum shopping*, in order to ensure – on a global level – the unity and inseparability of the marital status of any European citizen obtained through a free and informed choice. This is the only way to avoid the disarticulation of marital status when crossing borders, which is *incompatible with the principle of free movement of people in the European space*, and respect for the freedom and dignity of citizens (see Article 2 of the TEU).

10. From a processual point of view we must recognise that, after the Treaty of Lisbon, which foresees the accession of the EU to the ECHR, and refers the CFREU to primary law, regarding the protection of European citizens with respect to fundamental rights, the situation has not been facilitated.

First, because citizens' access to the Union's courts to scrutinise behaviours of the respective organs is restricted, in terms of legitimacy; second, because individuals have no active legitimacy, nor even a framework of infringement proceedings, nor

mechanisms of referred questions, to question the behaviour of the State in breach, unless through the ordinary courts of law of the Union – the competent national courts. Accordingly, either citizens' access to Union courts is widened or other adequate dispute-resolution mechanisms are created for the purpose, directly with the Union courts or through national courts.

Clearly it seems to be necessary to *increase the legal protective system of the European legal order regarding the protection of fundamental rights*, and on this point we endorse Maria José Rangel de Mesquita, namely when she fights "*for the clarification of CJEU's jurisdiction in matters of fundamental rights; for the due articulation between means of dispute and political means that can be used in case of violation of fundamental rights (...); for the widening of the active legitimacy of European citizens, specially in maters of action of annulment, when the question is the violation of fundamental rights, particularly by a normative act approved by the competent EU courts (...); maybe for the creation of new mechanisms, either on EU level or on Member State level, for the protection of fundamental rights, like, for instance, a complaint of non-compliance to the CJEU, a process of special non-compliance for violation of fundamental rights of European citizens, with restricted active legitimacy to the latest, or a special process of referred questions, mandatory to a national judge (...).*"

11. Finally, what has been said is conclusive evidence for us that although these are solutions of a legal nature, recommended measures concerning the material content for the right to marry and the right to found a family, or also regarding the possible sheltering of a selective principle like forum shopping, represent, at the current time, the most feasible and workable solutions, rooted in *the necessary substantialization of any right considered fundamental* and/or in *respect for personal freedom and dignity in the choice of an adequate personal and familial legal system*, whilst preserving the specific legal and sociocultural characteristics of the States regarding family law.

Carlos Pamplona Corte-Real & *José Silva Pereira*

ARTICLE 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

1. *Relevance and historic precedent*. Freedom of thought, conscience and religion could not be omitted from the CFREU, representing as it does an essential component of the realisation and guarantee of individual freedom against oppression, persecution, and intellectual, moral and religious discrimination. Its integration is in line with all the modern national and international declarations of human rights, since the Virginia Declaration of Rights in 1776, and the Declaration of the Rights of Man and of the Citizen, in 1789, to the UN ICCPR, of 1966, encompassing the UDHR, of 1948, and the ECHR in 1950, just to refer to the most remarkable instruments on human rights since the dawn of the constitutional era at the end of the 18th century.

As reiterated by the ECtHR, freedom of thought, conscience and religion is one of the foundations of the "democratic society" that underlies the conception of the ECHR and its inherent pluralism (judgment *Kokkinakis v. Greece*, 1993).

The EU is a multi-national and multi-religious Union of States where many different relationships between State and religion coexist. Due to this fact, freedom of thought, conscience and religion gains growing importance, as it securely integrates the core of the values on which the Union is based and which are common to the Member States, in accordance with the list contained within Article 2 of the TEU, where human dignity, freedom, democracy, equality, rule of law and human rights, as well as pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men are listed.

2. *Sources and interpretation*. As explicitly stated in the official annotation to this Article of the Charter, on freedom of thought, conscience and religion, the sources are, respectively, Article 9(1) of the ECHR, which paragraph 1 of Article 10 CFREU literally reproduces, and the constitutional traditions of the Member States of the European Union, reflected in paragraph 2 (conscientious objection).

Therefore, pursuant to Article 52(3) of the Charter, paragraph 1 has the same meaning and the same scope as the correspondent precept of the ECHR, unless the EU law grants it a wider protection (this is in fact the case with the provision for conscientious objection). Correspondingly, according to Article 52(4) of the Charter, paragraph 2 of Article 10 (conscientious objection) must be interpreted in harmony with its understanding in the constitutional traditions common to the Member States. Given that the paragraph 2 expressly invokes the "national laws" that govern the exercise of conscientious objection, Article 52(6) of the Charter is here relevant, according to which "full account shall be taken of national laws and practices" in its interpretation and scope.

Even though Article 52 does not expressly state as such, with regards to the interpretation of the ECHR, the case-law of the ECtHR should, when it exists, be followed. The reason is that if the EU adheres to the ECHR, according to Article 6(2) of the TEU, the Court of Strasbourg may be called to assess a case. Furthermore, it is important to note that in the case of conscientious objection the interpretation of the national Constitutions and laws must be guided by the respective national case-law, namely from the Constitutional Court or equivalent. Nevertheless, neither the Union's Courts nor the Member States' Courts, in the given case, are strictly bound by the judicial precedents; always enjoying their own margin of interpretative autonomy.

3. *Content and reach*. Whilst they are all related, there are, in fact, three rights acknowledged and guaranteed by this precept: freedom of thought, freedom of conscience and freedom of religion.

The border between these three dimensions is not easy to establish and neither is this question essential from the point of view of the legal protection these rights benefit from. However, the basic ideas of each dimension should be outlined.

Freedom of thought pertains to freedom of choice and personal opinion in general, in all the domains. Freedom of conscience consists of freedom of moral or philosophical conviction, implying the freedom to access to certain structured sets of values. Freedom of religion is characterised by freedom of belief (or not) in a divinity and of allegiance to a faith or to a community of believers in the same religious faith.

All these three dimensions of intellectual, moral and religious freedom have two characteristic components:

- freedom of personal opinion and choice (freedom to think, freedom of conscience and freedom of religious belief);
- freedom, and the right, to assume and manifest choices and to conduct life according to those choices, especially in the case of freedom of conscience (convictions) and religion (beliefs).

For example, a person does not only have the freedom to be a pacifist but also the right to express that conviction and to behave in accordance therewith; one does not only have the freedom to choose a religious belief but also the right to express and to act in accordance with the religious belief.

This distinction between freedom of choice and freedom of expression is explicitly derived from paragraph 1; the former concept is expressed in the first sentence and in the first part of the second sentence and the latter in the final part of the second sentence ("freedom to manifest religion or belief").

As is apparent, the distinction is essential, insofar as freedom of choice is absolute and does not allow for restriction, whilst freedom of expression can be restricted with larger or lesser latitude. The absolute nature of the freedom of choice ensures the intellectual, moral and religious self-determination of people against any system of official indoctrination, of control of thought or the imposition of a system of moral or religious values.

Firstly, no one is obliged to reveal or to express intellectual, moral or religious views (right to reservation).

In the second place, the two dimensions of freedom of thought, conscience and religion possess two distinct facets:

- the internal or private dimension, also known as "internal freedom" or *forum internum*, that consists of the freedom of to believe, choose and conduct one's private life;

- an external dimension, also known as "external freedom" or *forum externum*, that is the public expression and manifestation of opinions, or convictions or religious beliefs, individually or collectively.

This distinction does not necessarily coincide with the previous distinction, given that both freedom of thought and choice and freedom of expression can be private or public.

This second distinction is also properly demarcated in the second part of paragraph 1, when in the second sentence reference is made to the freedom of expression of religion or belief "in public or in private."

In its external dimension, the freedom of thought, conscience and religion involves the exercise of other fundamental freedoms, such as the freedom of expression and opinion, the freedom of reunion and demonstration and the freedom of association. The first is not properly safeguarded without the others.

It is superfluous to state that if all have the right to announce and express opinions, or convictions or religious beliefs (or the absence thereof), no one is obliged to do so. Freedom of thought, conscience and religion covers the right to for each person's privacy in this regard. The case might be different regarding membership of collective organisations working towards the implementation of those opinions (see below, the restrictions theme).

Finally, like the other individual freedoms susceptible to collective action, freedom of thought, conscience and religion possesses two modes of expression:

- an individual expression, through singular actions and conduct (expression of opinions or convictions, acts of worship, etc.)
- a collective expression, through joint actions (demonstrations or collective actions, such as prayers, peregrinations, etc.) or through organisations established for that purpose (fraternity of conviction, such as masonic organisations, religious congregations, etc.), many of them with transnational expression and recognition, such as the Roman Catholic Apostolic Church.

Moreover, this distinction is expressed in the second part of paragraph 1 of this precept, when it refers to "freedom, either alone or in community with others and in public or in private, to manifest religion or belief."

When the collective manifestation of the freedom of conscience or religion implies organised forms of gatherings, as with churches in the case of freedom of religion, it naturally includes freedom of organisation, freedom to choose leaders and ministers, etc., without public entities have a power of veto or intervention.

The freedom of religion in particular. Given its troubled history (persecution and religious wars, etc.), given the potential for conflicts it still represents today and given the diversity of traditional and national regimes, even in the heart of the European Union, the freedom of religion assumes some special traits.

Firstly, freedom of religion encompasses not only the freedom to have a religion (positive freedom) but also the freedom not to have any (negative freedom), the freedom to assume or change religion (conversion) and the freedom to abandon a religion (apostasy). Freedom of religion is the opposite of mandatory religion, allowing for freedom to join or not to join an official religion.

Freedom of religion covers the freedom not to have religion (*liberty of religion and liberty from religion*), the freedom to abandon or to change religion and religious pluralism, without which freedom of religious choice does not exist.

Besides its private or internal dimension, freedom of religion naturally covers an external dimension, of expression and public organisation of beliefs and religious practices. The more characteristic component of that external dimension is the existence of congregations or religious organisations (churches), as well as the building and function of establishments and places of worship (temples).

Therefore, the freedom of religion demands, among others, the freedom of religious organisation and the freedom to establish places of worship. Neither can be subjected to discretionary administrative authorisation regimes. Notwithstanding either can be subject to registration requirements and the prior verification of legal requirements. It is not up to the State to judge the merit or the convenience of religions.

The freedom of religious organisation protects autonomy *vis-à-vis* public power, since this power cannot interfere in the religious institutions nor interfere in terms of their leadership [judgment (ECtHR) *Hasan and Chaush v Bulgaria*, 2000].

The freedom of religion also covers the freedom of communication with believers and with the general public, the freedom of educating believers in accordance with the principles and values of that religion, as well as the freedom of diffusion and propagation of religious beliefs.

The freedom of religious communication covers the freedom to edit books and publications and to create exclusive means of communication. This freedom, however, does not extend to the attribution of public funds, nor to the privileged concession of means of communication of limited access (such as radio and open signal television).

The freedom of religious education encompasses not only the freedom to create religious schools, namely destined to train ministers or other leaders of worship and of its own believers, but also the freedom to choose schools of general education with religious orientation, without the imposition of mandatory attendance at official schools without religious orientation. That freedom expressly results from Article 14(3) of the Charter, concerning the right to education, when it established that it covers, according to national laws, "*the freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions*", namely opting for attendance at private schools that follow the respective religious orientation.

The freedom of diffusion and propagation of religious beliefs admits religious proselytism, provided it does not infringe upon the personal freedom of third persons nor resort to offering material enticements or exerting undue pressure [judgment (ECtHR) *Larissis v. Greece*, 1998]. It is debatable whether this freedom allows for commercial religious publicity, as witnessed in certain countries when new religions have sought to affirm themselves. However, in an Irish case the ECtHR accepted the official interdiction of religious publicity (judgment *Murphy v. Ireland*, 2003).

Conversely, anti-religious proselytism is also admitted, as long as it does not offend the personal dignity of believers, nor does it harm their freedom of belief. Within that boundary, blasphemy cannot be prohibited (much less criminalised) in a society marked by freedom and religious pluralism. If individual beliefs are worthy of respect, religions are not immune to criticism, condemnation or to public derision. That is part of the freedom of thought and opinion, as well as of

the negative freedom of religion. Nevertheless, in the controversial judgment *Otto-Preminger-Institut v. Austria*, the ECtHR decided that a prohibition on the screening of a movie that ridiculed Catholic dogmas was not contrary to the Convention, ruling that it is up to the State to ensure the "peaceful enjoyment" of the freedom of belief. But it is still not proven that the freedom of religion granted by Article 9 of the ECHR and now in Article 10 of the CFREU extends to religion's immunity to criticism.

Conscientious objection. In contrast to the ECHR, the CFREU recognises the right to conscientious objection (paragraph 2 of the Article under analysis), in concert with its acknowledgment and constitutional or legal guarantee in the generality of the EU Member States. It is one of the instances in which the CFREU goes beyond the ECHR.

The right to conscientious objection allows for a dispensation from compliance with certain official obligations, namely (but not only) the provision of military services for reasons of conscience (not only for religious reasons). It is a special guarantee not only of the freedom of religion but also of the freedom of conscientious objection (not covering, however, the "simple" freedom of thought). Without the right of conscientious objection, the general legal obligations that conflict with religious dictates implicitly function as limitations to the freedom of conscience and religion.

However, the Charter steps back from establishing the content and reach of such right, remitting to "*the national laws governing the exercise of this right*" (naturally including the national Constitutions, when applicable, as in the case of the Portuguese Constitution). Apparently, the Charter limits itself to "endorsing" the acknowledgement and the guarantee of that right at a national level, which is variable from country to country.

This reference to national laws gives rise to two problems. The first consists of the possibility of such a right not being acknowledged, or guaranteed, in one or more Member States, since they are not effectively bound to do so by the ECHR. The second is the verification, given the diversity of the national regimes, of the content and the reach of the guarantee of such a right regarding the Union and its institutions. The solution to the first problem may depend on the resolution of the second.

It would be illogical for the Charter to acknowledge a fundamental right that did not have value before the Union. If the first addressee of the Charter is the Union itself and its institutions, the acknowledgement and the guarantee of a right to conscientious objection implies that it can be upheld against the Union and its institutions, so the Charter's beneficiaries, starting from the employees and dependents of the Union, must be allowed to invoke a right of conscientious objection against obligations resulting from the Union law. However, given that the Charter remits to national law, the definition of the content and reach of such a right is left to the doctrine and to the case-law of the CJEU, to "distil" from the national laws a substantive minimum (a minimum common denominator to the generality of the national laws) that may be considered the right of objection at the Union level.

After resolving that problem – which does not appear to be a simple task –, such right to conscientious objection will not only be valued before the Union and its institutions but also before the Member States and the respective authorities

when applying EU law, in accordance with Article 51(1) of the Charter. This excludes cases where national protection of the right to conscientious objection is wider or more exigent, in which cases the national law will naturally take preference, since by applying the Union's law Member States are also bound by internal law (mostly through constitutional law) unless it is incompatible with the European law.

4. *Guarantee of freedom of thought, conscience and religion*. Typically, as a right of freedom and personal autonomy, the freedom of thought, conscience and religion is an essentially "negative" right, resulting in a right to non-intrusion or non-interference from public power in a person's sphere of freedom of choice and actions.

The less that the State prohibits, interferes or regulates their acknowledgement and exercise the wider the amplitude of the freedoms the individual enjoys. Safeguarding the possibility of restrictions (that will be referred to below), the guarantee of these freedoms prohibits the State from imposing any thought, conviction or official belief, prohibits the State from subjecting these freedoms to a discretionary authorisation, or from banning or sanctioning the pursuit of any religion, and prohibits discrimination against those who profess certain ideas, convictions or religious beliefs.

In contrast, public power does not have any positive obligation (duty to act or to intervene) to support or to foster the freedom of thought, conscience and religion. It is not up to the State to finance churches or to build or maintain temples, to subsidise religious schools or to decree religious holidays, much less to organise acts of worship (masses, etc.), or conduct religious or anti-religious proselytising.

Despite having the ability to support communities of believers or religious organisations, or alike, in the absence of any constitutional impediment and whilst ensuring that the principle of non-discrimination is observed (see *infra*), the public power, however, is not obliged to do so. The guarantee of the freedom of thought, conscience and religion does not include a right to support or sustenance from the public power.

Positive obligations of the public power. The first exception – if it even qualifies as such – to this posture of pure abstention relates to the exercise of religious freedom in public services, namely in situations of confinement and restriction of movement, such as in the case of hospitals, prisons, military establishments, and military operations. The public power has no obligation to proceed itself with the provision of religious services or the organisation of acts of worship – sealed when a principle of State secularism or of the separation of the State and churches prevails – but it is obliged to provide the logistic framework (access to ministers, places of worship, etc.) that allows followers of the respective religious organisations to observe religious obligations and to practice acts of worship.

In these circumstances, although it is not up to the public power to ensure religious assistance, it is responsible for removing the obstacles that may prevent those interested from observing their religious obligations.

A different consideration applies concerning the duty of the public power to protect the freedom of opinion, conscience and religion against the attack of third persons (verbal or physical) that may prevent its exercise, harming the freedom of choice (coercion or threats to join or not to join a religion, insults to the believers, etc.) or the freedom of manifestation (attacks upon places of worship, etc.).

As with the other freedoms in general, the public power does not only have the duty to respect them but also the duty to enforce respect on the part of third parties (right to safety in the exercise of individual freedoms). Everyone has the right to exercise, or not to exercise, their individual freedoms, and to be protected from threats or attacks by others.

However, such duty, in favour of the free exercise of individual freedoms, cannot be confused with a power of the State to interfere in the "competition" between religions, by defending religions from critiques, however disrespectful they might be. Freedom of religion includes the freedom to criticise or to censure religions (through words or artistic expression), which flows from the freedom of expression and opinion.

Non-discrimination. An unavoidable dimension of the freedom of thought, conscience and religion is the principle of non-discrimination; no one should be penalised or privileged by the public power (and in certain circumstances also by private entities) due to the fact that he/she has certain thoughts, convictions or religious beliefs.

This explicitly results from Article 21(1) of the Charter, whose caption is precisely "non-discrimination", establishing that "*any discrimination based on (...) religion or belief, political or any other opinion (...) shall be prohibited.*" The same idea is repeated in Article 10 of the TFEU that established a transversal clause to combat religious discrimination (among others) in all the Union's policies and activities.

This is an essential guarantee of the freedoms at stake, especially of the freedom of religion. If anyone can be penalised or privileged, especially by the public power, for professing or for not professing a certain religion, it is clear that freedom of choice and its individual exercise is strongly conditioned or limited. Discriminatory measures may, for example, exempt the follower of a certain religion from certain obligations, or provide privileged access to certain advantages, or subject non-believers or the followers of other religions to additional charges or to specific conditions.

Equally discriminatory are the measures imposed on all, regardless of the religion professed, to practise certain official acts of a religious nature or those pertaining to a certain faith. This would be the case, for instance, with official oaths of a religious nature [judgment (ECtHR) *Buscarini v. San Marino*, 1999] or the imposition to practise acts of personal registration (births, deaths, etc.) or religious wedding ceremonies, etc. In truth, in any of these cases, those who are not believers or who do not profess that religion see themselves obliged to practise acts of a religious nature with which they do not identify.

In the same way, the public powers cannot make decisions that imply an inequality of opportunity due to a choice of religion. Even before the CFREU existed, the CJEU decided that the European institutions must avoid the organisation of recruitment competitions on religious holiday, since believers are prevented from participating (judgment *Prais*, 1976).

The discrimination prohibition not only covers public powers but also private relations, at least when relations of asymmetrical power are involved ("horizontal effectiveness of the fundamental rights").

Freedom of religion and religious discipline. The accession to a religion implies, for the believers, the acceptance not only of its prescriptions in terms of rites and rituals (prayers, fasting, etc.) but also of the respective norms and disciplines of

behaviour (dietary rules, clothing, financial contributions, family behaviour, etc.). Norms and obligations apply to an even greater extent to ministers of religion (for example, exclusivity, obedience to hierarchy, uniform, celibacy, etc.). The infraction of these norms and obligations may lead to internal sanctions.

Several of these religious obligations involve the limitation of individual freedom. However, as a consequence of the free and reversible religious choice of believers, public power must not be able to interfere in the internal normative autonomy nor in its disciplinary power, unless it amounts to a violation of human dignity (Article 1 of the CFREU) or of values that, according to Article 9(2) of the CFREU, may justify restrictions to the freedom of religion.

It is obvious that those norms and rules are only relevant in the scope of that religious community. It is not up to the State to provide legal enforcement in the context of believers (as in Portugal during the period of the *Estado Novo*, with the prohibition of divorce for Catholic marriages), much less in terms of general application (as with the official adoption of *Sharia* law in some Islamic countries), nor is it up to the State to carry out religious sanctions.

5. *Beneficiaries and addressees. A universal personal right*. As the initial words of paragraph 1 ("*everyone has...*") clearly convey, all people, without exception, benefit from the freedom of thought, conscience and religion.

It is not an exclusive right of European citizens – *i.e.*, the nationals of a Member State of the Union [Article 20(1) of the TFEU] – and foreigners that have a right of residence in the Union's territory, but of all people who, in one way or another, are subjected to the Union's jurisdiction, including political asylum seekers or undocumented immigrants.

On the other hand, as a personal freedom, this right protects, in principle, individual persons, even when it comes to collective exercise. However, especially in the cases of freedom of conscience and freedom of religion, that involves the creation of specific associations and organisations, such as churches, that can be a fundamental vehicle for the realisation of those freedoms. That is why those associations and organisations can also be the holders of those same freedoms and benefit from the protection afforded to individuals against unjustified persecutions and discriminations [see, in this context, the judgment (ECtHR) in the case *Cha'are Shalom Ve Tsedek v. France*].

Recipients. Similarly, to other personal freedoms, freedom of thought, conscience and religion aim, above all, to defend freedom and individual autonomy before the public powers. In the case of the CFREU, that means the Union's institutions, bodies and agencies, to which the Charter applies, but also the Member States' authorities, which are bound to the Charter when it comes to applying EU law.

This means that the former, in the exercise of the legislative, and administrative and judicial powers of the Union, as well as the latter, in the exercise of the legislative, administrative and judicial powers of applying the Union's law at a national level, are bound to respect the freedom of thought, conscience and religion, as set out in the Charter.

Laws and other regulatory acts of the Union, as well as executive acts and judicial decisions, will be invalid, and may generate liability for damages, when they infringe the Charter in general and this precept in particular. Being part of the "primary law" – *i.e.* constitutional law – of the Union, the Charter prevails over the "secondary law" and over the other secondary acts of the Union. The same

goes for the regulatory acts and other decisions at the level of the Member States destined to give application to the Union's law at a national level.

The individual freedoms can bind private entities, not just public bodies, when certain circumstances are observed. In accordance with the theory of "horizontal effectiveness", or of the effectiveness towards third parties, the individual freedoms may also apply to private entities that have the power, in law or in fact, to interfere in the ambit of individual freedom. In the case of the freedom of thought, conscience and religion, this binds religious entities in relation to the respective believers and third parties, and also binds other entities with the power to intrude in the individual sphere, such as employers, in relation to respect for the freedom of employees.

Finally, as seen above, since the individual freedoms require respect for each person's choices and beliefs, they impose upon all, indiscriminately, a duty of abstention from impediments or attempts to limit others' freedom. In that sense, the freedom of thought, conscience and religion in its "negative" dimension (right to non intrusion from others), binds everyone and has everyone as recipient.

6. *Freedom, non-discrimination and religious impartiality of the State. Neutrality and impartiality of the State.* In contrast to the United States, where freedom of religion is necessarily associated with the so-called Establishment Clause (separation of State and Church), many European States have "established churches" (Denmark and Greece, among others). The freedom of religion coexists with the regime of separation and with regimes of official religion.

However, the freedom of religion places demands upon the relationship between State and religion. From the individual freedom of religious choice and from the principle of non-discrimination (see above) it necessarily flows that the public power must adopt a fundamental stance of religious neutrality and impartiality, in a way that does not constrain the former and does not infringe the latter.

Denying the right of the State to impose official thinking, or an official morality or an official religion is not enough. The State's neutrality and impartiality also prevents it from establishing public obligations of a religious nature, discriminating against people according to their moral or religious choices, etc. For that same reason, when the State offers certain advantages or facilities to the believers of a certain religion (for example, religious schooling, religious assistance in public establishments, official religious holidays, official collection of "religious taxes", financial support to religious schools, official recognition of religious marriages, dispensations for religious ministers from public obligations, etc.), it must do the same for the believers of other religions, observing a principle of proportionality.

The principle of neutrality and impartiality of the State is especially relevant in the case of public education. In Portugal, in addition to not allowing a faith-based orientation in the public school system (Article 43 CPR) there can also be no obligatory "school prayer" nor mandatory attendance at classes on religion, at least when mandatory for all (although this does not apply to the moral and social classes without a religious orientation). In one sense the religious neutrality of the State regarding education may impose a restriction on teachers' (and even students') freedom of religious expression inside the school.

Freedom of religion and religion of the State. Neither the ECHR nor the CFREU impose a principle of secularism upon the State, or the public power in general, nor a principle of separation between State and religion, such as, for instance, France and Portugal have enshrined in their national laws.

Although the separation of the State and religion, and secularism, are a safeguard of personal freedom of religion and religious non-discrimination, those freedoms may still be compatible with the Confessional State or a State religion, as observed in several European countries, when fundamental requirements are met:

- no obligation to belong to the official religion and no prejudicial treatment for those who do not belong;
- the existence of religious pluralism and freedom to hold beliefs other than the official religion;
- the absence of religious discrimination in the matter of obligations and public rights, in the terms above mentioned;
- no proselytising by the State in favour of the official religion, namely through a policy of religious indoctrination in public schools (judgment (ECtHR) *Kjeldson v. Denmark*, 1976).

It follows that the State may officially be linked to a certain faith or church, as long as that link does not result in any discrimination regarding the individual exercise of the freedom of religion and as long as the State maintains an essential religious neutrality or impartiality. The ECHR had the opportunity to highlight this point on several occasions, referring, namely, to the State's role in the "*neutral and impartial organising of the practising of the various religions, denominations and beliefs*" (judgment *Refah Partisi v. Turkey*, 2003).

However, it remains unclear whether the State's identification with a certain religion, therefore established as official, does not in itself represent a violation of the necessary religious neutrality and impartiality of the State. The issue has been raised mainly about the ostentatious display of religious symbols in public establishments (courts, schools, hospitals, prisons, etc.). In fact, in the famous case *Lautsi v. Italy*, from 2011, the ECtHR, after, in the first instance, finding the display of crucifixes in public schools (in the case the Italy) incompatible with the freedom of religion and with the non-discrimination in religious matters, ended up accepting on appeal its compatibility, in a decision whose reasoning leaves a lot to be desired. The Court recognises that the display of crucifixes in classrooms provides an advantage to the preponderant religion in Italy but concludes that it is within the State's "margin of appreciation" in the configuring of its duty of religious neutrality.

Clearly such issues do not arise in the countries ruled by the principle of secularism or of separation of the State and churches, since identification by the State with any religion would be considered unacceptable, likewise the official use of symbols or signs of religious identification.

The case of the European Union. Although the CFREU, as well as the ECHR, does not explicitly establish any principle of separation between the EU and churches, it is easy to conclude that this is the case.

First, in contrast with the ECHR, it is the Charter that explicitly refers in Article 22, soon after stipulating the principle of non-discrimination, to the need for respect for "*religious diversity*" (alongside cultural and linguistic diversity). Thereafter the Treaties of the European Union do not leave any margin for doubts

about the religious neutrality and impartiality of the Union and of its institutions, bodies and agencies. Notably Article 17 of the TFEU, after declaring that the Union respects and does not interfere with the status that the churches benefit from at a national level (paragraph 1), as well as the philosophical and non-faith-based organisations (paragraph 2), limits itself to stipulating that the Union recognises "*their identity and their specific contribution*" and aims to "*maintain an open, transparent and regular dialogue with these churches and organisations.*" There is not the slightest indicator of any privileged relationship, much less an official one, with any church or organisation.

It is worth remembering that, at the time of the preparation of the failed "European Constitution" (2004), the proposal of an invocation of God in its preamble was rejected, giving way to the invocation of the "*cultural, religious and humanist inheritance of Europe*", which afterwards became the preamble of the Treaty on the European Union, as a result of the Treaty of Lisbon, in 2007.

Clearly, whilst respecting the different status of the relationships between State and religion in its Member States, the EU decidedly adopted the logic of religious separation, neutrality and impartiality. Therefore, there is no official preference for any religion at the Union level. Any decisions that involve the Union in religious activity, including the adoption of religious symbols in establishments or services of the Union, or the organisation of religious acts relating to any faith (masses, prayers, etc.), are unconstitutional.

This, naturally, without prejudicing employees and officials in fulfilling their religious obligations, as well as protecting the effectiveness of the right to conscientious objection, in the terms above seen.

7. *Restrictions to the freedom of thought, conscience and religion. Conditions and requirements of the restriction*. In keeping with the other precepts in the Charter that enunciate specific fundamental rights, Article 10 is also silent about the restrictions that are admissible to the freedom of thought, conscience and religion. However, it would be totally erroneous to assume that this freedom is not susceptible to restriction.

On one hand, the rules under Article 52(3) of the Charter fully apply, according to which the rights transposed, as in this case, from the ECHR have the same sense and scope. As such, in accordance with Article 9(2) of the ECHR, "*freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*"

Besides expressly authorising the restriction of this freedom, the same precept also established the conditions and requirements of the restrictive measures, *i.e.*, respectively, the scope and the objectives that may justify the restrictions and the rules that limit those restrictions (principles of legality and of necessity).

On the other hand, the Charter contains a subsidiary general rule concerning the restriction of rights and freedoms recognised therein [Article 52(1)], which fundamentally coincides with the said specific clause of Article 9(2) of the ECHR, apart from two differences: (i) introduction of respect for the "essential core" of the right or freedom restricted; (ii) substitution of the principle of necessity with the principle of proportionality, whilst referencing their convergence. It is to be understood that both precepts can and may be combined, bringing together the requirements of both.

Overall, the following conclusions can be drawn:

a) Regarding the object of the restrictions, Article 9(2) of the ECHR is clear in the sense that these can only focus on the freedom to express convictions or religious beliefs (namely "external" or public expression), but not on the freedom of choice in the matter of conviction or religious belief, a dimension that is insusceptible to restriction [judgment (ECtHR) *Buscarini v San Marino*, 1999];

b) The objectives that may justify the restrictions are indicated in Article 9(2) of the ECHR, namely public security, protection of the public order, health and morals or protection of others' rights and freedoms, noting the omission of the State's security, which is covered in other restrictive norms of the ECHR;

c) Regarding the requirements and limits of the restrictions, these are the following:

i) To be properly provisioned by law (or in infra-legislative norm adopted under the terms of the law), and not dependent upon the authorities' arbitrariness;

ii) To be necessary for the safeguarding of the said objectives in a democratic society;

iii) To observe the principle of proportionality, not imposing more sacrifices than those strictly necessary to attain the said objectives;

iv) To safeguard the essential core of the freedom of thought, conscience and religion, in each case.

Specific restrictions. It is important to mention the more typical hypotheses of admissible or non-admissible restrictions to the freedom of expression of thought, conscience and religion, as discussed by legal doctrine or considered by ECHR case-law.

The more radical restriction is the possible inadmissibility of "sects" or of "religious fundamentalism" expressions. What these have in common is ultra-orthodox radicalism, religious intolerance, aggressive proselytism, "totalitarianism" (covering all the dimensions of human conduct, such as the Islamic *Sharia* law), hostility towards other faiths and radical discrimination against women. Restrictions upon the expression of such religious choices may be justified given their capacity to undermine the values enunciated in Article 9(2) of the ECHR. In the previously mentioned case of *Refah Partisi v. Turkey*, the ECtHR considered dissolution of an organisation that expounded *Sharia* law admissible.

There are restrictions, equally justified, if not mandatory, designed to prevent religious manifestations by certain faiths that severely offend human dignity, personal self-determination, or physical or moral integrity (such as feminine genital mutilation or the circumcision of male children) or basic principles of equality such as, for example, gender discrimination or segregation, polygamy, barring girls from education, and similar.

Restrictions to the freedom to wear religious clothing, for safety or public order reasons, such as the prohibition of the Islamic face veil in public (France) or other similar restrictions of an occasional nature have been considered admissible, as in the case *Phull v. France*, judged by the ECtHR in 2005, concerning the obligation imposed upon a Sikh to remove his turban for security purposes in an airport.

More controversial is prohibiting the use of symbols or signs of religious identification, including clothing (the case of the feminine Islamic headscarf) in

public establishments. However, it is important to distinguish between the State's officials and employees (teachers, etc.), where the prohibition can easily be justified by the need to preserve the religious neutrality of the State and to prevent improper pressures upon the religious freedom of the users of the public services – as was the case in the judgment of the ECtHR *Dahlah v. Switzerland*, from 2001, regarding the interdiction on the use of the Islamic headscarf by a teacher – and the situation of the users of public services; for example, the prohibition of the Islamic headscarf for university students in Turkey and the ban on conspicuous religious symbols for students in France (primary and secondary schools), where the prohibition is considered dubious, not to say unjustified. Nevertheless, when it was called to decide on Turkey's case, the ECtHR considered the said restriction admissible (judgment *Leyla Sahin v. Turkey*, from 2004).

Less controversial are the restrictions connected with the recognition and official registration of religious faiths or congregations, albeit in the terms recognised by the national laws, as long as these are not discriminatory or disproportionate. The same goes for the restrictions on the practice of acts of worship in public places.

The case of the conscientious objection. As we have seen, in contrast to the ECHR, the CFREU includes recognition of conscientious objection, although in the terms acknowledged by the national laws. As seen above, the problem consists in defining the extension and the reach of the recognition of such right.

If the Charter only guarantees the freedom of conscience as guaranteed by the law, it does not raise the problem of the restriction of the right to conscientious objection, since the notion of restriction supposes the limitation of a right that has a wide scope guaranteed by a Constitutional or by an international instrument.

In the specific case the inverse is true. Beyond those cases where the law recognises it, the right to conscientious objection is not applicable, so we cannot talk about the restriction of something that does not exist. Therefore, the rule is: moral convictions or religious beliefs can only justify a waiver from general legal obligations (military service, vaccines and medical treatments, etc.) in the cases in which the right to conscientious objection is legally recognised (although the law has to provide for a minimally relevant scope). Implicitly, that means that, outside the legally recognised cases of conscientious objection, the general legal obligations can function as a general limit to the freedom of conscience and religion when in conflict with the moral or religious dictates of persons subjected to those obligations.

It is unnecessary to underline that Member States, when bound by the Charter, in the application of the Union's law, must respect the protection of conscientious objection in the most exigent terms possible under their constitutional and internal legislative order, as in the case of Portugal.

8. *Regulation of the freedom of thought, conscience and religion at the European Union level*. According to Article 51(2) of the CFREU, the Charter does not extend the remit of the Union. The recognition by the Charter of the rights and freedoms enunciated there does confer upon the institutions of Union any power of legislative regulation beyond the scope of the TFEU. The legal regime of religions, and their organisation, remains exclusively in the hands of the Member States. Article 17 of the TFEU is emphatic in the affirmation that "*the Union respects and does not prejudice the status under national law of churches and religious associations or*

communities in the Member States" (para. 1), likewise "*philosophical and non-confessional organisations*" (para. 2).

That does not mean that the Union does not have competence to regulate certain aspects of that freedom, as long as the aspects are relevant to the performance of the regulatory tasks of the Union in the areas of its competence such as, for instance, work conditions in the institutions of the Union, non-discrimination in the workplace, immigration and asylum, education, measures against racism and xenophobia, etc. Article 19 of the TFEU expressly establishes the competence of the Union to take the necessary legislative measures to combat various forms discrimination, including discrimination against religion or beliefs (para. 1), or to support the Member States in doing so (para. 2).

For example, long before the "constitutionalisation" of the CFREU, Directive 2000/78/EC of 27 of November 2000, on equality of treatment in employment, already prohibited discrimination at work on the grounds of religion or beliefs, amongst others. In the same way, the Framework Decision of the Council no 2008/913/JHA, of 28 of November 2008, on combatting certain forms and expressions of racism and xenophobia via criminal means, stipulates the criminalisation of the incitement to violence and to hate for religious motives, among others.

A question remains as to whether the obligation to maintain an "*open, transparent and regular dialogue with these churches and organisations*" [Article 17(3) TFEU] does not provide sufficient grounds to regulate the regime of recognition and relations with these organisations at the European Union level.

Vital Moreira

ARTICLE 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

1. Freedom of expression under the Article in question is broad and inclusive, encompassing freedom of information and freedom of the media (traditionally referred to as freedom of the press).

In fact, although the title of the Article refers to freedom of expression and information separately, it is certain that, in paragraph 1, the text explicitly states that freedom of expression includes, on the one hand, freedom of opinion and on the other, the freedom to receive and impart information and ideas.

In addition, although not expressly referred to in the title of the Article, freedom of the media is separately identified in paragraph 2 of the Article, referring to the exercise of an aspect of freedom of expression whose impact on people, because of its dimensions and powerful potential to shape opinion, needs a more specific protection.

Thus, in speaking of free speech we have to understand it within this comprehensive perspective, corresponding to a notion of freedom of expression in the broad sense.

Freedom of expression, in the various facets enshrined in this Article, always assumes a negative dimension, *i.e.* taking the form of a guarantee that obstacles to the exercise of freedom will not be raised, and a positive dimension, which implies the right to provide the means necessary to exercise freedom of expression, and, in the case of the implementation of these freedoms through the media, this takes on a particular significance in that it requires access to the media, which is often conditioned.

There is always an underlying active facet in freedom of expression (freedom to express ideas, opinions or information) and a passive facet (freedom to access and receive the communication of ideas, opinions or information).

2. Freedom of expression, in the broadest sense, is inescapably linked to freedom of thought, conscience and religion (under Article 10 of the CFREU), in that, especially in terms of freedom of opinion, it is only understood while achieving a freedom of thought, that is, as the external exercise, or outsourcing, of a way of thinking, an understanding, of a conviction or information.

In this regard it should be noted that opinions and ideas differ from the convictions, beliefs or ideologies (philosophical, moral, political, social, economic or scientific), perceived in Article 10 of the CFREU, insofar as these beliefs, owing to their sensitivity and depth, assume a certain degree of strength, of consistency, of importance that are not in the realm of mere opinions and ideas.

Along with the "generic" freedom of expression under this Article, the Charter also provides for the protection of certain specific manifestations of the same, namely: artistic and literary freedom and the freedom to disseminate works of art (Article 13); the freedom to conduct scientific research and academic freedom (also in Article 13) and freedom to teach and create educational institutions (Article 14); and finally the freedom to exercise a profession (Article 15). Nowthstanding the specificity of these freedoms the broad freedom of expression foreseen in this Article serves as a general framework and essential foundation of these specific provisions.

In addition, with regard to freedom of information, in its active facet of outsourcing and its passive aspect of internalization, there are specific expressions of that freedom in the Charter, both on the transmission of information and the access to documents and institutional information.

Accordingly the following are specifically foreseen: the right to information and consultation of employees in the company (Article 27); the right of every person to have access to processes relating to themselves [Article 41, paragraph 2, point b)]; the right to address the institutions in any of the languages of the Union and receive an answer in the same language (Article 41, paragraph 4); the right of access to documents (Article 42); the right to petition the European Ombudsman and the European Parliament (Articles 43 and 44); and the right to counsel in court (Article 47, second paragraph, *in fine*).

In light of the many facets of freedom of expression specifically provided for in the Charter, the freedom proposed by this Article is outlined by a process of elimination, and consists (given the wording of paragraph 1 of Article 11 of the CFREU) in freedom of opinion and freedom to receive and impart ideas and information.

Both aspects are independent, distinguished by the closer relationship the latter has with the democratic principle and the idea of formation of public opinion, and moreover the presence of a cognitive element.

In its outline in the Charter, freedom of expression is also distinguished from the freedom of assembly and association as enshrined in Article 12, because this is a right to collective exercise, regardless of the protection it confers upon the individual. Thus, all manifestations of a single person will be redirected, in principle, to the freedom of expression under this Article [cfr. judgment (CJEU) *Schmidberger*, of 12 June 2003, case C-112/00].

3. Paragraph 2 of Article 11 spells out the consequences of paragraph 1 regarding freedom of the media.

The concept of media has been redefined in light of the *"convergence, interoperability and globalization"* of technology. Thus, in addition to the press, radio, television, and film, the internet is covered by it, incorporating all forms of media, regardless of the platform and the communication process.

The European Parliament, in paragraph 6 of Resolution 2003/2237 (INI), recalled that technological convergence and the increase in supply, through the internet, digital, satellite, cable or other means, should not however result in 'convergence' of content and that consumer choice and pluralism of content, more so than pluralism of ownership or supply, is the key issue.

This paragraph reflects the need (felt during the process of drafting the Charter) to empower, in this Article, the protection given to the freedom and

pluralism of the media as a transmitter of opinions, of ideas and information, which is justified given the urgent activity of the institutions of the European Union with regard to this matter.

In the *Stichting Collectieve Antenne Voorziening Gouda* judgment, of 25 July 1991, Case C-288/89, the CJEU considered the interaction between freedom of expression and economic freedoms, particularly the freedom to provide services and the free movement of goods. The court found that a cultural policy designed to protect the pluralism of freedom of expression manifested in the press, on radio or television, may constitute an overriding reason in the public interest justifying a restriction on the freedom to provide services (cfr. recitals 22 and 23 of the judgment).

The same concerns were also reflected first in the Directive 89/552 / EEC of 3 October 1989, and later in the Directive 2010/13 / EU of 10 March 2010 (which revoked the first) amended by the Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018. These Directives are both on the coordination of certain legislative provisions and also the regulations and administrative provisions of the Member States regarding the provision of audiovisual media services – television without frontiers – ("Audiovisual Media Services" policies).

Paragraph 8 of the Directive 2010/13/EU of 10 March 2010 should be highlighted as it stated that it is essential for Member States to avoid actions that impair the freedom of movement and trade of television programs or actions that might promote the creation of susceptible dominant positions leading to restrictions on pluralism and to freedom of televised information and information as a whole. The same statement was reinforced in the Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 on paragraphs 16, 25 and 61.

Moreover, in Protocol 29 annexed to the TFEU, on Public Broadcasting Service in the Member States, it was recalled that the system of public broadcasting in the Member States is directly connected to the democratic, social and cultural needs of each society and the need to preserve pluralism in the media.

The regulatory activity of the Member States and EU institutions cannot, therefore, be guided solely by respect for economic freedom or by the idea of ensuring a competitive market, but it should ensure, as appropriate, respect for freedom of the media and in particular, the principle of pluralism.

In fact, particularly in the field of broadcasting, lack of protection of the principle of pluralism is keenly felt nowadays, because the rules of the right to competition, aiming only at cases of concentrations between companies or abuse of dominant position, can only provide a partial and indirect protection.

An example of this lack of protection is the case of the creation of a new television channel by a company already holding a dominant market position. Notwithstanding a situation which is incompatible with the principle of pluralism, the truth is that this operation is not in itself a concentration of companies, nor is it an abuse of a dominant position under Articles 101 and 102 of the TFEU.[1]

Regarding media pluralism and the existing dominant positions in the television sector, the European Parliament highlighted, in paragraphs 15 and 16 of its Resolution 2003/2237 (INI), the risks of violations of fundamental freedoms in

[1] See Filippo Donati, *Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Bologna: Società Editrice il Mulino), 105.

the EU and especially in Italy, relating to freedom of expression and information. It was pointed out that diversity of ownership of media and competition between operators is not sufficient to guarantee the pluralism of the content of the media.

Nevertheless, the interventions of the European Union in this area are limited, in accordance with paragraph 2 of Article 167 TFEU, to the promotion of cooperation between Member States and, if necessary, to supporting and complementing their action. Therefore the guarantee of pluralism remains an obligation incumbent primarily on the Member States. Hence in the wording of paragraph 2 of this Article the phrasing "are respected ..." instead of "are guaranteed ..." was chosen.

4. The existence of free and pluralistic media is especially important in the political sphere, as it secures and strengthens the principle of democracy on which the Union is founded and which is essential in a European Union where citizens, whether candidates or voters, have the right to participate in municipal and European elections in a Member State of which they may not be nationals, and need to be provided with the best means to know and evaluate the ideas and behavior of its respective leaders. That is, "freedom of the press", as a means of conveying information and political views, is seen as one of the cornerstones of democratic pluralism.

Thus, the limits of acceptable criticism are considerably more expansive in relation to politicians than in relation to ordinary people, because politicians are subjected to public scrutiny (public opinion) and media scrutiny (the press), whose analysis and opinions require a high degree of tolerance, even when emitted in an exaggerated form or in hostile, provocative or satirical tones.

This does not mean that politicians should not have legitimate expectations in terms of the protection of their personal reputation, their good name and image. Press freedom does not extend to mere rumours about private lives, unless they contribute in any way to the public debate and towards the fulfillment of the supervisory function played by the media in democratic societies.

The right to privacy must therefore be concretely and carefully counterbalanced with the interest in maintaining a lively public debate on political issues. As a matter of fact the narrowing of limits could result in a serious, excessive and disproportionate limitation of media resources, which would have repercussions in disproportionate litigation, and would inevitably result in an inhibitory effect ("*chilling* effect"*)* in the task of the media to provide information and allow the monitoring of political activity.

Finally, it should also be understood that the high degree of protection conferred on "press freedom", when its practice relates to matters of public interest, shall also be applicable in the field of the administration of justice; it serves the interests of the entire community and requires the cooperation of an enlightened public. Certain restrictions are, however, legitimate whenever public discussion of the lawsuit may affect the trial in a nefarious way, that is, turn it into a court of public opinion, or bring into question the role/function of the courts as competent organs to exercise the judicial function of the Member States.

5. The clause in question, contrary to Article 10 of the ECHR, does not consider the recognition of the freedom of Member States to submit broadcasters, or cinematographic and television companies, to a system of prior authorisation.

However, in the absence of explicit prohibitions and in accordance with the original right derived from the European Union, Member States may enshrine in

their legal systems that regime, as long as it is based on objective, transparent and non-discriminatory criteria and provided that it ensures respect for the fundamental principle of media pluralism and also the rules of competition law.

On the other hand, the media, especially the broadcasting sector, is subject to the strong monopolistic tendencies of the companies that develop journalism. Thus the monopolies, which make it impossible to set up new broadcasters, tend to be seen as barriers to pluralism and freedom of expression.

On this issue, the CJEU has already ruled in the judgment *ERT Elliniki Radiophonia Tiléorassi* of 18 June 1991, Case C-260/89, stating that EU law does not preclude the granting of a television monopoly for reasons of public, non-economic, interest. However, the organizational arrangements and practice of such a monopoly must not infringe on the TFEU provisions on the free movement of goods and services, nor the competition rules.

According to that same judgment, when a Member State relies on the combined provisions of the TFEU to justify – on grounds of public policy, public security or public health – the rules which may impede the exercise of the freedom to provide services, such justification, admitted by EU law, must be interpreted in the light of the general principles of law, including fundamental rights.

Thus, the national legislation at issue can only benefit from the exceptions provided for by the provisions mentioned above if consistent with fundamental rights which the CJEU ensures. Rules concerning television are at stake here, which implies that they will be assessed in the light of freedom of expression as enshrined in Article 10 of the ECHR, as a general principle of law which the Court ensures.

6. Europe has a long tradition in the protection of freedom of expression and information. The scope and levels of protection have tended to become broader and stronger, benefiting from its generalised consecration at the level of the Constitutions and national fundamental laws of the Member States and also in international instruments of various kinds.

In fact, albeit with different scopes and formulations, these freedoms are recognized across national constitutions and by the basic laws of the EU Member States, in particular in Articles 37 and 38 of the CPR, in Article 5 of German Basic Law, in Article 11 of the Declaration of the Rights of Man and of the Citizen (which refers to the preamble to the French Constitution of 1958), in Article 20 of the Spanish Constitution and in Article 21 of the Italian Constitution.

At an international level the protection provided in Article 19 of the UDHR, of December 10, 1948, and in Article 19, paragraph 2, of the ICCPR, 16 December 1966 must be highlighted.

However, and since we are in Europe, it should be noted that the evolution of the protection of these freedoms was exponentially developed and guided by its inclusion in Article 10 of the ECHR, adopted on 4 November 1950, and the activity of the European Commission of Human Rights and the ECtHR.

The ECHR and the national constitutions drew the first line in ensuring the protection of freedom of expression and other fundamental rights in the European Union (recognised under the terms established by Article 6 of the TEU).

7. Freedom of expression under this Article, similarly to most national, regional and universal protection systems of fundamental rights, should be understood not only as a fundamental right, based on the need to protect the autonomy of individuals and the free development of personality (due to the fact that our

ability to communicate with others is one of the most essential aspects of our own humanity), but should also be understood as an objective value of the legal order of the European Union and the democratic principle on which it is founded.[2]

Indeed, this principle is based on the idea of popular self-government, in which citizens can participate with equality and freedom in the formation of the State's will, by exercising voting rights and by playing a part in the public sphere, in multiple supervisory forums of government activity. This right to vote and this involvement in public forums should be exercised in an informed and conscious way, so that people can have access to more diverse opinions and ideas, which can enable them to form their own convictions and conversely influence, through their opinions and ideas, their fellow citizens.

Only then can the democratic ideal be truly realized, through the formation of a collective will, based on a free exchange of ideas and opinions, in which all groups and citizens can have the opportunity to participate, by expressing their point of view and listening to their peers. Moreover, pluralism and tolerance for the ideas and opinions expressed are essential in a society that is democratic and that guarantees human rights; an idea that was reflected in the accession criteria to the European Union as defined in the Copenhagen European Council in 1992 [see also the title II of the TEU (Articles 9 et seq.)].

Furthermore, the freedom of expression as it relates to freedom of information is a cornerstone in any society based on the recognition of individual liberties, to the extent that the practice of any freedom or right always involves a choice, which will be successful if well prepared and informed. Thus, freedom of expression plays a key role in the exercise of other rights and freedoms enshrined.

8. The content and scope of broad freedom of expression, inclusive of freedom of opinion, information and of media, set forth in Article 11 were inspired, apart from the constitutional traditions of the Member States, in an especially notable way by Article 10 of the ECHR (Freedom of Expression), which serves to a large extent as a delineating and interpretive criterion of the scope of protection established in this Article.

That becomes clear if one analyses the update of the Notes Relating to the CFREU (2007/C 303/02) made under the responsibility of the *Praesidium* of the European Convention.[3] These, although not legally binding in themselves, are a valuable tool of interpretation intended to clarify the provisions of the CFREU. Their importance is determined by the Charter itself, which, in its preamble, expressly states that its interpretation will be made by the courts of the EU and the Member States with due regard to the Notes prepared under the authority of the *Praesidium* Convention which drafted the Charter and which were updated under the responsibility of the *Praesidium* of the European Convention.

Furthermore, those Notes expressly mention that, pursuant to paragraph 3 of Article 52 of the CFREU, this right has the same meaning and scope as the right guaranteed by the ECHR. Therefore, the restrictions to which this right is subject to must not exceed those provided for in paragraph 2 of Article 10 of the ECHR, without prejudice to any other restrictions that the right to competition of the

---

[2] See Judgment CJEU *Commission of the European Communities vs. Cwik*, 13 December 2001, Case C-340/00 P, ECLI:EU:C:2001:701, paragraph 18, and Alessandra Silveira, "Princípio democrático", in *Princípios de Direito da União Europeia* (Lisbon: Quid Juris, 2009), 37 to 67.

[3] Published in the OJEU, C / 303/17 of 14 December 2007.

Union may impose on Member States in developing the licensing arrangements referred to in the third sentence of paragraph 1 of Article 10 of the Convention.

This understanding will also be valid for the specific expression of freedoms enshrined in the Charter, subject to the established limits for the performance of each of them.

However, since this freedom was set out in the Charter, the underlying idea was that while the mechanism of the Council of Europe is responsible for safeguarding human rights on the continent, the European Community and then the Union and its institutions, in their legal instruments, including the Charter, focus mainly on the economic integration of the Member States and the achievement of free movement of goods and services.

In fact, the provisions concerning the free movement of goods and services in the Treaty of Rome (Articles 30, 36 and 59-66 of the TEC, respectively – currently Articles 28 to 37 and 56 to 62 of the TFEU) have been set up under a double perspective: the protection of the right to engage in trade, and the respective right of consumers or potential consumers to have access to information that would lead them to buy a particular product.

Thus, understanding of the fundamental rights under Community law and then in the Union, namely freedom of expression, should be extended, beyond historical interest in political and religious dissident, more important to the organs of the ECHR and to the broader arena of economic activity.[4]

Nevertheless, the relationship between freedom of expression and economic freedom did not evolve in a linear and inseparable way,[5] to the extent that on the basis of economic integration an ever-deeper protection of fundamental rights has been developing.

This follows, of course, from the analysis of the case-law generated in this regard. There are multiple cases where, by judicial decision, the CJEU recognised that freedom of expression is part of the general principles of law (see the judgments *The Economic and Social Committee of the European Communities*, of 16 December 1999, case C-150/98 P, paragraph 12; *Lindqvist*, of 6 November 2003, case C-101/01, paragraph 76; and *Karner*, of 25 March 2004, case C-71/02, paragraph 48).

Based on this understanding, the courts moved towards the conception that freedom of expression can prevail over economic freedoms and may, in the abstract, justify its restriction [see the judgments (CJEU) *Stichting Collectieve Antennevoorziening Gouda*, *cit.* paragraph 23; *Familiapress* of June 26, 1997, case C-368/95, paragraphs 18, 24 and 25; and *Laserdisken* of September 12, 2006, case C-479/04, paragraph 61].

On the other hand, the CJEU has recognised, in other cases, that freedom of expression and information can strengthen and consolidate economic freedoms [see the judgment (CJEU) *GB-Inno-BM*, of March 7, 1990, case C-362/88, paragraph 8; the opinion of Advocate General Walter van Gerven, delivered on 11 June 1991, in the process *SPUC vs. Stephen Grogan*, case C-159/90, paragraphs 17-19; and the judgment (CJEU) *SPUC vs. Stephen Grogan*, of 4 October 1991, case C-159/90].

Freedom of expression defined in this Article in its broad and inclusive sense, as the freedom of opinion, freedom of information and freedom of the media

[4] See EU network of independent experts on fundamental rights, *Commentary of the Charter of Fundamental Rights of the European Union*, DG Justice, Freedom and Security, June 2006, 118 and 119.

[5] See Alessandra Silveira, "Princípio do respeito aos direitos fundamentais", in *Princípios de Direito da União Europeia*, 69 to 94.

should, as we have seen, be read in the light of these notes by reference to Article 10 of the ECHR. Thus, in the absence of provision, by this Article, of limits to the application of this freedom they must be assessed by reference to the ECHR Article 10 paragraph 2 and the relevant case-law.

However, pursuant to paragraph 3 of Article 52 of the CFREU, which provides that this right has the same meaning and scope as the right guaranteed by the ECHR, the restrictions to which this right is subject cannot exceed those that are set out in paragraph 2 of Article 10 of the ECHR. However, in implementing the final part of paragraph 3 of Article 52 of the CFREU, this does not preclude the "the right of the Union from providing more extensive protection", the same principle of recourse to the higher level of protection, stated in Article 53 of the CFREU.

Therefore, we should consider that the ECHR establishes a minimum standard of protection, subject to restrictions specifically allowed by the CFREU and the EU Treaties, in particular on competition (cfr. the third sentence of paragraph 1 of Article 10 ECHR), and not preventing European Union law, through the praetorian activity of the CJEU, from providing more extensive protection.

9. Freedom of expression, in its broad and inclusive sense of the freedom of opinion, freedom of information and freedom of the media, includes freedom to convey ideas, all kinds of statements, judgments, feelings, emotions, acts of volition, comments, advertising, communication of facts, whether true or false, understandable or unclear and unreadable, friendly, harmless and indifferent or offensive, shocking, disturbing and bothersome to a certain sector of the population or for a particular activity. It is, therefore, a critical exercise, and the demands of pluralism and tolerance, characterizing a "democratic society", necessitate, in this regard, protection with amplitude [cfr. judgment (CJEU) *Connolly*, of 6 March 2001, case C-274/99 P, paragraph 39].

Freedom of opinion, and of transmitting or receiving ideas and information, also covers the prohibition to compel someone to reveal their opinions and ideas, or information held, while "negative freedom" of expression or manifestation of thought is understood as the right to silence and the right not to express opinions, ideas or thoughts. Therefore, the scope of protection of freedom of expression covers the transmission and reception of opinions, ideas or information, whether oral or written, images, music, painting, gestures and also of silence.

The type of speech that will not benefit from any protection, in accordance with the case-law on the ECHR, is speech based on intolerance and discrimination, which incites violence, hatred or terrorist activities, such as holocaust denial and neo-Nazi propaganda.

On the other hand, it should be considered that paragraph 1 of this Article 11 also protects the instrumental dimension of freedom of expression, that is, the whole process of formation and expression of views, ideas or information, whether by recourse to the media, in which case the provisions of paragraph 2 of Article 11 apply, or not. Consequently, not only the intellectual owners of opinions, ideas and information are protected but also their disseminators and receivers. Interested parties should be able to choose, without unjustified, disproportionate or discriminatory interference by the authorities, the most effective route to reach the intended recipient.

Nevertheless, as in the judgment of *Laserdisken,* cit., paragraph 63, a violation of freedom of expression resulting from the fact that the copyright holder is unable to communicate their ideas, will be removed whenever the right of distribution of that

holder is exhausted, in accordance with Article 4, paragraph 2 of Directive 2001/29/EC of 22 May 2001, with their consent to the first sale or to another form of the first transmission of property. Therefore, the holder may only exercise control over the first sale of the object of the referred right. In this context, freedom of expression can obviously not be invoked to invalidate the rule of exhaustion (see judgment *Laserdisken* cit., paragraph 63).

10. Under paragraph 1 of the Article in question, everyone has the right to freedom of expression.

However, some people may, in the exercise of their profession, be restricted in the exercise of their freedom to express opinions, ideas and information, due to the protection requirements of certain values, such as national security or the protection of authority and impartiality of the judiciary. This may apply to employees of public entities – in the exercise of their activity they have a duty to pursue the public interest, not to disclose certain information, and also a duty of loyalty.

In the latter category we include the staff of the European Union's own institutions. The restrictions, which they are statutorily subject to and which relate to the EU's activity, are imposed in the interests of the Union and of the trust that must exist between the institutions and their employees and agents. Such restrictions remain in place even when the employee is enjoying unpaid leave (cfr. judgment *Connolly*, cit., recital 69).

In this regard we must also mention the judgment (CJEU) *Oyowe and Traore v. Commission*, of 13 December 1989, case C-100/88. In paragraph 16 of this judgment we read that the duty of loyalty to the Communities, as required from employees by statute, cannot be understood to move in the opposite direction to freedom of expression, a fundamental right which must be ensured in the field of Community law and which is particularly important when it comes, as in this case, to journalists whose primary function is to write in complete independence with regard to the views of African, Caribbean and Pacific countries as well as the Communities.

Similarly, relevant case-law is defined, in particular, in the judgments (CJEU) *Economic and Social Committee of the European Communities* of 16 December 1999, case C-150/98 P, recitals 13 and 15; *Connolly*, cit., recitals 43 to 49, 56 and 62; and *Commission of the European Communities v. Cwik*, cit., recital 18.

11. In addition to individuals (natural and legal persons), the Member States and also the institutions of the European Union are bound to respect this fundamental right.

With regard to the last two, freedom of expression cannot be understood only in the sense of the State abstaining, as though the right, which here takes on a negative character, constitutes a limitation to the authorities, built so that they do not have to stop or censor the expression of any opinions or ideas.

This freedom has, as we have seen, a positive and guaranteed dimension, which calls for a controlled performance from the Member States and the institutions of the Union, in order to assure that everyone has the real possibility to use the freedom and enrich the public debate, given that such action must conform to the guiding principles set out in the Treaties, in particular the principle of subsidiarity (cfr. Article 5 TEU).

Article 11 also maintains that freedom of opinion and freedom to receive and impart information and ideas does not admit that in its exercise there is interference from any public authority or that borders are considered.

It should not, however, be understood that this right assumes an absolute character. As already mentioned, this Article should be read in conjunction with the provisions of the "horizontal clauses" of the Charter, in particular with paragraphs 1 and 3 of Article 52, which means that, as this is a right that implies "duties and responsibilities", the exercise can be restricted every time the need for a fair balance with other interests, rights or the economic freedoms is imposed.

These restrictions shall, however, be provided for by law and must be interpreted strictly (an imposition that follows from the principle of the Union based on the rule of law),[6] and submitted to the judgment of proportionality, to thereby ascertain whether they are justified or necessary, to suit the purpose they pursue and not constitute, against the justified reason, a disproportionate and intolerable intervention, likely to undermine the very essence of this right (cfr. judgment *Connolly* cit., paragraphs 40 to 42 and 53). With regard to the freedom of media, any limitation on the exercise of this right should be provided for by law and respect the essence of "press freedom".

The restrictions are justified or necessary if they correspond, effectively, to the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. The reference to general interest objectives recognized by the Union covers both the objectives mentioned in Article 3 of the TEU and other interests protected by specific provisions of the Treaties, such as paragraph 1 of Article 4 of the TEU, paragraph 3 of Article 35 and Articles 36 and 346 of the TFEU [cfr. Explanations to the CFREU, note to Article 52; and the judgments (CJEU) *Karlsson*, of 13 April 2000, case C-292/97, recital 45; and *Karner,* cit., paragraph 50].

In this regard and concerning the specific case of freedom of the media we must refer to the case-law of the CJEU, namely to the following decisions: judgments *ERT Elliniki Radiophonia Tiléorassi*, of 18 June 1991, case C-260/89; *Stichting Collectieve Antennevoorziening Gouda*, cit.; and *Familiapress,* cit.

In cases of questionable necessity of the restriction we must consider that the assumption of necessity, on behalf of the precautionary principle, is satisfied [by analogy with the judgment (CJEU) *Greenham*, of 5 February 2004, case C-95/01].

In the judgment *Laserdisken,* cit., paragraph 65, it is considered that a "(...) *freedom restriction to receive information is justified by the need to protect intellectual property rights, such as copyright, which are included in property rights.*"

It should be noted that these restrictions may not exceed those provided for in paragraph 2 of Article 10 of the ECHR (see Explanations relating to the CFREU, notes to the Article in question).

Finally, restrictions upon freedom of expression and information may not be discriminatory on grounds of nationality, as this right is recognized across all nationals and residents of EU Member States.

Maria Ana Ferraz & Filipe Guerra

[6] See Alessandra Silveira, "Princípio da União de Direito", in *Princípios de Direito da União Europeia*, 17 to 36.

ARTICLE 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

1. According to the Explanations relating to the CFREU, paragraph 1 of this Article corresponds to Article 11 of the ECHR, which enshrines the freedoms of assembly and association, including the freedom to form trade unions to defend one's interests. To this extent, it is also inspired by the Community Charter of the Fundamental Social Rights of Workers.

It is also important to remember that the provisions of paragraph 1 must be interpreted in the light of the ECHR and the respective case-law of the ECtHR and that, in accordance with Article 52 of the CFREU, any restrictions to these rights cannot exceed those considered legitimate in the light of Article 11, paragraph 2, of the ECHR.

2. This norm thus enshrines two distinct, though interrelated, fundamental subjective rights: freedom of assembly and freedom of association, in their different dimensions. It is essential to remember that, on the one hand, the effective guarantee of these freedoms is an essential requirement for the shaping of public opinion and the safeguarding of democracy itself. On the other hand, and although these are subjective individual rights, they are also rights with an undeniable collective and communicative dimension, insofar as they presuppose a joint experience and dialogue between citizens. Finally, it should be remembered, in accordance with the ECtHR case-law, that the freedoms of assembly and association must be interpreted taking into account the right to freedom of expression. Indeed, in the words of this Court[1] "*the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association.*" It adds: "*as the Court has said many times, there can be no democracy without pluralism.*" As such, freedom of expression and the freedoms of association and assembly – as activities consisting in a collective exercise of the former – apply not only to ideas and behaviour "*that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.*"

3. In these terms, it can already be stated, as regards freedom of assembly, that it must be given a broad interpretation in accordance with the well-established case-law of the ECtHR. This subjective right thus includes freedom to demonstrate in all its forms, including marches, pickets, processions and so on. It also covers the freedom to hold public and private events at which a more or less large group of people gather. Indeed, the normative scope of freedom of assembly must not be defined in

[1] See Judgment ECtHR *The United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, no. 19392/92.

aprioristic terms, *i.e.*, it must not be based on quantitative indicators (the number of people required for a meeting to take place) or teleological (the aim or purpose pursued with a meeting). In fact, all intentional meetings of people, with any lawful purpose, without institutional permanence (since, if there is institutional permanence, we will find ourselves in the field of freedom of association) are guaranteed by the rule commented here, in the framework of the EU.[2]

In these terms, the only meetings excluded from the material scope of the rule commented on here are those which do not comply with the requirement expressed in the adjective "peaceful." This explicit limit is, in fact, common to other catalogues of fundamental rights, including the CPR. It applies, of course, to all meetings, whether public or private, held in a closed or public place or open to the public. However, here too, a careful interpretation is needed, in order to prevent legitimate meetings being prohibited on the basis of the requirement of peacefulness. Thus, in principle, only when a meeting or demonstration assumes, during its holding, a violent or tumultuous character can it be said to fall outside the scope of protection conferred by this rule. In other words, a prognosis regarding the occurrence of violent acts should usually not be sufficient to legitimise the prohibition of a meeting in any of its forms, including a demonstration, by the public authorities. On the other hand, it is natural that some gatherings, namely large-scale political protest gatherings, result in some kind of riot or disturbance in public order. However, as the ECtHR itself has recognised, if these are minor and unintentional incidents (intentionality being understood here as an aim or purpose, *i.e.*, the meeting cannot be convened with the intention of generating violence), then preventing the exercise of the freedom of assembly cannot be considered justified either. Thus, only concrete evidence of serious disturbance is capable of justifying such a prohibition. Also in this regard, it is useful to point out that the peaceful nature of a meeting or demonstration cannot be considered to be disturbed by the practice of violent acts on the part of a small minority of the participants, if the general public distances itself from such conduct; nor does the fact that the meeting causes disturbance to the exercise of the rights of others, even in forms which may be considered contrary to ordinary law, such as roadblocks with demonstrators sitting down, constitute the practice of violence, in opposition to the requirement of peacefulness.[3]

4. Public authorities have not only a duty to respect but also an obligation to guarantee the freedom of assembly in any form, for example by avoiding interference by third parties. However, in the case of disturbances or demonstrations and counter-demonstrations, they shall be given a reasonable margin of discretion and shall not in every case be required to allow the assembly to continue.[4]

All restrictions or interferences regarding the freedom of assembly must, naturally, respect the requirements arising from the principle of proportionality. Thus, an assessment must be made of the need for and appropriateness of all rules and acts of the public authorities regarding the exercise of the right to hold meetings and demonstrations, from the obligation on promoters to notify the public authorities

---

[2] See J. J. Gomes Canotilho and Vital Moreira, "Artigo 45.º", in *Constituição da República Portuguesa - Anotada - Volume I - Artigos 1º a 107º*, J. J. Gomes Canotilho and Vital Moreira (Coimbra: Coimbra Editora, 2007).

[3] See Judgment *M. C. v. Germany*, 6 March 1989, no. 13079/87; See Judgment ECtHR *Fáber v. Hungary*, 24 July 2012, no. 40721/08.

[4] See Judgment ECtHR *Plattform "Ärzte Für Das Leben" v. Austria*, 28 June 1988, no. 10126/82.

to legal or administrative constraints regarding the time, place or route and duration of such meetings and demonstrations.

The prohibition or dispersal of an assembly or demonstration may be considered justified in certain circumstances, but it is necessary to produce substantial evidence as to the reasons for the prohibition, namely the impossibility of coping with the risks by less onerous means. In case of intervention by the authorities to disperse an assembly or demonstration in progress, it is also indispensable to observe the principle of proportionality with regard to the means employed, respecting international standards for the use of force and the possibility of judicial appeal against administrative decisions.[5]

5. At the level of the CJEU case-law, the best known and most striking case concerning the right to demonstrate is probably still the *Schmidberger* judgment.[6] It was a question of assessing the compatibility of the provisions of EU law, in particular those relating to the free movement of goods, with the holding of a political demonstration lasting 28 hours, as a result of which a major road in the intra-Community goods transport network was closed to traffic for approximately four days. The Court then considered that "*the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations.*" However, it recalled "*measures which are incompatible with observance of the human rights*" and therefore it would be necessary to examine the case in the light of the need to respect the rights to freedom of expression and assembly. The CJEU stated that "*unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.*" However, in the present case, according to the Court's assessment, "*the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive*

[5] See, for example, ECtHR's order on admissibility in the case *Selvanayagam v. The United Kingdom*, 12 December 2002, no. 57981/00 and in *Cisse v. France*, 9 April 2002, no. 51346/99. See also the recent ECtHR judgment *Communaute genevoise d'action syndicale (CGAS) v. Switzerland*, 15 March 2022 (referral to the Grand Chamber, 5 September 2022), in which the Court reviewed an application of an association that complained of being deprived of the right to organise and participate in public events following the adoption of government measures to tackle COVID-19. The ECtHR held, by a majority (4 votes to 3), that there had been a violation of Article 11 (freedom of assembly and association) of the ECHR. The Court, while by no means disregarding the threat posed by COVID-19 to society and to public health, nevertheless held that, in light of the importance of freedom of peaceful assembly in a democratic society, and in particular the themes and values promoted by the applicant association under its constitution, the generic nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued.

[6] See Judgment CJEU *Schmidberger*, 12 June 2003, Case C-112/00, ECLI:EU:C:2003:333.

of intra-Community trade", so that authorisation of that demonstration was not held to be contrary to EU law.

The concern in CJEU case-law with protecting and respecting fundamental rights in the EU's legal system is very positive, as is the margin of discretion conferred on the Member States to bring about the essential *practical concordance* between the principles of EU law and fundamental rights; it would nonetheless be desirable for the Court to abandon, in methodological terms, a reasoning based on fundamental freedoms as a starting point to a proportionality analysis. The CJEU tends to consider whether or not possible restrictions to such freedoms are justified by the need to respect a particular fundamental right, as if there was a hierarchical relationship between them, which does not exist. Therefore, it would be preferable to adopt a constitutional approach, assuming that a conflict between two or more rights, or fundamental rights and values, is at stake in cases like *Schmidberger*. This way, the accusation of subordination of the rights recognised in the CFREU to the fundamental freedoms would be avoided and their protection would be assumed as the primary function of the CJEU.

6. Freedom of assembly and demonstration is linked to a fundamental problem to be solved in the EU legal order: that of the transnational exercise of rights in light of European citizenship status.

Questions regarding of the scope of the exercise of fundamental rights are not simple and have been the subject of several decisions by the CJEU, through which a development towards the construction of a "citizenship of rights" can be identified, as demonstrated at one point by the *Zambrano*[7] judgment. However, the apparently decisive steps that the CJEU had taken towards affirming European citizenship as a fundamental status for nationals of the Member States, a status of law and (fundamental) rights conferring the power to invoke them in purely internal situations was interrupted in a jurisprudential backlash taken by the *Brey*,[8] *Dano*,[9] *Alimanovic*[10] and *Commission v. United Kingdom*[11] judgments. The position that could put an end to the intolerable distinction between static citizens – who do not move between Member States – and dynamic citizens or market citizens who, by virtue of the exercise of the European fundamental freedoms, seem to enjoy a privileged status, a more intensive protection of their fundamental rights, *inter alia* because they can invoke the rights enshrined in CFREU, is not yet certain. Indeed, the recent *Jobcenter Krefeld*[12] judgment adopts a *rationale* dependent on the exercise of free movement, triggering a right of residence, for access to social benefits. In the words of the Court, the automatic exclusion of a national of another Member State and his or her minor children who have a *right of residence* from entitlement to benefits to cover their subsistence costs is incompatible with EU law (paras. 79 and 88). In addition, the *Coman*[13] judgment, regarding the invocable nature of citizenship rights against the Member State *of origin*, also signals that the differentiation between market citizens and others remains, as the CJEU continues to make the protection of

[7] See Judgment CJEU *Ruiz Zambrano*, 8 March 2011, Case C-34/09, ECLI:EU:C:2011:124.
[8] See Judgment CJEU *Brey*, 19 September 2013, Case C-140/12, ECLI:EU:C:2013:565.
[9] See Judgment CJEU *Dano*, 11 November 2014, Case C-333/13, ECLI:EU:C:2014:2358.
[10] See Judgment CJEU *Alimanovic*, 15 September 2015, Case C-67/14, ECLI:EU:C:2015:597.
[11] See Judgment CJEU *Commission v. United Kingdom*, 14 June 2016, Case C-308/14, ECLI:EU:C:2016:436.
[12] See Judgment CJEU *Jobcenter Krefeld*, 6 October 2020, Case C-181/19, ECLI:EU:C:2020:794.
[13] See Judgment CJEU *Coman*, 5 June 2018, Case C-673/16, ECLI:EU:C:2018:385.

fundamental rights dependent on the link with the exercise of the four freedoms as a means of attracting the application of EU law (paras. 39, 51 and 56).

Furthermore, situations where citizens move *because they wish to exercise their fundamental rights* in the new area of EU citizenship remain basically unresolved. The right of assembly and demonstration illustrates this circumstance particularly well, since in such cases citizens frequently move from one country to another within the Union for the sole purpose of exercising these freedoms. In such situations, the typical attitude of national authorities, faced with the announcement that groups of European citizens are preparing to cross Union territory to take part in protests (usually organised when the European institutions or other international organisations meet in a particular Member State) is the suspension of the Schengen Agreement[14] (in particular the temporary reintroduction of internal border controls). In this scenario, and on several occasions, the notification refusing entry at the border to EU citizens classifies their behaviour as a genuine, present and sufficiently serious threat to public policy and internal security on the basis that the citizens in question are linked to the organisation of demonstrations against the European institutions or other international organisations to which the Member States belong (such as NATO) and that they are carrying political propaganda material against those same organisations.[15]

In light of EU law itself, in particular the Free Movement Directive,[16] EU Treaties, common European constitutional traditions and the rule under consideration here, restrictive measures taken on grounds of public policy or public security must comply with the principle of proportionality and be based exclusively on the conduct of the individual concerned. It should also be noted that these are not purely internal situations, but important moments in an essential and never-ending process: the construction of a civil society and a public sphere at the European level. In fact, the participation of citizens from different EU Member States in demonstrations against certain policies adopted by the EU or organisations with which it is linked is much more than the simple meeting of a few activists. It is an exercise of citizenship and fundamental rights by people who have an opinion about the European Union and alternative proposals to the path taken so far, who aim, through protest, to give – legitimately – visibility to their idea of another Europe. In these terms, as far as fundamental rights are concerned (in particular, civil and political rights, of which the freedom of assembly is a good example), there is an urgent need to overcome the distinction between *good movers* – the market citizens, who move around under the cover of economic freedoms and can invoke the link to Union law and all the guarantees conferred by it – and the *bad movers*, those who move around not as economic agents but purely and simply as citizens, to whom invoking the violation of the freedoms of expression and assembly has done little good.

[14] See Regulation no. 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[15] See Question for Written Answer to Written Question E-010232/2010 by Marisa Matias (GUE/NGL), Miguel Portas (GUE/NGL) and Rui Tavares (GUE/NGL) to the Commission, under Rule 117 of Parliament's Rules of Procedure, 9 December 2010, and answer given by Viviane Reding on behalf of the Commission to Parliamentary Question E-010232/2010, 23 February 2011.

[16] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

In the wise words of the ECtHR, "*in a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means. [...] It is only through fair and public debate that society may address such complex issues. Any measures interfering with the freedom of assembly and expression [...] do a disservice to democracy and often even endanger it.*"[17]

7. In relation to freedom of association, the considerations regarding the parallelism in this matter between the CFREU and the ECHR are also valid, including the jurisprudential construction that has been made in this respect in recent decades by the ECtHR.

The material scope of the freedom of association includes the formation and organisation of any type of group, and this right encompasses not only the association in itself (the formation of a non-profit group, with institutional permanence, in pursuit of a common objective, that is, the freedom of *private collective organisation*), but also a range of ancillary interests, which ensure that the collective entity can effectively represent its members. Thus, in certain circumstances, the association may be the holder of rights, both in relationship with the State and in relationship with its own members. In essence, a true *collective dimension* of this fundamental right is present here, which grounds the attribution or recognition of *fundamental group rights* to the association itself[18] and not to the individuals who constitute it.

Freedom of association naturally has a *negative* dimension (the freedom not to be compelled to join any type of association) alongside the *positive* right described above. On the other hand, interference by public authorities in the constitution, membership or internal management and organisation of a given association constitutes, in principle, a breach of their duty to abstain, unless there is a well-founded justification. In these terms, there is no right to be admitted to a given association, since that would constitute a violation of the freedom of the other members. On the other hand, while it is permissible for public authorities to establish requirements for the recognition of an association as such – such as mandatory registration or licensing – a refusal to recognise or register an association may also be in breach of the right under consideration here, without legitimate, reasonable and proportionate justification.[19]

8. The right of association provided for in this provision of Article 12 of the CFREU covers various more or less institutionalised forms and groups, such as clubs, foundations, committees, religious associations and recreational associations, as well as expressly political associations – mainly political parties – and trade unions, which are particular types of association and raise specific problems. A particular question regards public associations with compulsory membership in certain cases, such as professional associations. For the ECtHR, this type of organisation cannot be considered a true association for the purposes of applying Article 11 of the ECHR,[20] particularly for the purposes of assessing whether the negative freedom of association has been infringed; however, the same Court has already admitted the inclusion of

---

[17] See Judgments ECtHR *Alexeïev v. Russia*, 21 October 2010, nos. 4916/07, 25924/08 and 14599/09 and *Sergey Kuznetsov v. Russia*, 23 October 2008, no. 10877/04.

[18] See J. J. Gomes Canotilho and Vital Moreira, "Artigo 46.º", in *Constituição da República Portuguesa - Anotada - Volume I - Artigos 1º a 107º*, J. J. Gomes Canotilho and Vital Moreira (Coimbra: Coimbra Editora, 2007).

[19] See Judgment *Sidiropoulos and Others v. Greece*, 10 July 1998, no. 26695/95.

[20] See Judgment *Albert and Le Compte v. Belgium*, 10 February 1983, Nos. 7299/75 and 7496/76.

professional associations (even if they are endowed, by law, with functions of public and not merely private interest) within the scope of application of Article 11.[21] With regard to the object of associations, the limit of admissibility is normally drawn by legality, but the ECtHR has already considered that an association of a political nature must be able to defend ideas contrary to the law and to fight for changes in the legal system of the State, provided that the means used are in accordance with the law and that the proposals put forward are compatible with the fundamental principles of democracy.[22]

9. Concerning political parties, these enjoy protection under the freedom of association, and their importance for the maintenance of democratic rule has been repeatedly pointed out by the ECtHR under the ECHR. The Court has often stated that "*one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence*" and that, in view of this, "*political parties are a form of association essential to the proper functioning of democracy.*"[23] Accordingly, political parties enjoy the protection afforded by freedom of association even when "*its activities are regarded by the national authorities as undermining the constitutional structures of the State.*" Indeed, while those authorities may take all measures they deem necessary to ensure respect for the law, they must nevertheless do so in a manner consistent with their obligations under the ECHR, in particular with regard to freedom of association.

In relation to the EU's legal system, paragraph 2 of the rule analysed here provides that political parties must, at the Union level, contribute to expressing the political will of its citizens, similarly to the provisions of Article 10 (4) TEU.

European parties are considered a necessary condition for the development of a true European representative democracy. Moreover, they have, even in the current scenario, a relevant role in establishing contacts between national and European politics, and improving their functioning could promote citizens' understanding of how European and national political processes influence each other, generating a transnational debate and contributing to the construction of a European public sphere. On the other hand, European political parties channel the will of citizens towards their elected representatives and are a fundamental element in affirming representative democracy in the Union.

Accordingly, Regulation no. 1141/2014 on the statute and funding of European political parties and European political foundations was adopted.[24] It repealed Regulation 2004/2003 on the same issue, following the Giannakou Report by the Secretary-General of the European Parliament, who called on the Commission to propose a statute for European political parties that also regulates questions of internal democracy and changes the funding system, in particular by demanding stricter conditions for access to funding.

---

[21] See Judgment *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, no. 16130/90.

[22] See Judgment *Yazar and others v. Turkey*, 9 April 2002, nos. 22723/93, 22724/93 and 22725/93.

[23] See Judgment ECtHR *The United Communist Party of Turkey and Others v. Turkey*.

[24] On 26 October 2021, the Committee on Constitutional Affairs (AFCO) of the European Parliament adopted a report on the implementation of Regulation 1141/2014 on European political parties and European political foundations, in line with its Article 38 mandating the report. The European Commission subsequently published its own report on the implementation of Regulation 1141/2014 and a proposal to amend this Regulation: COM(2021) 734 final 2021/0375 (COD) Proposal for a Regulation of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations (recast), 25 November 2021.

10. The right to form and join trade unions for the defence of workers' interests is another of the dimensions of freedom of association specially protected by the provision commented on here. In general terms, it translates, from the outset, into the freedom to form trade unions without opposition from the public authorities, which also cannot establish or favour the existence of a single trade union per industry or sector of activity.

The obligation to belong to a certain trade union, as well as the prohibition of the formation of professional associations in sectors in which the law provides for the existence of specific associations with public powers violates the freedom of association, in the dimension of trade union freedom. On the other hand, it should be noted that the State and the EU, as employers, must respect the freedom of trade union association, an obligation that derives from established ECtHR case-law.

Public authorities have a duty to protect the freedom of association of each worker, both in its positive dimension (the right to join a trade union and participate in its actions to defend one's interests) and in its negative dimension (the right not to join a trade union, without suffering any kind of reprisals).

As with associations in general, public authorities must recognise, guarantee and respect, in addition to the freedom of constitution and internal organisation of trade unions, a range of group rights, *i.e.*, those of trade unions, which are essential for the effective enjoyment of freedom of trade union association, as is the case, for example, of the right to strike or the right to be heard by the employer on behalf of workers.

In its case-law, the CJEU has shown a certain lack of understanding of the implications of effectively protecting trade union freedom. Take the decisions in the *Laval*[25] and *Viking*[26] cases, in which the Court ruled that national rules allowing collective industrial action, which in turn sought to prevent the exercise of those freedoms from resulting in a reduction in wages, working conditions or other workers' rights, were contrary to Community law, particularly as regards the free movement of services and freedom of establishment.

Trade union action does not seek to prevent the exercise of the freedom to provide services, the freedom of establishment or any other principle of Community law per se. Not only does it not do so – since the provision of services and the transfer of undertakings to an EU Member State other than the one in which they operate do not depend on such action – but it does not even prevent competitive advantages from being derived from the exercise of those freedoms, such as tax benefits, lower production costs, administrative facilities, etc. However, organised trade union action will always seek to ensure that the exercise of these fundamental economic freedoms has negative implications for workers' rights and working conditions. That is its nature: to prevent the advantages which may accrue to companies from adopting certain conduct protected by Union law from translating into disadvantages for workers.

However, freedom of association is an instrument of true democracies, in which the development of the law is decided not only 'from above', but also 'from below', from the confrontation between the interests of employers and their workers. Decisions that are too restrictive of trade union freedom – the freedom to form trade unions and use them to defend one's own interests – will have the effect of

[25] See Judgment CJEU *Laval*, 18 December 2007, Case C-341/05, ECLI:EU:C:2007:809.
[26] See Judgment CJEU *Viking*, 11 December 2007, Case C-438/05, ECLI:EU:C:2007:772.

limiting workers' organisations to fighting to maintain the *status quo*. This leads to a progressive blocking of all social structures likely to channel the sources of social violence, which creates high risks of effectively violent consequences. The Luxembourg Court has justified the criticism accusing it of having a bias which leads it to sustain the systematic prevalence of the four EU freedoms at the expense of any other fundamental rights, in particular social rights. It would be a positive step if we could see, in the light of the rule commented on here, a greater balance of positions in the future. Such balance has even recently been argued by the ECtHR, in a case regarding the rights of trade unions – namely, the right to collective action – under the EEA-agreement.[27] Referring to Article 11 of the ECHR, the ECtHR stated: "*freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2*" (paragraph 118). The ECtHR hereby declared that any restriction to the freedom of association under the ECHR must be necessary or proportional, whether they are based on national law or EU law. Therefore, the so-called EU "fundamental freedoms" do not have a privileged position as rights on the same (or on a higher) level as the human rights enshrined in the convention. It will be interesting to follow the developments of this discussion over time.

11. As with the freedom of assembly, and although the provision of the CFREU commented on here does not refer to the possibility of restrictions, freedom of association may also be limited on various grounds, including public security, the prevention of crimes or the protection of the rights of others; the case-law of the ECtHR gives States a clear margin of discretion in this area. Under Article 11(2) of the ECHR special restrictions may be placed on the freedom of association of members of the armed forces, the police or the administration of the State.[28] In any case, of course, the limitations must respect the principle of proportionality, in its various dimensions, as well as the requirements of approval through a legal provision, necessary in a democratic society and ensuring the pursuit of a legitimate aim. The CJEU recently applied this case-law in a case regarding provisions of the Hungarian law concerning the so-called *transparency of organisations which receive support from abroad*.[29] In this case, the Commission alleged that the right to the freedom of association was restricted by the Hungarian law provisions under review; it did so by arguing that the exercise of that right covers not only the ability to create and to dissolve an association but also the opportunity to have it exist and operate without unjustified interference by the State. Furthermore, the Commission also stated that the capacity to receive financial resources is essential to the operation of associations. Lastly, it submitted that in the case, first and foremost, the obligations of declaration and publication put in place by the Transparency Law were liable to render significantly more difficult the action of civil society organisations established in Hungary; secondly, that the accompanying obligations of registration and use of the designation "organisation in receipt of support from abroad" were

[27] See Judgment ECtHR *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (Ntf) v. Norway (Holship)*, 10 September 2021, no. 45487/17; see also, on this subject, Hans Petter Graver, "The Demise of Viking and Laval: The Holship Ruling of the ECtHR and the protection of fundamental rights in Europe", *Verfassungsblog*, June 16, 2021, https://verfassungsblog.de/holship/. DOI: 10.17176/20210616-193402-0.

[28] See Judgment *Rekvenyi v. Hungary*, 20 May 1999, no. 25390/94.

[29] See Judgment CJEU *Commission v. Hungary*, 18 June 2020, Case C-78/18, ECLI:EU:C:2020:476.

such as to stigmatise those organisations; and, thirdly, that the penalties attached to a failure to comply with those various obligations threatened the very existence of such organisations inasmuch as they include the possibility of their dissolution. On the contrary, Hungary argued that the law was drafted in neutral terms and that had a purpose of information, concerning the fact that some organisations receive financial support of a certain significance from a foreign source. The CJEU affirmed that "*it is apparent from the case-law of the European Court of Human Rights that, while it may, depending on the case, be justified, legislation which renders significantly more difficult the action or the operation of associations, whether by strengthening the requirements in relation to their registration, by limiting their capacity to receive financial resources, by rendering them subject to obligations of declaration and publication such as to create a negative image of them or by exposing them to the threat of penalties, in particular of dissolution is nevertheless to be classified as interference in the right to freedom of association and, accordingly, as a limitation of that right, as it is enshrined in Article 12 of the Charter.*" Again, developments of this case-law are worth following.

Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

I. *Freedom of arts*. According to Article 6 of the TFEU, the Union has a complementary competence in the cultural field.[1] This means that the Union, in cultural matters, has the recognised ability to develop actions destined to support, coordinate or complement the action of the Member States, but it is not able to exercise a competence that would replace the Member States [Article 2(5) (subparagraph 1) TFEU]. Therefore, in the cultural field, the Union cannot approve binding legal acts that produce an effect of harmonisation of the national laws through directives [Article 2(5)(paragraph 2) TFEU], nor can it, as reason dictates, approve legally binding acts that create uniform law through regulations[2] [an idea reaffirmed in Article 167(5) of the TFEU, which incorporates Chapter XIII, especially dedicated to the cultural field]. In accordance with Article 167(2) of the TFEU, the objective of the Union's interventions in the cultural field is to encourage cooperation between Member States and, when necessary, support and complete its action in what regards a) the improvement of knowledge and the diffusion of the culture and the history of the European people, b) the conservation and the safeguarding of cultural heritage of European relevance, c) non-commercial cultural exchanges, and d) artistic and literary creation, including the audio-visual sector. The European Parliament and the Council, deliberating in accordance with the ordinary legislative proceeding (established in Article 289 of the TFEU), may take action to support progress towards such goals, after consulting the Committee of the Regions.

In any case, the action/influence of the European Union in the cultural field has been developing through its shared competences regarding the internal market [Articles 4(2)(a) and 114(1) of the TFEU], within which the European market of culture and art is integrated. The Union's room for manoeuvre in the scope of its shared competences is significantly greater than its latitude regarding complementary competences. In the scope of the shared competences, Union

[1] There is no legal definition of culture. As J. J. Gomes Canotilho and Vital Moreira explain, we stand before a cultural creation when an act, conduct or its result may be recognised as a possible form of human creation. The starting point for any cultural creation – intellectual, artistic or scientific – is always a) the dimension of human *creativity*, b) based on human *initiative*, c) *shaping* different means of expression and comprehension of the human and material reality. For all, see J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada* (volume I, 4th edition, Coimbra: Coimbra Editora, 2007), 620.

[2] On the categories and fields of competence of the Union see Maria Luísa Duarte, *Estudos sobre o Tratado de Lisboa* (Coimbra: Almedina, 2010), 44. The TFEU distinguished between exclusive competences of the Union (Article 3), shared competences between the Union and the Member States (Article 4), competences of coordination of economic, employment and social policies (Article 5), competences to define and implement a common foreign and security policy [Article 2(4)] and supplementary competences (Article 6).

and Member States may adopt legally binding acts, but the exercise of European competence inhibits the regulatory initiative of the national decision-maker – whereby the recovery of competence by the Member States depends on a decision from the Union to cease exercising its own competence [Article 2(2) of the TFEU]. In the scope of the Union's competences regarding the internal market several European legal acts have been issued, to harmonise the national laws on the market of culture and art – especially in the field of intellectual property – and there have been several interpretative judgments from the CJEU.[3]

Meanwhile there is a new element to take into consideration regarding the Union's competences in the cultural and artistic field – and this novelty relates to the legally binding force of the Article of the CFREU that we are commenting upon. Theoretically, the CFREU's provisions do not broaden the Union's competences as defined by the Treaties – but rather oblige the Union and Member States, when applying the Union's law, to respect the fundamental rights protected by the CFREU and to promote its application [Article 51(1)], making it, therefore, ingenuous not to acknowledge the affect upon the exercise of the Union's competences. In addition, the "freedom of arts" (Article 13 of the CFREU) was separated from the "freedom of expression" (Article 11 of the CFREU) – diverging from what happens with the CFREU and some Constitutions of the Member States –, which certainly reflects the relevance attributed by the European Union's legal order to the subjective right of artistic creation. As Gianmario Demuro explains, the use of the plural "arts" integrates the evolution of the modern aesthetic conception and the affirmation of several arts, emphasising the concern to protect any form of creativity – not only the traditional arts, such as painting, sculpture, and architecture, but also the more recent forms of visual expressions that have broadened the concept of art – and therefore avoid the exclusion of new artistic developments.[4] In terms of the Union's legal order there would not be an Art but several arts – explains the author.

Nevertheless, defining the content of "freedom of arts" protected by Article 13 of the CFREU (or, in legal language, the scope of protection of the norm at stake; what it protects and prohibits) represents enormous challenges for legal scholars, starting with the definition of the protected legal good, which is not simplified by the range of the legislator's expression – "the arts shall be free of constraint." As observed when we turn to some of the judgments of the ECtHR regarding the freedom of artistic creation, the borders between the creativity (imaginary) and the opinion (reality) of the artist are not entirely clear when the freedom of artistic creation is understood as a derivation of the freedom of expression/opinion. In fact, the freedom of artistic creation demands a reinforcement of protection in comparison with the freedom to express thoughts – in what respects, fundamentally, the prohibition of impediments or intrusions –, because art does not comply with the imperatives of rational communication. As explained by Gomes Canotilho/Vital Moreira, to express freely artistically is more than just to

[3] For example, see the judgments ECJ *Gouda v. Commissariaat voor de Media*, 25 July 1991, Case C-288/89, ECLI:EU:C:1991:323; *Teresa Bobadilla v. Museo Nacional del Prado*, 8 July 1999, Case C-234/97, ECLI:EU:C:1999:367; *Commission v. United Kingdom*, 9 February 2006, Case C-305/03, ECLI:EU:C:2006:90; and *Fundación Gala-Salvador Dalí*, 15 April 2010, Case C-518/08, ECLI:EU:C:2010:191.

[4] In this regard, see Gianmario Demuro, "Article 13", in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, eds. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: Il Mulino, 2001), 117.

express freely, *i.e.*, artistic creation demands a greater freedom than the one implicit in the general right of freedom to express thoughts.[5]

We will try to map the contours of the "freedom of arts" protected by the European legal order in accordance with the Article under commentary – or capture the "state of the arts" of the European Union's law in that field. The range of the expression (particularly the plural "arts") suggests that the CFREU protects every and any form of creativity – or "*any creative representation of impressions, experiences and facts that lead to contemplation*"[6] – whether it is expressed through the traditional arts or the more recent audiovisual expressions that can be integrated in the concept of art. Through the expression "freedom of arts" the European Union's legal order adopts an inclusive definition of art, seeking to integrate the new artistic developments because the "*intuition, the fantasy and the eccentricity broaden the scope of artistic creation to unorthodox forms.*"[7] As Gomes Canotilho/Vital Moreira explain, the normative scope of cultural creation (mainly artistic), in addition to being open, is susceptible to profound transformations and innovations; the cultural creation of today, burgeoning to explore digital and technological expressions, shows the interplay and interaction of concepts and expressions of artistic creation, oriented by novelty, creativity, evolution and change.[8]

The freedom of the arts is established in the CFREU in terms that are fundamentally defensive/negative, *i.e.*, its exercise must not be subjected to impediments, or intrusions or any quality control exercised by the public powers. The positive dimension of the right to artistic creation (or, in a wider sense, of the right to culture and art) is not expressly established in the provision – which does not excuse the European Union from its obligations in the development of the cultures of the Member States and in the promotion of the arts, as in accordance with Article 167 of the TFEU. The concept of artistic creation is not developed by any of the CFREU's provisions. But the principle of the highest level of protection (Article 53 of the CFREU) allows us to deduce that the freedom of artistic creation protected by the Union's legal order cannot be lower than the one granted by the Member States' Constitutions. In this sense, and bearing in mind the freedom of artistic creation protected by Article 42 of the Portuguese Constitution, it would cover a) the process of creation as such, b) the work, as the object of the artistic creation, c) the dissemination, as communication of the product of the artistic creation. In other words, protection would be afforded not only to the artistic activity itself (invention and production), but also to the exhibition of the artistic product (dissemination).[9]

The "freedom of arts" comes from the freedom to express thoughts, yet it acquires a specific shape in the CFREU that did not exist in the ECHR. The concept is founded on Article 19 (paragraph 2) of the ICCPR of December 16th 1996 and on the case-law of the ECtHR regarding Article 10 of the ECHR – both

[5] In this sense, see J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 621.

[6] See Gianmario Demuro, "Article 13", in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, 117.

[7] In this sense, see J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 620.

[8] *Idem.*

[9] On the semantic densification of the concept of artistic creation in the Portuguese Constitution, see J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 621.

establish freedom of expression –, and therefore we will pay special attention to the evolution of the ECtHR's case-law respecting the freedom at stake.[10] And we will do so mainly for the following reason: according to the notations regarding the CFREU[11] – which constitute an instrument of interpretation destined to clarify the provisions of the Charter[12] – the freedom of arts is exercised in accordance with Article 1 of the CFREU, regarding the dignity of the human being, "*being able to be subjected to the restrictions authorised by the Article 10 of the ECHR.*"[13] In other words, according to the notation on Article 13 of the CFREU – that by dint of Article 6(1)(3rd paragraph) of the TEU and of Article 52(7) of the CFREU, has to be taken into account in the interpretation of that provision –, the freedom of artistic creation may be subjected to the limits of the freedom of thought resulting from Article 10(2) of the ECHR.

The admission of such limits causes us some perplexity given that the freedom of artistic creation was separated by the CFREU from the freedom of expression, marking a change from the treatment of these freedoms in the ECHR. It is generally accepted in the constitutional doctrine of the Member States that the freedom to express through art benefits from a substantially enlarged space in comparison with the freedom to express thoughts/opinions.[14] In any case, it is important to understand which restrictions are admitted by the ECtHR's case-law in the interpretation of Article 10(2) of the ECHR – and consider how they apply to the European Union's legal order, taking into account the particularities of the protection of the fundamental rights in the Union's space, oriented by the principle of the highest level of protection (Article 53 of the CFREU).

As we will be able to see in the judgments commented on below, the ECtHR integrates the freedom of artistic expression within the scope of the freedom of thought – protected by Article 10(1) of the ECHR – as one of the aspects of the freedom to receive and to communicate ideas. The ECtHR repeatedly affirms that the freedom of thought (inclusively artistic) constitutes one of the essential foundations of a democratic society, besides being one of the prerequisites for its progress and for individual self-determination, applicable not only to information

---

[10] To understand more fully the international legal context that inspired the establishing of the freedom of arts in Article 13 of the CFREU, namely some decisions from the Committee on Human Rights of the United Nations about the freedom of expression contemplated in the ICCPR, see EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, DG Justice, Freedom and Security, June, 2006, 133 and following (http://ec.europa.eu).

[11] The notations on the CFREU were compiled under the auspices of the *Praesidium* of the Convention (then amended by the Presidency of the Convention which drew up the 2004 Constitutional Treaty) and published in the *OJ (C 303)* on 14 December 2007.

[12] According to Article 6(1) (paragraph 3), the rights, freedoms and principles enunciated in the CFREU must be interpreted taking into account the Notations to which the Charter makes reference and that indicate the sources of such provisions.

[13] Article 10(2) of the ECHR has the following wording: "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*"

[14] In this sense, see Gianmario Demuro, "Article 13", in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, 119; J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 621.

and ideas favourably received or considered inoffensive/indifferent, but also to those which offend, shock or inconvenience the State or a part of the population. This corresponds to the demands of pluralism, of tolerance and of the open spirit without which there is no democratic society.[15] Whosoever creates, makes, distributes, or shows artistic work contributes to the exchange of ideas and opinions that is indispensable in a democratic society. From this arises the obligation of the public power not to unduly intrude in the exercise of the freedom of expression, inclusively artistic. In any event, artists and those who promote their work would not be exempt, in the ECtHR's perspective, from the restrictions provisioned in Article 10(2) of the ECHR, having the duty to exercise their freedom of expression according to the "duties and responsibilities" expressly referred in that provision, the reach of which will depend on the specific situation and on the meaning attributed to it.[16]

It is important, however, to ascertain if the "duties and responsibilities", besides the "formalities, conditions, restrictions and sanctions" authorised by the ECtHR regarding the exercise of the freedom of expression, apply equally to the exercise of the freedom of arts in the European Union's legal order. It its worth remembering that, among the restrictions admitted by the ECtHR, figure those designed to protect public morality – which, being potentially admissible in terms of the freedom to express thoughts, does not make any sense regarding artistic creation – which by its nature tends not to fit within the neat parameters of morality and good manners. To assess the limits admissible to the freedom of arts in the European Union's legal order it is necessary to take into account the effort to autonomise that freedom in the CFREU context, as well as the expression "being able to be subjected to the restrictions of the Article 10 of the ECHR" (and not "having to be subjected", it must be stressed) used in Article 13 of the CFREU. Moreover, it has to be noted that the signatory States of the ECHR, through the Council of Europe, exceed the recipient States of the CFREU in the scope of the European Union – naturally it is more difficult, in the first case, to reach a consensus on the nature of the freedom of artistic creation, taking into consideration the vicissitudes and sensibilities of the distinct societies involved. Let us accompany the evolution of the ECtHR's case-law in this area in order to fathom the problem in specific terms.[17]

The case (ECtHR) *Muller and others v. Switzerland* concerned the exhibition of three large paintings by Josef Felix Muller that were considered obscene by the Swiss Public Prosecution. The paintings were therefore removed and apprehended in accordance with the applicable criminal law. The paintings were qualified as "undoubtedly repugnant" and "morally offensive to the vast majority of the population", in the sense that they represented an "orgy of unnatural sexual practices", among which "sodomy and bestiality", were brutally offensive to the "sexual propriety of persons with ordinary sensibility."[18] The promoters of the exhibit – including Muller himself – were condemned to pay 300 Swiss francs for

[15] See judgment ECtHR *Handyside*, 7 December 1976, no. 5493/72, recital 49.
[16] See judgment ECtHR *Müller and others v. Switzerland*, 24 May 1988, no. 10737/84, recitals 33 and 34.
[17] See, as an example, judgments ECtHR *Müller and others v. Switzerland*; *Otto Preminger-Institut v. Austria*, 20 September 1994, no. 13470/87; *Karatas v. Turkey*, 8 July 1999, no. 23168/94; and *Vereinigung Bildender Künstler Wiener Secession v. Austria*, 25 April 2007, no. 68354/01.
[18] See judgment ECtHR *Müller and others v. Switzerland*, recital 18.

publishing obscene material and the apprehended paintings were deposited in the Art and History Museum of the Canton of Fribourg (for safekeeping, not display), although the legislation in force allowed for the destruction of the offending paintings.

The Swiss courts were not convinced by the applicants' argument according to which the paintings had a symbolic meaning; the supposed purpose of the artist, or the abstract idea disconnected with the visible image, did not matter to the Swiss courts. Instead they focused on the (objective) effect of the image on the observer. The Swiss courts did not appraise the Muller paintings from a predominantly aesthetic perspective but mainly examined the number of sexual figures displayed (one had "eight erect members"), concluding for the predominance of offensive sexuality. It did not help the artist's defence fact that there was no age limit restricting access to the exhibit, meaning the paintings were exposed to an undetermined number of people. In March 1988, by legal decision, Josef Felix Muller recovered his paintings – while being alerted to the fact that, if he decided to show them again, he would be at risk of a new legal action for violating the Swiss Penal Code.

Before the ECtHR, the applicants argued that the condemnation and the apprehension of the said paintings were a violation of the freedom of artistic expression ensured by Article 10 of the ECHR. It was up to the ECtHR to decide whether the intrusion was legally justified, if it pursued a legitimate objective authorised by Article 10(2) of the ECHR and if it corresponded to an imperative social need justified by proportionality. The ECtHR shielded itself behind the impossible task of finding a uniform moral conception in the different legal and social orders of the signatory States of the ECHR. Conceptions of sexual morality vary according to time and place, for which reason the ECtHR argued that the State's authorities, directly and continuously in touch with the prevailing opinion and social currents in the country, would in principle be in a better position to assess the need for the restriction at stake.[19] Therefore, taking into consideration the opinion of the three Swiss courts that had the chance to intervene in the process, the ECtHR understood that the contested measure did not violate Article 10 of the ECHR.

This judgment raises the following question: in which terms do the restrictions to the exercise of the freedom of expression, authorised by Article 10(2) of the ECHR, apply to the freedom of arts protected by the European Union's legal order? And what role does the principle of the highest level of protection play in this context (Article 53 of the CFREU)? Well, in accordance with Article 52(1) of the CFREU, any restriction to the exercise of the rights and freedoms recognised by the CFREU must i) be established by law, ii) respect the essential core of those rights, iii) respect the principle of proportionality, iv) be necessary for the pursuit of the objectives of general interest acknowledged by the Union or the protection of the rights and freedoms of others. Article 52(2)(3)(4) of the CFREU seeks compatibility in the distinct regimes of rights' restrictions that result from the Charter, from the constitutive Treaties, from the ECHR and from the national Constitutions. The level of protection granted by the Charter can never be inferior to the level granted by the Treaties, by the ECHR and by the constitutional traditions – the Union is expressly allowed to grant a wider protection. Thereby, the level of protection granted by the Charter, regarding the admissible restrictions, will never be inferior to the protection granted by the others.

[19] See judgment ECtHR *Müller and others v. Switzerland*, recital 35.

From here it follows that, in a situation of competition between levels of protection, the legal framework that allows for the least possible restriction to the fundamental right at stake is applicable (the more protective legal framework). Considering that the freedom of cultural creation enshrined in the Article 42 of the Portuguese Constitution, for example, does not contemplate the express possibility of legal restriction of this right, the admissible limits to the freedom of arts in a context of "inter-constitutionality" would be only those which are necessary for the safeguarding of other fundamental rights protected by the Union's legal order, namely the right to human dignity established in Article 1 of the CFREU (*i.e.*, immanent or implicit limits which result from a balancing of constitutionally protected goods). Now, if in a situation similar to *Muller and others v. Switzerland*, human dignity would be at risk by the fact that access to the exhibit is not age restricted – with the paintings exposed to an unlimited number of people –, it is sufficient for the authorities to limit access to the exhibit, by setting a minimum age, which protects vulnerable minors and thereby meets the imperative of proportionality for admissible restrictions [Article 52(1) CFREU].

See another example. The case (ECtHR) *Wiener Secession v. Austria* centred on an exhibition entitled "The century of artistic freedom", in which the artist Otto Muhl created a collage of various public figures – such as Mother Teresa, the Austrian cardinal Hermann Groer and the politician Jorg Haider – in sexual positions. The naked bodies of those figures were painted and their heads and faces reproduced from photos taken from newspapers. One of the portrayed figures was Meischberger, who at the time was a member of the National Assembly, who was shown holding Haider's ejaculating penis while at the same time being touched by two other Austrian politicians and ejaculating on Mother Teresa.[20] The painting was damaged by a visitor who covered Meischberger's body and the part of the face with red paint. Meischberger brought proceedings against Wiener Secession, grounded in Austrian legislation on copyrights (that protected the right to image), seeking an injunction prohibiting the public display of the painting, and compensation. The Vienna Commercial Court decided that the painting did not represent reality. Weighing the competing rights and interests, the Commercial Court did not uphold Meischberger's claim. However, on appeal the court of second instance decided in favour of Meischberger, finding that since the picture had been used in a degrading and insulting way the limits of artistic freedom had been exceeded.

Called to decide on a complaint regarding the violation of the freedom of artistic expression – due to the fact that the Austrian Courts prohibited the exhibition of the piece –, the ECtHR noted that the painting did not aim to reflect or even to suggest reality, but amounted to a caricature of the persons concerned using satirical elements. The ruling noted that satire is a form of artistic expression and social commentary, which, with its inherent features of exaggeration and distortion of reality, naturally aims to agitate and provoke. Accordingly, any interference with an artist's right to such expression must be examined with particular care.[21] The painting did not address Meischberger's private life but rather related to Meischberger's public standing as a politician, and, in this capacity,

[20] See judgment ECtHR *Vereinigung Bildender Künstler Wiener Secession v. Austria*, recital 8.
[21] See judgment ECtHR *Vereinigung Bildender Künstler Wiener Secession v. Austria*, recital 33.

he has to display a wider tolerance in respect of criticism.[22] Furthermore, the ECtHR emphasised that, besides Meischberger, the painting depicted 33 persons – including the painter himself – some of whom were far more well known to the Austrian public than the then deputy, and all of them were represented in the same terms.

Finally, the ECtHR noted that the Austrian court of second instance did not limit its decision either in time or in space, leaving the applicant association, which directs one of the best-known Austrian galleries specialising in contemporary art, with no possibility of exhibiting the painting while Meischberger was still known. In conclusion, having balanced Meischberger's personal interests, the satirical nature of his portrayal, as well as the impact of the measure on the activities of the applicant association, the ECtHR concluded that the Austrian court's injunction was disproportionate to the aim it pursued and therefore not necessary in a democratic society within the meaning of the Article 10(2) of the ECHR – based on which there had been a violation of the freedom of artistic creation, obliging the Austrian State to pay the applicant association a compensation for material damages, and the costs and legal expenses.

This judgment denotes an update to the ECtHR's case-law regarding the freedom of artistic creation – and is in the position to remove some of the concerns respecting the European Union's accession to the ECHR. In the absence of a catalogue of fundamental rights specific to the Union, the CJEU admitted, since the 1970s, that the ECHR works as a frame of reference for the protection of fundamental rights in the European legal order – and even with the CFREU, Article 6(3) of the TEU refers to the place in the Union's law, as general principles, of the fundamental rights granted by the ECHR, as well as those that result from the common traditions of the Member States. Meanwhile, the EU is not a signatory to the ECHR – only its Member States are – and therefore individuals cannot appeal to the ECtHR to complain about an alleged violation of the rights enshrined in the ECHR by the EU. In the future, this may change because Article 6(2) of the TEU authorises the Union's accession to the ECHR.

Therefore, when/if the accession is achieved, the ECtHR will, theoretically, have the last word on the protection of fundamental rights in the context of the European Union. It is not yet known how the accession to the ECHR will comply with the highest level of protection that results from the Union's law. Perhaps the possibility of accession to the ECHR has appeared too late: the EU's legal order has now too many catalogues of fundamental rights which are not always compatible. Regarding the current relations between the ECtHR and the CJEU, it is important to say that the former has developed a case-law of deference respecting the latter, grounded in the presumption of equivalent protection or of sufficiency of the legal guardianship in the matter of fundamental rights exercised by the CJEU.[23] Nevertheless, we cannot predict whether such deference would survive the accession – which is why the update of the ECtHR's case-law regarding the

[22] On this idea, the ECtHR refers to its previous judgment in *Lingens v. Austria*, 8 July 1986, no. 9815/82, recital 42.

[23] In the judgment (ECtHR) *Bosphorus v. Ireland*, 30 June 2005, no. 45036/98, in which Ireland was accused of violating its obligations under the ECHR in its application of a EU Regulation, the ECtHR clarified that a signatory State complies with the requirements of the ECHR when it fulfils the legal obligations arising from its accession to the European Union.

freedom of artistic creation (evident in the *Wiener Secession v. Austria* judgment) is welcomed.

II. *Freedom of sciences*. Article 13 of the CFREU also includes the "freedom of sciences" – according to which scientific research must be freely exercised. Research and technological development are shared competences between the Union and Member States [Articles 4(3) and 179 and following of the TFEU], namely regarding the respective programs' definition and execution, but with the particularity that the exercise of this competence by the European Union does not prevent Member States from exercising their own competence. As such, there is a divergence from the general rule, according to which the Union's exercise of a shared competence prevents the action of its Member States [Article 2(2) of the TFEU]; in the field of research and technological development, the Union's action does not exclude the Member States' competences, whose policies on research and technological development must be taken into account by the Union in the definition of its own competences.[24]

In protecting the "freedom of sciences", the inherent problem to Article 13 of the CFREU continues to be the definition of its object – especially in what regards the existing relation between the freedom of scientific research and academic freedom – as well as the limits to its exercise; whilst freedom of scientific research cannot be confused with academic freedom they can and will be eventually related. Regarding the object, the freedom of scientific research is defined as the possibility to determine the research *modus operandi*, *i.e.*, it revolves around the ability to freely define investigative criterions and methodology, without intrusions of any kind. Academic freedom, in turn, is defined as the ability to freely express the scientific opinion and to raise awareness of scientific progress through an academic forum, without being subjected to philosophical or ideological orientations. Therefore, similarly to the freedom of arts, scientific freedom and academic freedom are set out in the CFREU in terms that are fundamentally defensive/negative, *i.e.*, its exercise must not be subjected to impediments or intrusions – which does not exempt the European Union from its obligations in the field of the research and development policy, resulting from Articles 179 and following of the TFEU.[25]

In the decision *Hertel v. Switzerland*,[26] the ECtHR understood that the right to the freedom of expression also contemplates the freedom to conduct scientific research within its scope. In fact, the applicant was arguing for the incompatibility of the national criminal provision under which he was penalised (regarding free competition observance) as it was, in fact, undermining his freedom of expression (and, therefore, his scientific research freedom) since the scientific conclusions published took into consideration his research. Therefore, the ECtHR considered that, even though the ECHR does not contain a special mention concerning scientific research freedom, it can be understood to exist within the larger scope of the freedom of expression.[27]

---

[24] In this sense, see Declaration (no. 34) annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

[25] Regarding innovations introduced by the Treaty of Lisbon in the domain of realisation of a European Space for Research – that grants and promotes the free movement of researchers, scientific knowledge and technologies – see Norberto Nuno Gomes de Andrade, "Articles 179", in *Tratado de Lisboa Comentado e Anotado*, ed. Manuel Lopes Porto and Gonçalo Anastácio (Coimbra: Almedina, 2012), 739 and following.

[26] See judgment ECtHR *Hertel v. Switzerland*, 25 August 1998, no. 59/1997/843/1049.

[27] See judgment ECtHR *Hertel v. Switzerland*, recitals 31 and following.

Still on scientific research freedom, Article 27 of the UDHR enforces the right to share the benefits of scientific advancements. That is to say that it does not create nor establish a unique scientific research freedom but it reinforces, internationally, the role of scientific research as a way to achieve better results that benefit all the involved Parties. Furthermore, Article 15 of the UN's ICESCR contemplates a right for all States Parties "*b) To enjoy the benefits of scientific progress and its applications*;" and "*c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*", which becomes settled under 15(3), when it states that *"[t]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*" Notwithstanding the overlap with the wording of Article 27 of the UDHR, it can further engage States Parties in scientific understanding to collect and disseminate its benefits.[28] However, the research must be conducted in such a way that human dignity can always be preserved.[29]

Turning to academic freedom, it is perceived as included in the right to freedom of expression in Article 19 of the UN's ICCPR. It also underlies the scope of application of the right to education (enshrined under Articles 13 and 14 of the UN – ICESCR). Under this right, the UN Economic and Social Council foresaw the need to expressly establish the right to academic freedom since "*the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.*"[30] Furthermore, the UN Economic and Social Council understood that "*[m]embers of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing.*"[31] Therefore, academic freedom must include some essential dimensions: the ability to freely express opinions; the ability to fulfill functions without discrimination or fear of repression; among others. However, as the Council perceives it, *"[t]he enjoyment of academic freedom carries with it obligations, such as the duty to respect academic freedom of others, to ensure fair discussion of contrary views, and to treat without discrimination on any of the prohibited grounds.*"[32] This has been developed at an international level, namely through UNESCO's Recommendation concerning the Status of Higher-Education Teaching Personnel[33] where it is underlined that "*[t]he maintaining of the above international standards should be upheld in the interest of higher education internationally and within the country. To do so, the principle of academic freedom should be scrupulously observed.*"[34]

---

[28] For further developments, see Jessica Wyndham, "Scientific freedom: what do human rights have to do with it?", *Committe of Concerned Scientists*, 13 July 2010, http://concernedscientists.org/2010/07/scientific-freedom-what-do-human-rights-have-to-do-with-it/.

[29] See United Nations Economic and Social Council, General Comment no. 17 (2005), E/C.12/GC/1712 January 2006, recital 1, https://rb.gy/2pbiyb.

[30] See United Nations Economic and Social Council, General Comment no. 13, E/C.12/1999/10, 8 December 1999, recital 38.

[31] See United Nations Economic and Social Council, General Comment no. 13, E/C.12/1999/10, 8 December 1999, recital 39.

[32] *Idem*.

[33] See UNESCO Recommendation concerning the Status of Higher Education Teaching Personnel, 11 November 1997, especially under the VI section. Rights and freedoms of higher education teaching personnel; A. Individual rights and freedoms: civil rights, academic freedom, publication rights, and the international exchange of information.

[34] See UNESCO Recommendation concerning the Status of Higher Education Teaching Personnel, 11 November 1997, recital 27.

Nevertheless, it is important to reflect on the freedom to conduct scientific research and, particularly, on the limits to its exercise. Here, Article 3(2) of the CFREU is fundamental. In fact, it refers to the integrity of the human being, especially in the scope of medicine and biology – setting out a prohibition of eugenic practices, a prohibition of lucrative exploitation of the human body and its parts, and a prohibition of reproductive cloning of human beings. Therefore, and to avoid repetition, we remit to its comment. In any case, the CFREU's preamble expressly establishes the creation of a catalogue of fundamental rights that does not ignore the new realities that result from the scientific and technological progress.[35] In this sense, and to improve the wording of the Article that is now being discussed, the then President of the European Commission, Romano Prodi, actioned, in February 2000, the European Group on Ethics in Science and New Technologies. The group published, on May 23rd 2000,[36] a report where it focused its attention on a set of questions connected with the freedom of scientific research. In the above-mentioned report, the Group evokes Article 12 of the Universal Declaration on the Human Genome and Human Rights, as a reminder that scientific research related to human life demands the observance of strict deontological and ethical rules. The Group's conclusions proclaimed respect for the moral and intellectual independence of researchers, as well as indicating positive measures, to be taken by the European institutions and by the Member States, to allow and enhance the free exercise of scientific research, including research that initially may not appear to profitable. The conclusions underscore the idea that scientific research freedom – and the creation of conditions so that this freedom is fully observed – constitutes a safe way to reaffirm the democratic principle in a Union that is intended to be a Union of law.

Concerning scientific research freedom, the EU has also presented some soft law acts (such as the Commission's Communication on "Better careers and mobility", from 2008),[37] namely to promote a better and more fruitful free movement of knowledge. In fact, "*free movement of knowledge has been called the 'fifth freedom' of the Union and aims to reduce the obstacles to the cross-border mobility of researchers.*"[38]

In discussing the European Union's secondary legislation, it is vital to reflect on Directive 98/44/EC, of the European Parliament and of the Council, of July 6th 1998, on the legal protection of biotechnological inventions – and the CJEU's corresponding decisions. The case *Oliver Brustle v. Greenpeace*[39] deals with biotechnological patentability, where the definition of the limits of scientific research's freedom becomes important. In the main litigation, Oliver Brustle was the holder of a German patent, which "*isolated and purified neural precursor cells, processes for their production from embryonic stem cells and the use of neural precursor cells*

[35] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 37.

[36] See *Droits des citoyens et nouvelles technologies: un défi lancé a l'Europe*, report from the European Group on Ethics in Science and New Technologies, required by the President of the European Commission on 3 February 2000, Brussels, and issued on 23 May 2000. This report is available at http://www.europa.eu.int.

[37] European Commission, Communication to the Council and the European Parliament 'Better careers and more mobility: a European partnership for researchers', Brussels, 23 May 2008, COM(2008) 317 final.

[38] See Debbie Sayers, "Article 13 – Freedom of the Arts and Sciences", in *The EU Charter of Fundamental Rights – A Commentary*, eds. Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Oxford: Hart Publishing, 2014), 379-40, 394.

[39] Judgment CJEU *Oliver Brüstle v. Greenpeace,* 18 October 2011, Case C-34/10, ECLI:EU:C:2011:669.

for the treatment of neural defects." Taking into consideration Greenpeace's request, the competent German court declared the patent null and void since the use of human embryos for industrial and commercial purposes was excluded from patentability. However, for the referring court – that was dealing with the litigation at the appeal phase – the crux of the decision depended on whether the technical information of the patent at stake was really excluded from patentability, since it had as object progenitor cells obtained from human embryonic stem cells. Therefore, aiming at determining the scope of the patentability prohibition in the meaning of Article 6(2)(c) of the Directive 98/44/EC, the referring court only wanted to know if the human embryonic stem cells, which served as raw material for the patented processes at stake, were "human embryos" within the Directive's meaning. Thus, it sought to determine the scope of the prohibition of patentability of human embryos.

In its interpretation (taking into consideration the meaning it was given by the Directive), the CJEU understood that *"[t]he lack of a uniform definition of the concept of human embryo would create a risk of the authors of certain biotechnological inventions being tempted to seek their patentability in the Member States which have the narrowest concept of human embryo and are accordingly the most liberal as regards possible patentability, because those inventions would not be patentable in the other Member States. Such a situation would adversely affect the smooth functioning of the internal market which is the aim of the Directive."*[40] The CJEU is peremptory when it states that, even though the Directive was devised in such a way as to enhance scientific research/invention, the exploitation of biological matter of human origin must respect fundamental rights, stressing that *"[t]he context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected."*[41] Thus, the use of embryos for industrial and commercial purposes is excluded from patentability.

The second question presented by the national court – whether the prohibition to use human embryos for industrial or commercial purposes also covers the use of human embryos for scientific research purposes – aimed to clarify if scientific research that implies the use of human embryos can benefit from the protection for patent rights. The CJEU recalled that Directive 98/44/EC only focuses on the question of patentability and not on the determination of the objective of scientific research – the Directive does not regulate the use of embryos in the scope of scientific research. However, according to the Court, the concession of a patent to a scientific invention implies its exploitation for industrial and/or commercial purposes, which is supported by Article 14 of the Directive. Consequently, the CJEU understood that *"[t]he answer to the second question is therefore that the exclusion from patentability concerning the use of human embryos for industrial or commercial purposes in Article 6(2)(c) of the Directive also covers use for purposes of scientific research, only use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable."*

Lastly, the referring court asked the CJEU whether an invention is excluded from the possibility of patentability even though its purpose is not the use of human embryos, but rather the creation of a product whose production necessitates the prior destruction of human embryos, or a process which requires a base material obtained by destruction of human embryos. The CJEU considered that *"[...] an*

[40] Judgment CJEU *Oliver Brüstle v. Greenpeace*, recital 28.
[41] Judgment CJEU *Oliver Brüstle v. Greenpeace*, recital 34.

invention must be regarded as unpatentable, even if the claims of the patent do not concern the use of human embryos, where the implementation of the invention requires the destruction of human embryos. In that case too, the view must be taken that there is use of human embryos within the meaning of Article 6(2)(c) of the Directive. The fact that destruction may occur at a stage long before the implementation of the invention, as in the case of the production of embryonic stem cells from a lineage of stem cells the mere production of which implied the destruction of human embryos is, in that regard, irrelevant."[42] Therefore, Directive 98/44/EC determines the patentability exclusion of an invention *"where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos."*[43]

Concerning academic freedom we can find some ECtHR judgments linking this dimension to the freedom of expression enshrined under Article 10 of the ECHR. In the case *Garaudy v. France*, the ECtHR understood that Mr. Garaudy's application was inadmissible, since his plea relied on a misinterpretation of Article 10 of the ECHR, where the freedom of expression is enshrined. In fact, he published a book rethinking the Holocaust, which could be understood as promoting hate speech towards a particular group of people, namely the Jewish community, and which led to five criminal proceedings against him in France. He pleaded that his right to freedom of expression was infringed based on the argument that his book was a political work, written to fight Zionism and to criticize Israeli policy, and claimed that it had no racist content. In order to justify the inadmissibility of the complaint, the Court recalled Article 17, since no one can rely on the Convention as a basis for engaging in any act contrary to its provisions – and the book, as understood by the ECtHR, was an attempt to dispute the existence of established historical facts and events (in this case the Holocaust) and, so, it "*did not constitute historical research akin to a quest for the truth*" since *"[t]he real purpose of such a work was to rehabilitate the National-Socialist regime and, as a consequence, to accuse the victims of the Holocaust of falsifying history."*[44] As we can perceive, the ECtHR connects academic freedom to freedom of speech and, for that matter, it follows a discursive approach in order to set aside the dissemination of scientific research results (since academic freedom acts as the visible face of scientific research), which could lead to ECHR violations. No one can rely on ECHR dispositions if their interpretation, in order to fit the litigation's purposes, conduces to a teleology that is contrary to the spirit of the ECHR.

In a University context, the ECtHR judgment *Sorguç v. Turkey* is a good example of how academic freedom, despite being considered under the scope of application of freedom of expression, can be generously interpreted. In fact, in this case, the applicant criticized, in a paper, the system of appointment and promotion of academics in his University. A national civil procedure was brought against him by a colleague, who claimed that the intervention jeopardized his reputation. The applicant was fined and, after exhausting national appeals, resorted to the ECtHR. This Court understood academic freedom as comprising "*the academics' freedom to*

[42] Judgment CJEU *Oliver Brüstle v. Greenpeace*, recital 49.
[43] Judgment CJEU *Oliver Brüstle v. Greenpeace*, recital 52.
[44] Judgment ECtHR *Garaudy v. France*, 24 June 2003, no. 65831/01, Press Release, 7.7.2003, 2.

express freely their opinion about the institution without restriction"[45] and, so "*the Court finds that the reasons adduced by the domestic courts cannot be regarded as a sufficient and relevant justification for the interference with the applicant's right to freedom of expression.*"[46]

As such we understand that Article 13 of the CFREU entails the protection of some dimensions that can be perceived under the freedom of expression – in fact, *"[t]he right to free expression would be meaningless if it only protected popular or publicly acceptable or accepted expression."*[47]

Most recently, CJEU also had to interpret Article 13 of the Charter, concerning academic freedom: in its judgment *European Commission v. Hungary*, of 2020.[48] The CJEU was called to intervene in order to interpret the meaning and the scope of academic freedom, where it understood that "*academic freedom in research and in teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction, although it should be made clear that that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions.*"[49] Furthermore, following this argumentative path, the CJEU understood "*academic freedom also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities.*"[50]

Academic freedom was also deemed by the European Commission as playing a vital role on the sedimentation of the European democratic principle. In its Communication on the European democracy action plan,[51] the European Commission recalls that *"[d]emocracy, the rule of law and fundamental rights are the foundations on which the European Union is based", this institution also underlined that democracy "allows citizens to shape laws and public policies at European, national, regional and local levels."*[52] In this sense, so that citizens can shape their opinions from a plural and informed standpoint, academic community must be free to contribute and to stimulate "*open debate, free from malign interference, either domestic or foreign.*"[53] The prosperity of European democracy depends on deepening citizens' capacity to make informed options and making it a European political priority, where citizens' literacy is essential.[54] This literacy can only be achieved if academic freedom and the freedom of scientific research in higher education institutions continue to be fully promoted: to do so, "*ensuring academic freedom in higher education institutions is also at the core of all higher education policies developed at the EU-level.*"[55]

---

[45] Judgment ECtHR *Sorguç v. Turkey*, 23 June 2009, no. 17089/03, recital 35.
[46] Judgment ECtHR *Sorguç v. Turkey*, recital 38.
[47] See Debbie Sayers, "Article 13 – Freedom of the Arts and Sciences", 399.
[48] Judgment CJEU *European Commission v. Hungary*, 6 October 2020, Case C-66/18, ECLI:EU:C:2020:792.
[49] Judgment CJEU *European Commission v. Hungary*, recital 225.
[50] Judgment CJEU *European Commission v. Hungary*, recital 227.
[51] See European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "On the European democracy action plan", Brussels, 3.12.2020, COM(2020) 790 final.
[52] See European Commission, On the European democracy action plan, 1.
[53] See European Commission, On the European democracy action plan, 1.
[54] See, for further developments, Joana Covelo de Abreu, "A economia de dados na União Europeia e a política de ciência aberta na investigação científica: uma reflexão a partir da liberdade das ciências", in *Estudos Comemorativos dos 30 Anos da Escola de Direito da Universidade do Minho* (Braga: UMinho Editora, 2023).
[55] See European Commission, On the European democracy action plan, 24.

These efforts do not stop here: in September 2023, a Member of the European Parliament, Mr. Christian Ehler, rapporteur of this institution on Horizon Europe funding programme, drew attention to the need of the European Commission launching a legislative procedure to the adoption of a legislative act that protects academic freedom in Europe, which could also reinforce the rule of law in the EU.[56]

Alessandra Silveira & *Joana Covelo de Abreu*

[56] See, for further development, Science Business – bringing together industry, research and policy. Parliament debates upcoming call for EU legislation on scientific freedom, 19 September 2023, accessed November 7, 2023, https://sciencebusiness.net/news/universities/parliament-debates-upcoming-call-eu-legislation-scientific-freedom.

ARTICLE 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions should be respected, in accordance with the national laws governing the exercise of such freedom and right.

1. The Article follows the formulation of the CFREU as outlined in the Solemn Declaration of the European Parliament, of the Council and of the Commission in Nice on 7 December 2000 (OJEU, 18 December 2000, C-364 / 1).

Furthermore, it develops the ideas established in the first paragraphs of the Charter's Preamble, which state that:

> "*The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.*
> *Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*
> *The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.*"

2. *Evolution of the concept of right to education in relation to the ECHR*. Although this right was absent from the ECHR (1950), its Protocol I, Article 2, would go on to include its protection, in the following terms: "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State should respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical conviction.*" This is a typical formulation of a liberal viewpoint that limits the freedom of education to a guarantee of the freedom to shape educational content according to the religious and philosophical points of view of educators (namely, parents or their chosen proxies). The influence can be detected of the two key and related political issues existing at the time (1950) – fear of any kind of state and secular domination of education, fuelled in Western Europe mainly by Catholic political thought, and the danger of ideological indoctrination as practised in the totalitarian regimes and residual western authoritarian regimes, like the Spanish and the Portuguese regimes.

This restrictive formulation did not comprise: (i) the right to require from the State the provision of an education system, accessible to all, as a precondition to exercising other rights and to allow for full personal development; (ii) the definition of what was meant by "education", leaving in particular the idea hovering that this was limited to the content traditionally transmitted by formal schooling, and not encompassing therefore the vast field of education in the broader sense in a "learning society" [informal education, lifelong education (permanent or recurring education), professionally focused education] which may be nevertheless relevant for several reasons – either because the state should guarantee its availability or because pluralism – namely in a multi-ethnic and multi-ethics society – should also embrace this vast field of educative practices; (iii) the guarantee against any kind of discrimination (not just of a religious or ideological nature) in the access to or the provision of educational content, whatever its nature or direction.

In contrast, the Charter's article should be considered as originating from the idea that the right to education is a condition for the free development of personality and for the exercise of other rights (liberties, political rights, economic and social rights).

3. *Limitations of the text of the Article.* A substantial definition of "education", which relates education to personal development and empowerment to social and political participation, is lacking [see, for instance, Article 73(2), of the CPR, in which the personal and civic aims of education are emphasised using the following wording "*the state shall promote the democratisation of education and the other conditions needed for an education conducted at school and via other means of training to contribute to equal opportunities, the overcoming of economic, social and cultural inequalities, the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in collective life*"].

This definition should nowadays be consistent with the notion of the "communicative, inclusive, and pluralistic society" in which the phenomena of education and learning – with all their inherent virtues, but also with all their risks – are ubiquitous and not only limited to the sphere of State, family and school, gaining an ever-greater degree of dispersion and efficiency. The educational impact of the mass media (press, but especially television and the Internet) is particularly relevant. These new forms of education should be promoted, while they contribute to promote personal achievements and civic goals, such as pluralism, non-discrimination, peaceful conviviality, civic and political participation. Although State intervention in this domain should be cautious, public policies enhancing social inclusion and non-discrimination in access to the media should be enforced. In an era of fast expansion of the use of *e-government* and *e-participation*, public entities must seriously consider the fact that info-exclusion could become a dramatic factor in fomenting civic and political segregation. Regarding content, the same care concerning the preservation of pluralism and non-discrimination in formal education should apply to these massive, yet subtle,[1] ways of shaping mentalities.

[1] S. Pierre Bourdieu, *Sur la télévision* (Le Kremlin-Bicêtre: Raisons D'agir Eds, 1996); Michel Foucault, *Il Faut Défendre la Société* (Paris: SEUIL, 1977); Edward S. Herman and Noam Chomsky, *Manufacturing Consent* (New York: Pantheon Books, 1988); Cass Sunstein, *Republic.com* (Princeton, New Jersey: Princeton University Press, 2001) and Cass Sunstein, *Republic.com 2.0* (Princeton, New Jersey: Princeton University Press, 2009).

Inclusiveness should now be a key concept in the hermeneutics of the right to education. First, because the concept of education has become much more inclusive, encompassing multiple levels (often subtle) of communication. Second, because it has to match the globalization of social relations, with readiness to listen to the Other, as a factor of self-enrichment and a personal commitment to integrate the Other in a multi-ethic society: acknowledging and respecting differences, accepting and defending the dignity of all human beings, their different values and experiences (even if alternative to mainstream thought) and living peacefully and tolerantly with them willingly.[2] This is even more worthy of emphasis, as educational practice is usually conceived as a form of "driving" (*e-duco*) of those who are to be "educated" and less as a means of liberation and promoting imagination and creativity, as stated by Alexander Von Humboldt, 1759-1869, two centuries ago. Even if education is also some kind of guidance, it should be carried out in accordance with the requirements of inclusiveness, if we want to adhere to the idea that education is a prerequisite for human dignity and not just a training process moving towards a predetermined goal of personal or social development.

These ideas had already been highlighted by Katarina Tomasevski, when formulating her criteria of the "4 As" – availability, accessibility, acceptability and adaptability[3] – to characterise the modern concept of the right to education. According to Tomasevski, this criterion of a right to education, as a claim primarily directed to the State, requires education to become: (a) Available – public funding should ensure a system of education – whose level meets the appropriate needs to allow for the building of an integrative community – that is universal, compulsory and free, and endowed with adequate infrastructure (safe and hygienic facilities, books and materials suitable for students, skilled and sufficient staff) in all schools; (b) Accessible – all students should have equal access to educational services, regardless of gender, race, religion, ethnicity or socio-economic status. Special attention should be paid to marginalized groups such as refugees, migrants and displaced populations, ethnic, cultural, linguistic minorities, the homeless, people with special physical or mental needs, and children at risk or subjected to forced labour. Schools should be located within a reasonable distance from learners or alternatively transportation should be provided. Educational materials must be of equal quality for all and generally free; circulation systems of these materials must be promoted that reduce public spending without jeopardizing the quality of education; (c) Acceptable – the quality of education must be free from any form of material discrimination, culturally appropriate for all students and neutral (ideally, an inclusive and not exclusive neutrality) regarding cultural, political, ideological and religious points of view, promoting an inclusive perspective of community life. Teaching methods should be objective, impartial, non-violent, promoters of creativity and personal development, with this spirit inspiring the whole school environment; (d) Adaptable – the content and educational programs should be flexible and adaptable, not only in relation to the mutability of canons regarding good government and to justice in social relations, but also in relation to the social functions of education, particularly professional vocations and training.

---

[2] Noam Chomsky, *Réfléxions sur l'Université suivies d'un entretien inédit* (Paris: Raisons d'agir, 2010); Chomsky's most significant writings on educational matters.

[3] Cfr. Katarina Tomasevski, "The State of the Right to Education Worldwide, Free or Fee: 2006 Global Report", Copenhagen, August 2006, http://www.katarinatomasevski.com/images/Global_Report.pdf.

4. *Right to education and right to vocational and continuing training*. The express reference, in no. 1, to "vocational and continuing training", appears superfluous here – it is only a partial aspect of the general right to education, with its natural place being Article 15 (professional freedom and right to work) – and negative, by ignoring the essentially continuous and recurrent nature (long-life education) of the whole educational process. It can therefore weaken the educational nature of professional training or, alternatively, too strictly link education to narrow vocational goals and to the acquisition of skills appropriate to specific work environments, which are today increasingly mutable. While the first danger is more theoretical, the latter can lead to discriminatory educational policies against personal development, humanities, arts, education for seniors or groups unable to undertake productive work (*e.g.,* persons with physical or mental disabilities), as already witnessed in the context of the financial constraints of the state.[4] While recognising that initial and on-going professional training plays a very important role in creating sustainable conditions for a "good life" and personal development, it should not be forgotten that a "good life" depends essentially on "happiness" (subjective happiness or well-being) and not on individual or collective "material wealth."

5. *Requirement for the State creation and funding of a national education system.* Paragraph 2 of Article 14 provides that "This right [to education] includes the possibility to receive free compulsory education."

This text creates for the States the obligation to create a universal and free education system and, for individuals, the obligation to attend. Although the level of education is not specified – as this would exceed the jurisdiction of the UE in establishing the levels of education in each State –, it should be understood that this obligation of the States is to be defined by dynamic criteria and not by a fixed stipulation of certain cycles (*e.g.,* primary, elementary) or age levels. A general criterion that seems appropriate is to understand that mandatory education is required for the participation of individuals, actively and critically, in society, according to the current notion of civilization, with respect for local cultural diversity where this does not conflict with human dignity. Mandatory and free education must include all people, regardless of gender, race, language, way of life (nomadism, for example) or religion. It has to contain a largely common core of contents, which facilitates educational mobility. It should be accessible for people with physical or intellectual disabilities. It must provide resources to mitigate the economic, social and cultural deficiencies that are directly related to school failure. It has to provide knowledge and attitudes that promote social integration, such as critical awareness of the dominant "lifestyles" and protection against forms of cultural and ideological indoctrination. It should deal with the specific problems of education of migrants and non-EU communities, according to the spirit of the preamble, in particular by respecting languages and cultural traditions of origin. Conversely, the universality of the educational system should avoid unnecessary homogenization, for instance by not prescribing dress codes that conflict with cultural and religious beliefs regarding modesty and appropriate clothing (for example the choice of wearing skirts or trousers, *burkas*, *chadors* or *hijabs etc.*). The only acceptable norms are those strictly related to the basic functioning of schools and the educational process. Regarding this compulsory level of education, the text

[4] See the excellent analysis of Tony Judt, *Ill Fares the Land: a treatise on our present discontents* (London: Allen Lane, 2011).

of paragraph 2 of the Article requires the State to fund the system. Owing to the existence of a universal system of education the State is not required to subsidize alternative, private, forms of education – religious or otherwise – unless these fill temporary gaps in universal public education.

Regarding further and higher education, the Charter no longer requires that the system should be free for students. The practice of "fair prices" even for these further degrees could be a positive measure, together with systems of refundable grants or subsidized loans for further educational segments, especially when these contribute towards equal opportunities or stimulate an uptake in courses that are socially useful but sometimes unattractive. In contrast, for educational segments that tend to generate high-income professionals, a "fair cost" can approach the "real cost" of education.

6. *Freedom to create educational establishments*. Paragraph 3 of the Article states that "*The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*"

This principle is consensual, in the way it is formulated. It is only necessary to specify that, having secured in an appropriate manner (see above) compulsory universal education, the state does not have to subsidize private schools in order to fulfil parental options regarding religious, ethical, civic or political guidelines, or pedagogical orientations and methods or specific content. However, when private schools cover deficits within the public educational system, the state has to subsidise the schools, on the condition that they abide by the principles of public schools, namely universality and religious/ideological neutrality. In the sphere of further and higher education the same principle remains valid, particularly if there are public entities in need of State funding. Exceptionally there may be funding where private establishments cover educational segments of unquestionable utility and social priority.

The existence of private educational institutions, besides respecting the right of parents (and students, although the Charter omits the latter, suggesting a patriarchal conception of education), must also respect "democratic principles." This means that private schools have a duty, similar to the duty of the State, to deliver educational content in keeping with a pluralistic and unprejudiced spirit, respecting the academic freedom both of those who teach and those who learn.

This issue of creating educational private institutions has recently gained momentum, since, in view of an alleged "disqualification of the middle classes", the creation of socially elitist educational institutions (similar to, in another area, the creation of closed condominiums) has become one of the strategies to restore "social distinctions." It is well known – at least since the publication of the classical study of Pierre Bourdieu and Jean-Claude Passeron – that school choice is one of the most effective routes to maintaining social status and preventing young "heirs" from having to "deal" with lower-income social groups. Recent studies in Europe and the Americas show how this trend of strengthening social discrimination, and of assuring better educational opportunities for those who already have social and economic advantages, has been reinforced, undermining democratic societies. In these cases, the two values mentioned in this paragraph – democratic principles and parental rights – should be carefully weighed, as too in the case of a private

school which promotes xenophobia, racism or religious intolerance. The reference to "national laws governing the exercise of such freedom and right" must also have this corresponding understanding. In national legislation the State may introduce quotas for social disadvantaged minorities, which can also apply to private schools.

Given the communication and educational realities in today's societies, the state must still take care to ensure that informal means of education – such as cable TV, personalised education and closed systems – do not project these same elitist or discriminatory goals. But above all, the state must guarantee a high level of quality in public institutions so as to leave no room for discriminatory private education, which may still worsen inequalities of opportunity in society.

7. *Official certification and recognition within the EU of educational segments.* The right to education also includes the right to official certification, under and in accordance with the requirements and procedures of national law, of the academic diplomas corresponding to segments or cycles of education. With the gradual introduction of comparability criteria for levels of education within the EU this right will be progressively extended to provide automatic recognition of educational cycles and respective diplomas or certificates. The objective of this certification is not only to facilitate the mobility of students within the EU (or freedom of movement between Member States for the purpose of education, without discrimination based on origin, nationality or residence), but also to prevent the exclusion – or discriminatory conditions of access to certain levels of education – of students who have received in another Member State educational diplomas equivalent to those required for State nationals wishing to pursue their studies.

8. *Internal effects of this Article (Portugal).* As the CPR is, in the area of right to education, much more advanced than the Charter – already containing in particular a concept of education explicitly or implicitly corresponding to the one referred in §2 above –, the latter will have no other interest than limiting less demanding future constitutional revisions (or ordinary legislation) on these matters. The Charter's stipulations will also be interesting to nationals of other Member States, to whom the Portuguese Government denies the guarantee or the rights enshrined in the Charter – not a negligible effect in a country of immigration and exchanges of people endowed with strong cultural and even linguistic identity, like Portugal.

9. *Cases decided in this area by the CJEU.* The justice of the Union is still not easily accessible to ordinary citizens, namely those in need of the coercive protection of these rights. Existing cases have focused on issues such as: the right to parental leave for child-raising; measures to be taken regarding education to promote tolerance (in the context of European rules on free movement); the guarantee of educational non-discrimination such as the protection of the right to education of the Greek minority in Tirana, Albania; or the right of the Albanian-speaking peoples to education in that language; the guarantee to nationals of access to foreign schools located in the country; and the right to subsidies for education in the State of employment equal to those of the State of residence.

António Manuel Hespanha

ARTICLE 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

1. *Introduction*. To provide commentary on Article 15 CFREU, which recognises the professional freedom to choose an occupation and the right to engage in work, the analysis of three aspects is required. Firstly, the sources through which traditionally it has been provided with content and the horizontal relationship with other provisions of the Charter. Secondly, to determine its subjects and beneficiaries, the scope of Article 15. Finally, the material scope, to determine the scope and limitations arising from its application.

2. *The international and Community sources of Article 15 CFREU*. The recognition of the freedom to choose an occupation and the right to engage in work as stipulated in Article 15 of the Charter can *a priori* assume an unnecessary reiteration. While addressing the terms under which it guarantees the freedom to choose an occupation and the right to engage in work it is clear they are inspired by three levels of sources, without including further references found in the constitutions of the Member States, such as Article 35 of the Spanish Constitution and Articles 47 and 58 of the CPR.

First, one can cite the international treaty sources which directly relate to Article 15 (1) CFREU, notably Article 23 (1) of the UDHR of 10 December 1948, Article 6 (1) of the ICESCR of 16 December 1966, and the ILO Convention no. 143 on migrant workers of 23 June 1975. All these international texts recognise the right to work and freely choose a job or occupation and the Member States are bound by them, as is clear from their international obligations. In the legal framework, derived from the Council of Europe, there is a clear precedent in Article 1 (1) of the European Social Charter signed in Turin on 18 October 1961, reviewed on 3 May 1996, entering in to force in 1999 for all Member States. It has already been cited as a reference by the CJEU in its case-law.[1]

Second, there are the Community sources per se of different nature and scope that determine Article 15 (2) and (3) CFREU.[2] On the one hand, the primary

[1] See Judgment CJEU *Lyreco Belgium*, 27 February 2014, Case C-588/12, ECLI:EU:C:2014:99.

[2] The Opinion of Advocate General Sharpston delivered on 14 November 2013 established the link between the freedoms guaranteed by the TFEU and Article 15 of CFREU, when the Advocate General established in the paragraph 58 that "*Article 15(2) of the Charter recognises the freedom of every citizen of the Union to exercise the right to establishment and to provide services in any Member State. The explanations relating to the Charter confirm that Article 15(2) deals with the freedom of movement for workers, freedom of establishment and freedom to provide services guaranteed by Articles 26, 45, 49 and 56 TFEU. As provision for this freedom is made within the Treaties, its scope and interpretation is determined by Article 52(2) of the Charter, which states that such freedoms 'shall be exercised under the conditions and within the limits defined by those Treaties'. The explanation to Article 52(2) also confirms that 'the Charter does not*

law provisions on the free movement of persons and workers (Articles 45 to 48 TFEU), freedom of establishment (Articles 49 to 55 TFEU) and freedom to provide services (Articles 56 to 62 TFEU). These are freedoms of eminent economic scope aimed towards the implementation of the common market and, subsequently, the internal market and bound to the concept of European citizenship, which implies a privileged status in the enjoyment of certain rights and freedoms over nationals of third countries. The development of these freedoms through secondary legislation and CJEU case-law, as to their scope and content, has been prolix and its summary analysis will be carried out later. As a mere political declaration, one should also mention point 4 of the Community Charter of Fundamental Social Rights of Workers of 9 December 1989, which, despite not being legally binding, the CJEU has resorted to as an element to be considered in its case-law.

In line with the reforms introduced by the Amsterdam Treaty these international and Community commitments are expressly mentioned in the Preamble to the Treaty on the European Union. This reference intends to demonstrate the commitment of the EU and the Member States to improve the social perspective of the European construction. This social vision finds its reason for being in the so-called social policy that with the Treaty of Lisbon has acquired a new dimension or relevance. The development of Title X social policy is found in Articles 151 to 161 of the TFEU. Its new status highlights the EU's commitment to social policy and its implications both for European citizens and nationals of third countries who are working legally in a Member State.

These social provisions especially affect Article 15 (3) CFREU. Among the social provisions, there is the reference in Article 151 of the TFEU to the need for both the EU and the Member States to have in mind the "fundamental social rights" in regulatory development. The basic core to carry out the development of these fundamental social rights lies in the legal basis provided by Article 153 (1)(g) TFEU as a reference point to equate the rights of nationals from third countries who are in regular work with those laid down for EU citizens. The difficulties to be faced in advancing with this plan are apparent, given State reluctance to allow the Union to promote and complement the actions of Member States in this context.

The tension emanating from the Union and the Member States derives from the shared competence between them on social policy in accordance with Article 4 (2)(b) of the TFEU, but with the expected correction in Article 5 (2) of the TFEU. This provision absolutely establishes that employment policy will be the competence of the Member States and the Union shall only undertake complementary and coordinating action. Attempts to move forward together on this matter have been held back, despite the direct implications on the lives of citizens. In a clear attempt to mitigate State reluctance as far as possible the mandate of Article 2 (3) of the TFEU boosts employment policy by stipulating the coordination of economic and employment policies between the Member States.

In connection with the primary law provisions concerning Article 15 one cannot fail to mention the limitation imposed by Article 52 CFREU, when it states that *"rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties."* Therefore, the development and scope of Article 15 shall be achieved with the support of the

alter the system of rights conferred by the EC Treaty and taken over by the Treaties'. Thus, so far as the present proceedings are concerned, respect for Article 15(2) of the Charter is coterminous with compliance with Article 56 TFEU."

above-mentioned Treaty provisions and, of course, with the limitations contained therein, without forgetting the important case-law of the CJEU[3] on those provisions.

The third source of reference for Article 15 is the general principles of law that have been developed through the case-law of the CJEU, in which it was considered whether the right to pursue a trade or professional activity was protected as a general principle against the action of the Union. The CJEU supports this right in all its judgments[4], although subjecting its exercise to certain limits based on the general interest whenever the defence thereof does not affect the substance of the right so recognized. In its judgment in *Nold*, of 14 May 1974, C-4/73, the CJEU considers that fundamental rights are an integral part of the general principles of law, respect for which must be ensured. To attain this goal, the CJEU references the common constitutional traditions of the Member States and the international human rights protection Treaties that should serve as a guide when applying EU law and protecting *"the right to choose or freely practice a trade or a profession."* Keeping to this line, the judgment in *Staatsanwaltschaft Freiburg v. Franz Keller*, of 8 October 1986, C-234/85, reiterates the classification of this right as a general principle and, consequently, the necessary protection of the freedom to pursue a trade or professional activity. Finally, the judgment in *Procurator Fiscal v. Marshall*, of 13 November 1990, C-370/88, follows the same logic.

Analysis of the sources that inspired the wording of the various paragraphs of Article 15 CFREU reveals the consistency of their content with the provisions in international and Community sources. However, as an additional guarantee, the Charter itself establishes a control before any applications or interpretations that could limit the scope of the freedom to choose an occupation and right to engage in work. In particular, the recognition of the rights in the Charter is subject to a compatibility control with the different sources that served to its formulation. Thus, Article 53 imposes the obligation not to interpret the provisions of the Charter restricting or adversely affecting *"human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."* The only question that arises concerning the

---

[3] See Judgment CJEU *Giordano v Commission*, 14 October 2014, Case C-611/12 P, ECLI:EU:C:2014:2282. In this case, the Court stated in paragraph 49 that "*as the Court has held, the freedom to pursue a trade or profession does not constitute an absolute prerogative, but must be viewed in relation to its function in society (see, to that effect, judgment in FIAMM and Others v Council and Commission, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 183 and case-law cited). Accordingly, limitations may be imposed on the exercise of that freedom provided, in accordance with Article 52(1) of the Charter, that they are prescribed by law and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 38).*" See also Judgment CJEU *Robert Pfleger and Others*, 30 April 2014, Case C-390/12, ECLI:EU:C:2014:281, paragraph 58.

[4] Judgment CJEU *Interseroh Scrap and Metals Trading*, 29 March 2012, Case C-1/11, ECLI:EU:C:2012:194, paragraph 43, the Court confirms that "*In that regard, Articles 15(1), 16 and 17 of the Charter of Fundamental Rights of the European Union, provide, respectively, for the right to engage in work and to pursue a freely chosen or accepted occupation, the freedom to conduct a business and the right to property. Moreover, according to settled case-law, both the right to property and the freedom to pursue a trade or business are general principles of European Union law (see Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 78; Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 68; Joined Cases C-154/04 and C-155/04 Alliance for Natural Health and Others [2005] ECR I-6451, paragraph 126; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 ABNA and Others [2005] ECR I-10423, paragraph 87).*"

effectiveness of this compatibility control is in reference to the standards agreed upon in international Conventions to which the Union or all the Member States are party. The requirement of "all" States hinders the control if one bears in mind that some Member States have made reservations or declarations in several international Conventions on this matter as they did in the Charter itself.

Along the same line of guarantee it must be borne in mind that the freedom to choose an occupation or to pursue a freely chosen activity is also conditioned by Article 54 of the Charter, which self-imposes a limit to the interpretation of the Charter provisions so not to serve as a legal support for conducting activities or acts involving the destruction or limitation of rights or freedoms recognized therein. Therefore, one cannot plead infringement of Article 15 CFREU when the respective professional activity is linked to activities that may damage or limit the enjoyment of rights enshrined in the Charter.

3. *The personal scope of Article 15 CFREU*. The examination of the various sources that affect the wording of Article 15 leads to the question of whether its inclusion in the Charter was necessary or, on the contrary, was it reiterative and unnecessary. The answer to this question is found by focusing on the need to collect and ensure the freedom to choose an occupation and the right to work under the CFREU.

The justification lies in the fact that in the sources we mentioned, whether international or Community ones, the liable subjects are Member States. But the scope and content of these sources ignores the substantial increase in the powers of the Union and its agencies and bodies and therefore its direct actions on the natural or legal persons residing in the Union with the consequent risk of weakening or limiting their rights and fundamental freedoms. Confronting this risk, the CFREU assumes a specifically Community framework for the protection of fundamental rights that can be affected by the direct action of the Union institutions, its bodies and agencies and, indirectly, by the action of the Member States in meeting the obligations imposed by Union law. In this context, it makes sense that Article 51 of the Charter points out that *"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."*

Consequently, the subjects liable to respect the freedom to choose an occupation and the right to engage in work are structured on two levels: on the one hand, the Union bodies and agencies, and on the other, Member States wherever and whenever Union law applies to their activity.[5]

---

[5] Judgment of the CJEU *Delvigne*, Case C-650/13, ECLI:EU:C:2015:648, the Court said "*It should be recalled that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law (judgment in Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 17).*
Article 51(1) of the Charter confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (see judgments in Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 19, and Torralbo Marcos, C-265/13, EU:C:2014:187, paragraph 29).
Thus, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see judgments in Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 22, and Torralbo Marcos, C-265/13, EU:C:2014:187, paragraph 30 and the case-law cited)." The Labour Spanish Hight Court in its Sentence of 11 February 2014, established that "*...the Charter of Fundamental Rights of the European Union includes, among others, ...may affect the sphere of competence of the Employment Division of the High Court.*"

In the case of the Union, the obligation is reflected in the fact that, within their respective competences, all the institutions involved – under Article 13 of the TEU – as well as the bodies and agencies that have arisen with the evolution of the EU, should be aware that they cannot adopt legislation or conduct behaviours that violate or limit professional freedom to choose an occupation and the right to engage in work unless they are adjusted to the limitations provided for in primary law from which they originate or in the CJEU's case-law on the exceptions to the enjoyment of free movement of persons, labour, services and the freedom of establishment.

The Member States will only be indirectly liable, *i.e.*, when they interfere with the professional freedom or the right to work because of the application of Union law. Following a logical sequence, the legislation that they apply must have been approved safeguarding the content of Article 15 but while applying it, the State at stake violated the provisions of this article. In practical terms, considering the vast case-law of the CJEU on the failure of the Member States regarding the fundamental freedoms or the secondary legislation that develops those freedoms, it is a situation that might happen often and that can be added to the violation of Article 15 CFREU. Therefore, when a State, applying Union law, hampers, impedes or stops the free movement of persons and/or workers and the freedom to provide services or of establishment, this not only breaches the respective legal provisions but also, Article 15 CFREU itself.

Since the subjects that must comply with Article 15 have been established, one should also determine its beneficiaries. In paragraph 1, it is stated that every person has the right to engage in work and to pursue a freely chosen or accepted occupation. The reference to every person would imply a universal scope of the right. However, it must be understood as having a mere declaratory value, given the *ratione personae* limitations enshrined in the Treaty in which it is based and also by the formulation of Article 15 itself, which in Paragraph 2 limits the manifestations of the right to work and to pursue a freely chosen profession to the citizens of the EU, within the terms of paragraph 1 and 2 (a) of Article 20 TFEU, without disregarding the corresponding case-law, and paragraph 3, which only recognises equivalent working conditions to nationals of third countries who are authorised to work in the territories of the Member States. The fulfillment of this right is conditioned by the regularity of their situation according to the national legislation of the Member State they are working in.

In the case of the citizens of the EU, the protection should be understood as including their family, even when those are nationals of third countries, within the terms of secondary legislation, more concretely in Article 2(2) and (3), Article 7(2) and Article 23 of Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States and the case-law of the CJEU on the community notion of family member. One should also consider as beneficiaries of Article 15(2) the third-country nationals who are long-term residents, considering that Article 11(1)(a) of Directive 2003/109/CE of 25 November 2003, which concerns the status of third-country nationals who are long-term residents, recognised that equal treatment must be given to nationals of third countries with regards to access to employment, either self-employed activities or employed labour.

The same is true, but with further limitations, for the family members of the third-country nationals authorised to work in a Member State, since Article 14(1)(a) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification, recognises their right of access to self-employed activities or employed labour. Thus,

there is a possibility that now, given the articulation with Article 15(3) CFREU, this could mean that EU institutions and States, when applying Union law, must safeguard those self-employed activities or employed labour activities and make sure they occur in equivalent working conditions of the citizens of the UE and their family members. The delimitation of the subjects that must comply and the beneficiaries leads to the analysis of their sphere of rights. To this end one needs to analyse the material scope of Article 15 of the Charter, as well as the limitations inherited from the provisions of the primary and secondary law on which this right is predicated.

4. *The material scope of Article 15 CFREU and its limitations.* The analysis of the material scope of Article 15 should consider the limit imposed by Article 52(2) of the Charter that reflects the conditions and limits imposed by the provision of the Treaty in which is based.

Therefore, the institutions of the Union, the various bodies and agencies, as well as the Member States, will have to guarantee the freedom to seek employment, to work, to exercise the right of establishment and to provide services, as recognised to citizens of the Union, and as prescribed by Article 15(2), to their family members within the terms above-mentioned. The epicentre to guarantee this provision is enshrined in the provisions of the Treaty concerning the freedom of movement of workers and the freedom to provide services and freedom of establishment as well as in secondary law and in the underlying case-law of the CJEU.

The search for employment and the freedom to work fall under Article 45 TFEU and Article 1 of Regulation (EU) 492/2011 of 5 April 2011[6] on freedom of movement for workers within the Union and Article 7 of Directive 2004/38/EC in which Recital 31 expressly mentions the compatibility with the Charter. Considering those who seek employment, in *Antonissen*, of 26 February 1991, C-292/89, the CJEU considered that Article 45 implies the right to move and settle freely throughout the territory of the Union's Member States with the purpose of seeking employment. Later, in the judgment on *Commission v. Belgium*, of 20 April 1997, C-344/95, the CJEU admitted that Member States can limit the right of residence of job seekers when these are unable to prove that they are still looking for work or that they have strong chances of being hired. Consequently, if the Member States did not transpose this provision correctly, they would be violating not only their obligation to properly transpose the Directive but also Article 15 (2) CFREU, by limiting the right of those who seek employment.

Regarding the freedom to work, the genesis of Article 45 TFEU is developed by Article 1 and 3 of Regulation (EU) 492/2011, and is rooted in the principle of non-discrimination on the basis of nationality. The abundant case-law safeguarding this freedom is translated in a broad concept that the institutions of the Union, the bodies, and agencies, as well as the Member States, must respect. In the judgment in *Vatsouras*, 4 April 2009, C-22/08 and C-23/08, the CJEU recalls that "*the concept of 'worker' within the meaning of Article 39 EC [now Article 45] has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he*

[6] Regulation (EU) no. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, http://data.europa.eu/eli/reg/2011/492/2021-08-01.

receives remuneration (see, in particular, Lawrie-Blum, 3 July 1986, 66/85, ECR p. 2121, paragraphs 16 and 17; Collins, 23 March 2004, C-138/02, ECR p. I-2703, paragraph 26, and Trojani, 7 September 2004, C-456/02, ECR p. I-7573, paragraph 15)."

Consequently, any attempt by a State to limit this freedom resorting to national definitions of "worker" or setting up obstacles, barriers or impediments that directly or indirectly may limit the fulfilment of the freedom to work in another Member State in equal conditions, would be violating the mentioned provision and Article 15(2) TFEU. The only limitations to the fulfilment of this right shall be based on the traditional concepts of public policy, public security or public health, as prescribed by Article 45(3) and Articles 27, 28 and 29 of Directive 2004/38/EC, that codify the vast case-law of the CJEU on these concepts limiting the discretionary power of Member States to expel a citizen of the Union. Similarly, civil service positions that entail a non-sporadic direct service of public powers may be reserved to nationals in conformity with Article 45(4) TFEU and with the case-law of the CJEU, narrowing the margin of appreciation of Member States.

Therefore, the safeguarding of the freedom of establishment and the freedom to provide services, as set out by Article 15(2) of the Charter, shall be consider resorting to the definitions provided by Article 49 and 56 TFEU respectively, and to the case-law of the CJEU on the scope and limits of those for Member States. One must highlight that the effective exercise of both freedoms is also enshrined in Directive 2004/38/EC. To guarantee the full enjoyment of these rights, one of the main obstacles was dismantled, with the recognition of educational qualifications through Directive 2005/36/EC, 7 September 2005, and the recognition of professional qualifications as well as the obstacles generated by requirements and bureaucratic barriers, in this case, through Directive 2006/123/EC, 12 April 2006, known as "Directive of Services' in the internal market.[7]

The right of freedom of establishment, in light of Article 49 TFEU, implies for nationals of a Member State, professionals or legal entities, the access and the exercise of non-salaried activities, including establishing, purchasing or managing companies, either by a principal or secondary place of establishment – setting up agencies, subsidiaries, branches or offices –, in the same conditions as the nationals of the Member State of establishment and according to the legislation in force there. The case-law of the CJEU sets out the indicative criteria to consider the existence of the right of establishment in a certain scenario*: i)* economic activity, *ii)* self-employed, *iii)* transnational nature, *iv)* by creating a principal or secondary establishment in another Member State, and *v)* with the aim to develop a stable, permanent, ongoing, regular activity.

The last two elements are precisely the ones that allow the differentiation of freedom of establishment from freedom to provide services. The combined reading of Article 56 and 57 TFEU allows one to define the freedom to provide services as the right granted by the Community legal framework to the nationals of a Member State undertaking a self-employed economic activity to provide their professional services, being those industrial, commercial, artisan or freelance services, regardless of their temporary, sporadic or discontinuous nature in exchange for remuneration, in another Member State. In the words of the CJEU in the judgment on *Gebhard*, 1995, C-55/94, "*...the freedom to provide services is defined by the absence of a stable and continuous participation in the economic life of the Member State in which the service is*

[7] Judgment of the Court (Grand Chamber) *Rina Services and Others*, 16 June 2015, Case C-593/13, ECLI:EU:C:2015:399.

provided. That does not prevent the service's provider to acquire an infrastructure or enough resources in that Member State to make providing services across the border viable."

In practical terms, the definition that can be built from the combined reading of Articles 56 and 57 TFEU, and the case-law of the CJEU, suggests that the freedom to provide services encompasses four different forms: *i)* the physical travel of the services' provider by crossing the border to provide the hired service, *ii)* or it is the beneficiary of the service that travels to the State where the service provider is (for example, a tourist or a medical patient), *iii)* both travel to provide and receive the services respectively (for instance, a tourist guide and a tourist, or group of tourists, travel to other Member State); *iv)* the last possibility would be the case in which neither travel but it is the service itself that takes place in another Member State (for example, a translation of a report sent by email, a television or radio signal, etc....).

The institutions of the EU, its bodies, and agencies and, especially, the Member States shall bear in mind the scope that the TFEU and the case-law of the CJEU gave to the freedom of establishment and to provide services to avoid infringing a facet of the Community legal framework and, when relevant, Article 15(2) CFREU. To guarantee the respect for this right, the best point of reference is to consider the CJEU case-law that established a clear limit on Member States when faced with restricting the freedom of establishment or to provide services in the above-mentioned judgment G*ebhard* by stating "*that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it ... Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned."*

Finally, one must mention that Member States may circumscribe the enjoyment of these freedoms without infringing the Treaty or Article 15(2) CFREU when reasons of public policy, public security or public health occur as well as due to the protection of the general interest.

To close this analysis of the scope of application of Article 15 CFREU, it only remains to examine paragraph 3, which recognises that third-country nationals are authorised to work and to do so under conditions equal to those of the citizens of the Union. As mentioned previously, the legal justification for this provision and its development is in Article 153(1)(g) TFEU. The limitation on the enjoyment of equal labour conditions is based on the fact that the worker shall be authorised to work legally, a circumstance that is subject to the national laws on migration even though important harmonisation steps have been taken, based on Article 63(3)(a) TFEU. Nothing is said regarding the meaning of "working conditions" and usually, only salary and dismissal are mentioned. In an effort to define terms more concretely, one can consider the conditions laid down by Article 3 Directive 96/71/EC, 16 December 1996, concerning the posting abroad of workers in the framework of the provision of services, on which the CJEU has already expressed its views, analysing the fulfilment of the working conditions concerning the posting abroad of workers by a company to another Member State: "a) *the maximum work periods and minimum rest periods*; b) the minimum paid annual holidays; c) the amount of minimum wage, including the amount of overtime hours; this is not applicable to the supplementary pension schemes, however; d) the conditions for

supplying labour, particularly by the temporary work agencies; e) *the health, safety and hygiene at work*; f) the protection measures applicable to work and employment conditions of pregnant women or women who have recently given birth, as well as to children and youngsters; g) the equal treatment between men and women and other measures on the subject of non-discrimination."

Two initiatives may reflect the freedoms set out in Article 15(3). On one hand, the one very specifically set out for third-country nationals with the EU blue card. Concretely, Article 14(1)(a) Directive 2009/50/EC, 25 May 2009, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, recognises the right to equal treatment regarding working conditions. On the other hand, Directive 2011/98/EU, 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. Recital 31 mentions the observation of the provisions of the Charter [Article 6(1)], among which one would find Article 15(3) and Article 12(1)(a), expressly recognising equal treatment in terms of working conditions. However, Article 12(2) permits Member States to retract from the obligation of equal treatment. The compatibility of that provision with Article 15(3) CFREU may be found in this provision itself, since it mentions equivalent rather than equal conditions for the citizens of the Union.

Emiliano García Coso

ARTICLE 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

1. Economic regimes and economic systems intertwine and together weave the constitutional background of economic activity in a given politically organised community. In a way, an economic regime is defined by the distinctive traces of the articulation between power – namely and mostly political power – and economic activity/reality.

Traditionally, "*the characterisation of the economic regime constitutes an explanatory frame of the principles of state intervention and of its financial practice, both in the dimension of the underlying ideology and the framing institutions.*"[1] That framing refers, precisely, to the financial and economic action (or intervention) of the State.

Regarding economic systems, we may say, on the other hand, that by integrating and materialising the framework defined by the regimes they end up mirroring the way that economic activity operatively organises itself on a day-to-day basis. The economic systems are inferred from the most typical characteristics of the tangible organisation and functioning of economic activity. They portray more immediately the working of the economy in a given community; in fact, they materialise the general lines projected for the economic activity by each regime.

Without developing, for now, the theory of the regimes and economic systems, in an abstract and (above all) theoretical domain, it is interesting to acknowledge the constitutional dimension framing and characterising the functioning of economic activity. In other words, the questions pertaining to regimes, and the concrete (economic) systems that materialise them, are fundamentally matters belonging to the political sphere – the ideological and organisational choices of a community – and, therefore, they are questions that require the consideration of constitutional choice. All in all, by apprehending the matrix of the systems and of the regimes which shape the economy, we necessarily deal with the physiognomy and relational and/or communitarian nature dominantly accepted and sought in a given community. We deal with a political, economic, social and cultural whole that matches, substantially, the Constitution of that community.

2. The reference to the theory of systems and of the economic regimes emerges from the enshrined statement made in Article 16 of the Charter, which establishes the "freedom to conduct a business." In reality, the "freedom to conduct a business" (or "economic freedom") shall be understood in the context of an option, underlying the Treaties, for a certain *economic system* – basically the market economy; the "freedom to conduct a business" set out in the Charter equates to the specification of an individual freedom.

---

[1] A. Sousa Franco and G. d'Oliveira Martins, *A Constituição económica portuguesa. Ensaio interpretativo* (Coimbra: Almedina, 1993), 89.

In fact, as LANDOLT affirms, in its original state the Treaty of Rome, which established the EEC, did not make any express reference to the "market economy" as the economic model that would be followed by the integration process.[2] However, the institutionalisation of the "economic freedoms", inherent to the common market/internal market, and the assertion, without reservation, of a policy (and of a normative system) of "defence of competition", has allowed for a general acceptance that the "market economy" or capitalism is the presupposed economic order for European integration.

It is important, for the contextualization of the economic freedoms and, in particular, of the so-called freedom to conduct a business, to choose a criterion of analysis (more precisely, a criterion of analytical description) of the economic systems. In that respect, the propositions that have been followed by the doctrine are historically varied, as AVELÃS NUNES explains.[3]

One of the most commonly used proposals for a typology of economic systems (and, consequently, of identifying and distinguishing criteria) is the one suggested by WERNER SOMBART.[4] According to SOMBART, there would be three (historical-economic) elements that would distinguish between the several systems, namely: the spirit (that is, the force behind the economic functioning, the main objective of the production); the shape of the system (in other words, as summed up by AVELÃS NUNES, "*the set of social, legal and institutional elements that constitute the framework inside which are developed the economic activity, the relation amongst the economic subjects – regime of property, labour status, role of the state*")[5] and the substance (that is, the dominant technique used in a given, real economy).

However, those elements/criteria of identification and analysis of the systems, proposed by SOMBART, must be articulated in light of the concrete functioning of respective the economies; with answers to the questions "what to produce?", "how to produce?" and "to whom to produce?." Essentially therefore the questions of production, consumption and distribution. Well, in a historic perspective and in the context of the industrialised society, we may identify two major principles of organisation and functioning of the economies. Two fundamental principles, which amount to, the principle of the central direction of the economy (total central direction, the planned or centralised economy, which inspired and simultaneously founded the socialist economies) and the principle of the free economy (market economy, open economy or decentralised economy that is the basis of capitalism).

3. To understand the role of the freedom to conduct a business in the constitutional architecture of the Treaty, now through Article 16 of the Charter, we must consider it within the context of the fundamental principle and the system of economic organisation and functioning presupposed by European integration. Such principle and system, as previously mentioned, are elemental to the design of the Internal Market (Common Market), enshrined in the Treaties, although originally no express or direct reference was in effect made to the principle of free economy and to the capitalist system.

---

[2] Phillip Landolt, *Modernised EC Competition Law in International Arbitration* (The Hague: Kluwer Law International, 2006), 26.

[3] A. J. Avelãs Nunes, *Os Sistemas Económicos, Separata do Boletim de Ciências Económicas*, vol. XVI (Coimbra, 1988), 10 to 25.

[4] On Sombart and his work, see the text of António Vasconcelos Nogueira, "Werner Sombart (1863-1941): apontamento bibliográfico", *Análise Social*, v. XXXVIII, no. 169 (2004): 1125 to 1151.

[5] A. J. Avelãs Nunes, *op. cit*., 15.

The capitalist system, or market system, or even, as it sometimes is called, the "free enterprise"[6] system, may be characterised, from the standpoint of the respective typical and defining social and legal institutions, (as per the theory of SOMBART, through the lens of form) because they integrate and dynamically provoke market interaction, business (in capitalist fashion), capital (as an autonomous production factor), free economic initiative and private property.

The last two institutions as mentioned above could be seen, from a certain perspective, as a sort of "institutional framework", structuring functioning not only economically but also politically and socially. A sort of "institutional framework" that derives directly from, and materialises the operational lines of action of, individual freedom. As SOUSA FRANCO and GUILHERME D'OLIVEIRA MARTINS state, both (institutional frameworks highlighted) "*are individualistic: the integration of the economic activity in individualist institutions defines the capitalist system, typical of European societies in the aftermath of the Discoveries.*"[7]

4. Free economic initiative or, in other words, economic freedom as an institutional framework founder of capitalism, cannot be viewed autonomously and disconnected from the recognition and protection of private property. This latter is the instrumental presupposition of the former (economic freedom). It is not conceivable, above all in an essentially individualistic worldview, to create the conditions for the development of economic freedom without recognising for all and, from the beginning, for economic agents,[8] the possibility of ownership, of – most importantly – the means of production.

Recognition of private property is not an exclusive feature of capitalist systems and the market economy. Yet, here in this context (capitalism), private property follows the lines of Roman law and tends to become absolute. It is set up as an absolute and exclusive right, "*reducing or abolishing the public or collective property as well as the forms of 'limited property, which the Medieval German laws had instituted.*"[9] Certainly, over time and with the development of conceptions that attribute or underline the role of the state as the guardian of solidarity in the social fabric (to put it differently, the state itself develops its supporting role – the welfare state), the original absolute character of private property was diluted, in a collective or social sense, in relation to the notions of nineteenth-century capitalism regarding private property. Nonetheless, "without subverting them, as such could only be conceived in a different economic system."[10]

In short, by translating economic activity, in the capitalist model, into market relations and, on the other hand, comprehending these relations as trading relations, economic agents will only be able to materialise such trades and, as a consequence, such market relations, if they have something to trade – in the sense

[6] A. Sousa Franco and G. d'Oliveira Martins, *op. cit*., 41.

[7] A. Sousa Franco and G. d'Oliveira Martins, *op. cit*., 42 (Excerpt freely translated by the Author).

[8] All citizens could potentially be economic agents.

[9] A. Sousa Franco and G. d'Oliveira Martins, *op. cit*., 52. In this regard, the same authors conclude – with remarkable insight, to our understanding – that there is, in this capitalist context, an "intensification and an absolutisation of the Romanist model of individual and absolute property. Hence, the predominance of appropriated capital and natural elements (to those assimilated) in a company, whose ownership and direction they usually take up. The succession status itself is nothing but an extension in time of individual private property with regimes that tend to become progressively more individualist" (Excerpt freely translated by the Author).

[10] A. Sousa Franco and G. d'Oliveira Martins, *op. cit*., 53.

of being holders of property rights. In the absence of the enshrinement and the guarantee of private property the development of the economic activity itself would be inconceivable, following the logic of a system derived from and concretizing individual freedom (market economy).

5. Nonetheless, what is the significance of this "economic freedom" (or free economic initiative) that composes the freedom to conduct a business?[11]

On one hand, it means contractual freedom. In reality, it is a concretisation, in legal terms, of the structuring principle of the autonomy of will (or private autonomy). The free market and free competition define, in this capitalist view, the functioning of the market.

On the other hand, "economic freedom" also refers to the so-called freedom to work. Each person, each citizen, exercises, in abstract, the profession or the occupation that, within the scope of their individual freedom, he/she desires (and as far as possible in non-discriminatory conditions).

As stated in Article 15 of the Charter, "everyone has the right to engage in work and to pursue a freely chosen or accepted occupation." In the context of a capitalist system, work (production) is the object of a process of market specialisation, *i.e.*, this individual dimension (the concretisation of an individual freedom) that is the freedom of work is enhanced with the development of a specific labour market whose conditions of access shall be, as far as possible, free, non-discriminatory and whose restrictions (in terms of freedom of access) shall be understood and based on objective reasons.

Another form of economic freedom is apparent in the affirmation of freedom of consumption, understood as the free choice that each person has to decide upon the type of needs that they seek, individually, to satisfy. Freedom of consumption is also a fundamental element for the assurance of the competitive functioning of the markets, *i.e.*, an efficiency catalyst in the performance of the markets.

Finally, in this whole set of materialisations/manifestations of economic freedom, we come to the freedom to conduct a business. This is the acknowledgment of the fundamental right, and thus the warranty of the margin of individual (I would say, existential) freedom, of everyone to have the ability to choose the options of production, the possibility of creating companies and, simultaneously, the possibility of managing the direction and market behaviour of such companies, restricted only by law and eventually government regulation. We stand here, to a certain extent, before the freedom of economic choice, before the freedom of self-determination of the people in the field of the markets.

More specifically, self-determination (intrinsic to the definition of the person as free, also from the economic vantage point) is necessary to the creation of companies, their management, their maintenance and their disposal/divestiture/sale.

6. As we see it, this is the meaning of the provision of the Charter. What I note – in favour of this integrating perspective of the freedom to conduct a business within the dynamics of free economic initiative in a capitalist reality – is the systemic argument itself. Indeed, the enshrinement in the Charter of the freedom to conduct a business emerges sequentially from the acclamation of the professional freedom and right to work as fundamental rights (Article 15) and before the above-mentioned institutional frame of the capitalist system: the postulate of the right to property (Article 17).

[11] In other words, the freedom to conduct a business is one of the manifestations of economic freedom.

7. Naturally, the case-law evolution of the CJEU, deepening fundamental rights – even prior to the Treaty of Lisbon and formal integration with the binding force of the Charter via Article 6 of the TEU – in the same *corpus iuris* of the primary law, ended up also encompassing the freedom to conduct a business. Such case-law developments, associated with European citizenship and fundamental rights, are more consistently and prominently focused on the invocation of the set of rights that approach the issue/guarantee of equality. Notwithstanding, the following rulings may be cited as upholding the freedom to conduct a business:

- Judgments *Nold*, 4/73, of 14 May 1974, paragraph 14; and *SpA Eridania*, 230/78, of 27 September 1979, paragraphs 20 and 31 (more directly concerning free economic initiative);
- Judgments *Sukkerfabriken Nykoebing*, 151/78, of 16 January 1979, para. 19; and *Spain v. Commission*, C-240/97, of 5 October 1999, para. 99 (more directly emphasising contractual freedom).

Pedro Madeira Froufe

ARTICLE 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

1. The original text of the founding treaties of the European Communities did not provide independent and explicit protection of fundamental rights.

The established fundamental freedoms – movement of goods, persons, services and capital – were essentially freedoms of an economic nature. For this reason, it is not surprising that the initial position of the CJEU on the issue of fundamental rights in the Community's legal order was to consider itself not competent to judge this matter and in particular, the compatibility of Community law with the constitutional law of the Member States.

This first stage lasted until the judgment (CJEU) *Stauder*, of 12 November 1969, Case 29/69. For the first time, the Court recognised that fundamental rights form an integral part of the general principles of Community law that it has to assure.

In the 1970s and 1980s the Court has gradually assumed a role in the fostering of fundamental rights in its case-law.[1] In the case *Hauer* of 13 December 1979, paragraphs 13 et seq., in a preliminary ruling under Article 177 TEC, the CJEU held that "*the right of property is guaranteed in the Community legal order in accordance with the ideas common to the Constitutions of the Member States, also reflected by the 1st Additional Protocol to the ECHR.*"[2]

Only with the Single European Act (signed in Luxembourg on 17 February 1986) was a generic statement included on the protection of fundamental rights.

In the preamble, the Member States committed themselves "*to promote together democracy on the basis of the fundamental rights recognized in the constitutions and laws of Member States, in the Protection of Human Rights and Fundamental Freedoms Convention and the European Social Charter, namely, freedom, equality and social justice.*"

It was, however, with the TEU (signed on 7 February 1992 in Maastricht) that the assumption of this commitment was reflected in the respective articles of the Treaty.

---

[1] Read more on this evolution, cf. José Luís da Cruz Vilaça, "A protecção dos direitos fundamentais na ordem jurídica comunitária", in *Estudos em Homenagem ao Prof. Doutor Rogério Soares* (Coimbra: Coimbra Editora, 2001), 419-421, and Maria Luísa Duarte, "A União Europeia e os direitos fundamentais. Métodos de protecção", *Studia Iuridica*, no. 4, Colóquio *Portugal – Brasil Ano 2000* (Coimbra: Coimbra Editora, 2000), 35-40, and EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, DG Justice, Freedom and Security, June 2006, 10.

[2] Cf. Fausto de Quadros, *A protecção da propriedade pelo direito internacional público* (Coimbra: Almedina, 1998), 173.

In effect, Article F, paragraph 2 (at that time) of the TEU set out that "the Union shall respect fundamental rights as guaranteed by the ECHR signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

The Treaty of Amsterdam (November 2, 1997), despite the inclusion of a greater number of fundamental rights, continued to regulate the matter in a sparse and unsystematic way.

2. The TEU (Article 6, paragraph 1), in force since 1 December 2009, gives legal force to the CFREU.

Paragraph 1 of Article 17 of the Charter corresponds, to a large extent, to the provisions of Article 1 of the Protocol to the ECHR. Indeed, in accordance with paragraph 3 of Article 52 of the CFREU, this right has meaning and scope equal to the right guaranteed by the ECHR, and the restrictions thereon set out may not be exceeded.

There are three main aspects to emphasise in paragraph 1 of Article 17:

a) concept of property;

b) deprivation of property;

c) use of the property.

Concept of property. The first part of paragraph 1 Article 17 aims to formulate a general principle of respect for property, for both individuals and companies.[3]

The notion of property should be interpreted broadly, as a fundamental right, and not in the civil law sense of a private property right (right *in rem*).

This is the unanimous current of thinking, both in international law in general,[4] and in the interpretation of the ECHR.[5]

This means that the concept of property, of goods, should cover, essentially and as a rule, the current private property rights, including, in addition to the property right (itself), other limited real rights, rights to shares,[6] rights to intangible assets[7] and to credit claims (the latter, when payable).

This broad concept of property, in the sense of a fundamental right, is also shared by doctrine and case-law in Portugal. In the CPR, the protection of private property (Article 62) is regulated under the economic rights and duties, social and cultural rights (Articles 58 to 79).

---

[3] This is what results from the hermeneutical guidance of Article 52(3) of the CFREU, mentioned above. In the same sense, see the EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, *cit.*, 8. It may give rise to doubt as to whether legal persons of public law are covered. It seems reasonable that they should be included if they are rights holders subject to the private area. On this subject, cf. Hélène Pauliat, in *Traité Établissant une Constitution pour l'Europe – Partie II, La Charte des Droits Fondamentaux de l'Union*, eds. L. Burgorgue-Larsen, A. Levade and F. Picod (Brussels: Bruylant, 2005), 236, and Alberto Lucarelli, in *Commento alla Carta dei Diritti Fondamentali dell'Unione Europea*, eds. R. Bifulco, M. Cartabia and A. Celotto (Bologna: Il Mulino, 2001), 139.

[4] Fausto de Quadros, *A protecção da propriedade pelo direito internacional público*, *cit.*, 6.

[5] Ireneu Cabral Barreto, *A Convenção Europeia dos Direitos do Homem* (*anotada*) (4th ed., Coimbra: Wolters Kluwer/Coimbra Editora, 2010), 457; Jorge Ferreira Alves, *A Convenção Europeia dos Direitos do Homem Anotada e Protocolos Adicionais Anotados (doutrina e jurisprudência)* (Porto: Legis Editora, 2008), 338 and EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, *cit.*, 10.

[6] In this commentary, we do not deal with the controversial issue of the legal nature of the right to ownership of shareholdings (namely quotas and shares).

[7] The so-called "intellectual property" referred to in Article 17(2) of the CFREU, which will be addressed later in the text.

Portuguese doctrine and case-law consensually qualify the right to private property as a fundamental right with an analogous nature to rights, freedoms and guarantees (Article 17).[8]

It is indeed the common position of the European Union Member States.[9]

Fundamental rights by analogy are those "*whose main content will have to be, to a greater or lesser extent, determined by options of the ordinary legislator, to which the Constitution confers powers of determination or achievement.*"[10]

According to VIEIRA DE ANDRADE,[11] the right of private property (Article 62) in the CPR is a fundamental right of a similar nature, at least in its relationship with the state power of expropriation. It is a right "*without an intense constitutional definition of its content*", which leaves space, therefore, for "*a certain degree of autonomous legislative shaping (...).*"[12]

The property right established in the CFREU gives the holder a set of rights, to use, enjoy and dispose of their respective property.

One cannot say that a *right to property* in the sense of the right to acquire assets with value is contemplated. Rather, property is protected in terms of capital assets legitimately acquired as *property rights.*

Deprivation of property. Deprivation of property is only allowed, in accordance with the CFREU, "for reasons of public interest in the cases and conditions provided for by law, subject to fair compensation for their loss in good time."

---

[8] Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada*, Tomo I (2nd ed., Coimbra: Wolters Kluwer/Coimbra Editora, 2010), 302 and 1239; Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, v. I (4th ed., Coimbra: Coimbra Editora, 2007), 798; J. C. Vieira de Andrade, *Os direitos fundamentais na Constituição Portuguesa de 1976* (4th ed., Coimbra: Almedina, 2009), 184; Miguel Nogueira de Brito, *A justificação da propriedade privada numa democracia constitucional* (Coimbra: Almedina, 2007), 841 and *Propriedade Privada: entre o privilégio e a liberdade* (Lisbon: FFMS, 2010), 60; Maria Lúcia Amaral, *Responsabilidade do Estado e dever de indemnizar do legislador* (Coimbra: Coimbra Editora, 1998), 570; Oliveira Ascensão, "A jurisprudência constitucional portuguesa sobre propriedade privada", in *XXV Anos de Jurisprudência Constitucional Portuguesa* (Coimbra: Coimbra Editora, 2009), 399. Maria Lúcia Amaral, *Responsabilidade do Estado e dever de indemnizar do legislador*, *cit.*, 570, considers that Article 62 "has a double meaning: on the one hand, it includes an objective guarantee that covers all private property rights – and not just certain *in rem* rights – which is expressed in paragraph 1 of Article 62; and, on the other hand, it integrates a genuine individual right, a fundamental right, and that is the right to fair compensation that is set out in paragraph 2 of that Article." Miguel Nogueira de Brito, *A justificação da propriedade privada numa democracia constitucional*, *cit.*, 852-853, recognises that "the application of Article 18 to the constitutional guarantee of property provided for in Article 62, paragraph 1, of the Constitution, raises undoubted difficulties. If it is the law that must mould the content of property, it does not, in fact, make much sense to maintain, in this context, that "the law can only restrict (the right to property) in the cases expressly provided for in the Constitution", as required by Article 18(2). But this difficulty does not have to be overcome at the cost of eliminating the right to property as a subjective fundamental right. Legally acquired property rights are protected against further injury by the state government, namely through the law, without this implying any paradoxical result. As a fundamental right, *i.e.* subjective rights of individuals, Article 62(1) guarantees them the existence of property and rights *vis-à-vis* state power, in the terms in which they were acquired according to the rules in force at the relevant time."
All excerpts from works originally written in a language other than English have been freely translated by the authors of this commentary.

[9] See the commentary on Article 17 in the notes on the CFREU, published in the OJEU (C-303/02), OJEU of 14 December 2007, drawn up under the responsibility of the *Praesidium* of the Convention which drafted the CFREU, and the EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, *cit.*, 8.

[10] J. C. Vieira de Andrade, *Os direitos fundamentais na Constituição Portuguesa de 1976*, *cit.*, 176.

[11] *Ibid*, 187.

[12] *Ibidem*, 360, note 3.

This means that a deprivation of property must always have legal basis and result in fair compensation, unless there is no legal provision given the particular nature of the deprivation (*e.g.,* extinctive or acquisitive prescription).

Thus, as a rule, a property value guarantee applies, a "fair compensation", due to the need for allocation of goods to a socially superior function.

Deprivation of property encompasses both formal as well as non-formal expropriation.[13]

The notion of public use must be assessed taking into account, on the one hand, the individual right and, on the other hand, the general interest of the community. The general or public interest must be assessed, in particular, taking into account all the circumstances and weighing the principles of reasonableness and proportionality.[14]

Use of the property. Property is not an absolute right. Within certain limits it is possible to restrict the contents of property rights. This is the so-called *social function* of property, a kind of "social mortgage" on behalf of the realization of common interest.

In the Aristotelian tradition, property was more subordinated to distributive justice. In the modern tradition, property is the expression of a person's freedom.[15]

"*The replacement of justice for freedom as a central aspect of the property order in the modern tradition has a huge consequence: in fact, it is this feature of the order of the property according to modern tradition that makes it inevitable that its recognition has to be completed by a social principle, with expression in modern societies through the ideas of the social State of Law and the Welfare State.*"[16]

It is the idea of corrective justice, instead of distributive justice. Property is a form of individual freedom, but tempered by the idea that the State or the European Union can exercise justified control, reasonable and proportionate, to ensure the protection of the general, legitimate and relevant interest.[17]

3. Article 17, paragraph 2, of the CFREU expressly provides for the protection of intellectual property. This is referred to herein in a broad sense, encompassing not only copyright and related right (intellectual property in the strict sense), but also the so-called industrial private rights (industrial property).

Copyright and related or neighbouring rights aim to protect literary and artistic creations.[18] Industrial private rights protect industrial creations (*e.g.,* inventions and design), distinctive trade signs (*e.g.,* trademarks, logos, designations of origin and geographic indications) and *sui generis* rights of other intangible assets (*e.g.,* topographies of semiconductor products and traditional knowledge).

---

[13] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union, cit.*, 11.

[14] For further developments, cf. Hélène Pauliat, in *Traité Établissant une Constitution pour l´Europe*, *cit.*, 243 and Alberto Lucarelli, in *Commento alla Carta dei Diritti Fondamentali dell'Unione Europea*, *cit.*, 145.

[15] For a more developed overview of the historical, philosophical and legal evolution of the concept of property, cf. Miguel Nogueira de Brito, *A justificação da propriedade privada numa democracia constitucional*, *cit.*, Parts I and II.

[16] Miguel Nogueira de Brito, *Propriedade privada: entre o privilégio e a liberdade*, *cit.*, 14.

[17] Similarly, in the practice of the ECtHR, cf. Ireneu Cabral Barreto, *A Convenção Europeia dos Direitos do Homem* (*Anotada*), *cit.*, 467.

[18] Dário Moura Vicente, *A tutela internacional da propriedade intelectual* (Coimbra: Almedina, 2nd ed., 2019), 13. The author observes that neighbouring rights are currently centred on three areas: interpretations or performances of works by performers; the fixation of sounds or images in phonograms or videograms by their producers; and emission of these sounds and transmissions of these sounds and images by broadcasting organisations.

Suppression of unfair competition, although "functionally related",[19] is excluded from intellectual property, because "*it is not intended (...) the granting of legal rights on the use of intangible assets, (...), but rather to protect the public interest in the activities of loyalty from competitors by imposing sanctions on those who commit acts of competition contrary to honest commercial practices.*"[20/21]

The reference to intellectual property (in the broad sense),[22] even if it differs from the tradition in our legal system,[23] corresponds to the nomenclature adopted both internationally,[24] and at the Community[25] level under the Anglo-Saxon influence.

4. Intellectual property rights are not expressly contemplated in the TFEU,[26] although some are enshrined as fundamental rights in international legislation [*e.g.*, in relation to copyright in Articles 27, paragraph 2, of the UDHR,[27] and 15, paragraph 1, point c) of the ICESCR].[28]

The same applies in the context of the ECHR. However, the "good" referred to in Article 1 of the Additional Protocol 1 to the Convention of March 20, 1952, according to the interpretation adopted by the ECtHR, comprises intellectual property.[29]

---

[19] Dário Moura Vicente, *A tutela internacional da propriedade intelectual*, *cit.*, 15.

[20] *Ibid*, 15.

[21] Jean-Christophe Galloux, "Article II-77-§2", in *Traité établissant une Constitution pour l'Europe*, *cit.*, 250, maintains that the Community case law nevertheless equates unfair competition with an intellectual property right, referring to the judgment *Dior and Others*, 14 December 2000, joined cases C-300/98 and C-392/98, ECLI:EU:C:2000:688.

[22] To read more on the adoption of a broad sense of intellectual property cf. Dário Moura Vicente, *A tutela internacional da propriedade intelectual*, *cit.*, 14 -15.

[23] In Portugal, industrial property is regulated in the Industrial Property Code (approved by Decree-Law no. 110/2018 of December 10, 2018) and copyright and related rights in the Copyright and Related Rights Code (approved by Decree-Law no. 63/85 of March 14, 1985).

[24] See the Agreement on Intellectual Property Rights Related Aspects of Trade annexed to the Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994. See also the Convention, which established the World Intellectual Property Organization, signed in Stockholm on July 14, 1967. On the international protection of intellectual property (in the broad sense), cf. Dário Moura Vicente, *A tutela internacional da propriedade intelectual*, *passim*, and also Alberto Bercovitz, "Globalización y propiedad intellectual", in *Direito Industrial*, v. VII (Coimbra: APDI/Almedina, 2010), 54.

[25] *E.g.* Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; Regulation (EU) no. 1352/2013 of 4 December 2013 establishing the forms provided for in Regulation (EU) no. 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights and the Council Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market (2010/C 56/01).

[26] However, they may be considered to be included in the "industrial and commercial property" (Article 36 TFEU). In this sense, cf. Alberto Lucarelli, in *Commento alla Carta dei Diritti Fondamentali*, *cit.*, 149, that also refers to the importance of intellectual property rights in the context of the competition rules (Articles 101 and 102 TFEU).

[27] That rule provides the following: "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [they are] the author.*"

[28] Adopted and opened for signature, ratification and accession by Resolution 2200A (XXI) of the United Nations General Assembly on 16 December 1966. Portugal ratified it on July 31, 1978. That Article provides that: "1. The States Parties to the present Covenant recognize the right of everyone: (...) (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." For a comparison between the standard of the UDHR and Article 15 of the ICESCR, cf., among others, Audrey R. Chapman, *The human rights perspective on intellectual property, scientific progress, and access to the benefits of science*, https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf.

[29] According to ECtHR case law, these goods include patents (see Judgment ECtHR *Smith Kline and French Laboratories Ltd. vs. The Netherlands*, 4 October 1990, no. 12633/87) and trademarks [see *Anheuser-Busch Inc. vs.*

Whereas "*the reference to the ECHR covers both the Convention and the Protocols*" and "*the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the European Court's jurisprudence on Human Rights and the Court of Justice of the European Union*", it is understood that Article 17 of the CFREU corresponds to Article 1 of the additional Protocol to the ECHR.[30] On the other hand, the development of the TFEU objectives – namely the free movement of goods (Article 26, paragraph 2, TFEU) – gave rise to abundant and fruitful case-law [31/32] and Community legislation focusing on intellectual property.

In this context a brief reference must be made to the main Community law in this domain,[33] which comprises, firstly, directives that aim to approximate the laws of Member States, such as those that are listed here:[34/35]

- Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products;
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission;
- Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases;
- Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of biotechnological inventions;
- Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs;
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art;

Portugal, 11 January 2007, no. 73049/01, in *Direito Industrial - vol. VI* (Coimbra: APDI/Almedina, 2009), 391].

[30] Notes to Articles 17 and 52, paragraph 3, developed and updated under the responsibility of the *Praesidium* of the Convention which drafted the CFREU, *cit.*, 23 and 33.

[31] As examples of important Court decisions prior to the approval of Community specific legislation, see, among many others, judgments *Hag I*, 3 July 1974, Case C-192/73, ECLI:EU:C:1974:72; *Terrapin vs. Terranova*, 22 June 1976, Case C-119/75, ECLI:EU:C:1976:94; and *CNL-SUCAL/HAG*, 17 October 1990, Case C-10/89, ECLI:EU:C:1990:359.

These rulings demonstrate the jurisprudential evolution on the compatibility of national law (in this case, trademark rights) with Community law, which turned out to respect the existence of national industrial property rights, although imposing certain limits on their exercise – e.g., the exhaustion of the right in the sense of disappearance "of one aspect of the content of that right that relates to the power of its holder to prohibit or restrict the movement of the original product placed on the market by himself or by a third party with his consent", Luís Couto Gonçalves, "O espaço europeu da propriedade industrial", *Actas de Derecho Industrial y Derecho de Autor*, Tomo XXVI (2005-2006): 88.

[32] The abundant case-law subsequent to the adoption of the Directives and Regulations referred to in the text can be found at http://curia.europa.eu.

[33] The updated list is available on the Internet in the Directory of European Legislation, available at http://eur-lex.europa.eu.

[34] The statement is made in chronological order, without taking into account any Directives that have been repealed in the meantime.

[35] As far as patent legislation is concerned, in addition to the harmonisation mentioned in the text, it should be noted that, thanks to the European Patent Convention (EPC) of 1973 (to which most EU Member States are a party), national laws are identical in practice.

• Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;
• Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version);
• Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version);
• Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version);
• Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works;
• Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market;
• Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Recast);
• Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure;
• Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

In addition to these, there are also a number of pertinent regulations, some of which gave recognition to community private rights, such as:

• Council Regulation (EC) no. 2100/94 of 27 July 1994 on Community plant variety rights;
• Council Regulation (EC) no. 6/2002 of 12 December 2001 on Community designs;
• Council Regulation (EC) no. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs;
• Regulation (EU) no. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection;
• Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification).

5. The express inclusion of intellectual property rights in the CFREU – resulting from the September 2000[36] version and justified by the growing importance of

[36] Reference to these rights was not included in the initial draft of the Charter (LETTER 4112/00) and was introduced in the version of September 2000 with the support of the Commission [see Commission Communication on the Charter of Fundamental Rights of the European Union, COM (2000) 559 final of 13 September 2000, 7]. Jean-Christophe Galloux, "Article II-77-§2", *cit.*, 247 also refers to the decisive role of the lobby of the copyright societies.

intellectual property in the secondary Community law[37] and international law[38] – therefore has an undeniable symbolism: these rights, with constitutional status, are a reference point for case-law.[39]

Despite the autonomy of the reference to intellectual property in paragraph 2 of Article 17, property guarantees set out in paragraph 1 shall also apply. This means, first, that the legislature should "*provide for each [intellectual property right] the appropriate legal provisions to ensure its full respect.*"[40] In addition, "*no one can be deprived of his property except for the public interest in the cases and conditions provided for by law, subject to fair compensation for their loss in good time.*" This exception is provided in respect of patents in Article 31 of the Agreement on Intellectual Property Rights Related Aspects of Trade.

6. The recognition of constitutional value to intellectual property does not mean that there is, in relation to this, an individual right.[41] The specific enshrinement of a fundamental right is the basis for legal protection.

Indeed, intellectual property rights, in general and to different degrees, are protected legally to encourage intellectual creativity and innovation.

But this legal protection involves some risks resulting from lawfully admitted monopoly, since it implies some restrictions either on the free movement of goods, or upon the "fifth freedom",[42] *i.e.*, the free movement of knowledge and innovation.

One of the most controversial cases has to do with the possible collision with other fundamental rights,[43] such as the one regarding public health and in particular to access to medicines in the context of diseases such as AIDS.

Due to the patents associated with these drugs, to the extent that they influence price, access to treatment can be difficult and especially onerous in developing countries. In this context we should highlight the Doha Declaration, adopted by the World Trade Organization on 14 November 2001 on the harmonisation of aspects of intellectual property rights related to trade and public health.[44]

---

[37] See the comment on Article 17 in the notes on the CFREU, prepared under the responsibility of the *Praesidium* of the Convention which drafted the CFREU, *cit.*, 23.

[38] For a summary of that development, cf. Dário Moura Vicente, *A tutela internacional da propriedade intelectual*, *cit.*, 22.

[39] Alberto Lucarelli, in *Commento alla Carta dei Diritti Fondamentali*, *cit.*, 150. In the case of the Constitution of the Portuguese Republic, the right to freedom of intellectual, artistic and scientific creation was already contemplated in Article 42 and the freedom of economic initiative in Article 62.

[40] Jean-Christophe Galloux, "Article II-77-§2", *cit.*, 252.
In this regard, see Directive 2004/48/EC on the enforcement of intellectual property rights, *cit.*

[41] In this sense, cf. Alberto Lucarelli, in *Commento alla Carta dei Diritti Fondamentali*, *cit.*, 152.

[42] The expression appears in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A single market for Europe in the twenty-first century, of November 20, 2007 [(COM (2007) 725 final) (SEC (2007) 1517) (SEC (2007) 1518) (SEC (2007) 1519) (SEC (2007) 1520) (SEC (2007) 1521], 9, available at http://eur-lex.europa.eu.

[43] In recent years, the doctrine that deals with human rights has repeatedly addressed the issue of the relationship of intellectual property with human rights. Among many others, see Laurence R. Helfer, "Human rights and intellectual property: conflict or coexistence?", *Minnesota Intellectual Property Review*, vol. 5, issue 1 (2003), "Toward a human rights framework for intellectual property", *U.C. Davis Law Review*, 40 (2007) (both available at http://scholarship.law.duke.edu) and "Mapping the interface between human rights and intellectual property", in *Research Handbook on Human Rights and Intellectual Property*, ed. Christophe Geiger (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2015), https://doi.org/10.4337/9781783472420.00008.

[44] On this issue, see J. P. Remédio Marques, "Propriedade intelectual, exclusivos e interesse público", in *Direito Industrial - Vol. IV* (Coimbra: Almedina/APDI, 2005), 199 and 217.

As advocated by REMÉDIO MARQUES, "*the corresponding legal system to each of the intellectual property rights must be appropriate and necessary, and therefore should be proportionate to the objectives that the intellectual or industrial property right aims to attain in a particular case.*" Thus, it "*should (...) be taken into due account the parametric interests of consumers, competitors and the general population, not only upon the constitution or recognition in particular of the intellectual property right, but also during the demarcation of this scope of protection.*"[45]

Luís Couto Gonçalves & Maria Miguel Carvalho

[45] J. P. Remédio Marques, "Propriedade intelectual – tendências globais", *Boletim da Faculdade de Direito da Universidade de Coimbra*, v. LXXXIV (2008): 269.

ARTICLE 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union. (Hereinafter referred to as "the Treaties".)

1. Article 18 is one of the few Articles of the CFREU that, together with Article 19, guarantees a right specifically aimed at protecting third-country nationals. It is also one of the very few existing norms on a supra-national level that guarantees a fundamental right to asylum.

The right to asylum is currently understood as a right to obtain international protection in a certain country by whoever cannot return to his or her country of origin because this country is unwilling or incapable of providing protection against persecution or torture, degrading or inhuman treatment. This protection is afforded by granting the person certain residence rights, as well as a legal status encompassing a set of rights and duties that shall be as close as possible to the ones enjoyed by the citizens of the host country.

2. We must recall that neither the Geneva Convention of 1951 on the Status of Refugees nor the ECHR expressly acknowledges a fundamental right to asylum, but only a *right to non-refoulement*. In general International Human Rights Law, only the UDHR specifically mentions a *human right to asylum.*[1] The Charter, thus, represents an evolution regarding an effective recognition of a right to asylum at supra national level.

This exceptionality can be explained by the direct source of inspiration for Article 18, which was Article 63 of the Treaty of the European Community, the legal provision containing the basis for the development of a common policy on asylum.[2] The express recognition, in several Member States Constitutions, of a fundamental right to asylum, may also have influenced the decision to recognize such right at the EU Charter level.

Article 18 mentions, expressly, the guiding texts for the development of this fundamental right: the Geneva Convention of 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

3. From the very beginning of the development of the EU common policy on asylum, the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees were elected as the paramount sources for the European law on such matter. Article 63(1) of the Treaty of the European Community, after the Amsterdam Treaty, established that the Council should,

---

[1] According to Article 14, (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[2] *Praesidium* of the Convention, *Explanations relating to the Charter of Fundamental Rights*.

within a period of five years, adopt measures on asylum, in accordance with the Geneva Convention and the New York Protocol. This would encompass, first and foremost, the need to respect these instruments while developing competence on matters of asylum. The EU acts could not contradict or disrespect these instruments, and, on the other hand, EU acts had to be interpreted in light of these texts. Moreover, this would also encompass implicitly a commitment to develop an asylum policy, which would enhance the protection afforded by these texts in the EU arena.

The "Geneva Convention inspiration" was reproduced in the new Article on competence on asylum, which entered in force with the Treaty of Lisbon. Accordingly, Article 78 of the Treaty of Functioning of the EU sets forth that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection, which must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967.

The Geneva Convention and the New York Protocol have been the paramount sources for several European Union provisions. First of all, the definition of "Refugee", under the current EU legislation,[3] relies almost completely on the definition of Article 1 of the Convention (as amended by the New York Protocol). After the entry in force of the Charter, this is no longer a political choice of the Member States, but an obligation derived from Article 18. This means that, at least, those who fulfill the conditions to be considered refugees under the Geneva Convention (those who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and, being outside the country of their nationality and being unable or, owing to such fear, unwilling to avail themselves of the protection of that country) must be considered as such under EU law. That does not imply, though, that EU law might not provide for a broader concept.[4]

International evolutions in terms of the qualification as a refugee have been and shall be accompanied by EU law. And, in this context, one must pay special attention to some of the interpretations developed by the UN High Commissioner for Refugees (UNHCR). For example, the need to prove an "individual" persecution due to belonging to a certain race, ethnicity, nationality, religion, social group or political opinions, became less demanding. It shall be sufficient to prove that, due to those characteristics, one is at risk in their country of origin, independently of being "individually persecuted."

Secondly, the reference to the Geneva Convention also binds the EU to guarantee a status to the refugee, where he or she must be granted with a set of minimum rights. This includes a special protection against expulsion measures and also the prohibition to impose penalties on refugees due to their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

---

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

[4] EU law has also codified some developments that were already advocated by legal scholars such as, for example, considering that persecution based on gender or sexual orientation should be considered as persecution on the grounds of belonging to a "specific social group".

Finally, the principle of *non refoulement*, granted in Article 33 of the Convention shall be respected in every single act of the EU and of Member States while applying EU law. According to such principle Refugees cannot in any manner be returned to the frontiers of the territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. This is considered the cornerstone of EU law and politics on asylum.

4. Moreover, Article 18 sets forth that the right to Asylum shall be guaranteed in accordance with the Treaty establishing the European Community. The Treaty is, then, considered as the second source of the EU recognized right to asylum. Currently, Article 78 of the TFEU is the central norm on development of the common policy on asylum.

By referring to the Treaty, the Charter establishes an umbilical link with Article 78 of the TFEU. This means that the right of asylum will follow the developments achieved in the fulfillment of Article 78, either through secondary law or through the praetorian activity of the CJEU.[5] The right to asylum is, thus, in the words of Cristina Gortazar, "a living and evolving right."[6] This does not mean, however, that the content of Article 18 is totally dependent on what the EU legislator shall decide in the Directives and Regulations. It only means that its content shall accompany the development of EU competence on asylum, pursuant that the minimum standard of asylum, as it will be defined below, is respected. That being said, the legislator may develop the protection already afforded to the fundamental right to asylum, but always guaranteeing the respect of the content that, at a certain time, is already part of Article 18.

In this context, the case-law of the CJEU represents the main propeller of the gradual evolution of the right to asylum. Its case-law will gradually shape the content of Article 18 with new guarantees.[7]

5. Besides referring to the Geneva Convention, Article 78 of the TFUE also mentions that the common policy on asylum must be in accordance with "other relevant treaties." Therefore, these other treaties shall also be considered, through the TFEU, as sources of the fundamental right to asylum granted by Article 18. There are several treaties that may have some importance in this context, such as the ECHR, the European Social Charter, the ICCPR, the Convention on the Rights of the Child, the Convention on Prohibition of Torture, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention relating to the Status of Stateless Persons, amongst others.

In this context, the ECHR has been assumed a central role, mainly owing to the activity of ECtHR. Despite not mentioning a right to asylum as such, the European Convention became a central instrument for developing international protection. Such evolution has been achieved through the case-law of the ECtHR on Article 3, which forbids torture and inhuman and degrading treatments to everyone and under all circumstances. This case-law has contributed to an overhaul of the traditional concept of "asylum" in several aspects, even if it does not mention "right to asylum" as such. It has affirmed the rule (later followed also by the UN Committee on

[5] See Cristina Gortázar, "Direito de Asilo - Artigo 18.º", in *Carta dos Direitos Fundamentais da União Europeia Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 232.
[6] *Ibid*, 233.
[7] Also, Cristina Gortázar, *op. cit*., 233.

the Prohibition of Torture), that no one shall be expelled or sent by any means to a country where they may be subjected to torture or inhuman and degrading treatments. Thus, one can say that it has created a different – and broader – concept of *non refoulement*. In fact, in contrast to the Geneva Convention that only protects Refugees against expulsion to a country where they may face persecution on one of the listed grounds, the protection afforded by Article 3 of the European Convention forbids expulsion to a country where anyone (irrespective of their status) may face torture or inhuman and degrading treatment.

The case-law of the ECtHR has been developing the definition of "torture, inhuman and degrading treatment" in order to encompass a wide range of activities.[8] The more recent development concerns the situations where general or indiscriminate violence in the country of origin possibly amounts to one of those forbidden treatments. This is especially important nowadays, since the majority of forced migrants flee from their countries of origin due to armed conflicts or other types of general and indiscriminate violence. Hence, these people would not qualify as "refugees" under the Geneva Convention, since they could not be considered as being persecuted due to one of the grounds listed in Article 1. However, they would be protected, under some circumstances, and due to the Strasbourg case-law, against refoulement to a country where those conflicts would persist.

One must point out, however, that the case-law of the ECtHR does not qualify anyone as "refugees" or even, more broadly, as "forced migrants." It simply affirms that some foreigners cannot be sent back to a country where they would be subjected to those forbidden treatments. However, this evolution has had a major impact on the concept of forced migrants, and also on the concept of asylum. That is because the States were forced to recognize that these persons, if they could not be sent back to their countries or to a safe third country, had to be granted a form of residence rights. And such residence rights would assume a form of "international protection", or of "asylum", in a broader sense.[9]

This evolution has been followed by the competent monitoring organs of other international conventions, such as the Committee Against Torture (which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and the Human Rights Committee (which monitors the implementation of the ICCPR).[10] These institutions have also contributed to the dissemination of this wider concept of *non refoulement*, with clear implications for a broader concept of asylum.

By referring to these other Treaties, Article 78 of the TFEU acknowledges that the concept of asylum, traditionally connected to the concept of refugee of the Geneva Convention, must accompany these evolutions. That is why nowadays asylum in the EU must be understood, as we stressed in point 1., as a right to obtain international protection in a certain country by whom cannot return to his or her country of origin because this country is not willing to or is not capable of providing protection to them against persecution or torture, degrading or inhuman treatment.

---

[8] See the next comment on Article 19, no. 2. For further developments, see Ana Rita Gil, *Imigração e Direitos Humanos* (Forte da Casa: Petrony, 2017), 308.

[9] James Hathaway claims that the principle of *non refoulement* amounts to a *de facto* duty to admit the refugee since admission is the only means of avoiding the exposure to the risk. See *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 301.

[10] For developments on this case-law, see Ana Rita Gil, *op. cit*., 327 *et seq*.

6. Besides the reference to other important treaties, Article 78 of the TFEU also sets forth that the EU shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection. All these three forms of protection correspond to *asylum* in a broader sense.

Asylum in the strict sense corresponds to the protection afforded to those who fulfil the conditions laid down by the Geneva Convention to be considered Refugees. But the Treaty has chosen to protect other forms of asylum in a broader sense, as well: the subsidiary and the temporary protection. The policy on asylum, thus, encompasses these several forms of protection: asylum in the strict sense, subsidiary protection and temporary protection.[11] One can point out that these two other forms of protection represent mechanisms aimed at providing responses to the broader concept of asylum, explained in point 4, which stems from other international Treaties as the ECHR.

By referring to the Treaty, Article 18 of the Charter extends its scope of protection also to these other forms of asylum. Thus, we can say that the right to asylum enshrined in Article 18 does not only encompass the traditional and more strictly understood right to protection of refugees, but also these other forms of international protection, which are, therefore, also fundamental.

6.1. ***Subsidiary protection*** has been recognised as a form of international protection since the adoption of the first version of the "Qualification Directive", under the auspices of the Treaty of Amsterdam.[12] This institution was created in order to provide a form of complementary protection to the refugee status. There was a recognition that the refugee definition, as it was designed by the Geneva Convention, did not encompass all forced migration situations. There were many cases where people were fleeing their home countries not because of being persecuted due to race, religion, nationality, membership of a particular social group or political opinion, but also because of serious violations of Human Rights in their countries of origin. Thus, the EU decided that these people would also deserve some sort of international protection, since their situation could not be comparable to the common voluntary migrant. Nowadays,[13] this new form of protection covers the following situations: subjection to the death penalty or execution, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin and, finally, a "*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.*"

The Directive went further than its direct source of inspiration, which was the ECtHR's case-law on Article 3 of the ECHR. Some cases correspond to grounds for *non refoulement* mentioned in Article 19, paragraph 2 of the Charter, which is

[11] For more developments on "alternative forms of protection", see Hemme Battjes, "Subsidiary protection and other alternative forms of protection", in *Research Handbook on International Law and Migration*, eds. Vincent Chétail and Céline Bauloz (Cheltenham: Edward Elgar Publishing Ld., 2014), 541 *et seq*.

[12] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[13] The first "Qualification Directive" was replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

also broader than Article 3.[14] But most important here is that the Qualification Directive expressly mentions the subjection to indiscriminate violence as a ground for protection, avoiding any doubts as to whether such violence could amount to "torture, inhuman and degrading treatment." In the *Elgafaji* case, the CJEU stated that such a clause could be used either where the applicant suffered an individual risk, or when such risk derived from a situation of general violence.[15] In the latter case, however and following the ECtHR case-law, the degree of violence would need to be more serious.

Nowadays, due to the large numbers of persons affected by wars and conflicts, most cases of international protection take the form of "subsidiary protection." Thus, this status is now currently overcoming refugee status as the paramount form of international protection.[16]

Despite the right to subsidiary protection being granted at secondary legislation level, we cannot say, however, that the cases in which subsidiary protection is guaranteed may be freely modified by the European legislator. First of all, Article 78 of TFEU sets forth a genuine institutional guarantee of subsidiary protection, that is to say, the European legislator cannot eliminate the existence of this type of protection. Above all the EU legislator cannot suppress the cases that must be granted subsidiary protection, since such cases are impositions derived from other international conventions and also from other Articles of the Charter, such as Article 4 and Article 19, paragraph 2. Therefore, they are not modifiable on a discretionary basis.

6.2. ***Temporary protection*** is the second form of alternative protection granted under Article 78. Temporary protection is an exceptional measure aimed at providing a mass influx of displaced persons, who are unable to return to their country of origin, with immediate and temporary protection. It applies in particular when there is a risk that the standard asylum system is struggling to cope with demands stemming from a mass influx, which risks having a negative impact on the processing of claims. It is not up to domestic authorities, but to the Council, to examine whether a situation requires temporary protection: it will decide that a certain situation qualifies as a mass influx of persons, indicate the group of persons entitled to the protection and its duration.

This type of protection is different from asylum in strict sense and from the subsidiary protection. It constitutes a mechanism aimed at protecting a specific group of persons, which will be determined in a decision made by the European Council.[17] There has to be, first, a political decision, which declares the existence of a mass influx of persons, and, secondly, that will define the persons who belong to the group of this mass influx. One may argue, nonetheless, that all those who are part of the group will benefit from a subjective right to the temporary protection for as long as it lasts.[18]

---

[14] See our commentary in this book on Article 19.

[15] Judgment *Elgafaji*, 17 February 2009, Case C-465/07, ECLI:EU:C:2009:94.

[16] Nuno Piçarra, "A União Europeia e a crise migratória e de refugiados sem precedentes: crónica breve de uma ruptura do Sistema Europeu Comum De Asilo", *e-publica, Revista Electrónica de Direito Público*, v. 3, no. 2 (2016): 16.

[17] The existence of a mass influx of displaced persons must be established by a Council Decision, which must be binding in all Member States in relation to the displaced persons to whom the Decision applies. The conditions for the expiry of the Decision should also be laid down.

[18] Hemme Battjes, *op. cit*., 558.

Moreover, temporary protection is also an institutional guarantee. It has been enshrined in the Treaties since the Treaty of Amsterdam, where Article 63, paragraph 2, a) mentioned the EU competence on minimum standards for granting temporary protection to displaced persons from third countries who are unable to return to their country of origin.

Currently, temporary protection is foreseen in Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. This Directive was activated for the first time in 2022, as a response to the mass displacement of persons fleeing the Ukrainian territory, due to the Russian invasion in February 2022.[19]

7. Currently, and respecting the competences laid down in Article 78 of TFEU, these are the main legal instruments which, for the moment, shape the content of the right of asylum in the EU:

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof;
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted;
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection;
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection;
- Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

8. The CJEU, in turn, has been quite active in developing some important principles, which shall be respected in the development of the common policy on asylum. These are some of the more important decisions on this matter:

- *A, B, C*, C-148/13, on persecution on the grounds of sexual orientation and admissible evidence;
- *X, Y, and Z*, C-199/12, on persecution on the grounds of sexual orientation;
- *Bundesrepublik Deutschland v. B et D*, C-57/09 and C-101/09, on grounds for exclusion of Refugee status;
- *Lounani*, C-573/14, on grounds for exclusion of the refugee status due to involvement in terrorist activities;

[19] For a comment on the "activation" of the Directive in 2022, see Ana Rita Gil, "Proteção internacional revisitada: As soluções da União Europeia para a proteção dos deslocados da Guerra da Ucrânia num contexto de "«múltiplas crises e refugiados»", *Relações Internacionais*, no. 75 (2022).

• *Elgafaji*, C-465/07, on right to protection on the grounds of indiscriminate violence in the country of origin;
• *H. T.*, C-373/13, on derogation to the principle of *non refoulement* on public order grounds;
• *Alo and Osso*, C-443/14, on a Refugee's right to free movement within the territory of the host State;
• *Cimade and Gisti*, C-179/11, on the obligation to guarantee asylum seekers minimum reception conditions during the process of taking charge or taking back by the responsible Member State;
• *Saciri*, C-79/13, on general rules on material reception conditions and health care of asylum seekers;
• *Mehmet Arslan,* C-534/11, on detention of asylum-seekers (legitimacy);
• *N.S.* C-411/10 and *M.E.* C-493/10, on prohibition to transfer asylum seekers to another Member State that suffers from systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers;
• *MA e. a.*, C-648/11, on the Member State responsible for analysing an asylum application of an unaccompanied minor;
• *Mirza, C-695/15*, on the right of Member States to send an applicant to a safe third country and obligations of the Member State responsible for examining the application in the event that the applicant is taken back;
• *Ghezelbash*, C-63/15, on the right to an effective judicial remedy;
• *HID*, C-175/11, on the right to a fair procedure;
• *Moussa Sacko*, C-348/16, on the right to be heard during the procedure.

9. The most controversial issue around Article 18 concerns its value. Legal scholars question whether it only establishes guiding principles for the development of the common policy on asylum or whether it sets forth a true individual right. In our opinion, the reading of Article 18 provides an answer to this dilemma: it mentions expressly that the right to asylum shall be guaranteed. Thus, we consider that it ensures a real fundamental right to the individual.[20] Moreover, it assigns a minimum content to such right: at least, it must protect individuals who would be protected under the Geneva Convention and under the TFEU. The TFEU, in turn, refers to other relevant international treaties, so the protection afforded by these Treaties, as mentioned in point 4, also shapes the personal scope of application of this fundamental rights.

The wording of the current "Qualification Directive" undoubtedly sets forth a subjective right to international protection, which shall be granted to all those that fulfil the requirements to be considered refugees or subsidiary protection holders. On the other hand, as stressed above, during a declaration of mass influx of displaced persons, all those who can be qualified as being part of the group, shall be entitled to a subjective right to temporary protection.

10. Having analysed its main sources, we shall now try to characterise the minimum content of the right to asylum enshrined in Article 18. We can enumerate the several guarantees, stemming from the Geneva Convention, other relevant treaties, other Articles of the Charter, the TFEU and also the case-law of the CJEU, as encompassing the following guarantees:

[20] Also defending the same perspective, Cristina Gortázar, *op. cit*., 235 and Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (2nd Edition, Cambridge: Intersentia, 2014), 245.

• guarantee of protection of those who qualify as Refugees under the Geneva Convention;
• guarantee of protection of those who cannot be returned to their country of origin due to risk of torture, inhuman and degrading treatments, as well as the death penalty;
• considerations of persecution on grounds of sexual orientation or gender violence as encompassing grounds for protection;
• absolute prohibition of *refoulement*, in the sense of the Geneva Convention, of the ECtHR case-law and of Article 19(2) of the Charter;
• institutional guarantee of asylum in strict sense, of subsidiary protection and of temporary protection;
• right to a legal status and a set of rights in the host country (refugee status or subsidiary protection status), including the right to family reunification;
• right to have every asylum application analysed in a fair procedure (according to Article 41 of the Charter);
• right to have a status and a set of rights during the examination of the application and to minimum reception conditions (asylum-seeker status);
• right to access to Courts to challenge the decision on the application (according to Article 47 of the Charter).

11. The immediate content of asylum is the right to receive international protection in a certain territory, by obtaining a certain legal status and a set of rights, which will enable the individual to live properly in the host territory in a dignified manner. However, the minimum content of the right of asylum, as it results both from the Geneva Convention and from other relevant treaties, is still an imperfect right. In fact, in order to benefit from it, the person who needs international protection must be present in the State territory when applying for asylum.

This limitation is very important today, as it is increasingly difficult for people without international protection to arrive legally and safely to countries where they seek asylum. In the EU, as a result of the establishment of the Schengen Area and a common policy on external border controls, migration controls are not always carried out by the authorities of the State of asylum, but by the Member States with external borders, or even by the carriers. These limitations have come to light in the refugee crisis that has beset Europe with particular intensity since 2015. Since the current asylum system does not protect a right to enter in a country for asking asylum, thousands of people risked their lives trying to reach EU Member-States territories illegally.

Thus, the right to asylum is currently designed to protect only those who are already present in the territory.[21] It is certainly dubious, from an ethical perspective, to consider that those who arrive in the Member States' territory need more protection than those who cannot reach them. Moreover, this important "imperfection" may lead to systematic circumvention of the fundamental right of asylum. Hence, Member States, interested in limiting the number of persons to whom protection is granted, take the most varied measures to prevent access to their

[21] For further developments on this issue, see Thomas Gammeltoft-Hansen, "Extraterritorial Migration control and the Reach of Human Rights", in *Research Handbook on International Law and Migration*, eds. Vincent Chétail and Céline Bauloz (Cheltenham: Edward Elgar Publishing Ld., 2014), 113 *et seq*.

territories. That is why some authors consider that the current international and asylum system is a "schizophrenic" system: States may be bound to the recognition of a fundamental right of asylum, but they make every effort to prevent people who actually need it from reaching their territories and, thus, from benefiting from it.

The ECtHR's case-law has developed the idea of "responsibility under jurisdiction" that might, at least partially, respond to the above criticism. For example, the Strasbourg judges already had the opportunity to state that the exercise of an effective authority in relation to asylum seekers on the high seas places them under the jurisdiction of the State exercising such authority. This implies that the respective State is bound to respect the rights guaranteed in the European Convention towards such persons, even if they are found outside the national territory. It is especially important to mention, in this context, the case *Xhavara*, where the Court considered that the Italian authorities were bound to respect the rights enshrined in the European Convention while intercepting, at 35 nautical miles from the Italian coast, a boat with Albanian refugees trying to enter into Italian territory.[22] The criterion of jurisdiction, even if it is a *de facto* jurisdiction, can therefore serve as a first element which makes a connection between an asylum seeker and a particular State. Otherwise, it would be easy for Member States to evade their human rights' responsibilities.

12. Despite all the evolutions witnessed in the context of a right to asylum, there are still several categories of persons who cannot be considered as mere voluntary migrants, but who are still not considered (either under the Geneva Convention system, or under other relevant treaties) as forced migrants for the purposes of benefiting from a right to asylum. That is the case, for example, of the so-called "environmental refugees", who were forced to abandon their places of residence, due to climate change or other natural phenomena. These persons have been protected through a system of internal protection, being considered as internal displaced persons. However, some studies claim that currently climate change constitutes the main cause for displacement. According to data, currently around 26 million people a year are forced to abandon their homes due to environmental factors.[23] Thus, many scholars claim that, besides internal protection, they should benefit also from international protection and receive a right to asylum. EU law does not provide specific protection to these people, despite several initiatives with such purpose. Moreover, since these persons have not, until now, been considered as beneficiaries of the right of asylum by the other relevant instruments, they remain outside the scope of Article 18 of the Charter. This is an evolution, however, that we consider urgent and paramount.

Ana Rita Gil

[22] Judgment *Xhavara and others v. Italy and Albania*, 11 January 2001, no. 39473/98. See also Judgment *Hirsi Jamaa and Others v. Italy*, 23 February 2012, no. 27765/09.

[23] Alfredo dos Santos Soares, "Governança e direito global perante as migrações forçadas. O papel da União Europeia", *Themis*, year XVIII, no. 33 (2017): 31.

ARTICLE 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

1. Article 19 is one of the few Articles of the CFREU that, together with Article 18, establishes a guarantee specifically aimed at protecting third-country nationals. This provision confirms that the CFREU is inspired by the principle of universality, despite not mentioning it expressly. In other words, it confirms that the Charter is an instrument aimed at protecting the fundamental rights of every human being, and not only the fundamental rights of EU citizens. In the same sense, the Preamble mentions the "universal values of human dignity." Therefore, several instruments, adopted in the development of the common policy on immigration and asylum, refer to the need to respect fundamental rights as protected by the CFREU.[1] The CJEU has also stated that Member States must respect the fundamental rights enshrined in the Charter while implementing such instruments.[2]

2. Paragraph 1 of Article 19 prohibits collective expulsions. This provision has the same meaning as Article 4 of the 4th Protocol to the ECHR, which was the first international law norm that expressly forbade the collective or mass expulsion of foreigners. Following on from this provision others were enacted, such as Article 22 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[3] However, several authors have pointed out that such prohibition already existed in customary international law.[4] This would also result from the fact that a collective expulsion encompasses a violation of several other human rights, such as the principle of non-discrimination, when the expulsion is grounded on a certain national or ethnic origin of the expelled foreigners.[5]

---

[1] For example, recital 26 of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, recital 24 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegal third-country nationals and recital 3 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[2] See Judgments CJEU *European Parliament v. Council of the European Union*, Case C-540/03, ECLI:EU:C:2006:429; and *Chakroun*, 4 March 2010, Case C-578/08, ECLI:EU:C:2010:117.

[3] Adopted in December 1990 by the UN General Assembly. Every EU Member State is a party to this Convention.

[4] Diego Boza Martínez, *Los Extranjeros Ante El Convenio Europeo de Derechos Humanos* (Cádiz: Universidad de Cádiz, 2007), 54.

[5] The African Charter on Human and Peoples' Rights of 26 June 1981 states in Article 12(5) that "mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

3. In contrast to individual expulsions, which are allowed, as long as some limits are respected, collective expulsions are totally and absolutely forbidden. Member States cannot invoke any public interest in order to justify the application of such measure.

The main difficulty in this context is to determine which expulsions can be considered as "collective." How can we distinguish a collective expulsion from a *group of individual expulsions*? The case-law of the monitoring bodies of the ECHR provides us with some answers. These bodies (both the European Commission of Human Rights and the ECtHR) have adopted a case-by-case approach. From this case-law one may conclude that the number and simultaneity of expulsion measures do not necessarily indicate a collective expulsion. The European Commission on Human Rights considered that a collective expulsion would be a measure that would force a group of aliens, taken as group, to leave the country. However, such a measure will not be considered as such as a collective expulsion, if it is adopted after an analysis that takes into account the particular circumstances of each individual part of the group.[6] If such individual analyses do not take place, one can say that the individual case of each alien is diluted in the global situation of the group. It would, therefore, constitute a collective or mass expulsion.[7]

The ECtHR reaffirmed this view, although it expanded upon the concept of collective expulsion. In the case *Čonka v. Belgium*,[8] the Court qualified an expulsion as collective, because it took into consideration several factors indicating that the Government was willing to expel a substantial number of Slovakian nationals. The Court adopted a pragmatic approach, and considered that an expulsion could be considered as collective, even when an individual analysis of the foreigners takes place, if its purpose would be to stigmatise a particular group of aliens. Thus, in order to qualify an expulsion as "collective", it is also important to analyse whether the authorities want to address a group of foreigners collectively, because they belong to a specific ethnic or national origin, religion, language or political party. Several factors may be taken into account, such as public announcements and raid operations, amongst others.

The ECtHR has issued several convictions on collective expulsions, regarding actions made by some EU Member States during the 2015 and onwards "EU refugee crisis." These actions encompassed mainly push backs at the borders.[9]

While assessing whether there has been an individual analysis of the situation of each deported alien, the ECtHR takes into account whether there was a due process of law during the expulsion procedures.[10] In this context, the ECHR takes into consideration the guarantees foreseen in Article 13 of the ICCPR and in Article 1 of the 7th Additional Protocol to the Convention. However, the European Charter does not contain rules on procedural justice for individual expulsion decisions.

---

[6] Judgment *Becker v. Denmark*, 3 October 1975, no. 7011/75. Decision of the former European Commission of Human Rights.

[7] EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, DG Justice, Freedom and Security, 2006, 179.

[8] Judgment ECtHR *Čonka v. Belgium*, 5 February 2002, no. 51564/99.

[9] Judgments ECtHR *Hirsi Jamaa v. Italy*, 23 February 2012, no. 27765/09 (push back at seas) and, among many others, *D. and others v. Poland*, 8 July 2021, no. 51246/17 (push back at the border, preventing migrants to register asylum applications).

[10] *Čonka v. Belgium*.

The Convention's *Praesidium* notes are similar to the conclusions that one may draw from the ECtHR case-law. They mention that paragraph one of Article 19 "*has the same meaning and scope as Article 4 of Protocol no. 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State.*" The first part of the note is a broad reference to the case-law that we have analysed. However, the second part seems to be narrower, since it only mentions mass expulsions of foreigners sharing the *same nationality*. However, such limit does not result from the literal reading of paragraph 1 of Article 19, or from its source of inspiration, which is Article 4 of the 4th Protocol to the ECHR. Therefore, one shall consider this indication as merely illustrative, and it does not preclude the prohibition of collective expulsions based on other grounds, such as race, ethnic origin and religion, amongst others.

4. Paragraph 2 of Article 19 refers to some limits that Member States may respect in what concerns individual expulsions or extraditions.

First of all, this provision guarantees a right that is already broadly recognised for a specific category of aliens – refugees: the principle of *non refoulement*, which was established in the 1951 Geneva Convention relating to the Status of Refugees and can be found in several Member States' Constitutions. According to this principle, a refugee cannot be returned to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The prohibition of *refoulement* is a core principle of the European common policy on Asylum. Paragraph 1 of Article 78 of the TFEU sets forth that "*the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*" The need to respect this principle is, thus, also an obligation imposed by the Treaty for all the fields of the EU common policy on asylum: asylum, subsidiary protection and temporary protection. However, due to its acclaim in the Charter, it must also be respected in the development of a common policy on *immigration*. Thus, paragraph 2 of Article 19 has a broader scope than the Geneva Convention, since it also protects non-refugee migrants.

5. Besides its personal scope, paragraph 2 of Article 19 of the European Charter also offers broader protection than the *non refoulement* principle.

Firstly, it upholds some already existing principles in the field of international law of extradition, such as the prohibition of extradition in cases of the death penalty or political persecution.[11] This prohibition was already taken into account by the EU law.[12]

Secondly, this provision welcomed the case-law of the ECtHR in what regards the application of Article 3 of the European Convention to expulsion and extradition cases, when there is a risk of incurring torture, inhuman or degrading treatment or punishment in the country of destination. Thus, the protection afforded by the

[11] See the European Convention on Extradition of 13 December 1957.

[12] Recital 13 of the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

European Charter in this context shall be equivalent to that afforded by Article 3 of the European Convention.

The ECtHR's case-law on the application of Article 3 is one of the most perfect examples of "side protection" or "*protéction par ricochet*" of foreigners in cases of expulsion.[13] The "side protection" theory aims at reconciling the principle of the State sovereignty regarding immigration control and the duty to respect the human rights of all human beings under the States' jurisdiction. According to such protection, the State cannot expel, return or extradite a foreigner from its territory if such measure amounts to a disrespect of the alien's human rights – for example, the right not to be subjected to torture, inhuman or degrading treatment or punishment.

The case-law relating to Article 3 has not been linear. In the beginning, the former Commission of Human Rights stressed that only in exceptional circumstances could one accept that a foreigner's expulsion could amount to a disrespect of Article 3.[14] The European Court expanded the protection afforded by this Article. In the leading judgment *Soering*,[15] it discussed the extradition of an alien to a country where he would be subjected to the death penalty. The particular circumstances of the case, namely the length of the detention until the execution, the conditions on "death row", and the age and the mental health of the applicant were paramount. Because of such circumstances, the ECtHR was convinced that the applicant would suffer treatments that would be contrary to Article 3 of the European Convention. Thus, the Court considered that, by deciding to extradite, the extraditing State would disrespect that provision. It would be the extraditing State that would be responsible for the treatments that would occur in the requesting State.[16]

Later, this case-law was extended to expulsion cases.[17] The development of such case-law has created then, a true right not to be expelled, when carrying out the expulsion amounts to a risk of subjection to torture, inhuman or degrading treatment or punishment in the country of destination.[18]

As the wording of Article 19 of the Charter was deeply influenced by the case-law of the ECtHR, we must analyse in detail how, the ECtHR, has assessed a risk of torture, inhuman or degrading treatment.

6. For the ECtHR, it is sufficient the mere existence of a risk of torture or of any other forbidden treatments to trigger the application of Article 3. However, the applicant must prove that there is, indeed, a real risk of incurring such treatments.[19]

---

[13] Vincent Chétail, "Migration, Droits de l'Homme et Souveraineté: Le Droit International dans tous ses États", in *Mondialisation, Migration et Droits de l'Homme: le Droit International en Question*, dir. Vicent Chétail (Brussels: Bruylant, 2007), 75; Jean-Yves Carlier, "L'Europe et les Étrangers", in *Mondialisation, Migration et Droits de l'Homme: le Droit International en Question*, *op. cit.*, 241-278.

[14] Judgments ECtHR *Agee v. the United Kingdom*, 17 December 1976, no. 7729/76 and *B vs. France*, of 22 January 1987, no. 11722/85.

[15] Judgment ECtHR *Soering v. United Kingdom*, 7 July 1989, no. 14038/88.

[16] The responsibility of the requested State is applicable even if the country of destination is also a State Party to the European Convention. See Judgment ECtHR *TI vs. United Kingdom*, 7 March 2000, no. 43844/98.

[17] Judgment ECtHR *Cruz Varas v. Sweden*, 20 March 1991, no. 15576/89; and *D vs. United Kingdom*, 2 May 1997, no. 30240/96.

[18] Frédéric Sudre, *Droit Européen et International des Droits de l'Homme*, 9th edition (Paris: Puf, 2008), 599; and Paulo Manuel Abreu da Silva Costa, "A protecção dos estrangeiros pela Convenção Europeia dos Direitos do Homem perante processos de asilo, expulsão e extradição", *Revista da Ordem dos Advogados*, 60, no. 1 (2000): 519.

[19] Judgment ECtHR *H. v. Sweden*, 5 September 1994, no. 22408/93.

It is obvious that the protection afforded by Article 3 is granted when there is only a risk of such treatments. Otherwise, if there were a demand that an actual violation had already taken place, the protection afforded by Article 3 would clearly be ineffective. The effectiveness of the Charter's guarantee demands, thus, the possibility of paralysing a proceeding of expulsion or extradition. Paragraph 2 of Article 19 of the Charter must be read according to this interpretation. It seems, however, to be more demanding, as it expressly requires the existence of a "serious risk", when, in contrast, the protection afforded by the case-law of the ECtHR only required the mere existence of a "real risk."[20]

7. The ill treatment must, therefore, present a minimum level of severity. This level will depend on the particular circumstances of the case. The ECtHR takes into account the nature or the context of the treatment or punishment, the execution methods, its length, its physical and psychic effects on the victim, as well as some personal characteristics of the victim, such as sex, age, and health.[21] The Court may also consider the social and political characteristics of the country of destination. Traditionally, a situation of general violence in the country was not considered as ill treatment for the purposes of Article 3. The ECtHR usually required a risk of individual persecution or ill treatment.[22] However, since 2015, the Court has been changing its approach, as it can be seen in some cases regarding returns to Syria during the context of the civil war.[23] In cases of extradition, the Court also takes into account the procedure, the guarantees and the punishment that may be applicable to the applicant in the State of destination.

The risk of ill treatment may originate from different entities. First of all, it may derive from the authorities of the State of destination – whether because the risk comes from intentional acts of the public authorities, or because it is a result of a general situation, or finally because of the internal judicial system of the State (for example, when it sets forth the applicability of certain punishments).[24] The risk may also have its origins in the acts of private actors.[25] In such situations the applicant must prove that the authorities of the country of destination cannot provide adequate protection against the risk of ill treatment.[26]

8. In what concerns the types of ill treatment, paragraph 2 of Article 19 of the Charter mentions, like Article 3 of the ECHR, torture and other inhuman and degrading treatments or punishments. Torture has been understood as encompassing

---

[20] Jean-Yves Carlier argues that it would have been preferable not to have established a specific threshold for the risk of ill treatment, leaving room for the CJEU to decide. See "La place des ressortissants de pays tiers dans la Charte", in *La Charte des Droits Fondamentaux de l'Union Européenne*, ed. J. Y. Carlier, Olivier de Schutter (Brussels: Bruylant, 2002), 191.

[21] *Soering*, *cit.*, § 100, and Judgment ECtHR *Jalloh vs. Germany*, 11 July 2006, no. 54810/00. See João Madureira, "La Jurisprudence des organes de la Convention Européenne des Droits de L'Homme et de la Charte Sociale Européenne concernant l'entrée et la sortie des étrangers du territoire d'un État", *Revista de Documentação e Direito Comparado* (1989) : 158.

[22] Judgment ECtHR *Vilvarajah and others v. United Kingdom*, 30 October 1991, nos. 13163/87, 13164/87 and 13165/87.

[23] Judgment ECtHR *L. and M. v. Russia*, 15 October 2015, no. 40081/14.

[24] See the Judgment of the ECtHR on punishment by stoning *Jabari v. Turkey*, 11 July 2000, no. 40035/98.

[25] See the following judgments from the ECtHR: *H.L.R. v. France*, 29 April 1997, no. 24573/94; *Sultani v. France*, 20 September 2007, no. 45223/05. In the case *Collins and Akaziebie v. Sweden*, 8 March 2007, no. 23944/05, there was a risk of genital mutilation if the applicant were to return to Nigeria. In the case *N. v. Sweden*, 20 July 2010, no. 23505/09, there was a risk of domestic violence.

[26] Ruling *H.L.R. v. France*, *cit*.

every treatment that intentionally inflicts severe pain or suffering, whether physical or mental, upon a person.[27] Inhuman treatments are those that inflict serious physical or psychological pain, and degrading treatments are those that intentionally cause feelings of fear, anguish, and humiliation.[28] In some cases, however, it is not possible to distinguish between the types of treatment. All the types mentioned above may happen simultaneously.[29]

The wording of paragraph 2 of Article 19 of the Charter is broader than the wording of Article 3 of the ECHR, since it expressly refers to the death penalty. The leading case of the ECtHR on Article 3, *Soering*, concerned the extradition of a foreigner, from the United Kingdom to the United States, where he would be subjected to the death penalty. The Strasbourg Court considered that the extradition would amount to a treatment contrary to Article 3, however it would not be the application of death penalty that would represent, itself, an ill treatment. The ill treatment would derive not from such punishment, but from the conditions on "death row", which would entail a long period of waiting and anguish for the convicted person. Thus, at the beginning of its activity, the ECtHR considered that the death penalty, itself, would not be inconsistent with Article 3. However, recent decisions show that the Court's stance on this issue is shifting. In the case *Chamaïev and others v. Georgia and Russia*,[30] the Court considered that the extradition of a foreigner to Russia would amount not only to a disrespect of Article 3, but also of Article 2 – which guarantees the right to life –, because Russia had not signed either the Protocol no. 6 nor the Protocol no. 13 to the Convention, for the abolition of the death penalty. According to the Court, this would indicate that there was a risk of the foreigner being subjected to the death penalty.[31]

9. As for the scope of torture, inhuman and degrading treatment, according to the case-law of the ECtHR, these may result from several factors. First, from the risk of persecution of the foreigner due to his/her belonging to a specific group.[32] This type of situation is an expression of the *non refoulement* principle.

In very exceptional circumstances, ill treatment may result from a situation of extreme poverty and inhuman living conditions in the country of origin. The former Commission so decided in the case *Fadele v. United Kingdom.*[33] However, the Court has denied that Article 3 would encompass the protection of a certain standard of living.[34]

---

[27] Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984.

[28] Paulo Manuel Abreu da Silva Costa, "A protecção dos estrangeiros pela Convenção Europeia dos Direitos do Homem perante processos de asilo, expulsão e extradição", *cit.*, 521. For more developments on the concepts of inhuman and degrading treatments, see Diego Boza Martínez, *Los extranjeros ante El Convenio Europeo de Derechos Humanos*, *cit.*, 110 *et seq.*, and Frédéric Sudre, *Droit Européen et International des Droits de l'Homme*, *cit.*, 304 and following.

[29] Ireneu Cabral Barreto, *A Convenção Europeia dos Direitos do Homem Anotada* (2nd ed., Coimbra Editora, 1999), 74.

[30] Judgment ECtHR *Chamaïev and others vs. Georgia and Russia*, 12 May 2005, no. 36378/02.

[31] In the same sense, the judgment issued on the case *Jabari v. Turkey*, *cit*. For more details, see also Frédéric Sudre, *Droit Européen et International des Droits de l'Homme*, *cit.*, 602.

[32] See the judgments of the ECtHR issued in *Salah Sheekh v. The Netherlands*, 11 January 2007, no. 1948/04; *Baysakov and others v. Ukraine*, 18 February 2010, no. 54131/08; and *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, no. 30471/08.

[33] Decision of the European Commission on Human Rights *Fadele v. United Kingdom*, 12 February 1990, no. 13078/87. See also ECtHR *Sufi and Elmi v. United Kingdom*, 18 September 2012, no. 8319/07.

[34] Hélène Lambert, *The Position of Aliens in relation to the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2006), 38.

The expulsion of a seriously ill foreigner to a country where he/she may not have access to adequate health care, may also amount to ill treatment.[35] However, the Court highlights that these situations only happen in very exceptional circumstances, namely in cases of terminally-ill patients.[36] Thus, in principle, foreigners cannot claim a "right to stay" in the territory for access to better health care.[37] Also the mere risk of aggravation to the applicant's health or even a reduction in his/her life expectancy are not considered sufficient grounds for being qualified as ill treatment for the purposes of Article of the European Convention.[38]

Finally, situations where foreigners are subjected to successive expulsions may also amount to inhuman and degrading treatment. This would be case when no country is willing to receive the expelled aliens.[39]

As it was inspired by this case-law, Article 19, paragraph 2 of the European Charter must encompass all these situations. However, there is a development of the case-law of the ECtHR that was not mentioned in this provision. The Charter protects foreigners against expulsion only where there is a risk of ill treatment in the country of destination. However, the ECtHR had already used the protection afforded by Article 3 in order to forbid expulsions executed in an inhuman or degrading way in the country of expulsion. That would apply, for example, in cases where the way in which the expulsion is carried out would disrespect Article 3,[40] due to unnecessary use of force or detention of the immigrant. Foreigners who are physically unable to travel would also be protected.[41] The ECtHR has so decided in a case regarding the detention and expulsion of an unaccompanied five-year old minor.[42] Apparently, these situations are not mentioned by Article 19, paragraph 2 of the Charter. Nonetheless, the CJEU may offer protection in these cases, through Article 4 of the Charter.[43]

10. Finally, we must stress that Article 19 of the Charter, like Article 3 of the ECHR, sets forth an absolute right. There is no possibility of restriction, on any grounds. This absolute character is justified given the nature of the prohibition of torture, which is not subject to any justification under international human rights law. Such prohibition must always apply, irrespective of the circumstances that

---

[35] *D. v. United Kingdom*, *cit.* See also other judgments of the ECtHR, such as *Pretty v. United Kingdom*, 29 April 2002, no. 2346/02 and *Kudla v. Poland*, 26 October 2000, no. 30210/96.

[36] In the ruling *Bensaid v. United Kingdom*, 6 February 2001, no. 44599/98, the Court considered that Article 3 would not be disrespected by the expulsion of a foreigner to Algeria, even if he suffered serious health problems, because in the country of destination he would have access to sufficient health care. See also the ECtHR's judgment in the case *Aoulmi v. France*, 17 January 2006, no. 50278/99.

[37] See Judgment ECtHR *Arcila Henao v. The Netherlands*, 24 June 2003, no. 13669/03; *Ndangoya v. Sweden*, 22 June 2004, no. 1768/03; and *Aoulmi v. France*, *cit.*

[38] See Judgment ECtHR *N. v. United Kingdom*, 27 May 2008, no. 26565/05.

[39] Hence, the decision of the ECtHR in the case *Harabi v. the Netherlands*, 5 March 1986, no. 10798/84, concerning an undocumented immigrant, whose State of origin systematically refused his entry in national territory.

[40] See the judgment of the ECtHR in the case *Öcalan v. Turkey*, 12 May 2005, no. 46221/99.

[41] For more details, see João Madureira, "La Jurisprudence des organes de la Convention Européenne des Droits de L'Homme et de la Charte Sociale Européenne concernant l'entrée et la sortie des étrangers du territoire d'un État", *cit.*, 165.

[42] Judgments of the ECtHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, no. 13178/03, *Muskhadzhiyeva and others v. Belgium*, 19 January 2010, no. 41442/07, *Abdolkhani and Karimnia v. Turkey*, 27 July 2009, no. 30471/08 and *A.A. v. Greece*, 22 July 2010, no. 12186/08.

[43] However, some authors claim that the reference in Article 19(2) to "other punishments" may include such cases. See, for example, EU Network of Independent Experts on Fundamental Rights, *cit.*, 181.

may arguably justify such a treatment – for example, even when national security is concerned, or in cases of terrorism or organized transnational criminality.[44] Thus, the protection afforded by Article 3 of the ECHR and also by paragraph 2 of Article 19 of the Charter is broader than the Protection guaranteed by the Geneva Convention on the Status of Refugees. This latter allows exceptions to the *non refoulement* principle, where there are serious reasons to believe that the refugee may represent a threat to national security or where he/she was convicted for having committed particularly serious crimes and represents a danger to the population (paragraph 2 of Article 33).[45]

11. The two paragraphs of Article 19 will be important principles for the development of a common European policy on immigration and asylum. They shall not only be applicable in the context of the *non refoulement* principle (in the terms of Article 78, paragraph 1 of the TFEU), but also in what concerns the development of policies on tackling illegal immigration, namely regarding return measures. Article 79, number 2, paragraph c) of the mentioned Treaty establishes that the main way to tackle this type of immigration shall be the adoption of a common policy on the return of illegal immigrants. However, a return decision can only be issued where there is no risk of disrespecting Article 19 of the Charter. This is a very important point, since the institutions of the European Union have been highlighting the importance of dealing with illegal immigration in several political documents, such as the 2009 Stockholm Programme. Thus, the several instruments that had already been adopted for the development of such policy – such as the already mentioned Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegal third-country nationals (the so-called "Return Directive"), the Directive 2003/110/CE of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, and the Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals – must all only be executed when there is no violation of the prohibition of collective expulsions, the death penalty, torture, or other inhuman and degrading treatments. Respecting Article 19 may result in a Member State not issuing a return decision and, instead, in accordance with the possibility enshrined in paragraph 4 of Article 6 of the Return Directive, granting a residence permit to the foreigner, or any other title allowing them to stay in the territory, for humanitarian, compassionate grounds or others.[46]

Ana Rita Gil

---

[44] Ireneu Cabral Barreto, *A Convenção Europeia dos Direitos do Homem Anotada*, *cit.*, 74. See, on the violation of Article 3 of the European Convention in cases of expulsion or extradition of foreigners to a country where they were being persecuted due to belonging to a certain group, the judgments *Chamaïev and others v. Georgia and Russia*, 12 April 2005, no. 36378/02; *Saadi v. Italy*, 28 February 2008, no. 37201/06; *Khaydarov v. Russia*, 20 May 2010, no. 21055/09.

[45] Paulo Manuel Abreu da Silva Costa, "A protecção dos estrangeiros pela Convenção Europeia dos Direitos do Homem perante processos de asilo, expulsão e extradição", *cit.*, 516.

[46] We regret that the first judgments of the CJEU on the application of the Return Directive did not mention the European Charter. See Judgments *Kadzoev*, 30 November 2009, Case C-357/09 PPU, ECLI:EU:C:2009:741; and *El Dridi*, 28 April 2011, Case C-61/11 PPU, ECLI:EU:C:2011:268.

ARTICLE 20

Equality before the law

Everyone is equal before the law.

1. Equality is an ethical ideal that has been part of man's journey since the early days of Mediterranean civilizations, with Ancient Greece and the Roman Republic – finding a place in modern constitutionalism as the legal principle of "equality before the law." In this last sense, legal equality means that all people are subject to one and the same law without regard to privilege or differentiation. This is the meaning that modern constitutionalism has attributed to it. British constitutional tradition, as it is well known, has long been based on history and custom, in which from the outset the courts have affirmed legal equality as the heritage of "common law"; later finding expression in the texts that served as the models for those of the American Republic, notably in the *Virginia Bill of Rights* (1776) and the *Constitution of the Commonwealth of Massachusetts* (1780); and finally in the French *Declaration of the Rights of Man and of the Citizen* (1789). In the American texts the idea was emphasised that "men are born free and equal", without distinctive or exclusive privileges, and that they have certain natural rights, essential and unalienable, among which are the right to enjoy and protect their lives and liberty, to acquire and possess property, and to seek and obtain security and happiness. Although starting with the same presuppositions, the French Declaration concludes in Article 6 that the law, as an expression of general will, should be the same for all "whether to protect, or to punish", seeing all citizens in the same way, such that all are "equally entitled to all dignities, to have access to all public places and offices, according to their abilities and without any distinctions other than those related to their virtues and talents."

This notion of legal equality is later confirmed in the evolution of European constitutionalism in the 19th and early 20th centuries. Based on the belief in "original" (from birth) egalitarianism for all men, equality is then understood as a prohibition of favoritism. This was the sense of equality in the "liberal rights State": the law is equal for all and all are equal before the law. From this point of view the principle of equality went hand in hand with the principle of legality – reducing everything to the fact that the public entities (and soon the Administration) would accept the law arising from the general will (of the Parliament), and that it would be applied "without regard to whom."

From mere legal equality, lawmakers turned equality into a legal product, and started to pose the question of the very nature of justice to lawmakers themselves – giving an additional boost to democracy in the process. Growing Parliamentary representation, extension of suffrage, minority rights, and above all the understanding that if equality was to be attained, there would have to be a paradigm shift in the perception of equality's very nature: with these developments there was a move from a legal formality to a *de facto* reality. The discussion of equal opportunity and overcoming discrimination moved to centre stage. These changes, at the dawn of contemporary constitutionalism, marked the rise of the Social State that sought to

equate the principle of equality with that of non-discrimination, fueling the debate about the true parity of rights in a number of contexts, including women, minors, the elderly, those with challenges such as learning disabilities, etc. A sign of the times was the close link between equality, universalism, and non-discrimination. With the rise and express establishment of social, economic, and cultural rights, equality came more and more to mean material, substantial equality. In this sense one could almost say that it had been transformed into a principle of the prohibition of inequality. This change was expressly codified in many juridical-constitutional orders following the Second World War. Legal equality and non-discrimination are two sides of the same coin. Equality also evokes a concern for differentiation (equal treatment for what is equal and unequal for what is unequal). But the truth is that the constitutional orders of the founding countries of the European Community, and later the Constitutions of all the Member States of the EU, have, through successive enlargements, established without exception the principle of legal equality. Perhaps this is the reason why the principle of equality is not explicitly mentioned in any of the Community treaties. Nevertheless, this should not in any way be construed as an indication that the principle is not fundamental to Community rights, especially given that communitarian case-law has steadily embraced it in so many ways. In fact, the CJEU has always considered the principle of equality as a fundamental feature of community rights, even before its formal consecration in the current CFREU (see *Racke*, of 13 November 1984, C-283/83, ECLI:EU:C:1984:344; *EARL*, of 17 April 1997, C-15/95, ECLI:EU:C:1997:196; and *Karlsson*, of 13 April 2000, C-292/97, ECLI:EU:C:2000:202).

Today, the TEU (in the version following the "Treaty of Lisbon") expressly mentions equality as a cornerstone of the EU (Article 2), highlighting equality between men and women [Articles 2 and 3(3)]. Furthermore, under the terms of Article 6(1) of the TUE, the CFREU has the same legal weight as the treaties, although lacking the prerogative to exceed the EU's primacy of institutions and governing bodies, with respect to principle of subsidiarity [see Articles 6(2) of the TUE, and Articles 51 and 52 of the Charter].

2. The present precept is found in Chapter III of the Charter, entitled "Equality". There appears to have been a deliberate intention on the part of the authors of the Charter to expressly underscore the notion of equality as a core value of the EU. Two Articles (20 and 21) refer first to the principle of equality and then to non-discrimination; while saying that some situations deserve "positive discrimination" (*e.g.*, issues pertaining to children, the elderly, and persons with challenges), thereby confirming the paradigm shift mentioned above, gaining normative autonomy. In comparison to the ECHR, which only consecrates the principle of non-discrimination, the Charter was, in this regard, broader. However, these gains are contradictory. In truth, we should recognize that the Charter's solution excludes the constitutional traditions of the Member States. It is enough to read the Constitutions of Italy, France, or Portugal (among others) to see that equality and non-discrimination do not correspond to the same legal reality, or rather, they are two sides of the same coin – but two *separate* sides, nevertheless. Article 13 of the CPR illustrates this, consecrating the two in the same precept and as dimensions of the same "Principle of Equality": in para. 1 legal equality, and in para. 2 non-discrimination. The understanding expressed in the Charter could be attractive to someone intending to normatively devalue the principle of equality,

arguing that it is a "light idea" and "devoid of substance", when compared to the weight of the principle of non-discrimination. In fact, the truth is that legal equality follows from the *de facto* equality, making it almost always imperative to contemplate the distinctions in genuine situations in order to avoid the error of subjecting everything to the same juridical regime. This demands that the issue of non-discrimination be raised whenever there is a discussion about equality versus inequality. To the extent to which the Charter treats the two principles separately, one might question whether this echoes the position of those who devalue the principle of equality. No one should believe that this is a purely theoretical point. It ends up having real consequences at the level of legal sway over the principle of equality. Actually, measured by the yardstick of national case-law, the degree of jurisdictional control varies considerably according to cases of "determined equality" (that is, based on concrete prohibitions of non-discrimination or "suspicious" differences) or cases of "undetermined equality" (legal equality *tout court*). Control in the former is quite strong, while in the latter, less so.

3. From a subjective point of view, the principle of equality addresses "one and all" and not only "citizens". Equality has opted for a broader solution than the one that is expressed in most Member State Constitutions, in which the principle of equality applies only to citizens [*e.g.*, Austria, Article 7(1); Belgium, Article 10; Greece, Article 4(1); Spain, Article 14; Portugal, Article 13(1); and Ireland, Article 40(1)]. Nevertheless, it is best to bear in mind that even in its application at the national level, the principle of equality is also extended to non-citizens and stateless persons, as a corollary to the principle of human dignity (see Articles 13 and 15 of the CPR, which prescribe some exceptions to the exercise of rights and obligations on the part of foreigners, without prejudice to the general extension of the principle of equality to all of them).

4. In the expression "equality of all before the law", the term "law" is not synonymous with an act promulgated by a representative parliament. That would be an unjustified limitation regarding the understanding of the principle of equality. "Law" is here understood as a product of some source of rights generated by legal norms. It is this broad sense of the term "law" that the Charter adopts. As there is no source of law in the legal system of the EU that is designated as "law", there can be no recognition of any additional contribution from legal traditions or constitutions of Member States, which in their own Constitutions recognise, according to tradition, equality before the law. But this also implies a very interesting symbiosis between EU law and the national legal orders.

5. The principle of equality postulates the prohibition of arbitrary choice, and at the same time, the obligation to differentiate. Such methodical thinking is developed by case-law, and rightly so, as the control of equality/non-discrimination resides, fundamentally, in the courts. The contributions of American and European constitutional scholars led to the interpretation of control over equality as control over the prohibition of arbitrary choice, which invites the issue of interested parties (see, for the Portuguese perspective, among many others, the judgment of the Constitutional Court no. 232/03, Case 306/03, of 13 May 2003).

6. The difficulty of achieving equality in the purely legal sense – by means of deft maneuvering on the part of legislators in "the Contemporary State" – has altered the question about how to exercise legal control, as mentioned. At the level of EU Member States this control belongs to courts, which is to say, constitutional

courts. For the EU, this is the CJEU. This CJEU, as we have just seen, determined – even before the approval of the current Charter – the structural nature of the principle of equality for the EU. Keep in mind, however, that until today, the incursions into this area have amounted to little. While the case-law of Member States' constitutional courts is overly abundant (invoking the principle of equality depends greatly on the guarantee of the defense of fundamental human rights affected by those same courts in their control of the constitutionality of their laws), the same cannot be said of the CJEU. Some of the reason for this can be attributed to the application of the Charter itself (see Article 6 of the TEU). But the main reason has to do with a certain jurisprudential self-discipline, given that controlling the principle of equality is by nature complex and controversial – easily leading to conflict among lawmakers, and in which normative decisions that do not presuppose differentiation are rare. That is why the CJEU has been restrained until today in the realm of truly arbitrary discrimination (which is to say, lacking adequate justification that is neither carefully considered nor proportioned). In this sense, the case-law of the CJEU has not regarded the principle of equality as an absolute principle, but has treated differentiation within the EU as non-arbitrary, and at the same time, sought to be reasonable and proportional. Strictly speaking then, performance of the CJEU (judging from the historical track record) has been preponderantly driven by Articles 21 through 26 of the Charter (which address non-discrimination, and identify specific personal categories or factors of non-discrimination or positive discrimination) rather than by the generic invocation of the principle of equality prescribed in Article 20.

As in the judgment handed down in *Karlsson* (cited above), in which the issue had to do with a possible violation of the principle of equality contained in the Common Agricultural Policy (CAP) brought by the Government of Sweden in the calculation of its dairy quotas, the CJEU, referring specifically to Article 40(3) of the version of the TFEU in force at the time, which expressly stipulates the prohibition of discrimination in the scope of the CAP, sustained non-discrimination as a corollary of the principle of equality, ruling "*that comparable situations not be treated differently and that different situations not be treated equally, unless such treatment is objectively justified.*"

Ricardo Leite Pinto

ARTICLE 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

1. Having in mind the origin of these provisions, and in accordance with the Explanations relating to the CFREU, the rule in paragraph 1 is inspired by Article 13 of the EC Treaty, now replaced by Article 19 of the TFEU, and Article 14 of the ECHR, as well as by Article 11 of the CHRB with regard to genetic heritage. Insofar as it coincides with Article 14 of the ECHR, it applies in accordance with said norm. However, unlike this provision, Article 21 of the CFREU gives the principle of non-discrimination an autonomous dimension, as its application is not dependent on the invocation of any other right. In fact, the CFREU establishes a general prohibition of discrimination, in all areas of law, regardless of its source or ground.

Paragraph 2, in turn, corresponds to the first paragraph of Article 18 of the TFEU and must be applied in accordance with such Article.

The Explanations also intend to clarify that there is no contradiction or incompatibility between paragraph 1 of this Article of the CFREU and Article 19 of the TFEU, since the two rules have different scopes and purposes: Article 19 confers on the EU the power to adopt legislative acts, including harmonisation of the laws and regulations of the Member States, to combat certain forms of discrimination, which it exhaustively lists. The provision set out in paragraph 1 of Article 21 of the CFREU does not create or attribute a legislative competence. Instead, it affirms a prohibition of discrimination that is binding upon the institutions and bodies of the Union, in the exercise of the powers conferred upon them by the Treaties, and the Member States whenever they implement EU law.

2. The ban on discrimination was introduced in EU law at the demand of some Member States (notably France), who feared that their more advanced legislation on gender equality might become a factor distorting competition within the common market. This explains the inclusion in Treaty law of the provision corresponding to the current Article 157 of the TFEU (then Article 141 TEC) on equal pay for workers of both sexes.

The body of EU gender equality law has evolved remarkably over the decades to cover areas such as pensions, pregnancy and statutory social security schemes. However, until around 2000, the Union's anti-discrimination legislation concerned almost exclusively matters of employment and social security and the prohibition of discrimination on grounds of sex.

The 1990s saw significant pressure to extend the prohibition of discrimination in EU law to other areas, including racial or ethnic origin, religion or belief, disability, age and sexual orientation. Thus, in the field of secondary legislation,

we now find several key regulatory instruments that were approved during the first decade of the 21st century, following the drafting of the CFREU: Directive 2000/43/EC[1] on the prohibition of racial or ethnic discrimination; Directive 2000/78/EC[2] establishing a general framework for equal treatment in employment and occupation and Directive 2006/54/EC[3] of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2004/113/EC[4] implementing the principle of equal treatment between men and women in the access to and supply of goods and services. In addition, it is also worth noting Directive 2010/41/EU[5] on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. The European Commission has also presented an initiative, still under way, for the adoption of a proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.[6]

Regarding the development, through EU secondary legislation, of the principle of non-discrimination, as set out in the rule commented on here, some observations are warranted. Firstly, the progress that has been made in this area, within the framework of the EU legal system, especially in the last decades, is obvious and undeniable. However, the European vision of this principle is anchored in an approach that tends to address the problems of equality and non-discrimination as mainly (sometimes, exclusively) *recognition* issues, practically ignoring, in the legislative framework, problems of *redistribution and representation.*[7] Finally, the uneven and unsystematic nature of legislative solutions should be noted, although the European institutions' efforts at standardisation must be emphasised.

3. There are few subjects on which EU law has had such a positive influence on the domestic law of the Member States as the issues of equality and non-discrimination. In the specific case of Article 21 of the CFREU, it should be noted that it deals with the particular issue of *non-discrimination* and does not contain the general statement of the principle of equality, which is customary in constitutional law. Academic literature on the subject tends to be divided between two main positions: *i)* the consideration of non-discrimination as a mere *negative dimension of equality*; and *ii)* an understanding of non-discrimination as a principle

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[3] Directive of the European Parliament and of the Council 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version).

[4] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[5] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

[6] European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)].

[7] See, on the concepts of recognition, redistribution and representation, Nancy Fraser and Axel Honneth, *Redistribution or recognition?: a political-philosophical exchange* (London: Verso Books, 2003).

with a certain degree of autonomy. In any case, it is unequivocal that the principle of non-discrimination derives from the principle of equality, complementing it, as one can see in many of the constitutions of the Member States and in international human rights instruments and catalogues, including Protocol no. 12 to the ECHR.

This principle of non-discrimination, herein embodied as a norm of fundamental rights, is therefore assumed to be a *value* (absolute), a *right* (both from an objective and a subjective point of view) and also a *legal technique* (relative). As an absolute value, it enshrines a prohibition of distinctions, which, due to the differentiation criterion on which they are based, are *a priori* considered arbitrary, odious or illegitimate. As a fundamental rights' norm, it corresponds, in the light of EU case-law, to one of the social objectives of the EU, it is binding upon the Union's institutions and to Member States, and it reflects the individual subjective right not to be discriminated against, deprived of any right or subjected to any duty by virtue of belonging to any of the categories listed. Finally, as a control technique, also largely developed through case-law, it allows for a constitutional principle with a highly undetermined content – the principle of equality – to be made operational.

Thus, in practical terms, it may be said that the principle of non-discrimination distinguishes between valid and invalid criteria for differentiating persons and situations. However, legal literature on this subject has also long affirmed the need to adopt a substantial concept of equality, and to bear it in mind when using the principle of non-discrimination, since mere formal equality often perpetuates real inequalities. This requirement could even imply some forms of positive action, or true positive discrimination, to achieve equality in the long term. These measures, which would be considered directly discriminatory if there were no explicit legislative permission for their adoption, are now provided for in secondary legislation. They have also been much discussed in the case-law of the CJEU, as illustrated in the *Kalanke*[8] judgment (in which the Court initially gave a very restrictive interpretation of the admissibility of positive discrimination, in the form of quotas for access to the labour market, with regard to certain professions) or *Lommers*[9] (in which the CJEU reviewed its position, admitting the possibility of positive discrimination against women in the form of the preferential – although not exclusive – allocation of crèche places, on the grounds of the need to promote equal access to the labour market, since female workers demonstrably give up their careers to look after their children much more often than their male counterparts).

4. As the above example illustrates, the CJEU has played a very important role in defining and clarifying the principle of non-discrimination. Indeed, it is through the Court's equality case-law that EU law has come to recognise, first and foremost, that anti-discrimination rules are a *fundamental basis* for the protection of European citizens. Moreover, the Court has stated that it is essential to build a "*social dimension*" to the EU, alongside the project of economic integration, and has warned that discrimination may undermine the achievement of the objectives of the TEC, namely the promotion of a high level of employment and social protection, the raising of the standard of living and quality of life, economic and social cohesion, solidarity, and the free movement of persons.

The CJEU also recognised, over two decades ago, that the principle of equal treatment (then enshrined only in Article 157 of the TFEU) corresponds to a *genuine*

[8] Judgment *Kalanke*, 17 October 1995, Case C-450/93, ECLI:EU:C:1995:322.
[9] Judgment *Lommers*, 19 March 2002, Case C-476/99, ECLI:EU:C:2002:183.

fundamental right: "*the economic aim pursued by (...) the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.*"[10]

The CJEU later went even further in asserting non-discrimination as a principle of EU law, stating in the famous and much-discussed *Mangold*[11] judgment that "*the principle of non-discrimination (on grounds of age) must therefore be regarded as a general principle of Community law. Where national rules fall within the scope of Community law [...] and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle.*" It also added that, as a result of that recognition of non-discrimination as a general principle of Community law, "*observance of the general principle of equal treatment [...] cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination.*"

The CJEU's position in the cited case has been strongly criticised. Critics have pointed out, among other issues, the immense economic repercussions of the general principle of non-discrimination (and its sub-principles) in areas where the EU has, at best, *shared* competences (social and employment policy, and access to social benefits such as education and health). However, and conversely, it has been claimed that the judgment in *Mangold* constitutes a first step towards the judicial development of a general legal framework on equality and non-discrimination to fill the gaps in the current (and insufficient) body of law.

The CJEU upheld and developed the *Mangold* doctrine in the *Kücükdeveci*[12] case, in which it stated the following: "*the need to ensure the full effectiveness of the principle of non-discrimination*" – (in this case it was non-discrimination on grounds of age, as concretised in secondary law) – "*means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so.*"

This case has also been much debated, as it has relevant implications for the application of the EU's catalogue of fundamental rights. First of all, it draws attention to the constitutional status of the general principles of EU law, which may, on their own, justify the disapplication of a national provision that proves to be in disagreement with them. As one of the most fundamental subjective rights, both universally recognised and enshrined in the different legal systems that make up the different layers of the plural European legal order, the principle of non-discrimination is one of the obvious examples of a principle that is included in such a list. On the other hand, its application gives rise to the problem of horizontal effectiveness or justiciability of fundamental rights in the context of disputes between private individuals – as is the case of the right not to be discriminated against – provided for in the Charter and in Directives; in this case, that possibility has been accepted by the CJEU.

[10] Judgment *Deutsche Telekom*, 10 February 2000, Case C-50/96, ECLI:EU:C:2000:72.
[11] Judgment *Mangold*, 22 November 2005, Case C-144/04, ECLI:EU:C:2005:709.
[12] Judgment *Kücükdeveci*, 19 January 2010, Case C-555/07, ECLI:EU:C:2010:21.

5. One of the most important contributions of the case-law of the CJEU on the prohibition of discrimination is the frequent reasoning based on the concepts of *direct and indirect discrimination*, as well as the admission of possible *grounds of justification*. These decision-making criteria are repeatedly used by the CJEU, which has drawn attention to the importance of considering the *concrete results of normative precepts*.

This distinction between the concepts of direct and indirect discrimination, which has become commonplace in EU law, in particular due to its frequent application by the CJEU, seems truly fundamental for the real effectiveness of the principle embodied in Article 21 of the CFREU. We may say that such distinction is based on the visibility of the discrimination. Thus, *direct discrimination* consists in a situation where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of one of the characteristics protected by law; in other words, a case of ostensible, manifest, discrimination. Examples of direct discrimination may be found in CJEU's judgments in *Feryn*,[13] *Association belge des Consommateurs Test Achats ASBL*,[14] *Pensionsversicherungsanstalt v Christine Kleist*[15] or *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*.[16]

Indirect discrimination, on the other hand, shall be understood to occur where an apparently neutral provision, criterion or practice would put persons – of the protected characteristic – at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Therefore, there is indirect discrimination whenever a measure or regulation, based on apparently neutral criteria, proves *in concreto* to cause a disadvantage to a certain group of individuals, protected by the prohibition of discrimination. Thus, situations of indirect discrimination include: *i)* the use of distinguishing criteria that have similar effects to those which would result from the application of legally invalid criteria; and *ii)* the establishment of a purely formal distinction between cases to which identical treatment should in practice apply. In essence, the question here is whether the law not only can, but must, consider the diversified effects of a formally equal rule.

Examples of situations of indirect discrimination may be found in many of the CJEU's rulings, such as *Seymour-Smith and Perez*,[17] *Allonby*[18] and *CHEZ*.[19] In the first case, which was a typical case of labour discrimination on grounds of gender, the Court held that "*as regards the establishment of indirect discrimination, the first question is whether a measure such as the rule at issue has a more unfavourable impact on women than on men*", so that it must be determined "*whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the*

[13] Judgment *Feryn*, 10 July 2008, Case C-54/07, ECLI:EU:C:2008:397.
[14] Judgment *Association belge des Consommateurs TestAchats ASBL*, 1 March 2011, Case C-236/09, ECLI:EU:C:2011:100.
[15] Judgment *Pensionsversicherungsanstalt v. Christine Kleist*, 18 November 2010, Case C-356/09, ECLI:EU:C:2010:703.
[16] Judgment *NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, 23 April 2020, Case C-507/18, ECLI:EU:C:2020:289.
[17] Judgment *Seymour-Smith and Perez*, 9 February 1999, Case C-167/97, ECLI:EU:C:1999:60.
[18] Judgment *Allonby*, 13 January 2004, Case C-256/01, ECLI:EU:C:2004:18.
[19] Judgment *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, 16 July 2015, Case C-83/14, ECLI:EU:C:2015:480.

condition of two years' employment required by the disputed rule." In *CHEZ*, in which the CJEU brings forward new perspectives to the dilemma of distinguishing between direct and indirect discrimination, the Court recalled that according to its case-law relating to the concept of indirect discrimination, "*such discrimination is liable to arise when a national measure, albeit formulated in neutral terms, works to the disadvantage of far more persons possessing the protected characteristic than persons not possessing* it", and established that "*no particular degree of seriousness is required so far as concerns the particular disadvantage referred to in that provision.*"

6. The question of whether there is discrimination *in casu* is treated as a *matter of fact* by the CJEU. This has a relevant consequence: it leads us to recognise that, in addition to equal treatment in relation to each individual in particular, the impact on individuals as members of a given social group must be considered when assessing normative measures. In this sense, and despite the methodological difficulties of this assessment, the consideration of indirect discrimination as a dimension of non-discrimination is important as a way of protecting minorities in pluri-comprehensive societies, allowing group identities to be highlighted and preserved.

The CJEU has also played an important role in *suggesting stages of the evidential process* in discrimination cases. In this sense, we should underline the relevance of its proposals to consider statistical data (in the comparisons it makes, the CJEU often refers to the percentage of individuals of each group affected by a certain measure, as seen above), the importance given to the sociological dimension (the Court has dealt with individual questions by examining the situation of the group to which the affected individual belongs) and the drawing up of lists of justifications considered objectively legitimate and illegitimate, in order to avoid the prohibition of discrimination.

7. A much-discussed issue is the possibility *of legal justification for discriminatory treatment*, namely indirect discrimination. In fact, direct discrimination is, in principle, difficult to justify (unless there are express legal exceptions to a certain prohibited criterion for distinction, which must be well-founded), but the same is not true for normative provisions that have the practical consequence of placing a certain group of individuals at a disadvantage. Thus, precisely because they are not based on prohibited criteria for distinction, many of these rules will not have a discriminatory intention and may even be the best possible solution to achieve a certain, constitutionally desirable, end. In addition, and unlike direct discrimination, the legislator's necessary margin for social order conformation must be taken into account.

Overall, the case-law of the CJEU holds that in the case of indirect discrimination, a conduct may be objectively justified. It has even suggested a test for normative solutions whose legitimacy is contested. They should (1) meet a real need, (2) be appropriate to the pursuit of a particular aim, and (3) be necessary to achieve that aim. This test basically corresponds to our comprehensive understanding of the principle of proportionality (encompassing the principles of proportionality in the strict sense, necessity and suitability). The decisions handed down, for example, in the *Sirdar*[20] and *Rinke*[21] judgments laid the path to this kind of analysis, but the CJEU has shown greater difficulty in drawing the line between admissible and non-admissible distinctions in more complex situations, where phenomena of

[20] Judgment *Sirdar*, 26 October 1999, Case C-273/97, ECLI:EU:C:1999:523.
[21] Judgment *Rinke*, 9 September 2003, Case C-25/02, ECLI:EU:C:2003:435.

intersectionality arise. That is what happened in the *Bougnaoui*[22] and *Achbita*[23] cases, where, in highly criticised judgments regarding a "workplace headscarf ban", the Court ruled that such behaviour may in certain situations be considered merely indirect discrimination, and that employers may justifiably ban employees from wearing headscarves, if under a general religious neutrality policy.

Given the seriousness of the consequences of prohibited discrimination, even indirectly, and the State's true obligation to protect citizens in this respect, there have long been successive calls to "tighten" the justification requirements for indirectly discriminatory measures, proposing a true *inversion of the burden of proof*, whereby it is up to the public authorities (or the entity interested in the maintenance of the measure) to demonstrate that it corresponds to the least burdensome means possible to achieve a certain objective, and to prove the inexistence of alternative non-discriminatory means, or the least discriminatory possible means, of achieving the intended aim. This has been established by EU law, in particular in the directives on non-discrimination issues, and as recognised by the CJEU, for example, in the *Nikoloudi*[24] judgment and, subsequently, in *Feryn* and *CHEZ*.

Problems regarding *justification*, on one hand, and *intersectionality*, on the other, have been recurring in the CJEU's case-law. The limits and scope of freedom of religion and belief have arisen in several recent cases, such as *Egenberger,*[25] and *VMA*;[26] the latter brought to light another approach, namely an intersectional dimension concerning the Union's protection of equal social rights, articulated between children's rights and the right to respect for private and family life, under the exercise of freedom of movement. In the *VMA* judgment, the Court recalled that EU citizenship rights can be invoked *vis-à-vis* the Member State of origin (as had been said in *Coman*)[27] and that European citizens born in the host Member State of their parents, without ever having exercised the right to free movement, may also rely on Article 21(1) TFEU.

8. Article 21(2) of the Charter refers to the specific problem of discrimination on grounds of nationality. By providing that it is prohibited *without prejudice to the application of the specific provisions of the Treaties*, it basically affirms the prohibition of non-discrimination on grounds of nationality *for citizens of the European Union*, since differentiated treatment on grounds of nationality of third-country nationals is not considered discriminatory in the light of Union law.

The admissibility of the distinction between citizens of the Union and non-EU citizens has even been accepted by the ECtHR,[28] which has stated that as regards the "*preferential treatment given to nationals of the other member States of the Communities, there is objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order.*"

It should also be stressed that this requirement of non-discrimination, with its specific features, applies within the framework of the application of EU law and not

[22] Judgment *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole AS*, 14 March 2017, Case C-188/15, ECLI:EU:C:2017:204.
[23] Judgment *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, 14 March 2017, Case C-157/15, ECLI:EU:C:2017:203.
[24] Judgment *Nikoloudi*, 10 March 2005, Case C-196/02, ECLI:EU:C:2005:141.
[25] Judgment *Egenberger*, 17 April 2018, Case C-414/16, ECLI:EU:C:2018:257.
[26] Judgment *VMA*, 14 December 2021, Case C-490/20, ECLI:EU:C:2021:1008.
[27] Judgment *Coman*, 5 June 2018, Case C-673/16, ECLI:EU:C:2018:385.
[28] Judgment ECtHR *Moustaquim v. Belgium*, 18 February 1991, no. 12313/86.

beyond it. This has two consequences. The first is that, in the context of the exercise of the exclusive competence of the Member States, a number of legally permissible discriminations between nationals of the country and nationals of other Member States are maintained, even as regards the exercise of certain fundamental rights (an obvious example being the restriction of the right to vote for sovereign bodies). Fundamental social rights are especially problematic; in judgments such as *Martínez Sala*,[29] *Grzelczyk*,[30] *Trojani*,[31] *or Bidar*,[32] the CJEU seemed to incrementally broaden non-national EU citizens' rights to claim social benefits, while narrowing Member States' scope to regulate or restrict their access to national welfare systems, notably in the case of non-contributory benefits. However, more recent decisions have drawn very clear limits on the right to social assistance granted to non-national Union citizens in host Member States; that is the path followed in the *Brey*,[33] *Dano*[34] and *Alimanovic*[35] cases, which arguably define a new paradigm on the issue of access to host State social benefits by non-national EU citizens.

Finally, with regard to the enjoyment of fundamental rights enshrined in the various catalogues of the European legal order (in particular the ECHR), it should be noted that many of them are universal rights, recognised to all, regardless of their nationality, and even in situations of statelessness.

Mariana Canotilho & Sergio Maia Tavares Marques

[29] See Judgment *María Martínez Sala v. Freistaat Bayern*, 12 May 1998, Case C-85/96, ECLI:EU:C:1998:217.
[30] Judgment *Grzelczyk*, 20 September 2001, Case C-184/99, ECLI:EU:C:2001:458.
[31] Judgment *Trojani*, 7 September 2004, Case C-456/02, ECLI:EU:C:2004:488.
[32] Judgment *Bidar*, 15 March 2005, Case C-209/03, ECLI:EU:C:2005:169.
[33] Judgment *Brey*, 19 September 2013, Case C-140/12, ECLI:EU:C:2013:565.
[34] Judgment *Dano*, 11 November 2014, Case C-333/13, ECLI:EU:C:2014:2358.
[35] Judgment *Alimanovic*, 15 September 2015, Case C-67/14, ECLI:EU:C:2015:597.

ARTICLE 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

1. Diversity is an intrinsic feature of the European project and also one of its fundamental principles. The EU – like its predecessor, the EEC – brings together States that are very diverse and also keen to preserve their respective national identities. The project's purpose is not to erase the diversity of the cultures and traditions of the peoples of Europe in the name of an ever-closer union or of common values, even though the efforts put into promoting a "European identity" may suggest otherwise. As we can read in the Charter's Preamble, the Union contributes to the development of common values among the peoples of Europe "*while respecting the diversity of the cultures and traditions*" of these peoples, as well as the national identities of the Member States. The Union's motto is precisely "United in diversity", which suggests a difficult balance between integration and autonomy, but which is nevertheless presented with confidence in the official European discourse as both a source of originality and a key to the Union's success. Instead of aiming to be a single culture, the EU's Europe presents itself as a mosaic of different cultures – as a "culture of cultures" –, combined to form a whole which is greater than the sum of its parts. That is why the EU considers itself to be particularly suited to build bridges between different cultures and why it is committed to fostering intercultural dialogue, inside and across borders. A commitment confirmed, for example, by the involvement of the European Community in the negotiations of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005, and by the European Parliament and Council's decision to celebrate 2008 as the European Year of Intercultural Dialogue.

2. Diversity is therefore not just a feature of Europe and European societies, each day ever more multicultural due to the impact of migration flows and globalisation, but rather an asset to be preserved and a normative principle underlying the European construct and its legal system. Article 22 confirms this. According to the explanatory note initially prepared under the responsibility of the *Praesidium* of the Convention which drafted the Charter, Article 22 was based, not only on Article 151(1) and (4) of the EC Treaty, but also on Article 6 of the EU Treaty, something which has been interpreted as evidence that diversity is a "quasi-constitutional" principle of the EU legal order. Even though the CJEU is yet to acknowledge a general constitutional principle of cultural diversity in its rulings, diversity is commonly referred to as such in political and academic discourse, and the existence of a "diversity *acquis*" – with Article 22 as a key component – is widely recognised. The bases for Article 22 were Article 6 of the EU Treaty and Article 151 of the EC Treaty, two provisions introduced by the Treaty of Maastricht, under which the Union "*shall respect the national identities of its Member States*" and the Community "*shall contribute to the flowering of the cultures of the Member States*,

while respecting their national and regional diversity." Both provisions keep, for the most part, the same wording in the current version of the Treaties. Article 167 of the TFEU is the same as former Article 151, whereas the duty of respect for the national identities of the Member States is now established in Article 4(2) of the TEU, under which the Union "*shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.*" Respect for diversity was in the meantime reinforced by Articles 2 and 3 of the TEU, which establish the Union's values and aims. Article 2 includes respect for the rights of persons belonging to minorities among the values on which the Union is founded and lists pluralism and tolerance as features that are common to the Member States. Article 3(3) establishes that the Union shall respect its rich cultural and linguistic diversity. The goal of safeguarding diversity is also mentioned *a propos* specific subjects, such as education [Article 165(1) TFEU], the welfare requirements of animals (Article 13 TFEU) and the negotiation and conclusion of agreements with third countries in the field of trade in cultural and audio-visual services [Article 207(4) TFEU].

3. Although respect for diversity is an ever-present idea in European rhetoric and is expressly enshrined in the text of the Treaties, the concept of diversity remains extremely vague, which may hinder the practical relevance of Article 22. First, it is not very clear whether it is meant to protect only diversity *between* States – in which case it demands that the Union refrains from acting – or if it aims to go further and also protect diversity *within* Member States, which would require the Union to act on behalf of members of cultural, religious or linguistic minorities when their identities are threatened by assimilationist policies of Member States. The Treaties offer contradictory signs and the extremely generic terms in which Article 22 is drafted are also not of much help. On the one hand, we have references to national identity, to the cultures, customs and cultural and linguistic diversity of Member States, in support of an *exclusive* reading of diversity. On the other hand, we also find references to the pluralism of European societies, to the rights of persons belonging to minorities, to the diversity of cultures and traditions of the peoples of Europe, to the regional diversity of Member States and to the cultural and linguistic diversity of the Union itself, which authorises an *inclusive* reading of the concept. In defence of the first reading, it can be argued that, in the absence of a European consensus on the best way to manage cultural diversity, Member States should be free to decide upon the degree of diversity they are willing to allow in their territories, especially since that is bound to determine their respective national identities. Harmonising action on the part of the EU on behalf of *intra-state* diversity would always require a sacrifice of *inter-state* diversity. At the same time, it does not seem to make much sense to establish a separate principle of diversity if the intention is simply to protect the Member States' autonomy *vis-à-vis* the Union, since this protection is already provided by other means, such as the principle of subsidiarity, the principle of enumerated powers and the requirement of unanimity for treaty revision. Besides, an exclusive reading of diversity would neglect multiple forms of cultural, linguistic and ethnic diversity that, although internal to Member States, significantly contribute to European diversity in general. Traditionally, it was, without a doubt, the exclusive reading of diversity which prevailed. Consider, for instance, Directive 77/486/EEC, of 25 July 1977, on the education of children of migrant workers, which made it incumbent upon Member

States to promote teaching of the "mother tongue" and "culture of the country of origin" of workers and their children. The Directive excluded not only the teaching of minority languages and cultures existing in the Member State of origin, but also the teaching of languages and cultures of migrant workers coming from third countries. In recent years, however, there have been some changes in approach, to a large extent due to the rise of immigration on the European political agenda. Several measures have been adopted to reinforce the legal status of third-country nationals residing in the territory of Member States, in order to facilitate their integration in their respective host societies. As stressed in many political statements, integration is a two-way process, which must be promoted while respecting the identity and the culture of origin of third-country immigrants. Another important factor in this, still modest, change in perspective was the attribution to the EU, by the Amsterdam Treaty, of an explicit competence to combat discrimination based on any ground, such as racial or ethnic origin and religion or belief [Article 13 of the EC Treaty; now, Article 19(1) TFEU], something which the Charter reinforced by prohibiting any discrimination based on race, colour, ethnic origin, language, religion and membership of a national minority (Article 21). Therefore, it can be said that EU law already offers some measure of protection to intra-state diversity.

4. The case-law of the CJEU provides abundant evidence of the ambiguous stance of EU law *vis-à-vis* diversity. On the one hand, the Court is respectful of the Member States' national identities. In *Groener,*[1] the Court was willing to accept that the protection of Irish national identity justified making the appointment to a permanent full-time post as a lecturer in public vocational education institutions conditional upon proof of an adequate knowledge of the Irish language, even though the duties associated with said post were to be carried out in English. On the other hand, in a case which opposed the European Commission and the Grand Duchy of Luxemburg,[2] regarding the access by nationals of other Member States to civil service and public sector posts not involving participation in the exercise of powers conferred by public law or the safeguarding of the general interests of the State, the Court did not accept the argument put forward by the Luxemburg Government according to which the nationality requirement in relation to teachers was an essential condition for preserving Luxemburg's national identity, in view of the size of the country and its specific demographic situation. The Court held that the protection of national identity cannot justify the exclusion of nationals of other Member States from all the posts in an area such as education, since that interest, whilst legitimate, could be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States, and since nationals of other Member States must, like Luxemburg nationals, still fulfil all the conditions required for recruitment, in particular those relating to training, experience and language knowledge. In *UTECA,*[3] the Court accepted that the defence of Spanish multilingualism constitutes an overriding reason in the public interest, which justified requiring television operators to invest in cinematographic films and films made for television in an original language which

[1] Judgment *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, 28 November 1989, Case C-379/87, ECLI:EU:C:1989:599.

[2] Judgment *Commission of the European Communities v. Grand Duchy of Luxemburg*, 2 July 1996, Case C-473/93, ECLI:EU:C:1996:263.

[3] Judgment *Unión de Televisiones Comerciales Asociadas (UTECA) v. Administración General del Estado*, 5 March 2009, Case C-222/07, ECLI:EU:C:2009:124.

was one of the official languages of that Member State, even though the beneficiaries of the financing concerned were mostly cinema production undertakings in that Member State. In *Mutsch*[4] and *Bickel and Franz*,[5] the Court dismissed the argument that respect for the national (multicultural) identities of, respectively, the Belgian and the Italian States would justify an exception to the principle of non-discrimination on grounds of nationality, in such a way that domestic law provisions adopted for the benefit of an officially recognised minority could apply only to the members of that minority and not to citizens of other Member States. On occasion, the Court has also granted protection to the cultural identities of individuals against assimilationist policies of Member States. In *Konstantinidis*,[6] the Court held that it was contrary to Community law for a Greek national to be obliged, under the applicable national legislation (*in casu* German legislation), to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation was modified, and the resulting distortion exposed him to the risk that potential clients could confuse him with other persons. According to the reasoning of the Court, however, what was at stake was not the interest in preserving one's cultural identity, but the commercial interest in not seeing one's name mistaken with that of someone else. In *Garcia Avello*,[7] the Court held that a uniform system for the attribution of surnames is neither necessary nor even appropriate for promoting integration within Belgium of the nationals of other Member States, and concluded that the administrative authorities of a Member State could not refuse to grant an application for a change of surname made on behalf of minor children resident in that State, and having dual nationality of that State and of another Member State, in the case where the purpose of that application was to enable those children to bear the surname to which they were entitled according to the law and tradition of the second Member State. Revealing of the Court's sensitivity to the growing multicultural character of European societies and of the specific needs of immigrants is illustrated by the observation made in *Haim II*[8] – a case regarding the language requirements set by German law for the eligibility for appointment as a dental practitioner of a Social Security Scheme – according to which, while the "*reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner under a social security scheme subject to language requirements, [it] is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language.*"

5. The normative weakness that can be ascribed to Article 22 is not just a result of the uncertainties about the kind of diversity that the Union is bound to respect, but is also largely due to the extremely soft terms in which this duty to respect is phrased. In a text such as the Charter, dominated by the establishment of rights by means of directly applicable provisions, this Article stands out for simply stating

[4] Judgment *Ministère Public v. Robert Heinrich Maria Mutsch*, 11 July 1985, Case 137/84, ECLI:EU:C:1985:335.
[5] Judgment *Pretura Circondariale di Bolzano v. Horst Otto Bickel and Ulrich Franz*, 24 November 1998, Case C-274/96, ECLI:EU:C:1998:563.
[6] Judgment *Christos Konstantinidis v. Stadt Altensteig, Standesamt and Landratsamt Calw, Ordnungsamt*, 30 March 1993, Case C-168/91, ECLI:EU:C:1993:115.
[7] Judgment *Carlos Garcia Avello v. Belgian State*, 2 October 2003, Case C-148/02, ECLI:EU:C:2003:539.
[8] Judgment *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 4 July 2000, Case C-424/97, ECLI:EU:C:2000:357.

a general principle, without granting rights nor demanding from the Union that it actively promotes cultural, religious and linguistic diversity. As noted by some commentators, only in the English version of the Charter's text is it established that the Union shall respect diversity, thereby suggesting a duty of positive action on the part of the Union. In the other linguistic versions, the verb *respect* appears isolated – the Union respects –, which can be interpreted as an indication that the drafters of the Charter simply decided to abstain from taking a firm and clear stand on this matter. On the one hand, they were not satisfied with a mere prohibition of discrimination on the grounds of ethnic, religious and linguistic identity, which they enshrined in Article 21. Yet, on the other hand, they did not want to go so far as to demand from the Union that it adopts measures to safeguard and guarantee diversity, as would be the case if the text of Article 22 used more assertive verbal forms, such as the Union *safeguards* or the Union *guarantees* diversity. Whereas under the Treaty provisions on education and culture the EU has a duty to promote linguistic and cultural diversity, under Article 22 it seems to be only required to avoid that its actions may endanger that diversity. It may nevertheless be considered that the systematic placement of a statement of respect for cultural, religious and linguistic diversity in the chapter dedicated to equality is most significant and can be interpreted as the formal acknowledgement of the link between the principle of non-discrimination and the protection of difference, and as a sign of openness for the protection of minorities. Conversely, it may also be claimed that Article 22 merely restates the principle of non-discrimination, as it translates one of its necessary aspects, which is the principle of differentiation. However, this claim is problematic for two main reasons. First, it reduces respect for diversity to a dimension of the principle of equality, hindering its potential reach. Secondly, it suggests that the Charter adopts a substantive and not a formal understanding of equality, by admitting and even imposing the adoption of differentiating or positive discrimination measures, which is contradicted by an analysis of the other provisions in Chapter III. As it happens, the Charter only allows for positive discrimination measures in matters pertaining to equality between men and women (Article 23) and these measures – referred to as "*specific advantages in favour of the underrepresented sex*" – appear as an exception to the principle of equality, not as one of its essential dimensions.

6. Contrary to the opinion of the EU Network of Independent Experts on Fundamental Rights,[9] it cannot be said that Article 22 constitutes a minority protection clause. The possibility of including a separate provision on minority rights was suggested in several proposals put forward during the Convention that drafted the Charter, but it was eventually dropped, due to opposition from the French among others. The explanatory note initially prepared under the responsibility of the *Praesidium* of the Convention which drafted the Charter did not mention any international law instrument pertaining to the protection of minorities and its updated version, prepared under the responsibility of the *Praesidium* of the European Convention in 2007, does not even mention Article 2 of the EU Treaty, where respect for the rights of persons belonging to minorities is listed among the values on which the Union is founded. The inclusion of this mention of the rights of persons belonging to minorities in the Treaty was not followed by the attribution of any

[9] See EU Network of Independent Experts on Fundamental Rights, Report on the situation of Fundamental Rights in the European Union and its Member States in 2002, available at http://www.statewatch.org.

specific EU competence in the field of minority protection. It is, therefore, highly unlikely that the Union's commitment to diversity may so easily translate into a founding norm on minority protection, applicable throughout Europe. After all, it is precisely this respect for diversity that Member States have been using for years to shield their domestic policies on immigrant integration and minority protection against the Union's harmonising interference. The Union may well come to institute its own system of minority protection and use this Article 22 combined with Article 2 of the EU Treaty as legal grounds for it. However, given the circumstances that surrounded the adoption of Article 22 and the very laconic terms in which it is drafted, this Article is much more a reflection of the present lack of political will on the part of Member States to move towards such a system than a promise of future developments. It is worth recalling that the idea of instituting minority protection mechanisms at the EU level goes as far back as the 1980s – when Count Stauffenberg and Siegbert Alber submitted their proposals for an EC Charter of Rights for Ethnic Groups – and has been continuously championed by the European Parliament in several resolutions. The 2004 Eastern enlargement made the issue all the more pressing. First, by shedding light on the EU's duplicity when it came to minority protection, since it became apparent that the EU was very strict in its demands that candidate states respected the rights of persons belonging to minorities, while it had always ignored the treatment of minorities by "old" Member States. Secondly, by bringing into the Union's legal landscape the domestic minority issues of the "new" Member States. And finally by revealing the lack of a consistent and EU-specific set of normative standards on minority protection, since the Commission's periodic reports on the fulfilment by candidate states of the so-called *Copenhagen criteria* addressed minority issues in a haphazard manner and made frequent use of standards set by the Council of Europe and the Organization for Security and Co-operation in Europe. The existence of these European standards on minority protection, on the other hand, can be used as an argument against the need for the Union to set its own normative standards. That would not be the case only if the Union, enjoying competence for the protection of minorities, was able to adopt its own definition of minority and apply it to groups present in the territory of the Member States, recognising them as "European minorities" – even when these groups were not recognised as minorities by the Member State of residence – and granting them rights defined at a European level. Given the current stage of European integration this is entirely unrealistic. In spite of all the obstacles to the institution of an EU policy on minority protection, it must be acknowledged that the process of European integration has brought many benefits, even if indirectly, to persons belonging to minorities. Consider, first and foremost, the EU's action in the fight against discrimination, the recognition of linguistic and mobility rights associated with EU citizenship, and the EU funding for projects in the fields of education, culture, languages and regional development. The CJEU has contributed to this indirect protection by holding, for example, that "*in the context of a Community based on the principles of free movement of persons and freedom of establishment the protection of the linguistic rights and privileges of individuals is of particular importance*" (*Mutsch*, *Bickel and Franz*), and that, in some circumstances, the imposition by Member States of uniform spelling for individuals' surnames is incompatible with EU law (*Konstantinidis*, *Garcia Avello*). In *Bickel and Franz*, the Court went so far as to admit that the protection of an ethno-cultural minority may constitute a legitimate aim of the Member States.

This remark, however, can hardly be interpreted as recognition by the Court that the protection of minorities is a general principal of EU law. The Court will certainly have plenty of opportunities to come back to this issue, now that the Treaties expressly mention the rights of persons belonging to minorities (Article 2 of the EU Treaty) and prohibit any discrimination based on membership of a national minority [Article 21(1) of the Charter], and considering that the number of minority groups within the EU rose significantly with the Eastern enlargement. It remains to be seen what role Article 22 may perform in such case-law. So far, the Court has made a very frugal use of Article 22. Only in very few cases has the provision warranted express mention and, for the most part, the references are limited to a citation of the provision without further comment (*Angioi*)[10] or accompanied by bland statements such as "the Union must respect its rich cultural and linguistic diversity" (*Runevič-Vardyn and Wardyn*,[11] *Las*,[12] *Cilevičs and Others*).[13] In keeping with this minimalist stance, in the case which opposed the Kingdom of Spain and the Council of the European Union,[14] concerning the compatibility with the Treaties and the CJEU case-law of Council Regulation no. 1260/2012, of 17 December 2012, implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, the Court made only a very brief mention of Article 22, citing it as evidence, along with Article 3(3) of the EU Treaty, of the Union's commitment to the preservation of multilingualism.[15] Also, in *Centraal Israëlitisch Consistorie van België and Others*,[16] the Court did not find it necessary to elaborate separately on Article 22, holding instead that "*in the light of the considerations [made with regard to Articles 20 and 21 of the Charter], it must be held that Regulation no. 1099/2009 does not disregard the cultural, religious and linguistic diversity guaranteed in Article 22 of the Charter, in providing only for a conditional exception to the prior stunning of animals, in the context of ritual slaughter, while excluding from that regulation's scope, or exempting from the obligation of prior stunning laid down therein, the killing of animals during hunting, recreational fishing, and sporting and cultural events.*" The only case in which the reach of Article 22 was slightly elaborated upon by the Court was *Izsák and Dabis*.[17] The case concerned a refusal on the part of the European Commission to register a citizens' initiative entitled "Cohesion policy for the equality of the regions and sustainability of the regional cultures", which aimed at the adoption of a legal act to require the EU's cohesion policy to pay special attention to "*regions with*

[10] Judgment of the EU Civil Service Tribunal (Full Court), *Marie-Thérèse Angioi v. European Commission*, 29 June 2011, Case F-7/07, ECLI:EU:F:2011:97.

[11] Judgment *Malgožata Runevič-Vardyn, Łukasz Wardyn v. Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius*, 12 May 2011, Case C-391/09, ECLI:EU:C:2011:291.

[12] Judgment *Anton Las v. PSA Antwerp NV*, 16 April 2013, Case C-202/11, ECLI:EU:C:2013:239.

[13] Judgment *Cilevičs and Others*, 7 September 2022, Case C-391/20.

[14] Judgment *Kingdom of Spain v. Council of the European Union*, 5 May 2015, Case C-147/13, ECLI:EU:C:2015:299.

[15] Similarly, in a case opposing the Kingdom of Spain and the European Parliament, judgment of 26 March 2019, Case C-377/16, ECLI:EU:C:2019:249, with regard to a selection procedure for contract staff, the Court referred to Article 22 as evidence of the importance of respect for the linguistic diversity of the Union.

[16] Judgment *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, 17 December 2020, Case C-336/19, ECLI:EU:C:2020:1031.

[17] Judgment *Balázs-Árpád Izsák and Attila Dabis v. European Commission*, 10 May 2016, Case T-529/13, ECLI:EU:T:2016:282.

national minorities", in order to foster their economic development and safeguard the preservation of their ethnic, cultural, religious and linguistic characteristics. The Court decided against the initiative's proponents, holding *inter alia* that Article 22 could not be used as legal grounds for the Commission to submit, within the framework of the EU's cohesion policy, a proposal for a legal act designed to protect the cultural diversity represented by national minorities, an act which, in any case, would not have corresponded to the purpose and content proposed in the initiative.[18]

7. In what concerns specifically the Union's respect for *cultural diversity*, it is worth noting that EU action in the field of culture has been unfolding without being based on a clear and unequivocal understanding of the parameters and substance of the term "culture". The expression *culture* is used interchangeably in its material and spiritual meanings, as synonymous both of archaeological heritage and fine arts and of a system of values and ways of life. In its first report on the consideration of cultural aspects in European Community action, of 1996, the European Commission drew attention to the "nebulous" character of the concept of *culture* – "*which can vary from one school of thought to another, from one society to another and from one era to another*" – and ended up by declining to put forward a precise definition of the concept, even though it recognised that it would be too narrow to merely identify culture with the traditional components of cultural policies (heritage, the live arts, literature, etc.).[19] More recently, in its communication on a European agenda for culture in a globalising world, the Commission did not hesitate in adopting a wide understanding of *culture*, by stating that it "should be regarded as a set of distinctive spiritual and material traits that characterize a society and social group. It embraces literature and arts as well as ways of life, value systems, traditions and beliefs."[20] This wide understanding of *culture* represents the acknowledgment that culture also has an anthropological meaning, constituting the "*basis for a symbolic world of meanings, beliefs, values, traditions which are expressed in language, art, religion and myths*" and, as such, "*plays a fundamental role in human development and in the complex fabric of the identities and habits of individuals and communities.*" Culture therefore encompasses religion and language, which means that the text of Article 22 is not only extremely vague, but also tautological. The intention of the authors of the Charter – when they added to the statement of respect for cultural diversity the express mention of religious and linguistic diversity – seems to have been to stress the importance of these two cultural expressions and of their diversity across Europe. Besides, the expression "cultural and linguistic diversity" has some tradition in the text of the Treaties. Less defensible would be to interpret the distinction between cultural diversity and religious and linguistic diversity to mean that the understanding of culture underlying Article 22 is narrower than the one advanced by the European Commission and includes only archaeological, historical and artistic heritage and cultural services. The case-law of the CJEU on the topic of cultural diversity, although often addressing the compatibility with EU law of

[18] On appeal, this judgment was set aside for errors in law regarding the allocation of the burden of proof and the Commission's decision was annulled. I*zsák and Dabis v. Commission*, 7 March 2019, Case C-420/16 P, ECLI:EU:C:2019:177. One of the grounds of appeal was the violation of Article 22, but the Court did not consider it necessary to analyse this argument.

[19] See First Report on the Consideration of Cultural Aspects in European Community Action, COM(96) 160 final, of 17 April 1996, in http://aei.pitt.edu.

[20] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda for culture in a globalizing world, COM(2007) 242 final, 10 May 2007.

domestic policies and legislation directed at safeguarding their respective artistic and historic heritage, including publishing, television and movie industries, has also ruled on the protection of culture as ways of life and value systems. In general, the Court does not easily accept that Member States' protectionist measures may evade the application of EU law, but it does acknowledge that domestic cultural policies may justify restrictions on the freedom of movement and of services, provided that they meet adequacy and proportionality requirements. In the case which opposed the European Commission and Italy, regarding the levy of a tax on exports to other Member States of articles possessing artistic, historic, archeologic or ethnographic interest,[21] the Court refused to treat said tax as an equivalent to the export restrictions authorised by Article 36 of the EC Treaty to protect national treasures possessing artistic, historic or archaeological value, having argued that the levy had the sole effect of rendering more onerous the exportation of the products in question, without ensuring the attainment of the object referred to in Article 36, which is to protect artistic, historic or archaeological heritage. In the cases which opposed the European Commission to France,[22] Italy[23] and Greece,[24] regarding tourist guides, the Court did not accept that Member States could subject the provision of services by tourist guides travelling with a group of tourists from another Member State to the possession of a licence which requires the acquisition of a specific training evidenced by a diploma, on the grounds that it imposed restrictions going beyond what is necessary to protect the general interest in a proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country. In *Fedicine*,[25] the Court held that the provisions in Spanish legislation, which reserved the granting of licences for dubbing films from third countries to distributors who undertook to distribute national films, were incompatible with EU law, on the grounds that an advantage was granted to producers of Spanish films in comparison with producers established in other Member States. According to the Court, said provisions pursued only an economic objective and not a cultural aim, since they promoted the distribution of national films whatever their content or quality. In *LIBRO*,[26] the Court held that Austrian legislation, by prohibiting importers of German-language books from fixing a price lower than the retail price fixed or recommended by the publisher in the State of publication, had instituted an unjustified restriction on imports from other Member States. The Court rejected the argument put forward by the Austrian government, according to which, given the characteristics of the Austrian market (very low number of booksellers and significant imports from Germany), the restriction constituted a proportionate means of achieving overriding objectives in the public interest, namely that of financing the

[21] Judgment *Commission of the European Communities v. Italian Republic*, 10 December 1968, Case 7/68, ECLI:EU:C:1968:51.

[22] Judgment *Commission of the European Communities v. French Republic*, 26 February 1991, Case C-154/89, ECLI:EU:C:1991:76.

[23] Judgment *Commission of the European Communities v. Italian Republic*, 26 February 1991, Case C-180/89, ECLI:EU:C:1991:78.

[24] Judgment *Commission of the European Communities v. Hellenic Republic*, 26 February 1991, Case C-198/89, ECLI:EU:C:1991:79.

[25] Judgment *Federación de Distribuidores Cinematográficos v. the Spanish Stated supported by the Unión de Productores de Cine y Televisión*, 4 May 1993, Case C-17/92, ECLI:EU:C:1993:172.

[26] Judgment *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, 30 April 2009, Case C-531/07, ECLI:EU:C:2009:276.

production and marketing of more demanding but economically less attractive works. The Court acknowledged that the protection of books as cultural objects can be considered as an overriding requirement in the public interest, but concluded that the objective of protecting books as cultural objects could be achieved by less restrictive measures for the importer. The Court noted, furthermore, that the protection of books as cultural objects and the protection of cultural diversity in general could not be considered to come within the scope of Article 30 of the EC Treaty, regarding the protection of national treasures possessing artistic, historic or archaeological value. It also stressed that Article 151 of the EC Treaty, which provides a framework for the activity of the European Community in the field of culture could not be invoked as a "provision inserting into Community law a justification for any national measure in the field liable to hinder intra-Community trade." In *Gouda*,[27] *Veronica*,[28] *United Pan-Europe*[29] and *European Commission v Belgium*,[30] the Court acknowledged that the safeguarding of pluralism in a Member State might constitute an overriding requirement relating to the general interest, which justifies a restriction on the freedom to provide services. It added, however, that compliance with EU law required that said restrictions had to be necessary and suitable for securing the attainment of the objective which they pursued. These requirements are only met if implementation of national legislation is subject to a transparent procedure based on criteria that are objective, non-discriminatory and known in advance. In the case which opposed the European Commission and Belgium, on the transposition of Article 31 of Directive 2002/22/EC, of 7 March 2002, on universal service and users' rights relating to electronic communications networks and services, the Court held that Belgian legislation did not meet those requirements of necessity and suitability. Although Belgian legislation pursued an objective of general interest – to ensure plurality and cultural diversity – it did not clearly define the actual criteria relied upon by the national authorities to select the television broadcasters benefiting from the "must-carry" obligation, which compromised the transparency of the entire selection procedure. In *Gouda*, the Court concluded that there was no necessary connection between the cultural policy implemented by the Dutch government for the audio-visual sector and the conditions imposed by Dutch law relating to the structure of foreign broadcasting bodies, and that therefore said conditions could not be regarded as "*being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.*" On the other hand, in *Veronica*, which also concerned the Dutch audio-visual broadcasting system, the Court accepted that the disputed provisions of Dutch law – which were part of "*a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands*" – were necessary and suited to secure its intended aims, which were to prevent that the financial resources available to the national broadcasting organisations to enable them to ensure pluralism in the audio-visual

[27] Judgment *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, 25 July 1991, Case C-288/89, ECLI:EU:C:1991:323.

[28] Judgment *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, 3 February 1993, Case C-148/91, ECLI:EU:C:1993:45.

[29] Judgment *United Pan-Europe Communications Belgium SA, Coditel Brabant SPRL, Société Intercommunale pour la Diffusion de la Télévision (Brutélé), Wolu TV ASBL v. Belgian State*, 13 December 2007, Case C-250/06, ECLI:EU:C:2007:783.

[30] Judgment *European Commission v. Kingdom of Belgium*, 3 March 2011, Case C-134/10, ECLI:EU:C:2011:117.

sector were diverted from that purpose and used for purely commercial ends, and to ensure that those organisations could not use the freedoms guaranteed by the Treaty to improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes. In *United Pan-Europe*, the Court concluded that EU law did not preclude national legislation such as the Belgian legislation which required cable operators providing services in the bilingual region of Brussels-Capital to broadcast television programmes transmitted by private broadcasters falling under the public powers and designated by them. The Court held that the legislation under dispute pursued an aim in the general interest, since it formed part of a cultural policy the aim of which was to safeguard, in the audio-visual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in the bilingual region of Brussels-Capital. The Court found that the Belgian legislation constituted an appropriate means of achieving the cultural objective pursued, since it permitted Dutch-speaking television viewers to have access to television programmes having a cultural and linguistic connection with the Flemish Community and French-speaking television viewers to have similar access to television programmes having a cultural and linguistic connection with the French Community, thereby guaranteeing to television viewers in the region of Brussels-Capital that they would "*not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture.*" In the cases *Torfaen*,[31] *Schindler*,[32] *Läärä*,[33] *Zenatti*,[34] *Gambelli*[35] and *Placanica*,[36] the Court acknowledged the relevance of "*national or regional socio-cultural characteristics*" and of "*moral, religious or cultural aspects*" in the regulation, by Member States, of the opening hours of retail premises and of gambling activities. It concluded, in *Torfaen*, that EU law does not preclude national rules prohibiting retailers from opening their premises on Sunday, and, in *Schindler et al.*, that national authorities may impose restrictions on gambling and associated activities, bearing in mind the "*moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States*", provided that those restrictions are justified by overriding public interest, are limited to the necessary to attain their aim and are not applied in a discriminatory manner.

8. Regarding *religious diversity*, it is worth mentioning that, according to the explanations to the Charter, of 2000, Article 22 was inspired by Declaration no. 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations. The text of the Declaration was in the meantime incorporated, by the Treaty of Lisbon, in Article 17 of the TFEU, under which terms the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States, as well as the status

[31] Judgment *Torfaen Borough Council v. B & Q plc (formerly B & Q (Retail) Limited)*, 23 November 1989, Case C-145/88, ECLI:EU:C:1989:593.

[32] Judgment *Her Majesty's Customs and Excise v. Gerhardt Schindler and Jörg Schindler*, 24 March 1994, Case C-275/92, ECLI:EU:C:1994:119.

[33] Judgment *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*, 21 September 1999, Case C-124/97, ECLI:EU:C:1999:435.

[34] Judgment *Questore di Verona v. Diego Zenatti*, 21 October 1999, Case C-67/98, ECLI:EU:C:1999:514.

[35] Judgment *Piergiorgio Gambelli and Others*, 6 November 2003, Case C-243/01, ECLI:EU:C:2003:597.

[36] Judgment *Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio*, 6 March 2007, joined cases C-338/04, C-359/04 and C-360/04, ECLI:EU:C:2007:133.

of philosophical and non-confessional organisations, while maintaining an open, transparent and regular dialogue with all, based on the recognition of their identity and their specific contribution. More than the text of Declaration no. 11, which very clearly only protected diversity among Member States, Article 17 TFEU reflects the ambiguity between *exclusive* and *inclusive* diversity already mentioned, by stating, on the one hand, that the Union respects and does not prejudice the status of churches and non-confessional organisations *under national law*, but adding, on the other hand, that it maintains a *direct dialogue* with churches and organisations existing in the territory of the Member States. Nevertheless, it seems beyond dispute that the inclusion of the reference to religious diversity in Article 22 was designed above all to safeguard Member States' autonomy in defining the place to be occupied by religion in their respective societies. The individual dimension of religious freedom is already protected by other provisions of the Charter: Article 10 (freedom of thought, conscience and religion), Article 14(3) (the right of parents to ensure the education and teaching of their children in conformity with their religious and philosophical convictions), and Article 21 (non-discrimination on grounds of religion or belief). It was on behalf of religious diversity, in both its national and individual dimensions, that the drafters of the Charter opted not to include a reference to God in the Charter's Preamble. It was not even possible to reach an agreement on the less charged formula of the "religious inheritance of Europe", which is now part of the Preamble to the EU Treaty, following protracted debates about the possibility of an *invocatio Dei* in the Preamble of the Treaty establishing a Constitution for Europe. In the text of the Treaties, besides the already mentioned Article 17, references to religion are limited to its inclusion among the grounds for discrimination which the Union is bound to combat [Articles 10 and 19(1) TFEU] and to the statement of respect for the customs of the Member States relating to religious rites when considering the treatment of animals in the context of the Union's policies on agriculture, fisheries, transport, etc. (Article 13 TFEU). The case-law of the CJEU on the topic of religious diversity was until recently likewise remarkably scarce. The first time the Court was asked to rule on an issue involving a member of a religious minority was in the *van Duyn* case.[37] Here, a Dutch national had been refused leave to enter the UK to take up employment as a secretary with the Church of Scientology on the grounds that the Secretary of State considered it undesirable to give anyone leave to enter the UK on the business of or in the employment of that organisation, given that its activities were considered to be socially harmful. The Court did not address the issue from the perspective of whether Ms. van Duyn had been discriminated against because of her religion. It did not seem to consider the Church of Scientology to be an actual Church as it referred to it between quotation marks. Instead, the Court focused on whether the UK could invoke public policy reasons to prevent a national of another Member State from taking gainful employment within its territory due to his or her association with an organisation such as the Church of Scientology. The Court concluded in the affirmative, holding that it was necessary to allow the competent national authorities an area of discretion to decide when to use the concept of public policy and that a Member State, in imposing restrictions justified on grounds of public policy, was entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual was associated with some body or organisation the activities of which the Member State considered socially harmful.

[37] Judgment *Yvonne van Duyn v. Home Office*, 4 December 1974, Case 41-74, ECLI:EU:C:1974:133.

In *Prais*,[38] the Court was called to rule on a decision by the Council which had rejected a request made on religious grounds for the fixing of an alternative date for the written test of a recruitment competition. Vivian Prais had informed the Council that, being Jewish, she would not be able to undergo the test on the date fixed by the Council, since it coincided with the first date of the Jewish feast of *Shavuot* (Pentecost), during which it is not permitted to travel or to write. Before the Court, the Council argued that such an attention to the religious identity of the candidates would force it to set up an elaborate administrative machinery, since it would be necessary to ascertain the details of all religions practiced in any Member State in order to avoid scheduling a test on a date or at a time which might offend against the tenet of any such religion. The Court acknowledged that, "*if a candidate informs the appointing authority that religious reasons make certain dates impossible for him[,] the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates.*" However, since in this case the candidate had only informed the Council of her religious reasons after the date of the test had been announced, the Court held that the Council was entitled to refuse to set a different date when the other candidates had already been convoked, in order to ensure respect for the principle of equality. In the case which opposed the United Kingdom and Northern Ireland to the Council,[39] with regard to Council Directive 93/104/EC, of 23 November 1993, concerning certain aspects of the organisation of working time, the Court showed again a degree of sensibility to religious diversity in Europe, by annulling the second sentence of Article 5 of said Directive, per which the minimum weekly rest period should in principle include Sunday. The Court noted that, "*whilst the question of whether to include Sunday in the weekly rest period is ultimately left to the assessment of Member States, having regard, in particular, to the diversity of cultural, ethnic and religious factors in those States[,] the fact remains that the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.*" As mentioned earlier, similar acknowledgments of the relevance of religious factors may be found in passing in *Torfaen*, also with regard to the opening of retail premises on Sundays, and in *Schindler et al.*, which ruled on the regulation of gambling activities. Since 2017, the CJEU has rendered several judgments on religious discrimination in the workplace, by reference to Directive 2000/78/EC, of 27 November 2000, which established a general framework for equal treatment in employment and occupation to combat discrimination based on, inter alia, religion or belief. In *G4S Secure Solutions*,[40] *Bougnaoui*,[41] *WABE and MH Müller Handels*,[42] and *L.F.*,[43] the CJEU addressed the issue of the use of the Islamic headscarf during working hours. In *G4S Secure Solutions*, the Court accepted as legitimate an employer's "policy of neutrality", in the pursuit of which certain restrictions may be imposed

[38] Judgment *Vivien Prais v. Council of the European Communities*, 27 October 1976, Case 130-75, ECLI:EU:C:1976:142.

[39] Judgment *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, 19 November 1996, Case C-84/94.

[40] Judgment *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, 14 March 2017, Case C-157/15, ECLI:EU:C:2017:203.

[41] Judgment *Asma Bougnaoui, Association de defense des droits de l'homme (ADDH) v. Micropole SA*, 14 March 2017, Case C-188/15, ECLI:EU:C:2017:204.

[42] Judgment *IX v. WABE eV and MH Müller Handels GmbH v. MJ*, 15 July 2021, joined cases C-804/18 and C-341/19.

[43] Judgment *L.F. v. SCRL*, 13 October 2022, Case C-344/20, ECLI:EU:C:2022:774.

on the employees' freedom of religion, while at the same time holding that a general prohibition on the visible wearing of any political, philosophical or religious sign may amount to indirect discrimination on grounds of religion. In *WABE and MH Müller Handels*, the Court went further, holding that such a prohibition is liable to constitute direct discrimination if limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs. In *Bougnaoui*, the CJEU rejected that the willingness of an employer to take account of the wishes of a customer not to be assisted by a worker wearing an Islamic scarf could be considered a genuine and determining occupational requirement for the purposes of Directive 2000/78. Significantly, the CJEU has been increasingly demanding with what employers can claim in the name of neutrality. In *WABE and MH Müller Handels*, the CJEU clarified that the mere desire of an employer to pursue a policy of neutrality is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate. In *L.F.*, the CJEU added that this interpretation is "*inspired by the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity, and to avoid abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing.*" Another important religious discrimination case is *Cresco*,[44] where the Court found that Austrian legislation establishing Good Friday as a public holiday only for employees who are members of certain Christian churches, and entitling only those employees to extra payment for work done on that day, amounted to direct discrimination. The Court addressed the question of the exemption allowed by Article 4(2) of Directive 2000/78/EC for ethos-based employers in *Egenberger*[45] and *IR*,[46] having found inter alia that it must be possible to subject to effective judicial review an assertion by a church or other organisation whose ethos is based on religion or belief that religion constitutes a genuine, legitimate and justified occupational requirement, and that such a requirement must be necessary and objectively dictated by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or the right of autonomy of the church or organisation. The tension between ritual slaughter and animal welfare was addressed in *Liga van Moskeeën en Islamitische Organisaties*,[47] *OABA*[48] and *Centraal Israëlitisch Consistorie van België and Others*, with the Court finding inter alia that restrictions to the ritual slaughter of animals without prior stunning did not constitute an infringement of the right to freedom of religion.

9. Finally, in what concerns *linguistic diversity*, it is worth stressing that multilingualism has been, from the outset, a defining feature of the European project. The Treaty of Rome was drafted in Dutch, German, French and Italian, all four texts being equally valid. Pursuant to Article 217 of the Treaty of Rome, the Council

[44] Judgment *Cresco Investigation GmbH v. Markus Achatzi*, 22 January 2019, Case C-193/17, ECLI:EU:C:2019:43.
[45] Judgment *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, 17 April 2018, Case C-414/16, ECLI:EU:C:2018:257.
[46] Judgment *IR v. JQ*, 11 September 2018, Case C-68/17, ECLI:EU:C:2018:696.
[47] Judgment *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Vlaams Gewest*, 29 May 2018, Case C-426/16, ECLI:EU:C:2018:335.
[48] Judgment *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v. Ministre de l'Agriculture et de l'Alimentation and Others*, 26 February 2019, Case C-497/17, ECLI:EU:C:2019:137.

adopted, in 1958, Regulation no. 1, determining the languages to be used by the EEC. Regulation no. 1 recognised to Member States and to any person subject to the jurisdiction of a Member State the right to communicate (address and receive written documents) with the Community's institutions in any one of the official languages selected by the sender; it also required that regulations and other documents of general application, as well as the *Official Journal*, be drafted and published in the four official languages. The right to communicate with Union institutions in one of the languages of the Treaties was elevated to the status of a *citizenship right* by the Treaty of Amsterdam and later recognised, by the Charter, also to third-country nationals [Article 41(4) of the Charter]. Successive enlargements, combined with growing calls for the protection of minority languages, led to an increasingly complex linguistic regime in the Union, which resulted, on the one hand, in an increase in the number of protected languages and, on the other hand, in a decrease in the number of languages actually used by European institutions in their daily functioning, which has led to frequent interventions by the CJEU. Per Article 55(2) of the EU Treaty, Member States may determine the translation of the Treaty into any other languages which, in accordance with their constitutional order, enjoy official status in all or part of their territory. The decision is still up to the Member States, which may simply opt for silencing the minority languages present in their territories, but the recognition of this possibility nevertheless represents an advance in the protection of lesser-used languages in Europe. At least that is how this innovation is explained by Declaration no. 16 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. Safeguarding and promoting linguistic diversity is, therefore, an objective of the Union and has justified, over the years, an array of resolutions, programmes, action plans and initiatives, among which the creation in 1982 of the European Bureau for Lesser Used Languages (EBLUL), the launch in 1989 of the *LINGUA* Programme, and the celebration of 2001 as the European Year of Languages. However, an abundance of initiatives does not protect the Union from the accusation that it is not implementing a genuine policy on behalf of linguistic diversity in Europe. The EU is criticised, first and foremost, for the fact that its commitment to linguistic diversity is selective and half-hearted, since the languages benefiting from protection are solely the national or official languages of Member States, with the exclusion of traditional regional languages as well as of the languages spoken by third-country nationals. The case-law of the CJEU pertaining to linguistic diversity addresses two main types of questions. First, the respect for the equal status of the languages of the Treaties, in the interpretation of provisions of EU law (*EMU Tabac*)[49] and in the functioning of European institutions (*Lassalle*,[50] *Rudolph*,[51] *Rasmussen*,[52] *Kik*,[53] *Polska Telefonia*,[54] *Kingdom of Spain v. Council of the European Union*, *Italian*

[49] Judgment *The Queen v. Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham*, 2 April 1998, Case C-296/95, ECLI:EU:C:1998:152.

[50] Judgment *Claude Lassalle v. European Parliament*, 4 March 1964, Case 15/63, ECLI:EU:C:1964:9.

[51] Judgment *Charlotte Rudolph v. Commission of the European Communities*, 23 March 2000, Case T-197/98, ECLI:EU:T:2000:86.

[52] Judgment *Lars Bo Rasmussen v. Commission of the European Communities*, 5 October 2005, Case T-203/03, ECLI:EU:T:2005:346.

[53] Judgment *Christina Kik v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, 9 September 2003, Case C-361/01 P, ECLI:EU:C:2003:434.

[54] Judgment *Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej*, 12 May 2011, Case C-410/09, ECLI:EU:C:2011:294.

Republic v. Commission of the European Communities,[55] *EESC*,[56] *Angioi*). Second, the compatibility with EU law of domestic legislation directed at protecting national or official languages (*Mutsch*, *Groener*, *Bickel and Franz*, *Angonese*,[57] *UTECA*, *Runevič-Vardyn and Wardyn*, *Las*, *Cilevičs and Others*). In *EMU Tabac*, the Court rejected the claim that the Greek and Danish versions of the text of a Directive could not be decisive in the interpretation of the Directive's provisions because those two Member States represented only a small percentage of the total population of the EEC. The Court took the opportunity to stress that "*all language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question.*" In *Lassalle*, the Court held that it was inadmissible to require a "*perfect level of Italian*" as a condition of eligibility for an administrative post at the European Parliament, since this condition was not justified on the grounds of the proper functioning of the department responsible for the post in question and gave automatic priority to nationals of a specific Member State irrespective of any consideration of the merits of the officials eligible for promotion. In *Rudolph* and *Rasmussen*, the Court clarified that the provisions in Regulation no. 1 regarding communications between EU institutions and persons subject to the jurisdiction of a Member State were not applicable to the relations between the EU institutions and its officials or servants, even though the administration was bound to ensure that they could easily and effectively be aware of the administrative acts which concerned them. In *Kik*, the Court held that the Treaty provisions on the use of languages in the EU could not be invoked in support of a possible principle of equality of languages, nor could they be regarded as evidencing a "*general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances.*" According to the Court, the right of citizens to communicate with EU institutions in one of the languages of the Treaties is not generally applicable to all bodies in the Union, the same way that an individual decision need not necessarily be drawn up in all the official languages, even though it may affect the rights of a citizen of the Union other than the person to whom it is addressed. At stake was the Regulation on the Community trade mark, per which the application for a Community trade mark shall be filed in one of the official languages of the EC and the applicant must indicate a second language, among the languages of the Office for Harmonisation in the Internal Market (English, German, French, Italian and Spanish), the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings. According to the Court, the requirement of the indication of a second language is justified by the operating needs of the Office for Harmonisation in the Internal Market and does not amount to a violation of the principle of non-discrimination. In *Polska Telefonia*, the Court was asked to rule on whether, under the 2003 Act of Accession, the Polish National Regulatory Authority was prevented from referring to the Commission's guidelines on market analysis and assessment of significant market power ("2002 guidelines"), in a decision which imposed certain

[55] Judgment *Italian Republic v. Commission of the European Communities*, 20 November 2008, Case T-185/05, ECLI:EU:T:2008:519.

[56] Judgment *Italian Republic v. European Economic and Social Committee (EESC)*, 31 March 2011, Case T-117/08, ECLI:EU:T:2011:131.

[57] Judgment *Roman Angonese v. Cassa di Risparmio di Bolzano*, 6 June 2000, Case C-281/98, ECLI:EU:C:2000:296.

regulatory obligations on an operator of electronic communications services, in view of the fact that said guidelines had not been published in the *Official Journal* in Polish. The Court answered in the negative, pointing out that the 2002 guidelines did not lay down any obligation capable of being imposed, directly or indirectly, on individuals and that Article 58 of the 2003 Act of Accession did not require the Council, the Commission or the European Central Bank to translate into the nine new languages listed in that provision all the acts of the institutions and the European Central Bank adopted prior to the accession of the new Member States. In the case which opposed the Kingdom of Spain and the Council of the European Union – about the translation arrangements established by Council Regulation no. 1260/2012, of 17 December 2012, for the European patent with unitary effect –, the Court concluded that the Council's decision to differentiate between the official languages of the European Union, and to choose only English, French and German, was appropriate and proportionate to the legitimate objective pursued, which was to facilitate access to patent protection, particularly for small and medium-size enterprises, by reducing the costs associated with translation requirements. In the cases that opposed Italy to the European Commission and to the European Economic and Social Committee (EESC), the Court resumed the line of reasoning adopted in *Kik*, by pointing out that, under Article 6 of Regulation no. 1, European institutions are free to stipulate in their rules of procedure which of the languages are to be used in specific cases – in their relations with their officials and servants, as well as in relations with the candidates for those posts –, which means that they can decide to publish vacancy notices in only a few of the official languages. The Court stressed that "*there is no provision or principle of Community law requiring that such publications should routinely be made in all the official languages*", even though the posts are likely to be of potential interest to candidates from any Member State. The Court added, however, that, although the Appointing Authority is entitled to adopt measures to regulate aspects of the procedure for recruiting its senior management staff, those measures must not result in discrimination on grounds of language between the candidates for a specific post. Therefore, if the Appointing Authority decides to publish the full text of a vacancy notice in the *Official Journal* only in certain languages, it must, in order to avoid discriminating on grounds of language between candidates potentially interested in the notice, adopt appropriate measures to inform all the candidates of the existence of the vacancy notice concerned and the editions in which it has been published in full. In *Angioi*, the Court held that, although the Conditions of Employment of Other Servants of the EU only require a thorough knowledge of one of the languages of the EU and a satisfactory knowledge of another language of the EU, the administration "*may, if necessary, where the needs of the service or those of the post require it, legitimately specify the language(s) of which a thorough or satisfactory knowledge is required.*" Therefore, the Court concluded that the European Personnel Selection Office had not infringed EU law by requiring candidates for recruitment as contract staff to have, as their main language, a thorough knowledge of one of the official languages and a satisfactory knowledge, as a second language, of English, French or German (that second language having to be different from the main language).[58] In

[58] This issue is recurrent. In *European Commission v. Italian Republic*, judgment of 26 March 2019, Case C-621/16 P, ECLI:EU:C:2019:251, the Court of Justice was equally not persuaded and ruled against the Commission, noting that the restriction on the choice of second language must be based on objectively verifiable elements, both by the candidates and by the courts of the European Union, such

Mutsch, the Court was asked to rule on whether a Luxemburg national, residing in Belgium in a German-speaking municipality, could rely on the right, granted by Belgian law to Belgian nationals residing in a German-speaking municipality, to require that proceedings before the Criminal Court take place in German. The Court started by noting that, in the context of a Community based on the principles of free movement of persons and freedom of establishment, "*the protection of the linguistic rights and privileges of individuals is of particular importance.*" The Court held that the right to use his own language in proceedings before the courts of the Member State in which he resides falls within the meaning of the term "social advantage" as used in Article 7(2) of Regulation no. 1612/68 and concluded that the principle of free movement of workers requires that "*a worker who is a national of one Member State and habitually resides in another Member State be entitled to require that criminal proceedings against him take place in a language other than the language normally used in proceedings before the court which tries him if workers who are nationals of the host Member State have that right in the same circumstances.*" A similar question was addressed by the Court in *Bickel and Franz*, with the difference that the defendants here were not habitually resident in the Member State where the criminal proceedings took place. An Austrian national and a German national had been arrested by the Italian authorities while travelling in the province of Bolzano and, when brought before the local magistrate, had requested that the proceedings be conducted in German, relying on rules for the protection of the German-speaking community of the province of Bolzano. The Court held that Mr Bickel and Mr Franz's situation was covered by EU law provisions on the freedom to provide services, since both men were nationals of a Member State and were visiting another Member State where they intended or were likely to receive services. The Court noted that the ability of EU citizens to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals is likely to enhance the exercise of the right to move and reside freely in another Member State. "*Consequently, persons such as Mr Bickel and Mr Franz, in exercising that right in another Member State, are in principle entitled, pursuant to Article 6 of the Treaty, to treatment no less favourable than that accorded to nationals of the host State so far as concerns the use of languages which are spoken there.*" The Court rejected the argument put forward by the Italian government, according to which the aim of the rules in issue was to recognise the ethnic and cultural identity of persons belonging to the protected minority (the German-speaking community of the province of Bolzano) and it would be undermined by an extension of the right of that protected minority to the use of its own language to nationals of other Member States who are present, occasionally and temporarily, in that region. The Court acknowledged that the protection of a minority such as the German-speaking community of the province of Bolzano might constitute a legitimate aim, but added that there was no indication that that aim would be undermined if the rules in issue were extended to cover

as to justify the knowledge of the languages required, which must be proportionate to the real needs of the service. On the same day, the Court annulled a call for expressions of interest for contract staff issued by the European Parliament because the electronic application form for the call was only available on EPSO's website in English, French and German, which created an unjustified restriction on the choice of language of communication. The Court was also not persuaded that the reasons given to justify the restriction on the choice of language 2 of the selection procedure in any way addressed the justification for that restriction in relation to the actual language needs relating to the duties that the recruited drivers would be required to perform. *Kingdom of Spain v. European Parliament*, judgment of 26 March 2019, Case C-377/16, ECLI:EU:C:2019:249.

German-speaking nationals of other Member States exercising their right to freedom of movement, in particular since the courts concerned were in a position to conduct proceedings in German without additional complications or costs. In *Groener*, the Court ruled on the compatibility with EU law of the provisions in Irish legislation which made appointment to a permanent full-time post as a lecturer in public vocational education institutions conditional upon proof of an adequate knowledge of the Irish language. Such provisions had determined the refusal, on the part of the Irish Minister for Education, to appoint a Dutch national to a permanent full-time post as an art teacher after she had failed an Irish language examination, in spite of her proficiency in English and of the fact that it was in English that the duties attached to the post were to be carried out. As noted earlier, the Court accepted that, given the "*special linguistic situation in Ireland*", the linguistic requirement was justified "*by reason of the nature of the post to be filled*", since the obligation imposed on lecturers in public vocational education schools to have a certain knowledge of the Irish language was one of the measures adopted by the Irish government in furtherance of its policy to "*promote the use of Irish as a means of expressing national identity and culture.*" The Court drew attention to the fact that the EEC Treaty did not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. It noted, however, that the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers, and that therefore the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States. Exemplifying, the Court noted that the principle of non-discrimination precludes the imposition of any requirement that the linguistic knowledge in question must have been acquired within the national territory. In *Angonese*, the Court returned precisely to this point and ruled as incompatible with the principle of non-discrimination on grounds of nationality a requirement imposed by a private banking undertaking in the province of Bolzano for admission to a recruitment competition. One of the conditions for entry to the competition was possession of a type-B certificate of bilingualism, which is issued by the public authorities of the province of Bolzano after an examination which is held only in that province. The Court noted that persons not resident in the province of Bolzano had little chance of acquiring the required certificate, which, combined with the fact that the majority of residents of the province are Italian nationals, resulted in a disadvantage to nationals of other Member States. The Court concluded that, even though requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate, the fact that it is impossible to submit proof of the required linguistic knowledge by any means other than the certificate, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view. In *UTECA*, the Court ruled as compatible with EU law the provisions in Spanish legislation which required television operators to allocate, first, 5% of their operating revenue for the previous year to the funding of full-length and short cinematographic films and European films made for television and, secondly, 60% of that funding to the production of films of which the original language is one of the official languages of the Kingdom of Spain. The Court held that, although constituting a restriction on several

fundamental freedoms, the measure served overriding reasons relating to the general interest – the defence of Spanish multilingualism – and appeared appropriate to ensure that such an objective was achieved as it did not go beyond what was necessary to achieve it. In contrast to its stance in *Fedicine*, the CJEU dismissed as irrelevant the absence of legal criteria to classify the works concerned as "cultural productions" and noted that, since language and culture are intrinsically linked, "*the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty.*" On the possibility of such a measure resulting in discrimination on grounds of nationality, since the beneficiaries of the financing concerned were mostly cinema production undertakings established in Spain, the Court held that it appeared inherent to the linguistic objective pursued the possibility to benefit cinema production undertakings working in the language covered by the linguistic criterion and which may in practice mostly comprise undertakings established in the Member State of which that language constitutes an official language. In *Runevič-Vardyn and Wardyn*, the Court held that the provisions in Lithuanian legislation, under which forenames and surnames must be written on certificates of civil status using only the characters of the Lithuanian language, pursued the legitimate objective of protecting the official national language and as such was capable of justifying restrictions on the rights of freedom of movement and residence granted to EU citizens. The Court admitted, however, that the refusal on the part of Lithuanian authorities to amend the joint surname of the couple in the main proceedings could cause serious inconvenience to them at administrative, professional and private levels. It concluded that it was for the national court to determine whether such inconveniences existed and, if so, to decide whether the refusal of the Lithuanian authorities was necessary and appropriate to achieve the objectives pursued, weighing, on the one hand, the right of the applicants to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions. In *Las*, the Court was asked to rule on the compatibility with EU law of legislation such as that of the Dutch-speaking region of the Kingdom of Belgium, which required all employers established in the region to draft cross-border employment contracts exclusively in Dutch, failing which the contracts were to be declared null and void by the national courts of their own motion. Similarly as in *Runevič-Vardyn and Wardyn*, the Court pointed out that the provisions of EU law do not preclude the adoption of a policy for the protection and promotion of one or more official languages of a Member State. Here, however, the Court had no doubts that the legislation went beyond what was strictly necessary to attain its purported objectives and could not be regarded as proportionate. It noted that the parties to a cross-border employment contract do not necessarily have knowledge of the official language of the Member State concerned, in which case the establishment of free and informed consent requires the parties to be able to draft their contract in a language other than the official language of that Member State. On this point, the Court added that the objectives pursued by the legislation of the Dutch-speaking region of the Kingdom of Belgium could be attained by legislative measures less prejudicial to the freedom of movement of workers, as would be the case with legislation requiring the use of the official language of the Member State for cross-border employment contracts, while allowing the drafting of an authentic version of such contracts in a

language known to all the parties concerned. In *Cilevičs and Others*, the Court concluded that Article 49 TFEU, which guarantees freedom of establishment, must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued. The Court recalled that Member States enjoy broad discretion in their choice of the measures capable of achieving the objectives of their policy of protecting the official language, since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU, even though that discretion cannot justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms. What is key is that the legislation requiring the use of the official language of the Member State allows for exceptions that ensure that a language other than the official language may be used in the context of university education. Otherwise, the legislation would exceed what is necessary and proportionate for attaining the objective pursued, namely the defence and promotion of the official language.

Patrícia Jerónimo

ARTICLE 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

1. Article 23 of the CFREU proclaims equality between men and women and lays down an obligation, in particular for public authorities, to ensure equality in all areas, especially in matters of employment, work and pay. Furthermore, this rule implies the recognition of a right not to be discriminated against on the grounds of gender, establishing a separate and specific provision for the prohibition of this kind of discrimination.[1] The second paragraph, on the other hand, expressly provides for the adoption of positive action measures or policies, granting prerogatives, in particular cases, to the under-represented sex in a given situation.

This provision must, naturally, be interpreted in the light of the provisions of Articles 20 and 21 of the Charter, which enshrine, respectively, the principles of equality before the law and non-discrimination. It should also be read broadly in the sense of extending the requirement of equal treatment of persons of both genders to all areas or spheres of society, including not only work, or labour matters in general, but also education, training and science or the holding of positions of responsibility within enterprises and other institutions.

In accordance with the Explanations relating to the CFREU, the first paragraph of this Article was based on Article 3 of the TEU and Article 8 of the TFEU, which establish the promotion of equality between men and women as an objective of the EU, as well as on Article 157 TFEU, Article 20 of the European Social Charter and point 16 of the Community Charter of the Fundamental Social Rights of Workers.

2. Gender equality is one of the areas in which EU law has had the most positive influence on the domestic law of the Member States, whether through legislation or case-law. It is, moreover, cited as a *surprising source of women's rights*, which has been a very present and obvious concern in the European legal order.

One of the first European rules on gender equality was the current Article 157 of the TFEU (formerly Article 141 TEC), which establishes the principle of equal pay for equal work (meaning the "same work" or "work of equal value") for both sexes. Moreover, this provision attributes to the European Parliament and the Council the power to adopt measures to ensure the application of the principle of equal

[1] The relevant Charter and Treaty provisions, legislation, and case-law of the CJEU on this subject is usually referred to as 'gender equality acquis'. However, the term 'sex equality' or mentions of the 'under-represented sex' are also present in academic literature and in legal instruments. Both terms are used in this comment, although gender is preferred, because of its broader meaning. While the term 'sex' refers primarily to the biological distinction between women and men, the term 'gender' comprises social differences between women and men, such as certain pre-conceptions about their respective roles within the family and in society.

opportunities and equal treatment of men and women in matters of employment and occupation, and clarifies – as does this provision of the Charter – that the principle of equal treatment does not prevent Member States from maintaining or adopting any positive discrimination measures.

Initially, and similarly to other fundamental rights, gender discrimination issues were perceived as harmful because they were a factor distorting competition. Several Member States' governments, in particular the French government, expressed concern that countries with more advanced legislation in this area (and with inherently more expensive social policies) could see their level of protection against discrimination turned into a competitive disadvantage within the common market. On the other hand, discriminatory practices were soon also perceived as damaging to the market itself, since they could prevent the selection of the most suitable human resources for a given task.

Subsequently, an evolution of EU law on gender equality has been visible over several decades, going beyond the merely utilitarian vision of equality and recognising that the norms on non-discrimination constitute a fundamental basis for the protection of European citizens, being the expression of a true fundamental right and a general principle of EU law. Furthermore, the idea that the construction of a *EU social dimension* is essential, alongside the project of economic integration, has been affirmed and it is understood that gender inequality may seriously compromise many of the objectives of the Treaties, namely the promotion of a "high level of employment" and the "guarantee of adequate social protection" (Article 9 TFEU), "economic, social and territorial cohesion and solidarity among Member States" and the free movement of persons (Article 3 TFEU). In this way, a common EU law on equality between men and women has been developed, and it is now regarded as an autonomous subject of Union law and policy.

Equality between women and men is also one of the key principles of the European Pillar of Social Rights[2] (principle 2), and is mentioned as a dimension of others, such as the principle of equal opportunity (principle 3), work-life balance (principle 9) and old age income and pensions (principle 15).

3. In the current framework of European Union law we can find multiple references to equality between men and women, in different normative sources, which materialise forms of protection and guarantee the fundamental right foreseen in the provision of the CFREU in different domains.

In the field of secondary legislation, and in addition to the case-law of the CJEU, a number of key normative instruments are of particular importance: Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the so-called *recast directive*, because it repeals and replaces a significant number of directives on equal pay, equal treatment in employment, training, promotion and working conditions, social security schemes and burden of proof); Directive 2010/18/EU (amended by Directive 2013/62/EU) implementing the revised Framework Agreement on parental

[2] The European Pillar of Social Rights was proclaimed by the European Parliament, the Council and the Commission at the Gothenburg Summit, in 2017, and reaffirmed at the Social Summit in Porto on 7-8 May 2021. Available at https://ec.europa.eu/info/sites/default/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC; and, finally, Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.[3]

Besides the Directives, there are several other legal instruments concerning the issue of equality between men and women. Following the European Pillar of Social Rights, see, for instance, the *Gender Equality Strategy 2020-2025*[4] and the proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.[5]

As one can see, the issue of gender equality, of which the fundamental right enshrined in Article 23 of the CFREU is one of the greatest exponents, stands as one of the most developed areas of so-called European social policy; however, the promotion of equality between men and women beyond aspects directly or indirectly linked to the market and employment has had limited success. There have been several difficulties in its implementation and only Directives 2006/54/EC and 2004/113/EC require the designation of Member State bodies for the promotion of equal treatment and non-discrimination.

4. The central concepts relating to equal treatment between men and women in EU law are those of *direct* and *indirect discrimination*, *positive action* and *harassment*. The former, as seen in relation to Article 21 of the CFREU, are, in this context, and respectively, a situation where, on grounds of gender, one person is treated less favourably than another one of the opposite gender, has been or would be treated in a comparable position (direct discrimination); and a situation where an apparently neutral provision, criterion or practice is liable to place a person of one gender at a particular disadvantage (indirect discrimination). As for harassment, it is usually defined as a situation where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Sexual harassment is said to take place where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. Both may be considered forms of discrimination.

With regard to positive actions, these are understood as measures adopted by governments, social partners or other competent bodies, with a view to compensating for the detrimental effects on women in working life resulting from attitudes, behaviours and structures in society. Such measures appear, in certain situations,

[3] With regard to equal treatment between men and women, along with those cited in the text, the following relevant Directives should be highlighted: 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security and 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

[4] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025 COM/2020/152 final.

[5] Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM(2021) 93 final, 4 March 2021. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0093&from=EN.

to be indispensable, since legal rules on equal treatment, particularly the one under consideration here, which recognises a fundamental right, are insufficient on their own to eliminate any form of *de facto* inequality.

5. The scope of this right to equal treatment between men and women thus lies primarily within the framework of the labour market. First of all, regarding access to work, working conditions and promotion and vocational training, all practices detrimental to workers of one or other gender are hereby prohibited; exceptions are allowed, based on the nature or context of performance of certain occupations, but only if the differentiation in treatment is objectively justifiable and decisive.

Likewise, the right not to be discriminated against on the grounds of gender extends to wages, where the principle of equal pay for equal work applies, admitting only differentiations based on objective criteria (such as experience or seniority) common to all workers; it also extends to pension and social security systems, to the legal regime for the protection of self-employed workers, especially in situations of maternity and paternity and protection in illness, and, finally, to the marketing and acquisition of goods and services.

The above-mentioned situations are subject to specific legislation within the framework of the EU legal order. However, the interpretation to be given to the provisions of Article 23 of the Charter, commented on here, must be much broader. In fact, the principle of equality between men and women cuts across all areas in which Union law is involved, in a more or less direct manner.

6. The case-law of the CJEU on gender equality is extensive and highly developed. In fact, the Court's rulings in recent decades have helped to stimulate important progress on equality issues, both within the EU legal order and, more importantly, within the domestic order of the Member States. In fact, gender equality is a subject in relation to which the Union's courts have frequently declared rules of domestic law and European rules on equal treatment between men and women to be incompatible.

Among the most important judgments, in *Drefrenne v. Sabena*,[6] the CJEU recognised that the rules on non-discrimination and equal pay for men and women seek to "*avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay*", but also, on the other hand, that such standards form part of the "*social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples.*"

Later, in 2000, in the famous *Deutsche Telekom v. Schröder* judgment,[7] the CJEU reaffirmed that the principle of equal treatment, provided for and protected by EU law, is a genuine *fundamental right* and that it takes precedence over the economic purpose of those same rules: the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure, so that "*the economic aim [...] of the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision.*" In the same ruling, the Court recalled that it follows from its case-law "*that the principle of equal pay [...] may be relied upon before the national courts and that those courts have a duty to ensure the protection of the rights which that provision vests in individuals.*"

[6] Judgment *Drefrenne v. Sabena*, 8 April 1976, Case 43/75, ECLI:EU:C:1976:56.
[7] Judgment *Deutsche Telekom v. Schröder*, 10 February 2000, Case C-50/96, ECLI:EU:C:2000:72.

There is also an extensive body of case-law on positive action. The *Kalanke*,[8] *Marschall*,[9] *Hessen*[10] and *Abrahamsson*[11] judgments may be highlighted. In a position that has undergone back and forth over the years, the CJEU holds that, as regards access to employment, "*a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.*" Such preference complies with EU law inasmuch as it makes it *easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers*, as the Court anew stated in the ruling *WA v Instituto Nacional de la Seguridad Social*.[12]

Since the turn of the century the number of judgments concerning equal treatment has increased, extending the application of the principle to situations that do not fall within the specific context of the (private) labour market, namely social protection, the reconciliation of private and professional life and the purchase of services. See, in this respect, the rulings in the *Kreil*,[13] *Roca-Alvarez*,[14] *Test-Achats*,[15] *Mayr*,[16] *Busch*[17] or *Syndicat CFTC*[18] cases.

In the *Kreil* case, concerning the almost complete ban on women's access to employment in the German Armed Forces, the CJEU stated that the principle of gender equality is of general application and also applies to employment relationships in the public sector. Accordingly, although a Member State may "*restrict such activities and the relevant professional training to men or to women, as appropriate*", it is required "*to assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation*" from the general system can still be maintained.

Still within the labour market, it is worth recalling the large number of CJEU judgments analysing indirect discrimination issues, such as the *Rinke*,[19] *Allonby*[20] and *YS v. NK AG*[21] judgments. The first two are good examples of the need to assess the gender impact of the legal regime of part-time work – in the first case, for the purposes of vocational training and access to a medical career, and in the second one, on remuneration and pensions. In fact, most part-time workers are women, both because of the demands they still face in reconciling family and professional life and because of their *weaker position* in the labour market compared to male workers in equivalent situations. Thus, the usually unfavourable regulation of part-time work may imply real *indirect discrimination*, prohibited by EU law, in particular by the

[8] Judgment *Kalanke*, 17 October 1995, Case C-450/93, ECLI:EU:C:1995:322.
[9] Judgment *Marschall*, 11 November 1995, Case C-409/95, ECLI:EU:C:1997:533.
[10] Judgment *Hessen*, 28 March 2000, Case C-158/97, ECLI:EU:C:2000:163.
[11] Judgment *Abrahamsson*, 6 July 2000, Case C-407/98, ECLI:EU:C:2000:367.
[12] Judgment *WA v. Instituto Nacional de la Seguridad Social*, 12 December 2019, Case C-450/18, ECLI:EU:C:2019:1075. See also Judgment *EEAS v. Hebberecht*, 19 November 2020, Case C-93/19 P, ECLI:EU:C:2020:946.
[13] Judgment *Tanja Kreil*, 11 January 2000, Case C-285/98, ECLI:EU:C:2000:2.
[14] Judgment *Roca-Alvarez*, 30 September 2010, Case C-104/09, ECLI:EU:C:2010:561.
[15] Judgment *Test-Achats*, 1 March 2011, Case C-236/09, ECLI:EU:C:2011:100.
[16] Judgment *Mayr,* 26 February 2008, Case C-506/06, ECLI:EU:C:2008:119.
[17] Judgment *Busch*, 27 February 2003, Case C-320/01, ECLI:EU:C:2003:114.
[18] Judgment *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle*, 18 November 2020, Case C-463/19, ECLI:EU:C:2020:932.
[19] Judgment *Katharina Rinke v Ärztekammer Hamburg*, 9 September 2003, Case C-25/02, ECLI:EU:C:2003:435.
[20] Judgment *Allonby*, 13 January 2004, Case C-256/01, ECLI:EU:C:2004:18.
[21] Judgment *YS v. NK AG*, 24 September 2020, Case C-223/19, ECLI:EU:C:2020:753.

rule commented on here. The *YS v. NK AG* judgment is interesting because of the factors it takes into account in order to establish the objective justification of indirect discrimination, namely the reaffirmation of the need to maintain the long-term health of a pension scheme as a legitimate aim; also relevant is the significance given to substantive/redistributive concerns in the proportionality analysis.

In this context, the consideration of real quantitative data, in addition to legal questions, is of considerable importance for the application of European norms on gender equality – namely, the fundamental right provided for in the rule commented upon. Examples of this are the *Voß*,[22] *Kelly*[23] and *Minoo Schuch-Ghannadan*[24] judgments. *Voß* concerned German legislation on employment contracts in the public sector that provided for different overtime payments, depending on whether the worker in question had a full-time or part-time contract. The Court based its decision not only on the factual and legal arguments put forward by the parties but also, and as a very relevant factor, on the available statistical data showing that more than 80% of the part-time staff employed in the positions in question were women. However, not considering this analysis sufficient to determine the final decision, the CJEU referred a more in-depth statistical analysis to the national referring body, pointing out that national legislation on the remuneration of civil servants must be considered contrary to EU law when a considerably higher percentage of female than male workers is affected among the workers subject to that legislation and the difference in treatment cannot be justified by objective factors unrelated to any discrimination based on sex. In *Kelly*, the CJEU explained that although the right to equal treatment does not specifically entitle a person who considers herself affected by an infringement of the principle to information in order to establish "*facts from which it may be presumed that there has been direct or indirect discrimination*", the fact remains that the inaccessibility of information or relevant statistical data, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness. Therefore, the Court added in *Minoo Schuch-Ghannadan* the need to ensure the practical effect of the right to equal treatment, demanding that a worker who considers herself wronged by indirect discrimination on grounds of sex may substantiate a *prima facie* case of discrimination by relying on general statistical data concerning the job market in the Member State concerned, where the person concerned cannot be expected to produce more precise data regarding the relevant group of workers, such data being difficult to access or unavailable.

In the field of social protection, maternity and paternity, the CJEU has also issued several important decisions. In the *Roca-Alvarez*[25] judgment on equal rights between men and women as regards the reconciliation of family and professional life, the CJEU found against a national rule that "*provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is*

[22] Judgment *Voß*, 6 December 2007, Case C-300/06, ECLI:EU:C:2007:757.
[23] Judgment *Patrick Kelly v. National University of Ireland (University College, Dublin)*, 21 July 2011, Case C-104/10, ECLI:EU:C:2011:506.
[24] Judgment *Minoo Schuch-Ghannadan v. Medizinische Universität Wien*, 3 October 2019, Case C-274/18, ECLI:EU:C:2019:828.
[25] Judgment *Roca-Alvarez*.

also an employed person." This position represents an important step towards effective equality and sharing of family rights and obligations between men and women. However, other case-law has shown a hesitant CJEU, and more recent decisions have admitted similar distinctions, using arguments related to the mother's social security status and to the need of "*protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth*", such as in *Betriu Montull*.[26]

For their part, the *Mayr* and *Busch* judgments, also concerning maternity protection, respectively hold that the "*principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preclude the dismissal of a female worker who [...] is at an advanced stage of in vitro fertilisation treatment [...] inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment*" and that EU law "*reserves to the Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity, by recognising the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth, as well as guaranteeing «special protection for pregnant women and women who have recently given birth or are breastfeeding in respect of any activity liable to involve a specific risk to their safety or health or negative effects on the pregnancy or breastfeeding».*" Such *rationale* is still upheld, as the CJEU adopted the same terms of these rulings in *Syndicat CFTC*, reiterating this strengthening of gender equality to balance and protect. Decisions on such specific matters demonstrate the broad scope of application of the fundamental right to equal treatment between men and women and the high level of development of EU law in this regard.

Finally, still on the subject of case-law, it is worth recalling the controversial *Test-Achats* ruling on the principle of equality in the provision of services, particularly motor vehicle insurance. At the time, the Luxembourg judges ruled that a Community rule "*which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits*" was contrary to EU law – in particular, to the principle of non-discrimination on grounds of sex – stating that it "*works against the achievement of the objective of equal treatment between men and women*" and "*is incompatible with Articles 21 and 23 of the Charter.*"

7. In the field of intersectionality – a framework for analysis that acknowledges that experiences of discrimination are unique and complex and that all grounds of discrimination or differentiated treatment and their interaction must be taken into consideration – the CJEU has shown some difficulty in articulating gender and other kinds of discrimination (namely, religious discrimination). This difficulty is noticeable when judgments such as *Achbita*,[27] *Bougnaoui*[28] and *WABE*[29] are assessed from a critical point of view under Article 23 CFREU. Although the CJEU held that they concern matters outside the scope of equality between women and men, thereby not ruling on this dimension of non-discrimination, there are plenty of reasons to claim otherwise. In all three cases, the object revolved around Directive

[26] Judgment *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS),* 19 September 2013, Case C-5/12, ECLI:EU:C:2013:571.
[27] Judgment *Achbita*, 14 March 2017, Case C-157/15, ECLI:EU:C:2017:203.
[28] Judgment *Bougnaoui*, 14 March 2017, Case C-188/15, ECLI:EU:C:2017:204.
[29] Judgment *WABE*, 15 July 2021, joined cases C-804/18 and C-341/19, ECLI:EU:C:2021:594.

2000/78, which does not provide for equal treatment on grounds of gender. It refers to a general framework for equal treatment in employment and occupation. This being the case, the CJEU's findings, especially regarding the possible justification of discriminatory treatment and proportionality analysis, are sound, even if one might not agree with them. Yet, this does not solve the central problem, which concerns the evident need to articulate the religious discrimination issue with the gender question – more than one religion has particular or more demanding dress codes for women, and a general ban on religious symbols is bound to affect the religious freedom and the right to equality of treatment in the workplace in a more significant way for women than for men. The CJEU has chosen not to adopt an intersectional approach in ruling on cases where there is an obvious interplay of equal treatment issues on grounds of religion and gender, but the shortcomings of such an approach are likely to become more apparent as it is called upon to solve complex situations such as the ones mentioned above.

8. As one can see, the provision of Article 23 of the CFREU enshrines a general principle of equality between men and women, which in turn implies the recognition of a fundamental right not to be discriminated against on grounds of gender. This principle is now part of a well-developed acquis on gender equality, which includes rules of EU primary law, a large number of legislative measures, soft law instruments and the consistent case-law of the CJEU.

One should not, however, assume that this solves all problems. The rule commented on here suffers recurrent violations, even in the EU of the 21st century. There are still more women than men at risk of poverty, especially among older people and single-parent families. Furthermore, economic and social crisis situations have serious specific repercussions for women, in matters such as the labour market and employment, as they are more likely to be at disadvantage, to be subject to precarious contracts or involuntary part-time work; they are also victims of persistent pay gaps and have more difficulty in finding work. Political and economic power also remain concentrated in male hands in most Member States, notwithstanding the progress being made in the field of diversity and representation. Thus, there is still a long way to go to ensure that what has already been called by some the most important equality in the Union's legal order can be considered effectively implemented, in all legal fields and in all sectors of society.

Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

1. The Preamble to the CFREU emphasises the central importance of the embodied "human being". In other words, the person must be considered in their context of action. The CFREU thus enshrined and "strengthened" the protection of fundamental rights at the EU level. Fundamental rights are inspired by "common values" such as *human dignity*, *freedom*, *equality* and *solidarity*. At the current stage of our civilisation, these values are regarded "indivisible and universal" by the "peoples of Europe".

By explicitly placing "the human being" at the centre of its action, the EU considers that both adult and infant European citizens are entitled to fundamental rights. Consequently, both adults and children are beneficiaries of the protection of legally enshrined rights. The Charter recognises the existence of at least three stages of human life and takes on the task of promoting non-discrimination and protecting against discrimination on grounds of *age* (Article 21). These specific tasks are based on the *principle of human dignity* (Article 1) and the *principle of equality* (Article 20).

The Charter devotes a special Article to *"the rights of the children"* (Article 24). The recognition of children's rights is due to European society's evolution which, since the early twentieth century, has come to recognise children as social citizens. This change in attitude towards children is based on a growing awareness of the characteristics and specificities of childhood: a recent finding in human history.[1]

Several authors argue that the concept of childhood is nothing more than a social construct,[2] which is constantly evolving and changing over time and space, as well as being influenced by economic, social and cultural conditions.

One must stress that EU States are not the only addressees of the Charter as far as children are concerned. The Charter went further and directly recognised some special rights to children. The choice of dedicating an Article to the specific "rights of children" and recognition of certain children's rights arose from a recent perception of the child. The child is no longer seen as an "object of protection" nor as a mere "subject of rights" but rather as an "equal and privileged citizen".[3]

---

[1] In this sense, see Philippe Ariès, *A criança e a vida familiar no Antigo Regime* (Lisbon: Relógio d'Água, 1988).

[2] In this regard, see Julia Fionda, "Legal concepts of childhood: an introduction", in *Legal concepts of childhood*, ed. Julia Fionda (Oxford; Portland, Oregon: Hart Publishing, 2001), 4-5; Alison James, Adrian L. James, *Constructing childhood* (New York: Palgrave Macmillan, 2004), 12-13.

[3] See Marie-Therese Meulders-Klein, "Droits des enfants et responsabilités parentales. Quel juste

The Charter therefore represented an important milestone in the cultural evolution of the legal systems of the Member States[4] and it has become an important tool of interpretation of European law on *the rights of the child*.[5]

Originally, the child was not at the centre of the EU's concerns because he or she was not an economic operator. In this way, the first explicit reference to the child in an EU Treaty dates to 1997 under the Treaty of Amsterdam. Previously, the child was only referred to implicitly and indirectly, provided he or she was perceived as a *family member* of the worker-citizen. Only as such he or she was protected under the veil of the rules on *free movement of workers*.[6/7]

Since then, children have been increasingly taken into account when defining the European Community and European policies. Thus, the Treaty of Lisbon, which was signed in December 2007 and came into force on 1 December 2009, established the *protection of the rights of children* as one of the main goals to be achieved in both the EU's internal and external policies [Article 3(3) and (5) TEU]. The Treaty of Lisbon "*reaffirms and strengthens the role of the European Union*", namely in areas such as the protection of children, family law, and the protection against discrimination of adults with disabilities "*by means of a more explicit reference*" to those areas.[8] Regarding the *rights of children* one should emphasise the novelty that it represented as it was the first explicit reference to such *rights* in a EU treaty. The symbolic value of introducing *children's rights* in the TEU, however, should not be overestimated. The setting of these goals has little impact on the effective protection and promotion of children's rights. Indeed, such objectives only "inform" the interpretation of other treaty provisions.[9]

2. Nevertheless, Article 24 is not truly innovative: it reflects, to a lesser or greater extent, the influences of other European and international law texts.

The ECHR was one of the key European law texts, which undoubtedly formed part of the cultural evolution that took place in European legal systems regarding

---

équilibre?", in *La personne, la famille et le droit (1968-1998). Trois décennies de mutations en Occident* (Brussels; Paris: Bruylant – LGDJ, 1999), 345.

[4] See Pier Francesco Lotito, "Diritti del bambino", in *L'Europa dei Diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, ed. Raffaele Bifulco, Marta Cartabia, and Alfonso Celotto (Bologna: Società Editrice il Mulino, 2001), 185.

[5] See specifically Judgment CJEU *Parliament v. Council*, 27 June 2006, Case C-540/03, ECLI:EU:C:2006:429.

[6] Article 42 of the Treaty establishing the EEC (TEEC), corresponding to the current Article 48 of the TFEU.

[7] And only in this sense was the protection of their rights made effective. See, in this regard, the case-law of the CJEU which, considering the rules of *free movement*, always with a view to promoting the achievement of the Union's economic objectives, has recognised children's rights, albeit in an incidental way: Judgment *Lair v. University of Hannover*, 21 June 1988, Case C-39/86, ECLI:EU:C:1988:322; Judgment *Steven Brown v. Secretary of State for Scotland*, 21 June 1988, Case C-197/86, ECLI:EU:C:1988:323; Judgment *Echternach & Moritz v. Netherlands Minister of Education*, 15 March 1989, joined cases C-389/87 and C-390/87, ECLI:EU:C:1989:130; Judgment *Landesamt für Ausbildung Nordrhein-Westfalen v. Lubor Gaal*, 4 May 1995, Case C-7/94, ECLI:EU:C:1995:118; Judgment *Baumbast and RV Secretary of State for the Home Department*, 17 September 2002, Case C-413/99, ECLI:EU:C:2002:493; Judgment *Zhu and Chen v. Secretary of State for the Home Department*, 19 October 2004, Case C-200/02, ECLI:EU:C:2004:639; Judgment *Garcia Avello v.* Belgium, 2 October 2003, Case C-148/02, ECLI:EU:C:2003:539 and Judgment *Standesamt Stadt Niebüll v. Grunkin Paul*, 14 October 2008, Case C-353/06, ECLI:EU:C:2008:559.

[8] See Helen Stalford, "The Impact of the Treaty of Lisbon on social welfare and family law", *Journal of Social Welfare & Family Law*, vol. 32, no. 1 (2010): 1.

[9] See Helen Stalford and Mieke Schuurman, "Are we there yet? The Impact of the Lisbon Treaty on the EU Children's Rights Agenda", *International Journal of Children's Rights*, vol. 19, no. 3 (2011): 383.

the concept of childhood and children's rights. The Convention affirms the general principles of the Union's law [Article 6(3) TEU] but does not have a specific Article dedicated to children, nor does it expressly mention children as holders of the rights that it guarantees.[10] However, as the European Commission of Human Rights has stated in the judgment *Austria v. Italy* of 11 January 1961, the rights consecrated in the ECHR have an *objective character,* which means that those rights are inextricably linked to the quality of the human person.[11] Thus, children must be included as holders of rights under the ECHR. Later, the ECtHR stated in its judgment *Nielsen v. Denmark* of 28 November 1988,[12] that the expression *"everyone"* used by the ECHR necessarily includes children and therefore the provisions of the Articles of the Convention also apply to them.

Thus, the ECHR has enabled children, whether in their own name,[13] represented or even accompanied by their parents, to invoke the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4), the right to liberty and security (Article 5), the right to a fair trial (Article 6), and the right to respect for private and family life (Article 8). Furthermore, it allowed some violations of their rights to be brought before the ECtHR.[14]

Albeit inspired by the ECHR, the catalogue of rights in the CFREU is not the same. The CFREU provided for "new" fundamental rights, in line with the evolution of society, social progress, as well as scientific and technological advances. The Charter therefore presents a more modern catalogue of fundamental rights, notably through the inclusion of an article dedicated to *children's rights*.

Reference should also be made to the revised European Social Charter (1996), which replaced the European Social Charter adopted by the Council of Europe in 1961. This charter complements the ECHR in the social and economic fields. The revised European Social Charter begins by stating, in Part I, the principle according to which "*children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.*" Then it establishes in its Article 7 the various commitments that States undertake "*with a view to ensuring the effective exercise of the right of children and young persons to protection.*" At the same time, the revised European Social Charter foresees a complex set of rights that directly or indirectly have children as their holders: the rights of employed women

---

[10] Certain Articles, however, appear to be aimed directly at children. For example, the Convention provides in its Article 5, § 1 *(d), that exceptionally there may be deprivation of liberty in the case of "detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority*", and, in its Article 6 § 1st that "*everyone is entitled to a fair and public hearing (...)*" and that the "*Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial (...) where the interests of juveniles (...) so require (...).*"

[11] Affaire *Autriche contre Italie*, Req. 788/60, Annuaire de la CEDH, vol. 4, 139. *Apud* Marie-Philomene Gil-Rosado, *Les libertés de l'esprit de l'enfant dans les rapports familiaux* (Paris: Defrénois, 2006), 31.

[12] In the judgment *Nielsen v. Denmark*, 28 November 1988, no. 10929/84, the Court states: «*According to its wording, Article 5 applies to «everyone». The protection afforded by this provision clearly also covers minors, as is confirmed by, inter alia, sub-paragraph (d) of paragraph 1».*

[13] To the extent that Article 34 of the Convention provides that "*the Court may receive applications from any person (...) claiming to be the victim of a violation (...) of the rights set forth in the Convention or the Protocols hereto (...).*" That Article sets no age requirement.
See the judgment *A. v. United* Kingdom, 23 September 1998, no. 25599/94, which ruled on a request from the United Kingdom for violation, *inter alia*, of Article 3 of the ECHR, made by a 14-year-old.

[14] See Geraldine Van Bueren, *The international law on the rights of the child* (The Hague; Boston; London: Martinus Nijhoff Publishers, 1998), 22.

to protection (Article 8), the right to protection of health (Article 11), the family's right to social, legal and economic protection (Article 16), and the right of mother and child to social and economic protection (Article 17).

It is also worth mentioning the Declaration of the Rights of the Child of 1924, the UDHR [Article 25(2)], and the Universal Declaration of the Rights of the Child of 1959, which, despite their mainly welfare-centred logic, are essential texts concerning the *protection of childhood* at an international level.

The clearest and most profound influence on the Charter and its Article 24 came from the Convention on the Rights of the Child, adopted unanimously on 20 November 1989 by the General Assembly of the UN. This Convention is the most comprehensive International Law instrument regarding the enshrinement of children's rights, and it represents an important "milestone in the history of the child"[15] insofar as it enshrines the "participatory model" rooted in a new child's concept. The new child's understanding as well as the new understanding of the child's role within the family and the society was also welcomed by the Charter.

Article 24 clearly reflects the influence of the UN Convention on the Rights of the Child (see Articles 3, 9, 12, and 13) regarding the guiding principles for the protection and promotion of children's rights and the rights specifically granted to them. In fact, the importance of this Convention may be inferred from the references made to it by, for example, Advocate General Jacobs in his Opinions delivered on 22 May 2003, in the case *Carlos Garcia Avello v. État Belge*, C-148/02,[16] paragraph 36, and by Advocate General Sharpston in her Opinions delivered on 30 September 2010, in the case *Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm)*, C-34/09,[17] paragraph 10.

3. It is also remarkable that Article 24 of the Charter, which is devoted to the *rights of the child*, is part of Title III, concerning *Equality*, and not, as one would expect, of Title II, dedicated to *Freedoms*, or Title I, regarding *Dignity*. The Charter takes for granted, in the European cultural space, the recognition of the child as *a human being* endowed with an *inviolable dignity* (Article 1) and therefore does not feel the need to reiterate it in Title I with the inclusion of a specific Article on the rights of child. In addition, the child is seen as a human being *equal in dignity to adults*, which entails recognising children the same fundamental rights granted to any human being. That is to say the fundamental rights in Title II, namely, the right to life (Article 2), the right to physical and moral integrity (Article 3), the prohibition of torture or inhuman or degrading treatment or punishment (Article 4), the prohibition of slavery and forced labour (Article 5), the right to respect for private and family life (Article 7), and the right to education (Article 14).[18]

The inclusion of an Article devoted to children's rights in the Title of *Equality* expresses the Charter's materialisation of *the principle of equality* (Article 20) as

[15] See Michael Freeman, "Introduction: Children as Persons", in *Children's rights: a comparative perspective* (Aldershot: Dartmouth, 1996), 1.

[16] Judgment *Carlos Garcia Avello v. État Belge*, 2 October 2003, Case C-148/02, ECLI:EU:C:2003:539. Opinion of Advocate General Jacobs delivered on 22 May 2003, ECLI:EU:C:2003:311.

[17] Judgment *Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm)*, 8 March 2011, Case C-34/09, ECLI:EU:C:2011:124. Opinion of Advocate General Sharpston delivered on 30 September 2010, ECLI:EU:C:2010:560.

[18] See Adeline Gouttenoire, "Article II-84", in *Traité établissant une Constitution pour l'Europe. Commentaire article par article: Tome 2, La Charte des droits fondamentaux de l'Union*, ed. Laurence Burgogue-Larsen, Anne Levade et Fabrice Picod (Bruylant, 2005), 334.

well as of the *principle of non-discrimination* (Article 21).[19] In fact, by stating that "everyone is equal before the law", the Charter is necessarily including the person-child. Furthermore, the prohibition of "*discrimination based on (...) age*" reveals that the Charter is aware that, regarding the child, prohibition of discrimination is only truly effective, on the one hand, with the explicit affirmation of the child's need for protection (understood as a fundamental right), and with the affirmation of the promotion of special rights claimed by childhood as a phase of human life with specific characteristics, on the other.

The principle of equality is one of the key principles dynamically shaping the EU's Law. This principle anchors the concept of Union's citizenship as referred to in Article 20 TFEU. The principle confers essentially on equal terms, to all citizens, the right to move and reside freely within the territory of the Member States [Articles 20(2) a), and 21(1), TFEU], prohibiting any discrimination on grounds of nationality (Article 18 TFEU).[20]

The principle of equality and the principle of non-discrimination enshrined in the Charter were object of legislative drafting, case-law, and legal doctrine regarding factors such as nationality and gender, both at an international and European level. The *age* factor, however, was not explicitly referred to as a discrimination factor in Article 2 UDHR, nor in Article 14 ECHR, nor even in Article 2(1), nor in Article 26 of the ICCPR. It was only with the Treaty of Amsterdam that *age* became a part of the non-restrictive list of factors under which all discrimination is prohibited (Article 13 TEEC, the current Article 19 TFEU).

The inclusion of *age* in the list of factors that may lead to discrimination (Article 19 TFEU, formerly Article 13 TEEC) did not entail a thorough debate, either politically or academically, on the meaning and scope of such inclusion regarding children and their rights. That lack of discussion and action can be explained on three grounds.[21] First, EU law aims to regulate the *homo economicus* life of the individual human being.[22] Thus, children, who are not (or should never be) workers and do not directly generate wealth, were never seen as a priority of European policies. Secondly, it should be noted that the absence, to date, of any reference to children in the Treaties has prevented the European institutions from promoting legislation and defining special policies in their favour. And finally, the "*confusion*" between children's rights and the rights of workers' families or women's rights has led to the perception that the rights of the former would be protected by legislation and policies aimed at other groups.

4. The rights enshrined in Article 24 are rights specifically recognised to the *child*. We must therefore try to define what the concept of child means.

The Charter does not provide a definition of child. Moreover, it says nothing about early or late childhood.[23] Nevertheless, we may resort to the UN Convention

[19] See Giovanni Passagnoli, "I diritti del Bambino nella Carta Europea", in *Carta Europea e Diritti dei Privati*, ed. Giuseppe Vettori (Milan: CEDAM, 2002), 328.

[20] See Helen Stalford, "Constitutionalising equality in the European Union: a children's rights perspective", *International Journal of Discrimination and the Law*, vol. 8 (2005): 53.

[21] Following closely Helen Stalford, "Constitutionalising equality in the European Union: a children's rights perspective", 54 and 55.

[22] See Rui Moura Ramos, "Les nouveaux aspects de la livre circulation des personnes. Vers une citoyenneté européenne" – questionnaire, rapport general et conclusions au XV Congrès F.I.D.E, Lisbon, 1994, 225. *Apud* Miguel Gorjão-Henriques, *Direito da União* (Coimbra: Almedina, 2010), 556.

[23] See Pier Francesco Lotito, "Diritti del bambino", 186-187.

on the Rights of the Child, given its profound influence on Article 24. Article 1 CRC defines the term "child" for the purposes of the Convention. According to this rule, a child is *every human being below the age of 18 years* unless, under the law applicable to the child, the legal age of majority is attained earlier. The maximum limit of childhood is thus 18 years of age,[24] which is in fact the age at which majority is defined in most Member States.

This age limit is justified by the goal of maximising the protection conferred by the Convention and ensuring that the rights therein provided are applicable to most members of an age group. However, this limit is not rigid but rather flexible. It allows a lower age limit if, under national law, majority is attained earlier.[25] The aim is to avoid any contradiction that may arise from the application of protection given by the Convention to a person who is no longer considered a minor.[26]

Article 24 of the Charter recognises certain rights to every human being under 18 years old, that is, to all children for being children. This means that Article 24 does not only concern, for example, children in poverty, social exclusion or danger, but also children that are dependent on an employed citizen.

5. The Charter has welcomed *the new understanding of the child* as a human being in development, especially vulnerable but endowed with a progressive autonomy; the child calls for special protection but is also an active subject in shaping his or her future, ultimately a child is a human being to whom specific rights should be recognised.[27] The Charter also adopted a perspective of the rights of the child *centred* on the child. The fundamental criterion regarding all the decisions and acts concerning children is their *best interest*.[28] The Charter acknowledges children's *right to protection and to care necessary for their well-being, the right to freely express their opinion* and the right to maintain personal relationships and direct contact with both their parents.

When analysing Article 24 and the rights that it confers to the child, it should be mentioned that it integrates two fundamental principles on the rights of the child: the principle of child protection and the principle of promotion of their autonomy. The relationship between those principles, however, is a *relationship of tension* that should not be underestimated. In fact, the EU should bear in mind the harmonisation of both principles, by, for instance, adopting legislation and defining its own policies,[29] in order to develop a complementary relationship between them.

Article 24 CFREU, inspired by the UN Convention on the Rights of the Child [Article 3(1)], elects the best interests of the child as the *primary consideration* regarding all the decisions and actions,[30] legally or just factually relevant,[31] concerning

[24] In support of this choice, there may be references to Article 1, paragraph 1, of the European Convention on the Exercise of Children's Rights, as well as to Article 2, paragraph *d)*, of the New Convention on Personal Relationships with regard to Children.

[25] See, for example, the case of Scotland where the age of majority is set at 16 years.

[26] See Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1999), 52, 57 and ff.

[27] Pier Francesco Lotito, "Diritti del bambino", 186.

[28] See Adeline Gouttenoire, "Article II-84", 334.

[29] Helen Stalford, "Constitutionalising equality in the European Union: a children's rights perspective", 60.

[30] Adeline Gouttenoire, "Article II-84", 335.

[31] Adeline Gouttenoire, "Article II-84", 336.

children, undertaken by public entities, private institutions, courts, legislative bodies or administrative authorities. That choice means, first and foremost, that the interest to promote and to which priority must be given is the child's interest. It is not just any interest of the child, but his or her *best interest.*[32] Secondly, it means that all institutions and bodies of the EU are subject to this principle.[33]

Affirming the priority of the consideration of the child's best interests implies deciding or acting so as to give it primary consideration, particularly in the case of conflict with other interests. Such prevalence was supported by the European Commission of Human Rights' judgment in *Hendriks v. The Netherlands* of 8 March 1982. It concerned the awarding of custody of a child to the mother, following a divorce, without assuring the visiting rights of the father, which were jeopardised by the mother. The Commission considered that prime importance should be given to the child's interest in not being at the centre of conflict between the parents, and not to the father's interest in exercising his right to visit so as to maintain regular contact with his son.[34]

Achieving the *best interests of the child* is no easy task. Indeed, it is a cultural and temporal notion.[35] Despite facing criticism of indeterminacy it is not an empty concept, instead it includes value judgments and experience rules, so as to determine the solution within a specific case. The factors that will contribute to such task should be pointed out, because they redirect to its essential core, the fundamental rights of the child provided for either in the UN Convention on the Rights of the Child or in the very CFREU.[36]

One of the special rights granted to children in Article 24(1) Part 1, CFREU is the right to *protection and care necessary for their well-being.* The recognition of this right is therefore a reflection of the consideration of the child as an especially vulnerable human being with specific needs.

The right to protection and care necessary for his or her well-being recognised in the Charter does not only include meeting the basic economic and social needs of the child. That right also includes the guarantee that children are safe from any violation of their physical and moral integrity. In fact, the Charter did not define "well-being", consecrating instead an "*open clause, likely to interpretive and applicative evolution*" only in the most favourable sense to children.[37]

---

[32] Michael Freeman, "Article 3. The best interest of the child", *in A Commentary on the United Nations on the Rights of the Child*, ed. André Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans and Mieke Verheyde (Leiden-Boston: Martinus Nijhoff Publishers, 2007), 40.

[33] See EU Network of Independent Experts on Fundamental Rights, "Commentary of the Charter of Fundamental Rights of the European Union", European Commission DG Justice, Freedom and Security, June 2006, 212.

[34] With regard to the issue of contact between minor children and both parents after separation or divorce, the ECtHR's case law has evolved. Thus, while the Commission, in the case cited in the text, concluded that there had been no violation of Article 8 of the ECHR, considering that the Dutch courts, when assessing the interests of the child, prioritised those interests over the interests of the father (Judgment *Hendriks v. The Netherlands*, 8 March 1982, no. 8427/78, paragraph 124), the ECtHR has recently stated that it could not support that the consideration that "joint custody" against the mother's will "is not *prima facie* in *the son's interests*" (Judgment *Zaunegger v. Germany*, 3 March 2010, no. 22028/04, paragraph 59).

[35] Michael Freeman, "Article 3. The best interest of the child", 27.

[36] EU Network of Independent Experts on Fundamental Rights, "Commentary of the Charter of Fundamental Rights of the European Union", European Commission DG Justice, Freedom and Security, June 2006, 212.

[37] Pier Francesco Lotito, "Diritti del bambino", 188.

Member States assume a very considerable obligation.[38] On the one hand, while always giving a key role to the child's best interests,[39] promoting measures of legislative and administrative nature,[40] which are essential to the protection and care necessary for the well-being of all children, and refraining from taking any measures that may compromise that same well-being, on the other.[41]

In this respect, the ECtHR, in its judgment *E. and Others v. The United Kingdom* of 26 November 2002 condemned the UK on the grounds of omission of measures to protect children in order to prevent them from being victims of child abuse by their mother's partner, based on a breach of Article 3 ECHR.[42] With regard to abuse outside the family's environment, the same court also condemned France, in the judgment *Darraj v. France* of 4 November 2010, for an infringement of Article 3 ECHR, given the insufficient protection guaranteed to an underage person who was mistreated by the police. The judgment *Okkali v. Turkey*, of 17 October 2006, should be mentioned – Turkey was condemned for refusing full protection against the "torture and (...) inhuman or degrading treatment" (Article 3 ECHR) of a 12-year-old teenager *precisely* because he was a *minor.*

The CJEU has already ruled on children's right to protection and care necessary for their well-being in a case in which a German company, *Dymanic Medien,* proposed to bring an action against another German company, *Avides,* so as to prohibit the latter from selling DVDs to the general public which had not been classified as appropriate for children and youth by a competent German authority. In the judgment *Dynamic Medien,* 14 February 2008, case C-244/06,[43] the CJEU held that audiovisual materials had to be analysed and classified before being put on sale to the German public and that the German classification procedure was reasonable, particularly as it had been designed to protect children and young people from *materials that could be harmful to their physical and psychological development.*

While the right to protection and care necessary for a child's well-being reflects a social representation of the child as an especially vulnerable human being, *the right to express their views freely* and *the right for their views to be taken into consideration on matters which concern them* [Article 24(1) Part 2] reveals a concept of the child as a human with a *progressive autonomy* that allows him or her to participate in the decision-making process in dialogue with adults.[44] Indeed, this is perfectly in line with the main source of inspiration of Article 24(1) 2nd part – the UN Convention on the Rights of the Child.

The provisions of Part 2 of paragraph 1 of Article 24 CFREU should be interpreted as implying two distinct children's rights, although in close connection. Indeed, by stating that children "*express their views freely, which will be taken into consideration on matters which concern them in accordance with their age and maturity*", it

[38] Adeline Gouttenoire, "Article II-84", 334.

[39] Michael Freeman, "Article 3. The best interest of the child", 67.

[40] Paragraph 1, Part 1 of Article 24 CFREU is interpreted here, based on Article 3, paragraph 2, of the Convention on the Rights of the Child that expressly mentions the type of measures to be undertaken to achieve the objective of the protection and care necessary for the well-being of the child.

[41] Pier Francesco Lotito, "Diritti del bambino", 188-192.

[42] See, also in the context of ill-treatment in familiar context, Judgments *Z. and Others v. The United Kingdom*, 10 May 2001, no. 29392/95, and *D.P. and J.C. v. The United Kingdom*, 10 October 2002, no. 38719/97.

[43] Judgment *Dynamic Medien*, 14 February 2008, Case C-244/06, ECLI:EU:C:2008:85.

[44] See Marta Santos Pais, "Child participation", in *Documentação e Direito Comparado*, Procuradoria-Geral da República, nos. 81, 82 (2000): 93.

recognises that children have the *right to freedom of expression and the* right to *participate* in decision-making process on issues concerning them.

As regards the former, it should be noted that this right includes freedom of opinion and freedom to seek, receive and impart information [Articles 13(1) of the Convention on the Rights of the Child, and Article 10 ECHR]. Such right, however, is not unlimited. It may be restricted by the Member States on the basis of respect for the rights and reputation of others as well as the protection of national security, public order and public health or morals [Article 13(2) of the Convention on the Rights of the Child].

The CFREU recognises the child's independent right to freedom of expression. However, this right turns out to underlie the child's *right* to *participate* in decision-making process in matters concerning them according to his or her age and maturity.[45] Indeed, the child, in order to participate in such processes, needs to be able to express his or her opinion and, for that, he or she needs to be in possession of sufficient information not only about the process in itself but also about the issue at hand.

This children's right to intervene in cases concerning them – which the Charter also welcomes [Article 24(1) Part 2], owing to the profound influence of the UN Convention on the Rights of the Child (Article 12) – is the most emblematic of all the children's rights. Such right is shaped by the right of the children to freely express their views and to have their views considered in decisions on matters that affect them, namely concerning education, religious beliefs, political or ideological options, marriage or medical treatment. This right is therefore consolidated in *the right of the child to be heard* in administrative and judicial proceedings relating to him or her[46] and the *right to have his or her views taken into account in the decision.*

The hearing of the child is of great importance within the context of European law. In fact, Regulation (EC) no. 2201/2003, of 27 November 2003, currently in force, regarding the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, which repeals Regulation (EC) no. 1347/2000, demands recognition of enforceability in the EU Member States of the decisions taken in a Member State on the matters referred to above following the hearing of the child. The only exception is when such a hearing is considered harmful to the child taking into account his or her age and maturity.[47]

One should mention the commitment to include children *"gradually and formally (...) in all consultations and actions related to their rights and needs."* This commitment was assumed by the European Commission in its 2006 Communication "[t]owards a Strategy on the Rights of the Child" [COM(2006) 367]. This responsibility was also recently reinforced in the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Regional Committee of 2011 – "A European Agenda for the Rights of the Child" [COM(2011) 60 final] – establishing the participation of the child as a priority.[48]

Article 24(1) Part 2 does not impose on States a duty to organise the precise way in which such a hearing must occur. States are prohibited from setting limitations

[45] Judgment ECtHR *Sahin v. Germany*, 8 July 2003, no. 30943/96, and Judgment CJEU *Aguirre Zarraga v. Simone Pelz*, 22 December 2010, Case C-491/10 PPU, ECLI:EU:C:2010:828.
[46] Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, 213-214.
[47] Adeline Gouttenoire, "Article II-84", 338.
[48] Helen Stalford and Mieke Schuurman, "Are we there yet? The Impact of the Lisbon Treaty on the EU Children's Rights Agenda", 391.

on this right and obliged to take measures that promote it. However, this right is made effective, and it seems clear that it cannot translate into the delegation of the responsibility to decide to the child. It is not intended to make the child decide, but only to involve him/her in decision-making.[49] In fact, it is a child's right and not a duty,[50] which should allow him or her to express themselves without constraints and only at their discretion. The relevance of their opinions to the decision will be determined in accordance with their age and maturity.

By allowing children to express their views, they are offered the possibility to influence the decisions that concern them by sharing their own view of the world. Therefore, the solution of the matter concerning the child will surely be most consistent with his or her best interests.

Paragraph 3 of Article 24 CFREU provides for the right of "every child" to "maintain a personal relationship and contact with both his or her parents", almost reproducing Article 9(3) of the Convention on the Rights of the Child that clearly provided inspiration.

The recognition of such right and its protection and promotion are particularly important in the European context due to the free movement of people and the growing number of transnational marriages and unions that give origin to children. Thus, in the European context, other standards recognise this same right, such as the Convention on Contact concerning Children, which in its Article 4(1) states that "*a child and his or her parents shall have the right to obtain and maintain regular contact with each other.*"[51]

By stating that *all children* are entitled to this right, Article 24(3) refers not only to children who are separated from one parent due to a situation of family breakdown, but also to children separated from their parents due to a measure of protection or an educational tutelage measure.[52]

Children separated from one or both parents have the right to maintain personal relations with both of them. This right includes, of course, the right to be in the company of their parents or one of them at his or her house, the right to meet each other, the right to establish contact by telephone, by letter, e-mail or other social networks and even the right to receive all relevant information about the lives of their parents,[53] which must therefore be respected by the Member States. However, it may subsequently be limited if those personal relationships and frequent contacts prove to be contrary to *the best interests of the child*, particularly when they endanger or if they can endanger other fundamental rights of the child [Article 24(3) final part].

The ECtHR[54] remains focused on the rights of adults, especially parents, despite increasingly referring to the UN Convention on the Rights of the Child

[49] Marta Santos Pais, "Child participation", 95.
[50] Marta Santos Pais, "Child participation", 95.
[51] Adeline Gouttenoire, "Article II-84", 340.
[52] Adeline Gouttenoire, "Article II-84", 340.
[53] See the definition of *family ties* in Article 2 of the Convention on Contact concerning Children.
[54] See, for example, the following Judgments: *Ciliz v. The* Netherlands, 11 July 2000, no. 29192/95; *Kuimov v. Russia*, 8 January 2009, no. 32147/04*; Nistor and Others v. Romania*, 20 0ctober 2020, no. 22039/03*; Zaunegger v. Germany*, 3 December 2009, no. 22028/04*; Sporer v. Austria*, 3 February 2011, no. 35637/03, regarding the right to personal relationships and frequent contact with one parent following a divorce or separation; *Dolhamre v. Sweden*, 8 June 2010, no. 67/04, regarding the right to personal relationships and regular contact with the parents of children cared for by the state protection system.

as a supporting instrument for the interpretation of the ECHR.[55] The explanation may arise from a still deficient European culture of the rights of the child, but also from the fact that the complaints presented in this regard[56] are complaints made by adults and not by children themselves or by adults on their behalf.[57] The same applies to the jurisdiction of the CJEU, which, in its recent judgment *Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEM)*, case C-34/09, despite mentioning the rights of the child and Article 24 of the Charter, ultimately decided that the refusal to grant a derivative right of residence to the father of children with Belgian nationality did not violate the rules of the Treaty, taking into account the adult's situation based on his status as a foreign citizen, provided that it respected the principle of proportionality. Thus, the right of children to a personal relationship with their father was almost disregarded.

Rosa Cândido Martins

[55] See, for example, Judgments ECtHR *Havelka et Autres c. République Tchèque*, 21 September 2007, no. 23499/06 and *Saviny v. Ukraine*, 18 March 2009, no. 39948/06.

[56] Most complaints lead back to complaints for violations of the right to respect for private and family life (Article 8 ECHR).

[57] EU Network of Independent Experts on Fundamental Rights, "Commentary of the Charter of Fundamental Rights of the European Union", European Commission DG Justice, Freedom and Security, June 2006, 214.

ARTICLE 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

1. *Context.* The CFREU organises the established rights around values – Dignity, Freedom, Equality, Solidarity. These are the values shared by the peoples of a European Union which as mentioned in the Preamble, puts "*the individual at the heart of its activities" by "establishing the citizenship (...) and by creating an area of freedom, security and justice.*"

Article 25 (rights of the elderly) is included in Title III of the Charter, which concerns "Equality", and its location is an element of great importance in determining the scope of that provision. Firstly, it is important to make a "negative" approach to the systematic insertion: why is Article 25 CFREU a part of Title III and not a part of Title IV, regarding "Solidarity"? In fact, this option may initially cause confusion since, in legal terms, the category of "Rights of the Elderly" has often been associated with a dimension of entitlement to benefits of the so-called "social rights", that stemmed initially from the retired worker status. Actually, references to the elderly began to appear in the international instruments related to workers' rights (right to a pension, the right to livelihood) – such as the Community Charter of the Fundamental Social Rights of Workers. At the national level, the fact that the relevant article of the CPR (72) on the elderly is integrated within the category of "economic, social and cultural rights and duties" is emblematic.

However, we consider that the CFREU's option should be applauded – placing the Article on the "rights of the elderly" within the Title on "Equality" and not on "Solidarity" avoids two difficulties. Firstly, it raises the issue of the rights of the elderly without dealing with the controversy about the "legal status" of social rights. This aim is incidentally already pursued by the organization of the Charter, centred on values, that avoided a division around the classic categories of fundamental rights, overcoming the separation between civil rights and social rights. Secondly, the placement rejects the idea that the problems presented by the condition of elderly people receive a full response through social provision, without, however, having to renounce the importance thereof, as will be analysed.

Thus the Charter seems to have adopted the idea that it is impossible to guarantee an effective protection of civil and political rights without also promoting social and economic rights.[1]

The connections of Article 25 CFREU are not confined to "Solidarity", but are also established with the values of "Freedom" and "Dignity", as a result of the reference to a "life of dignity and independence", as it shall be analysed. However, these dimensions are ancillary to the main goal – the protection of the status of

[1] Raffaele Bifulco, Marta Cartabia and Alfonso Celotto, "Introduzione", in *Commento alla Carta dei diritti fondamentali dell'Unione Europea*, *L'Europa dei Diritti*, eds. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: il Mulino, 2001), 16.

the elderly on an equal basis with other members of society. In fact, by including Article 25 within the Title of "Equality", the Charter emphasises the prohibition of discrimination on grounds of age ("ageism"), which shall inform the interpretation of this article. It is therefore also an embodiment of Article 21 CFREU which prohibits "*discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political opinions or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.*"

2. *Non-discrimination on grounds of age.* The recognition of age as a factor that may be the basis of discrimination situations is relatively new and it has not motivated statutory or case-law developments as significant as those regarding other factors such as gender or race, for example.

However, the general principle of equality on which this idea is based is part of Union law; it is found in the common constitutional traditions and it is expressed in various instruments of international law [cf. judgment (CJEU) *Mangold,* of 22 November 2005, Case C-144/04, paragraph 74, and Opinion of Advocate General Sharpston delivered on 30 November 2006 in *Lindorfer,* Case C-227/04 P, Recitals 52-58]. See for example, Articles 2 UDHR, 14 ECHR ("prohibition of discrimination"), or 2(1) and 26 ICCPR. Nevertheless, these instruments ignore age as a factor of potential discrimination in their non-restrictive lists.[2]

The legal system of the EU came to recognise that mere support for the general principle of equality could prove insufficient in several areas, such as that of discrimination on grounds of age. In fact, *"[a] classic formulation of the principle of equality, such as Aristotle's "treat like cases alike", leaves open the crucial question of which aspects should be considered relevant to equal treatment and which should not*" (Opinion of Advocate General Sharpston delivered on 22 May 2008 in the "*Bartsch*" case, Case C-427/06, Recital 44).

Article 13 TEU emerges in this context (included by the Treaty of Amsterdam as Article 6 A, an equivalent to Article 19 TFEU). With this provision, "age" became a specifically highlighted factor in the fight against discrimination by the Community authorities that, "within the limits of its powers" can "take the necessary steps" to address it. Article 13 TEU thus became the "legal basis for legislative action at the EC level to 'combat' various forms of unacceptable inequality of treatment – *inter alia*, discrimination on grounds of age" (cf. Opinion of Advocate General Sharpston, *cit.*, paragraph 49). It was as such that it became the basis for Directive 2000/78/EC of 27 November 2000 on employment and occupation – "*key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential*" (Recital 9).

Directive 2000/78/EC aims to "*lay down a general framework for combating discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*" (Article 1) (emphasis added), "*both the public and private sectors, including public bodies*" [Article 3(1)]. The "principle of equal treatment" in this context is understood as "*no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1*" [Article 2(1)]. However, the Directive opens the possibility to differences of treatment on grounds of age by considering them non-

[2] Although Article 25, § 1 of the UDHR refers to "old age", establishing a "right to a standard of living adequate for the health and well-being of himself and of their family", "in the event of (...) lack of livelihood."

discriminatory if, "*within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*", and lists examples of such differences in treatment [Article 6(1)].

The interpretation of the directive's rules (particularly Article 6) has been the subject of an affluent case-law of the CJEU and it is of great importance to define the contours of discrimination on grounds of age.

First, the *Mangold* judgment, which proclaimed the principle of non-discrimination on grounds of age and confirmed its status as a general principle of Community law (paragraph 75). Thus, according to this decision**,** any justification for discrimination on grounds of age must be subjected to a very tight control.

The *Mangold* judgment was heavily criticised (see, for example, the Opinion by Advocate General Mazák delivered on 15 February 2007 in the case *Palacios de la Villa*, case C-411/05, paragraphs 94-97, or the conclusions of Advocate General Geelhoed delivered on 16 March 2006, in the case *Chacón Navas*, case C-13/05, Recital 56).

However, the CJEU has not revised the judgment in *Mangold* that innovatively referred to this general principle of Community law.

Still, the case-law of the CJEU has defined discrimination on grounds of age as a special case compared to other grounds of discrimination [judgment *Age Concern England*, 5 March 2009, case C-388/07, paragraph 60], since "*age is not by its nature a 'suspect ground', at least not so much as for example race or sex*", it is a "fluid" criterion and therefore "*to establish where justifiable differentiations on the basis of age are ending and unjustifiable discrimination is starting*" "*may therefore be much more difficult" in the case of differentiation on grounds of age "than for example in the case of differentiation on grounds of sex*" (Opinion of Advocate-General Mazák delivered on 23 September 2008 in judgment *Age Concern England*, case C-388/07, paragraphs 74 and 76, and judgment *Palacios della Villa*, case C-411/05, paragraph 61). In fact, age is a "point on a scale," and discrimination on grounds of age can be graduated (Opinion of Advocate-General Jacobs, delivered on 27 October 2005, on the judgment *Lindorfer/Council*, case C-227/04 P, paragraphs 83 and 84, and Opinion of Advocate General Mazák on the judgment *Palacios de la Villa*, *cit.*, paragraph 61).

Finally, in order to determine the scope of the principle of non-discrimination on grounds of age in Article 25 CFREU, we have to take into account, in addition to Community law, its sources of reference, which the Preamble mentions in general and that the *Praesidium* of the Convention specifies with respect to Article 25, by pointing out as inspirational sources Article 23 of the revised European Social Charter, and numbers 24 and 25 of the Community Charter of Fundamental Social Rights of Workers ["Explanations Relating to the CFREU" (2007/C 303/02) published in the *OJEU*, C-303, on 14 December 2007 – which are the responsibility of the *Praesidium* of the Convention].

The rules of the Community Charter of the Fundamental Social Rights of Workers adopted the classical approach to the category of the elderly – they allocated resources (pension rights) and a social assistance guarantee – in line with the type of instrument and the "logic of protection of the Charter of 1989",[3] without pointing to the status of "citizenship" of the elderly or to the issues of "equality." However, Article

[3] Michel Borgetto and Robert Lafore, "Article II-85", *in Traité établissant une Constitution pour l'Europe. Commentaire article par article: Tome 2*, *La Charte des droits fondamentaux de l'Union*, ed. Laurence Burguogue-Larsen, Anne Levade and Fabrice Picod (Brussels: Bruylant, 2005), 351.

23 of the European Social Charter is one step ahead. Unlike previous arrangements, it may be considered that there is not the aforementioned classical approach to solidarity mechanisms as instruments that meet the needs of their beneficiaries, but rather that goals are set for services or social provisions (the elderly should "*remain full members of society for as long as possible*", and "*choose their life-style freely and lead independent lives in their familiar surroundings for as long as they wish and are able*", and, when they live in an institution there should be "*participation in decisions concerning living conditions in the institution*"). Ultimately, though not explicitly accepted, one can point to the construction of an equality status.

3. *Subjective scope.* Given the primary focus of Article 25 CFREU, its subjective scope should be defined, to ascertain the subjects targeted by this rule.

Firstly, in the title of the Article, the Charter presents "the rights of elderly."

Thus, in the first place, this category of persons is framed. In fact, contrary to children and young people, who, *grosso modo*, are identified as minors, the category does not appear to be restricted by an unambiguous criterion (age). Traditionally old age has been defined as a result of the official retirement ages, and this stage of life is connected to post-working age. Such a criterion cannot be indisputably invoked in this context: on the one hand, because there is no agreement between the EU's national legal systems on that age; on the other hand, because, even within each jurisdiction, there are situations of variable permanence in the labour market.

However, the disconnection from retirement age in the definition of the elderly as a category leads to characterisation factors that are not necessarily linked to old age, or which appear only in older stages. In fact, poor health, dependence of different kinds, physical or mental disability, economic precariousness or family abandonment are situations of particular vulnerability that are associated with old age and that enhance its classification as a risk group, particularly with regard to the violation of fundamental rights. Nevertheless, it is necessary to bear in mind the danger of its identification with the category of "elderly", which can in itself motivate discriminatory behaviours.

Apart from these issues, others need to be considered. Even though the title of the Article refers to "rights of the elderly", these are not the subject of the sentence of Article 25. In fact, the Union is the one responsible for recognizing and respecting such rights, similarly to what happens to the rights of persons with disabilities (Article 26 CFREU). The same does not apply regarding children, who are the subjects of Article 24 CFREU. Thus, the recognition of rights for their holders (the elderly) involves the mediation of the Union, which is committed to promoting them, but within the limits of its capacity to act.[4] This means that the EU is responsible for the effective protection of the elderly as holders of fundamental rights. Nevertheless, the exact extent of the responsibility of the Union must be ascertained. It should be noted that there are no formulas such as "The Union guarantees" or "the elderly are entitled to..." a life of dignity and independence, which would imply an activation duty of the public powers so as to ensure the effectiveness of the protection of such rights.[5] But the Charter does not go that far and it could not do it without possibly interfering with the Member States' sovereign powers.[6] Incidentally, one should

[4] Michel Borgetto and Robert Lafore, *op. cit.*, 346.

[5] Pier Francesco Lotito, in *Commento alla Carta dei diritti fondamentali dell'Unione Europea*, *L'Europa dei Diritti*, *op. cit.*, 201.

[6] *Idem*.

note the absence of any reference to States, as well as to other elements that should provide responses to issues raised by aging, such as family or civil society.

4. *Content.* The type of protection that is provided to the elderly by Article 25 CFREU leads back to the enunciation of those rights that concern everyone, but that are here presented as particularly relevant (or as particularly threatened) in the context of the elderly.

Firstly, Article 25 CFREU enshrines the "right to lead a life of dignity and independence." The first dimension of this right had already been referred to in general in Article 1 CFREU, which mentions the dignity of the human being. Regarding "independence", it can be considered that it is rooted in the "right to liberty" enclosed in Article 6 CFREU.

The provision in question also includes the right to "participate in social and cultural life", regarding which the *Praesidium* of the Convention ("Explanations Relating to the CFREU", *cit.)* clarifies that it includes participation in political life. Thus it covers the broad spectrum of life in society.

The restrained nature of Article 25 CFREU could lead to the conclusion that this provision would not ensure effective protection of the rights it sets out, as it does so in a vague way. However, it is possible to determine the true scope of this minimalist text, assisted by the sources indicated in the Preamble of the Charter and especially the information given to us by the *Praesidium* of the Convention ("Explanations Relating to the CFREU", *cit.)* on the provisions that inspired Article 25 CFREU – Article 23 of the European Social Charter and Articles 24 and 25 of the Community Charter of Fundamental Social Rights of Workers.

Each dimension of Article 25 CFREU should be considered in this analysis.

Firstly, attention should be drawn to the prohibition of discrimination on grounds of age arising from the systematic element, which has been analysed above and which will illuminate the remaining dimensions of the article.

Secondly, the statement refers to the right of the elderly to a decent and independent existence. This right depends on the creation of the conditions that enable this way of life. Whilst that does not result directly from the text of the Article, the connection established by the Convention *Praesidium* in its inspiring texts, which fundamentally enshrine rights to benefits, can sustain that this aspect is also advocated in the article of the CFREU. Therefore, it is not limited to an abstract proclamation (and recognition) of rights. In fact, Article 23 of the European Social Charter foresees the "right of elderly persons to social protection", particularly "to play an active part in public, social and cultural life" and "choose their lifestyle freely and to lead independent lives in their familiar surroundings." And formerly Articles 24 and 25 of the Community Charter of Fundamental Social Rights of Workers proclaimed that *"[e]very worker of the European Community must, at the time of retirement, be able to enjoy resources affording him or her a decent standard of living"* and that *"[e]very person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs."* The dimension of entitlement to social benefits with regard to the rights of the elderly had, incidentally, also been clearly underlined by the General Assembly of the UN, in the "United Nations Principles for the Older Persons" (Resolution 46/91 of 16 December 1991).

Thus, a "dignified existence" cannot fail to be associated with the guarantee of a minimum level of resources. The connection to the idea of "dignity" could already

be found in Article 24 of the Community Charter of Fundamental Social Rights of Workers, which combined the resources (of a pension) of workers to "*a decent standard of living*", and in Article 23(a) of the European Social Charter, that connects the "adequate resources" to be able to "lead a *decent* life" (emphasis added), allowing the elderly to remain full members of society for as long as possible. Nevertheless, the CJEU in *LM v European Commission* (Case T-560/15 P, of 16 July 2016) considered that Article 25 CFREU did not contain any provision that would bestow a right to a minimum amount of the Italian *pensione di reversibilità* (survival pension) in favour of the divorced spouse of a deceased official.

Article 25 CFREU does not expressly refer to the "right to a pension" or to the "right to care" by the community, in the case of lack of resources, but this absence can be remedied by the interpretation of this provision. It must be borne in mind that in the CFREU itself the right to the pension can be gleaned from Article 34, which states that the "*Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as (...) old age (...) in accordance with the rules laid down by Union law and national laws and practices*" and "*the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.*" However, in *Leïmonia Sotiropoulou and Others v. Council of the European Union*, the CJEU (Case T-531/14, paragraph 88) has considered that the right to access to social security provisions and to social services may not be "absolute prerogatives".

The other aspect associated with a "life of dignity" refers to the need for people "*to remain full members of society for as long as possible by means of: (...) b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them*" (Article 23 of the European Social Charter). Among these services, there is emphasis on "health care", "to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness" ("United Nations Principles for Older Persons"). Taking into account the possible vulnerability of the older person as a victim of crime, it is necessary to include the right to "be free of exploitation and physical or mental abuse" *(idem).*

The right to an "independent existence" implies, of course, the "right of elderly persons to choose their lifestyle freely" (Article 23 of the European Social Charter), which requires that old age is not associated with diminished capacity (or incapacitation). This idea is even reinforced by the paradigm shift operated on an international level by the United Nations Convention of the Rights of Persons with Disabilities (UNCPRD), whose Article 12 proclaimed the "*universal capacity paradigm*" and the recognition that even persons with disabilities "*enjoy legal capacity on an equal basis with others in all aspects of life.*"

One of the most important aspects of "lifestyle" is the relationship of the older person with the world of employment. It should be noted that the "United Nations Principles for Older Persons" include within the scope of the Independence Principle the entry and exit of the labour market and education, training and retraining.

Concerning employment and work, prominence should be given to the aforementioned Directive 2000/78/EC and the CJEU's case-law associated therewith. In this context, the *Mangold* judgment classified the benefit of employment stability as a "*major element in the protection of workers*" (paragraph 64). The CJEU case-law, however, has not been so strict as to the permanence in the labour market, since both in Judgment CJEU *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH*, of 12 October 2010, C-45/09 and in judgment CJEU *Fuchs and Köhler* [*Gerhard Fuchs*

C-159/10 and *Peter Köhler* (C-160/10) *v. Land Hessen*] compulsory retirement age was considered justified age discrimination.

Another dimension associated with an "independent existence" refers to the permanence of the elderly in their familiar surroundings for as long as they wish and to the extent that their physical and psychological conditions allow them to do so (cf. "The United Nations Principles for Older Persons" on independence). To this end, as it clearly derives from Article 23 of the European Social Charter, necessary measures include the "*provision of housing suited to their needs and state of health or of adequate support for adapting their housing*" and "*the health care and the services necessitated by their state.*" Outside that context, independence is still important even in the case of institutional care, which is guaranteed in particular ensuring "*elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution*" (the dimension of dignity is referred to here, "while respecting their privacy"). The reality of life in an institution had also already been the subject of attention of "The United Nations Principles for Older Persons", but this time it was associated with Assistance.

Finally, Article 25 CFREU refers to a right of older people to participate in social and cultural life (including politics). This provision does not refer to the allocation of resources, which is instrumental to achieve this end. This association is present in Article 23, paragraph *a)* of the European Social Charter, by enshrining the need to "*enable elderly persons to remain full members of society for as long as possible, by means of: a) adequate resources enabling them (...) to play an active part in public, social and cultural life*."

The right to participate in political life, which the *Praesidium* of the Convention ("Explanations Relating to the CFREU", *cit.)* clarified as being included in this context, means that the older person, should be able to exercise the civil rights that this participation involves, including the right to vote or the right to stand for elections. Indeed such right would already result from the principle of democracy on which, as mentioned in the Preamble to the Charter, the EU is founded.[7]

5. *Conclusion*. In the Preamble to the Charter it is argued that the strengthening of fundamental rights must be made "*in the light of changes in society, social progress and scientific and technological developments*", which shows a conception of the fundamental rights that may be classified as evolutionary.[8]

Such a conception is particularly important in the context of the rights of the elderly. In fact, the current reality of ageing populations in European society is a historically unprecedented phenomenon and one that continues to evolve, raising original issues in social, economic, cultural, and thus also legal terms.

In such a context, it is particularly relevant that the Charter has recognized that the category of "elderly" should be given a special protection, but it is also significant that the listed rights are common to the general population – which refers to a position of material equality.

The protection granted in these terms represents the evolution brought by Article 25 CFREU in relation to its inspiring rules (Article 23 of the European Social Charter and the Articles 24 and 25 of the Community Charter of Fundamental Social Rights of Workers).

---

[7] Michel Borgetto and Robert Lafore, *ob. cit*., 347.

[8] Anne Levade, "Preambule", in *Traité établissant une Constitution pour l'Europe. Commentaire article par article: Tome 2, La Charte des droits fondamentaux de l'Union*, *op. cit.*, 17.

The CFREU moved away from a characterization of the "rights of older persons" only as "social rights". Thus, while the densification of the content of Article 25 is inspired by those clauses, the provision of the Charter is not confined merely to the reception of rights enshrined therein. It goes further, through the completion of the general principle of equality enshrined in the Charter (which, as we have pointed out, results from the systematic insertion of Article 25 in the title of equality) and its relationship with those dimensions.

Finally, Article 25 CFREU also represents an evolution in recognising the rights of the elderly because the Charter itself, after a troubled history, has become, with the Treaty of Lisbon, an international instrument with binding force.

Paula Távora Vítor

ARTICLE 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

1. The construction of a right of persons with disabilities in the EU is the result of a long evolution, based on instruments such as the ECHR, the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.

However, the expression the right has acquired in the context of the CFREU allows it to be elevated to the level of the equality rights, thereby included in the set of categories requiring protection from prohibited discrimination.

Therefore, Article 21 of the CFREU includes disability in the restricted set of factors due to which discrimination is expressly forbidden. These factors are not exclusive – the list is not exhaustive – but their identification signals that, from the legislator's perspective, they are potentially more exposed to negative discrimination and/or frequent discrimination.[1] This norm presents a clear similarity with the provisions in Article 13(2) of the CPR.

According to the provisions in Article 21(1) "*any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*"

2. The inclusion of Article 26 of the CFREU in Chapter III ("Equality") – and not, notably, in the Chapter IV (Solidarity) – highlights a deliberate and unequivocal decision to place the rights of persons with disabilities in an area of *equal integration* and not in an *assistance support* framework for people "disadvantaged" by their disabilities.

In this way, the heading of Article 26 (*Integration of persons with disabilities*) is also illustrative of purpose; promoting what the Argentinian constitutional law expert Carlos Santiago called the "autonomy of the less autonomous". Autonomy is deliberately set as the scope of the measures safeguarded in the CFREU, seeking the integration of persons with disabilities.

Autonomy and social and professional integration, on one hand, and the participation in the life of the community, on the other, constitute the values or objectives to which the CFREU assigns legitimacy, recognising in the subjective sphere of each person with a disability the right to a different treatment, which is special or even positively discriminatory. Therefore, the Charter acknowledges the right – the subjective right – to *benefit* from specific measures. Naturally, the nature of those measures or their particular content is not specified, only the general direction. Given the teleology of the precept, *every measure* that seeks those objectives

[1] Jorge Reis Novais, *Os princípios constitucionais estruturantes da República Portuguesa* (Coimbra: Coimbra Editora, 2004), 113.

(autonomy, integration, participation) is legitimate in light of the Charter and, moreover, grants, so to speak, a subjective right to benefit from them.

In this respect, the Charter assumes, up to a certain point, a relative proximity with the rights of the elderly, protected by Article 25, since here the wording also refers to a concept analogous to the concept of autonomy ("independence") and the objective to "participate in social and cultural life" is also recognised as legitimate and worthy of protection. If we compare Article 26 with the precepts of the Charter that share some similarities (starting with the ones included in the same Chapter III) we may verify that, when it comes to women (Article 23) or children (Article 24), there is less of an ostensible overlap.

There is, nevertheless, an approach common to many potentially discrimination-generating situations (gender, age, disability) that legitimises a specific protection – that, in the present case, is assumed as a specific protection – a shared substantiation of subjective legal positions. It starts with the already mentioned inclusion in the same Chapter of the Charter, devoted to "Equality".

However, under the cloak of this generic principle – which has clear parallels, as pointed out, with Article 13(2) of the CPR, as an example – from the semantic and normative point of view the more evident parallel is drawn between the elderly and the persons with disabilities, which results from a conviction, somewhat questionable, according to which both raise similar "problems" and demand analogous answers in the face of the imperatives of equality and non-discrimination. Notwithstanding the fact that the precepts display some dissimilarities – "independence" of the elderly vs "autonomy" of the disabled; "ageism", on one hand, and "ableism", on the other – these are discriminatory attitudes and a more profound and visible difference in conceptual and normative treatment in the CFREU would be justified.

3. In any case, some advances in the CFREU deserve to be commended; even when these represent confrontation with juridical instruments that inspired the Charter (as expressly assumed by the *Praesidium* of the Convention that drafted the CFREU in the Explanations Relating to the CFREU 2007/C 303/2 in OJ, C 303/14 of 14 of December 2007). Evidencing an evolution that is also verifiable in the CPR, the CFREU uses the expression "persons with disabilities", in contrast to the wording in Article 15 of the European Social Charter, where reference was made to "physically or mentally disabled persons" (version from Resolution 21/91 of the Assembly of the Republic, prior, therefore, to the Social Charter's revision, in 1996), or in the Community Charter of the Fundamental Social Rights of Workers, which refers to "disabled persons" in Article 26.

The concept of a "person with disability", instead of "disabled" *prima facie* points to a personalist conception, yet open, of the subject of rights and, more than that, marks that disability, irrespective of its nature or severity, is not an "essential" or "defining" characteristic of the human person in the singularity of its evolvement or of its freedom to develop. Moreover, it opens more space to a plurality of concepts and, simultaneously, to the acknowledgment of the particular and distinct character of each disability and the limitations that, on account of such, arise for the affirmation of the autonomy of the right-holder. As underlined a while ago by the Council of Europe: "*Persons with disabilities do not constitute an uniform group of individuals with the same need of support.*"[2]

[2] Council of Europe, *A Coherent Policy for the Rehabilitation of Disabled People* (Lisbon, 1994), 10.

4. The choice of the "medical" or "social" model of disability has been controversial. The medical model, outdated to a large extent, originates in the notion that a disability is a "problem" that must be medically cured or solved. The citizen with a disability should, therefore, through medical intervention, make himself or herself fit into the environment. By contrast, the social model is based on a vision according to which the environment has to adapt in order to eliminate all disturbing barriers to the full integration of the citizen with disability.

The medical or individual model tends to focus on the disability of the person, on the medical or clinical diagnosis, on the individual difficulties, and perceives the person as a problem that needs solving or healing, so the answers are based on medical or psychological rehabilitation. On the other hand, the social model focuses on the social context, on the relationship between the individual and society, on the social barriers. It identifies discrimination, exclusion and prejudice as the main problems, presenting as the solution the end of discrimination, segregation and the elimination of all barriers. Today we are able to identify many social models, with different approaches, such as the British social model, the relational approach of the Nordic countries and the North American approach to minority groups.[3]

Therefore, the inclusion of Article 26 in Chapter III, devoted to "Equality", is to be welcomed. In fact, inclusion only within a "supporting", "charitable" or "solidarity" conception would be a superseded approach, evidencing the outmoded "medical model" of approaching disability, instead of the "social model",[4] which is now more favoured, albeit with nuances and variations. Nonetheless, a perspective that seeks to promote the "integration" of persons with disabilities, as set out in the CFREU, raises its own issues considering the current thinking on "identity politics"; proclaiming the need to preserve the minority and unique condition of persons with disabilities (minority approach).[5] Nevertheless, although this approach is in no way straightforward – contrasting as it does with a "universalist approach" –, the path taken by the CFREU is, in this case, the most consensual and appropriate one.

The CFREU departs from the controversy found in some European case-law, such as the *Chacón Navas* judgment, which is many times interpreted as an appeal to the "medical model" of disability.[6] This interpretation results from a specific passage in the decision that defines "disability" as "*a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.*" According to this passage of the judgment, the limitation is within the person and not in the social organisation, therefore sustaining a vision that is closer to the "medical model".[7]

5. We may question why the CFREU did not follow the example of one of its sources, the Community Charter of the Fundamental Social Rights of Workers,

---

[3] Oddný Mjöll Arnardóttir and Gerard Quinn, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Leiden: Martinus Nijhoff Publishers, 2009), 9-10.
[4] António de Araújo, *Cidadãos portadores de deficiência (o seu lugar na Constituição da República)*, (Coimbra: Coimbra Editora, 2001), 120 et seq.
[5] António de Araújo, *Cidadãos portadores de deficiência (o seu lugar na Constituição da República)*, 124-127.
[6] Judgment *Sonia Chacón Navas v. Eurest Colectividades SA*, 11 July 2006, Case C-13/05, ECLI:EU:C:2006:456.
[7] Lisa Waddington, "A new era in human rights protection in the European Community: the implications the United Nations' Convention on the Rights of Persons with Disabilities for the European Community", *Maastricht Faculty of Law*, Working Paper no. 4 (2007): 17. For a critique on this decision, see Lisa Waddington, "Case C-13/05, Chacón Navas v. Eurest Colectividades SA, judgment of the Grand Chamber of 11 July 2006, nyr", *Common Market Law Review*, 2007, vol. 44, issue 2 (2007): 487-499.

which in the 2nd paragraph of its Article 26 enunciates specific forms of action towards the integration of persons with disabilities: professional training, ergonomics, accessibility, mobility, means of transport and housing. As already mentioned, it is quite understandable, and even beneficial, that the CFREU – just like any other legal instrument of the same nature – does not contain a catalogue of measures aimed at promoting autonomy, integration, and community participation. A different matter, clearly, results from the sample list of domains, spaces, or places that, generically (namely physical disability and, within it, motor disability) seem more relevant to an adequate integration and promotion of the autonomy of persons with disabilities. It would certainly be an enunciation of a strongly rhetorical nature, but not void of juridical effectiveness – the implementation of the Charter through case-law –, so its absence in the CFREU turns out to have some significance. Moreover, arguably it would make sense for the Charter, regardless of its somewhat "minimalist" and healthily low "regulatory" content, to have welcomed a similar wording to paragraph 6 of the Declaration on the Rights of Disabled Persons, approved by the Resolution 3447 of the General Assembly of the UN in 9 of December 1975, that states: "*Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthetic appliances, to medical and social rehabilitation, education, vocational training, aid counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration and reintegration.*"

There is, however, no doubt that the rights of persons with disabilities carry not only a discrimination prohibition – liberal reading of the principle of equality – but also, and above all, the obligation of differentiation. Therefore, as mentioned before, although the CFREU does not include a list of measures to promote equality, there is a clear onus on the State to adjust its policies to allow for the integration of persons with disabilities. In this context, there is an obligation of the State to adopt relevant laws, to adopt awareness-raising campaigns, to build or adapt infrastructures, to train specialised personnel to accompany these persons, to promote employability, to provide services of support and assistance, to promote participation in society and encourage the participation of the associations representing persons with disabilities in devising public policy.[8]

6. The option not to mention *expressis verbis* the principle of equal opportunity is particularly justified. It is a fact that this reference was made, in the community framework, in the Council's Resolutions of 20 of December 1996 and, more recently, of 17 of June 1999. These acts have a substantially distinct reach to that of the CFREU, reflecting an action strategy, developed at a community level, that emerged right after the Resolution adopted by the UN in 1993 entitled "Standard Rules on the Equalization of Opportunities for Persons with Disabilities" and took shape through a communication of the Commission from July 1996 [COM/96/0406]. The convocation of the principle of equal opportunities does not apply only to action strategies, having already underpinned judicial decisions on the matter, such as *Sentencia* 269/1994 from the Spanish Constitutional Court, as well as finding a developed elaboration in texts such as Resolution 48/96, adopted by the UN (number 24 explicitly advances a notion of "equalization of opportunities"), Article 3(e) of the Convention on the Rights of Persons with Disabilities, adopted by the UN in 2006

[8] Frederic Megret, "The Disabilities Convention: human rights of persons with disabilities or disability rights?", *Human Rights Quarterly*, vol. 30 (2008): 13.

or, amongst others, in the form of "equivalence of opportunities", Article 74(2)(h) of the Law of Basis to the Prevention and Rehabilitation and Integration of Persons with Disabilities (Law 9/89, May 2nd) and, already expressly adopting the expression "equality of opportunities", Article 3(b) from the most recent Legal Regime on the Prevention, Qualification, Rehabilitation and Participation of the Person with Disability (Law 38/2004, August 18th).

The omission, in the CFREU, of a reference to the principle of equal opportunity does not represent a shortcoming, nor does it imply a lesser protection of the fundamental rights of the persons with disabilities. Moreover, the principle of non-discrimination – which, as we know, the CFREU has not refrained from setting out in its Article 21(1) – possesses a sufficient density to allow an adequate level of safeguard, given that this principle, according to the case-law of the ECtHR, as confirmed in the case *Thlimmenos v. Greece*, of 6 of April 2000, implies not only the interdiction of negative discrimination but also the adoption of a different (positive) treatment whenever the condition of the subject justifies and so requires.

In this context, the set of measures intended to promote the integration of persons with disabilities in the labour market gains a special projection. It has been a while since the EU devoted attention to these measures, establishing in Directive 2000/78/EC, of 27 of November 2000 a general framework on equal treatment in employment and professional activity. According to the terms of this important legislative instrument, in order to guarantee the respect of the principle of equal treatment regarding persons with disabilities, reasonable adaptations are foreseen. This means that an employer may take adequate measures, according to the needs of a specific situation, to ensure access to a job, the ability to perform, or to progress in it, or to benefit from training.

The *Coleman* case (C-306/06, *Coleman v. Attridge Law and Steve Law*)[9] was very significant in interpreting the scope of application of the Directive and, in general, the rights of the persons with disabilities. This case questioned whether the right to labour protection established in the Directive could only be invoked by the person with the disability, or whether it could also be invoked by the family members who are responsible for the person with a disability. Specifically in the case under analysis, a mother, who was responsible for a son with a disability, worked in a law firm with headquarters in London. The mother ended up quitting her job and claimed that the termination of the labour bond had been caused by the workplace discrimination she had suffered, due to the support she had to provide for her son.

According to the opinion delivered by the Advocate General Miguel Poiares Maduro in the case under analysis, *"if someone is the object of discrimination because of any one of the characteristics listed in Article 1 then she can avail herself of the protection of the Directive even if she does not possess one of them herself. It is not necessary for someone who is the object of discrimination to have been mistreated on account of "her disability". It is enough if she was mistreated on account of "disability". Thus, one can be a victim of unlawful discrimination on the ground of disability under the Directive without being disabled oneself."*[10]

The Court concluded that the Directive must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. "*When an employer treats an employee who*

[9] ECLI:EU:C:2008:415.

[10] Opinion of Advocate General Poiares Maduro, delivered on 31 January 2008, *Coleman v. Attridge Law and Steve Law*, Case C-303/06, ECLI:EU:C:2008:61, para. 23.

is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a)."

The Convention on the Rights of Persons with Disabilities also provides in Article 27 the right to work and employment, whereby persons with disabilities must be able to "*work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.*"

In the Portuguese legal system, the right to work and employment for persons with disabilities was expressly established in Law 38/2004, already mentioned, which defines the general grounds of the legal regime of prevention, qualification, rehabilitation and participation of the person with a disability. In accordance with the provisions of Article 26, it is up to the State to adopt the specific measures necessary to ensure the right of access to employment, to work, to professional orientation, training, qualification and rehabilitation and the adequacy of the working conditions of the person with a disability. The State must foster and support the resources required for self-employment, telework, part-time work and work from home.

This regime goes further and, in Article 28, establishes work quotas. Therefore, companies must, considering their dimension, hire persons with disabilities through an employment contract or a service agreement, representing up to 2% of the total number of employees. The Public Administration must ensure that at least 5% of its employees are persons with disabilities. More recently, transposing the above-mentioned Directive 2000/78/EC, Law 3/2001, of February 15th was published, which prohibits any discrimination in the access and exercise of self-employment.

However, it is clear that simply providing for the right to work for people with disabilities, even when accompanied by enforcement rules, is insufficient if it is not reinforced through practical and specific measures, providing guidance on how to implement these provisions, ensuring financial support to employers and promoting awareness campaigns for employers, the general public and people with disabilities themselves.[11]

7. Without prejudice to the scope of protection of the rights enshrined for people with disabilities, many of them being already well-known to us from other instruments for the protection of fundamental rights, we can presently refer to a "plus" set of rights that have arisen in the exclusive context of people with disabilities.[12]

Those are the rights of participation and integration. These rights carry with them the idea of full participation of persons with disabilities in the community, in the full exercise of their rights of citizenship. Similarly, integration requires tackling all forms of social exclusion due to disability.

These rights imply for the State the obligation to promote civic and political participation without any restrictions, as well as participation in cultural life, in leisure and in sports. In the same way, although perhaps not yet elevated to the level

[11] Lisa Waddington, "A European right to employment for disabled people?", in *Human Rights and Disabled Persons. Essays and relevant human rights instruments*, ed. Theresia Degener and Yolan Koster-Dreese (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995), 113.

[12] Frederic Megret, "The Disabilities Convention: human rights of persons with disabilities or disability rights?", 14.

of right, we can find the concept of autonomy. In order to foster this concept, the State should promote the necessary measures so that people with disabilities can, as far as possible, rely on themselves for their daily tasks, without depending on the help of others.[13]

8. The rights of persons with disabilities, while being human rights, are inherent to the condition of all human beings, regardless of their nationality or even of their status under the respective laws of the host State. Hence, today, it is a fundamental right held by each human person and not just citizens. Modern constitutions, which elevate the dignity of the human person as the ultimate foundation of fundamental rights, cannot refuse these rights to foreigners simply because they do not have the status of citizens. The quality of being human surpasses citizenship as the criterion for attributing fundamental rights.[14]

This does not mean that the entitlement to these rights, while they represent a "plus" in relation to the generality of international instruments of fundamental rights' protection, is disconnected from a qualification. However, the immigration status of the right-holder is not relevant to this qualification, but rather only his or her specific situation before society, resulting from the verification of a disability that might be his or hers or that may be relevant for someone with whom they maintain a personal or familial relationship, which results in discrimination or a lower level of social integration.

António Araújo & Gonçalo Saraiva Matias

[13] Frederic Megret, "The Disabilities Convention: human rights of persons with disabilities or disability rights?", 16-18.

[14] Gonçalo Saraiva Matias and Patrícia Fragoso Martins, *A Convenção internacional sobre a proteção dos direitos de todos os trabalhadores migrantes e dos membros das suas famílias: perspetivas e paradoxos nacionais e internacionais em matéria de imigração* (Lisbon: Alto-Comissariado para a Imigração e Diálogo Intercultural, 2007), 15.

ARTICLE 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

1. Article 27 of the CFREU has been the subject of divergent opinions: it may be viewed, as is often the case, from a "glass half empty" perspective, or from a "glass half full" perspective.

In any case, behind Article 27 we find more than three decades of history of workers' "participation" (in a broad sense) in the management of companies in EU law. For some authors, this history began with the 1974 social action programme and the 1975 green paper on workers' participation.[1] On this subject, legal writing[2] distinguishes between three stages of a long and complex evolution: the first stage, when the EU (at that time, the EEC) referred to participation in the management of companies it was, mostly, referring to the traditional or strong conception of participation, characteristic of German law, albeit also present in other legal frameworks such as the Swedish and Dutch. However, attempts to implement the German model of participation in other systems, particularly ones where the conception was completely foreign, entirely failed. Thus, during this first stage it was only possible, realistically, to achieve the implementation of information and consultation mechanisms, primarily related to very specific situations and issues and mainly related to the respective company's vicissitudes. As an example, we have Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, and Directive 77/187/EEC, the first directive relating to the transference of companies. The same could be said with regard to Directive 89/391/EEC of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers in the workplace. All these directives recognise the rights of the workers and their representatives to information or consultation on issues or specific events. In the directive on the introduction of measures to encourage improvements in the safety and health in the workplace, the information and consultation are configured as periodical realities, that might create, as highlighted by Anna Alaimo,[3] a continuous stream of knowledge, a regular contact with the workers and their representatives – in its preamble, this directive refers not only to consultation, but also to balanced participation of the workers' representatives. The second stage between 1989 and 2002,

---

[1] See Paola Olivelli, "La partecipazione dei lavoratori tra diritto comunitario e ordinamento italiano", *Diritto delle Relazioni Industriali*, no. 1 (2010): 37 *et seq*., 40.

[2] See Manfred Weiss, "La partecipazione dei lavoratori nella Comunità europea", *Diritto delle Relazioni Industriali*, vol. 14, no. 1 (2004): 153 *et seq*., and Anna Alaimo, "Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione", in *Diritto del Lavoro e Diritto Sociale Europeo*, ed. Anna Alaimo, Mariagrazia Militello, Silvana Sciarra, Maria Luisa Vallauri (Torino: Giappichelli, 2009), 127 *et seq.*

[3] Anna Alaimo, "Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione", 130.

was marked by the growing concern with workers' representation in transnational companies, culminating with the Framework Directive on the right to information, which represented a qualitative leap. Belonging to this second stage, we have Directives 94/45/EC of 22 September 1994, 2001/86/EC, of 8 October 2001, and even after 2002, Directive 2003/72/EC, of 22 July 2003. Among these directives, we would like to highlight the European Works Council Directive – widely considered in legal writings to be one of the most effective.[4] Without it, the 2001 Directive on the involvement of employees in the European Company, and the 2002 Directive on informing and consulting workers in the European Community, would not exist. It is curious to note that the Directive on European Works Council is regarded as a success, even if statistical data shows that in 2008 only one-third of companies or groups comprehended within the scope of the directive had European Works Councils (EWCs). Likewise, the directive on the involvement of employees in the European Company is, at the very least, ambiguous; there are plenty of authors who believe that it does not aim, strictly speaking, to reinforce the participation of workers, but only to prevent the adoption of this corporate form as a pretext to reduce the participation of workers in those companies where under the relevant national law they already enjoy a significant level of participation.[5]

The third stage corresponds to the recognition of the rights to information and consultation as fundamental social rights, under Article 27 of the CFREU, and thereby a true constitutionalisation of these rights. This stage begins with Directive 2002/14/EC of 11 March 2002, which, in fact, requires a rereading of all previous directives featuring these rights. In the words of Anna Alaimo, we are dealing with a qualitative leap because now "*the intervention of the community does not stop at regulating involvement of workers in transnational companies, but also aims to cover the system of relations between company/workers at the level of purely national manufacturing.*"[6] We can clearly perceive Article 27 in a "glass half empty" perspective, stressing that the concept of workers' participation was continually and progressively diluted, until, strictly speaking, true participation was abandoned, leaving in its place the emergence of the milder and

[4] In its decisions, the CJEU opted for a teleological interpretation of Directive 94/45/EC so as to maximise its useful effect: for example, in Judgments *Bofrost*, 29 March 2001, Case C-62/99, ECLI:EU:C:2001:188, and *ADS*, 15 July 2004, Case C-349/01, ECLI:EU:C:2004:440. In the first case, the Court stated that the obligation to supply information burdens every company in the group and is a logical and necessary step for the creation of a European Works Council. The fact that one company belongs to a group cannot serve as an impediment to the obligations to supply information concerning individual companies. In the second case, the Court stated that to guarantee the efficacy of the Directive, the right to receive information from the central management also entails the obligation to supply information, even if indirectly, through the member-company from which the workers request the information in the first place. Therefore, the obligation passes on to the controlled companies that also have the obligation to supply the information in their possession or that they have the means to obtain (see also the decision in *Kühne & Nagel*, 13 January 2004, C-440/00, ECLI:EU:C:2004:16). For a critical opinion of these decisions see Vincenzo Putrignano, "La partecipazione ed il coinvolgimento dei lavoratori nei gruppi: gli orientamenti comunitari", *Il Diritto del Mercato del Lavoro*, no. 3 (2004): 847 *et seq*, 849, where the author criticises the Court, stating that, according to this interpretation, it is impossible to understand why the Directive identifies the direct responsibility for the supplying of information.

[5] Thus, as an example, in Vincenzo Putrignano, "La partecipazione ed il coinvolgimento dei lavoratori nei gruppi: gli orientamenti comunitari", 857: *"the Directive's policy is not to generalise the participative practices, in the progressive spirit of extending participation rights, it is only to avoid that the new social model might serve as method to escape the current obligations."*

[6] Anna Alaimo, "Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione", 170.

more limited rights to information and consultation.[7] From the other perspective – that of the "glass half full" – we may argue that the recognition of said rights as fundamental social rights represents a significative breakthrough and also symbolises the comprehension of a company as a social reality and not only an economic one.

2. From all the evolution we have observed, it is possible to draw some conclusions. The first one, already highlighted by LUISA GALANTINO,[8] views the EU's vision of industrial relations as much more participative then conflictual. Furthermore, as also pointed out by GIANNI ARRIGO, the recognition of these rights to information and consultation is not, unlike the situation with workers' rights in national jurisdictions, a direct consequence of the demands of said workers. According to ARRIGO, these rights are based on different principles than the ones that traditionally fuelled workers' and unions' demands and arise as a product of the mediation of the Member States.[9] Significantly, participation rights (in a broad sense) were formally recognised at a EU level before rights of association and collective bargaining, not to mention the right to strike action. The genesis of participation rights is quite ambiguous, which leads the same author to refer to the Community model of participation or, more accurately, the involvement of workers,[10] as being similar to a centaur: half expression of social rights, half economic or corporate right; half existing right and half eternal dream; half binding norms and half soft law. It transpires, even from the preamble of the Framework Directive on information, that the rights[11] to information and consultation are, from the perspective of the community legislator, a "*prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work*" (Recital 9). In recital 7 of the same Directive we read that the reinforcement of the social dialogue and of the trust relationships inside the company will allow greater flexibility in the work organisation and "*make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.*" In essence, while limitations, at least procedural ones, are being introduced to the employer's power, there is a belief that this dialogue model, by mitigating conflict, is more efficient, to the point that in some matters it is viewed as a true alternative to

---

[7] Thus, as an example, in Vincenzo Putrignano, "La partecipazione ed il coinvolgimento dei lavoratori nei gruppi: gli orientamenti comunitari", 858, the author speaks of the "low" protection level of the Directive.

[8] *Apud* Vincenzo Putrignano, "La partecipazione ed il coinvolgimento dei lavoratori nei gruppi: gli orientamenti comunitari", 849.

[9] Gianni Arrigo, "La partecipazione dei lavoratori nel diritto comunitário tra armonizzazione normativa e competizione di modelli", *Il Diritto del Lavoro*, part I (2000): 381 *et seq.*, 381: more than the result of the workers' revindications, the notion and discipline of participation in the Community are the result of Member States' mediation, "*mediation that channels the theoretical and social foundations of participation in the cold estuary of the Community's objectives.*"

[10] Nowadays the expression "involvement of workers/employees" is preferred, as it includes the mechanisms of information, consultation and participation [see, as an example, Article 2, point *h)*, of the Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees]. Article 2, point *k)*, of the same Directive defines participation as "*the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of: – the right to elect or appoint some of the members of the company's supervisory or administrative organ, or – the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ*" [the same definition is enshrined in Article 2, point *k)* of the Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees].

[11] Directive 2002/14/EC.

collective bargaining. In any case, and without suggesting that there is some sort of hidden anti-union agenda in the EU, the truth is that its vision of industrial relations implicates, as stated by MANFRED WEISS, that "*the countries with an exclusively confrontational trade union tradition have no other option than to redesign their systems in an associative and cooperative direction.*"[12] Conversely, if the rights to the involvement of workers are seen as boosting the productivity of companies, it is also true that there seems to exist some opposition on a EU level to them, for different economic reasons,[13] specifically reactions "*against phenomena that cause distortion of competition and generate social dumping harmful to the functioning of the common market.*"[14]

Our previous mention of the preliminary recitals of the Framework Directive on information and consultation acknowledges the importance of this directive, which should not be underestimated. Some authors having stated that it represents "*a provisory conclusion to twenty-five years of progress towards a European model of industrial relationships.*"[15] We entirely agree with GIORGIO VERRECCHIA[16] when the Author states that the directive provides "a unitary reading key" to the vast and complex Union Legal Framework that regulates workers' intervention rights. Thus Directive 2002/14/EC, albeit chronologically posterior to most of the Union's interventions on this issue, functions as model of the regulation on the rights of information and consultation.

3. Moving onwards towards a closer analysis of Article 27, its detractors – the ones who adopt the "glass half empty" perspective – immediately point out the lack of a reference to true and proper participation.[17/18] Indeed, the norm only refers to the rights to information and consultation, which have been branded by some legal

---

[12] Manfred Weiss, "La partecipazione dei lavoratori nella Comunità europea", 170.

[13] Economic preoccupations are clearly visible, for example, in recital 22 of the Directive 2002/14/EC, where it is stated that "*a Community framework for informing and consulting employees should keep to a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted.*"

[14] Gianni Arrigo, "La partecipazione dei lavoratori nel diritto comunitário tra armonizzazione normativa e competizione di modelli", 382.

[15] Thomas Blanke, "Article 27 of the European Charter: information and consultation at enterprise level as a European fundamental social right", *DLM*, no. 1 (2003), 25 *et seq*, 33.

[16] Giorgio Verrecchia, "Informazione e consultazioni dei lavoratori: i minimi inderogabili nel d.lgs. 25 del 2007", *DLM*, no. 2 (2008), 347: "*this intervention is the result of the most mature and conscient Community law regarding the issue and presents itself as the interpretative canon for the other interventions, even if preceding it, regarding the rights to information and consultation.*" See, also, Ilaria Viarengo, "Informazione e consultazione dei lavoratori: l'Italia si adegua all'Europa", *Guida al Lavoro*, no. 3 (2007): 32 *et seq*.

[17] In Giuseppe Casale, "Riflessioni sulla posizione dell'OIL in materia di partecipazione dei lavoratori", *Diritto delle Relazioni Industriali*, vol. 14, no. 1 (2004): 172 et *seq*., the word "participation" should be interpreted strictly also in the view of the ILO as the participation of workers in the decision-making process at the company level. In 1966, the International Labour Conference adopted a Resolution regarding the participation of employees in the Company. To give practical application to this Resolution, the ILO created, in 1967, a technical commission. The experts at the commission concluded that it was not possible to achieve a unitary definition of participation and some stressed that the expression "employee's participation" could be so broad as to be meaningless. Therefore, the expression "participation of employees in the decisions of the Company" was preferred as a concept technically more precise than "participation management." During its history, ILO adopted several recommendations and conventions regarding the participation of employees. Such is the case of Recommendation 94 regarding "co-operation at the level of the undertaking" (1952), Recommendation 129 regarding "communications within the undertaking" (1967), Recommendation 130 regarding trade unions (1967), Convention 135 regarding "workers' representatives" (1971) and the accompanying Recommendation 143, Convention 158 regarding "termination of employment" and the accompanying Recommendation 166.

[18] Article 17 of the 1989 of the Community Charter of the Fundamental Social Rights of Workers explicitly referred to the rights to information, consultation and participation. See Pierluigi Rausei, "Nuovi obblighi di informazione e di consultazione", *Diritto & Pratica del Lavoro*, vol. 24, no. 15 (2007).

scholars as "interrupted"[19] participation. A considerable number of scholars[20] question the legislative option of including this as the first article of Title IV – "Solidarity". Some authors find it incoherent to have chosen the rights to information and consultation to open the above-mentioned Title, instead of more important rights, such as protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), or the protection of children and women at work (Article 32). According to Pier Francesco Lotito, the option was political and almost propagandistic, "*with the political reasons taking precedence over logic and legal coherence.*"[21] In a nutshell, the idea of workers' involvement in the company was a politically correct banner, cloaking, or giving a "social" appearance, to an eminently economic agenda. The Title's designation itself is equally subject to criticism, since it could imply a pluri-personal and collective dimension.[22] However, and above all, the wording of the precept is criticised due to the fact that, in contrast to the preparatory works, the legislator opted for a disjunctive rather than cumulative phrasing: "Workers *or* their representatives must, at the appropriate levels, be guaranteed information and consultation." For most legal scholars, the right to information is composed of two dimensions, individual and collective. Notwithstanding, given the potential significance of the collective dimension, it should be guaranteed at the appropriate levels; at least in large companies, it is certainly not enough just to recognise the individual dimension of the right to information.

Taking a different standpoint, authors that see the precept from the "glass half full" perspective state that it represents an important step[23/24] in the development of European

---

[19] Marcello Pedrazzoli, "Partecipazione, costituzione economica e art. 46 della costituzione: chiose e distinzioni sul declino di un'idea", *Rivista italiana di diritto del lavoro*, vol. 24, no. 4 (2005): 427 *et seq*., 438. The author draws attention to the important linguistic rigour in this subject. It is important to "*clarify what we are talking about when we are talking about participation*" (430). An initial possible distinction for the author is a *summa division* between, on the one hand, participation in earnings, profits, property or assets and, on the other hand, participation in rulemaking, decision-making, the content of the norm, procedures or mechanisms regarding the formation of rules and decisions concerning the workers themselves. Regarding the latter, "*participation procedures are the procedures that confer normative competences that allow the workers (and/or their representatives) to contribute in the formation of rules (decisions) designated to regulate their conditions of work and life*", allowing for the emergence of a normative counter-power to the power of the employer. Furthermore, according to the author, the right of employees to participate in the management of the company has gradually eroded into a simple right of collaborating in the management (447), giving rise to weaker or improper forms of "participation", and avoiding true and genuine modalities of participation.

[20] As an example, see Pier Francesco Lotito, "Commentary to Article 27", in *L'Europa dei Diritti, Commento alla Carta dei diritti fondamentali dell'Union Europea*, ed. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: Il Mulino, 2001), 209 *et seq.*

[21] Pier Francesco Lotito, "Commentary to Article 27", 210. The author also finds it so unconvincing to refer to Articles 138 and 139 of the Treaty as the foundation of the norm, when it seems more adequate to base the norm with Article 137 of the Treaty as the foundation.

[22] In Pier Francesco Lotito, "Commentary to Article 27", 209, the author criticises the heading. He believes that solidarity implies a division of situations, needs and responsibilities that burden certain individuals or groups. These would not normally be burdened by such situations, needs and responsibilities. Furthermore, "*solidarity implicates a relationship between a plurality of heterogeneous subjects, while the right to information and consultation offers a natural protection inside a homogeneous group of interested subjects*", 210.

[23] Thomas Blanke, "Article 27 of the European Charter...", 25 and ff.

[24] The CFREU itself is frequently appreciated in a very favourable light. As an example, see Christophe Vigneau, "La costituzione europea nella prospettiva dell'Europa sociale: progressi dalla portata incerta", *DLM*, no. 1 (2006): 123 *et seq*., 127, where the author considers the Charter's contents innovative and surprising in terms of "the number and diversity of the fundamental rights it proclaims". Furthermore, according to the author, "*one of the more surprising aspects of the Charter is the richness regarding the dispositions*

Labour Law. It is a constitutionalisation, or rather a recognition of a fundamental right to information and consultation. It also seems evident that the information must be given, and the consultation procedure should be carried out prior to any final decision by the company's management, otherwise there would be no reason for the inclusion of "in good time" when referring to information and consultation in the precept. The last section of the precept, where it states that the rights to information and consultation shall be guaranteed "*under the conditions provided for by Union law and national laws and practices*", should not be interpreted too narrowly. It is acknowledged, on the one hand, that these rights to information and consultation[25] are not participative in a strong sense; there would be a "continuous tendency for more abstract descriptions regarding time, content and form of these rights as to turn them more effective."[26] Such statement may seem paradoxical, however, given the great diversity of situations in the Member States, it might be more realistic to recognise these rights of information and consultation, even if they might be considered more "diluted"[27] than the types of the true right to participation that are based on prerequisites that are not common to all Member States. As a matter of fact, Thomas Blanke states that Article 27 of the Charter has "*as much or more to do with the protection of human dignity (Article 1 of the EU Charter) than with traditional social rights and the objective of democratisation of the economy.*"[28]

4. Despite varying interpretations – some more negative and pessimistic, stressing the abandonment of the idea of true and proper participation of workers in the management of the company, whilst some are more optimistic – it seems that it is possible to draw some conclusions from this precept. Firstly, the recognition of two dimensions, individual and collective, of the rights to information and consultation, even if it seems difficult to decide the extent to which both coexist. It seems, in fact, that we are looking – as is the case for many authors regarding the right to strike action – at individual rights of collective exercise.[29] In any case, it does not seem sufficient, at least in sizeable companies, to recognise a strictly individual dimension to these rights given that they might play an auxiliary role in relation to the rights of action

---

concerning work relationships, that is the case of almost the totality of rights appearing in chapter 4 titled solidarity and that connects to the category of social rights" (127), the same with regard to the "*equality in the charter of civil and political rights and social rights*" (128). See, also, Jacques Ziller, "L'Europe sociale dans la Constitution pour l'Europe", *Droit Social*, no. 2 (2005): 188 *et seq.*, 196, where attention is drawn to the fact that "*social rights have exactly the same level as fundamental political rights.*"

[25] Article 2, point *f)*, of the Directive 2002/14/EC defines information as "*transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it*", and point *g)* of the same article defines consultation as the "*exchange of views and establishment of dialogue between the employees' representatives and the employer.*"

[26] Thomas Blanke, "Article 27 of the European Charter...", 47.

[27] This optimistic vision can be found in Lorenzo Zoppoli, "Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese", *Giornali di diritto del lavoro e di relazioni industriali* (2005): 373 *et seq.*, 405, where the author states that "*there cannot be much doubt that the European normative draws an upward and not downward path to participation.*"

[28] Thomas Blanke, "Article 27 of the European Charter...", 52.

[29] See Giorgio Verrecchia, "Informazione e consultazioni...", 339 *et seq.*, 367.
The author states that the rights to information and consultation are bidirectional rights guaranteeing both workers individually and their representatives the possibility of information and consultation. However, the author ends up concluding that since these are individual rights of collective exercise the ultimate beneficiaries of the information and effects of the consultation are the workers. See also Judgment *Confédération générale du travail and Others*, 18 January 2007, Case C-385/05, ECLI:EU:C:2007:37. Hence, the exercise of these rights is only possible, as a usual rule, through the workers' representatives.

and collective bargaining.[30] The reference to appropriate levels indicates that there might be information and consultation that should be provided at an establishment level, information and consultation that should be provided at a company level, and, eventually, information and consultation that should be provided at the level of company groups or company networks.[31]

Perhaps one of the most interesting aspects of the recognition of these rights might be a much less conflictual perspective on company and industrial relationships than the one we believe to be dominant, for ideological reasons, in our country. It is, at least, curious that some authors feel the need to note that social participation in a broad sense is not a monopoly of the Catholic Church's social doctrine.[32] In fact it is not, but it is easy to understand the issue in the light of this doctrine, according to which the company, regardless of tensions and conflicts, appears as a unit and a space for dialogue and collaboration between labour, as the main factor of production, and capital. From the perspective of the European legislator, the involvement of workers in the company also aims to achieve permanent dialogue in this common space, strengthening the dedication of workers in the company, and thus making the employer "internalise" the interests of workers, taking into account in the management process the negative repercussions that decisions may have on employment and the working conditions of workers.[33] In this sense, one should understand and applaud the perspicacity of Giorgio Verrecchia when he states that the rights to information and consultation are rights with established procedures in their exercise, establishing procedures in confrontation with the employer's power.[34] This "*establishment of procedures vis-à-vis the employer's power through the rights of information and consultation aims to turn the employer towards solutions more coherent with social objectives.*"[35] However, it is evident that this model can only work if the parties have a genuine desire for collaboration.

5. It is important to recognise, however, that the CJEU's case law appears to reflect the "glass half empty" perspective. In its landmark judgment *Association de médiation sociale*,[36] the CJEU had the opportunity to rule on the interpretation of Article 27 of

[30] Thomas Blanke, "Article 27 of the European Charter...", 48: the rights to information and consultation are both individual rights of workers and collective rights of their representatives. For the author, however, even if it is possible to state that the employer has the obligation of providing information and consultation directly to the workers or to their representatives, "*it seems clear that direct information and consultation of individual workers can only happen at an appropriated level in very small companies and establishments. Only in such cases the exchange of perspectives and arguments is possible in the presence of all workers.*" Furthermore, for Thomas Blanke, reducing the right of workers and their representatives to a right of individual workers would contradict the guarantee of freedom of assembly and of association in Article 12 of the CFREU. The author reminds that the Directive 2002/14/EC expressly predicts in its recital 16 that the Directive is "*without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives.*"

[31] Thomas Blanke, "Article 27 of the European Charter...", 48: refers to the necessity of information and consultation at the level of networks, giving the example of franchising.

[32] Paola Olivelli and Giuliana Ciocca, "La partecipazione del sindacato in generale", in *Conflitto, Concertazione e Partecipazione*, ed. Fiorella Lunardon, vol. III of *Trattato di Diritto del Lavoro*, ed. Mattia Persiani e Franco Carinci (Padova: Cedam, 2011), 773 *et seq.*, 775.

[33] Paola Olivelli and Giuliana Ciocca, "La partecipazione del sindacato in generale", 776: "*it seems that to favour competitivity and productivity commercial relationships based more on collaboration than on conflict are needed.*"

[34] Giorgio Verrecchia, "Informazione e consultazioni...", 358.

[35] Giorgio Verrecchia, "Informazione e consultazioni...", 343. The author adds that "*the European idea of the company seeks to conjugate that dynamic of the organisational model of company with the promotion of the involvement of workers, transparency and social responsibility of the company itself.*"

[36] Judgment CJEU *Association de médiation sociale*, 15 January 2014, case C-176/12, ECLI:EU:C:2014:2.

the Charter and of Directive 2002/14/EC. In this case, arising from a reference for a preliminary ruling by the French *Cour de cassation*, two questions were posed to the CJEU: "*1) [m]ay the fundamental right of workers to information and consultation, recognised by Article 27 of the [Charter], and as specified in the provisions of Directive [2002/14], be invoked in a dispute between private individuals in order to assess the compliance [with EU law] of a national measure implementing the directive; and 2) "[i]n the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the legal thresholds for putting into place bodies representing staff, workers with [assisted] contracts?.*"[37]

It should be noted the argumentative path taken and the solution found diverged substantially between the Advocate General's Opinion and the final judgment.

The Advocate General Cruz Villalón, in his 18 July 2013 Opinion sustained the existence of a s*umma divisio* between "rights" and "principles",[38/39] particularly in light of the dispositions under Article 51(1) and Article 52(5) of the Charter. In the Advocate General's view the scope of the right to information and consultation in the company is "extremely weak".[40] In fact, Article 54 does not specify "*the kind of information nor the consultation arrangements, and nor does it specify at what levels and through which representatives they are to be effected.*"[41] Nonetheless, the Advocate General defended that it was possible to give specific substantive and direct expression to the content of the principle through normative acts such as the provisions of a Directive.[42] In this context, Article 3(1) of Directive 2002/14/EC would provide the content of the principle with substantive and direct expression: the personal scope of the right to information and consultation.[43] Therefore, even if Article 27 of the Charter only established a principle, the specific substantive and direct expression given to it through Article 3(1) of the Directive would open the door to it "*be[ing] relied on in a dispute between individuals, with the potential consequences which this may have concerning non-application of the national legislation.*"[44]

The CJEU's judgment does not address specifically the *summa divisio* between "rights" and "principles". Some legal scholars consider that this matter was deliberately avoided.[45]

---

[37] Judgment CJEU *Association de médiation sociale*, paragraph 22.

[38] Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2013:491, paragraph 32.

[39] On this division see, for example, Nicolas Cariat, *La Charte des drois fondamentaux et l'équilibre constitutionnel entre l'Union européenne et les États members* (Brussels: Bruylant, 2016), especially 488 and following.

[40] Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, *Association de médiation sociale*, paragraph 54.

[41] Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, *Association de médiation sociale*, paragraph 54 (conclusions).

[42] Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, *Association de médiation sociale*, paragraphs 63 and 65.

[43] Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, *Association de médiation sociale*, paragraph 66.

[44] Opinion of Advocate General Cruz Villalón delivered on 18 July 2013, *Association de médiation sociale*, paragraph 66.

[45] Petra Herzfeld Olsson, "Possible shielding effects of Article 27 on workers' rights to information and consultation in the EU Charter of Fundamental Rights", *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 32, 2 (2016): 251 and following, 260: "In the AMS case, the CJEU avoided clarifying its position on the status of Article 27 CFR." It should be emphasised that for this author, 261, "it is far from clear that the CJEU would categorize Article 27 as a principle." See, also, Filip Dorssemont, "The right to information and consultation in Article 27 of the Charter of Fundamental

The CJEU, however, highlights that "*it is (...) clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in EU or national law.*"[46] Thus, and unlike what happens with the principle of non-discrimination on grounds of age laid down in Article 21(1) of the Charter, Article 27 "*by itself does not suffice to confer on individuals a right which they may invoke as such.*"[47] In fact, the CJEU goes further and argues that Article 27 cannot as such or in conjunction with the provisions of Directive 2002/14/EC, be invoked in a dispute between individuals in order to conclude that a national provision should not be applied.[48/49]

This judgment was deeply impactful among legal scholars, with some controversy still existing with regards to its scope and meaning. For authors, the judgment means that Article 27 of the Charter establishes only a principle and not a true right.[50] Others disagree with this assessment and a third group criticises the judgment as a "lost opportunity."[51/52]

Rights of the European Union; less than a right and less than a principle, just an ordinary provision lacking direct effect?", *Maastricht Journal of European and Comparative Law*, vol. 21, no. 4 (2014): 704 and following, 704-705, "a reference to the distinction between a Charter principle and a Charter right, which lays at the heart of Article 54(5) of the Charter has been scrupulously avoided."

[46] Judgment *Association de médiation sociale*, paragraph 45.

[47] Judgment *Association de médiation sociale*, paragraph 49.

[48] This aspect of the decision was strongly criticised by Johannes Heuschmid, "Horizontalwirkung von Art. 27 Europäische Grundrechtecharta – Fehlanzeige?", *Europäische Zeitschrift für Arbeitsrecht* (2014): 514 and following, 520, who believes that if this right needs to be concretised, it is precisely secondary EU law that should be taken into account, and wonders if reading the precept in conjunction with the latter would not have sufficient consistency, which, in his opinion, would correspond to the historical will of the legislator of the Charter.

[49] Nicolas Cariat, *op. cit.*, 453, in the same vein, emphasises that the Court has acknowledged the possibility of a horizontal effect of provisions of the Charter, but excludes such a possibility in relation to Article 27. In the author's words, this is a "*double position of principle*".

[50] See, for example, Sebastian Krebber, "Die Unionsrechts- und Kompetenzakzessorietät des unionsrechtlichen Grundrechtschutzes im Bereich des Arbeitsrechts: Grundsatz und Ausnahmen", *Europäische Zeitschrift für Arbeitsrecht*, no. 1 (2016): 3 and following, 8; Achim Seiffert, "Die Bedeutung von EMKR und GRCh für das deutsche kollektive Arbeitsrecht", *Europäische Zeitschrift für Arbeitsrecht*, no. 2 (2013): 205 and following, 212; Claudia Schubert, "Article 27", in *Kommentar zum Europäischen Arbeitsrecht*, ed. Martin Franzen, Inken Gallner, Hartmut Oetker (München: C.H. Beck, 2018), 400, margin no. 11. Also, Bernard Teyssié, "Article 27, Droit à l'Information et à la Consultation des Travailleurs au Sein de l'Entreprise", in *Charte des droits fondamentaux de l'Union européenne*, *Commentaire article par article*, ed. Fabrice Picod and Sébastien Van Drooghenbroeck with the collaboration of Cecilia Rizcallah (Brussels: Bruylant, 2018), 613 and following, 616, refers to an appearance of right ("*la norme fulminée n'est plus que jeu d'apparence: hormis sur le principe – il faut créer un dispositif d'information et de consultation des travailleurs – il n'y a point proclamation d'un véritable droit fondamental mais simple définition d'une orientation générale*").

[51] Filip Dorssemont, "The right to information and consultation...", *cit.*, 720, states that "Remarkably, the CJEU failed to do what it requires domestic judges to do namely to utilize every tool it has at its disposal (for the Court of Justice this is European law) to achieve an outcome consistent with the objective pursued by the directive." See also Filip Dorssemont, "Article 27", in *The EU Charter of Fundamental Rights, A Commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Oxford: Hart Publishing, 2nd edition, 2021), 779 and following, 780: "*Despite the fact that the qualification of a right as a principle does not exclude judicial cognisability, the Court missed an opportunity to provide this cognisability in Association de médiation sociale.*"

[52] Bruno Veneziani, "Article 27 - Worker's Right to Information and Consultation within the Undertaking", in *The Charter of Fundamental Rights of the European Union and the Employment Relation*, ed. Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (Oxford, London, New York, New Delhi, Sydney: Hart, 2019), 419 *et seq.*, 460, states that "*A different attitude has been addressed*

For our part, we recognise that the CJEU is absolutely right when it states that the right to information and consultation enshrined in Article 27 needs to be developed/specified in some of its essential aspects through references to the rules of EU and Member State law. Only after this development/specification can its genuine content be known. Therefore, regardless of its recognition in the Charter and, therefore, in the EU's primary law, it will be a right of eminently variable content.[53] After all, the strong participation right that exists in Germany and the right of co-involvement that exists for instance in the Portuguese legal system are hardly comparable.

Júlio Manuel Vieira Gomes

to Article 27. In fact from the day of entering in force of the Charter – as part of an EU Constitution – to present day it has been banished, in the CJEU case law, to a role of provisions to which it attributes only a ritual homage." He also refers to the *Association médiation sociale* case as one "*where the judges reiterated their traditional unpersuasive interpretation.*"

[53] The evocative expression of 'fundamental right of variable geometry' has been coined by Daniela Comandè, in *Carta dei Diritti Fondamentali dell'Unione Europe*a, ed. R. Mastroiani, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (Milan: Giuffrè, 2017), 523.

ARTICLE 28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

I – Content

1. The second of twelve articles of the Chapter IV (Solidarity) established two categories of rights functional or instrumentally related: the rights to collective action and the rights to collective bargaining. These are rights that in some way densify two fundamental principles common to the generality of the labour relation systems of the Member States of the European Union: the principle of collective self-guardianship and the principle of collective autonomy, both expressions of the principle of freedom of association (question with frequent and disturbing deviations, not being rare to see contemplated the right to found unions without including the right to strike and/or the right to collective bargaining).[1]

The first uphold various modalities of collective action at disposal of the social actors to – namely in case of conflict[2] – defend and promote their interests; the second protects the means to solve controversies or to overcome conflicts, specially, the right to negotiate and to conclude collective conventions, with or without resource to auxiliary measures of self-composition (conciliation or mediation) or to alternative means, namely arbitration (an hetero-composition mean), being the first of the said principles frequently considered a mere lever of the second.

2. The collective self-guardianship is more frequently associated to, the strike and, in some national systems, also the lock-out, but several other forms of collective action can be considered its modalities or ways of expression, such as reunion, manifestation, petition, label, boycott, etc.

On its turn, the collective autonomy is basically the capacity of the social interlocutors to search, by their own means, in the social dialogue frame, answers for the problems they face. Although it does not deplete it, the most common idea associated with collective autonomy is, however, the one of instrument that regulates work conditions, of source of labour law, of one of its "mean(s) of elaboration and revelation." In addition to that nuclear element, there are also associated to it other ways of joint search for answers to tensions and conflicts, namely, information, consult, social dialogue, concertation, institutionalised and non-institutionalised participation, negotiation with goals different from the ones of collective convention subscription (see, for example, the negotiation foreseen in and incipiently regulated in EU law and in the national law of the Member States).

---

[1] See, among us, the cases of the police union, the magistrate's union, etc.

[2] This reference to the type of cases in which collective action is lawful seems, at first glance, to favour a contractual and restrictive conception of the corresponding collective action rights.

Furthermore, one and the other presuppose and settle, as suggested, on the principle of the freedom of association, a kind of *mother principle* of both, that the Charter established in the Article 12. If, however, like it is usual to consider, both in the institutional context of the ILO and of the Council of Europe[3] scope, collective action and collective bargaining are to be seen as rights that are part of the content of the right of union's freedom, what is the reason for its systematic insertion in different chapters? Will it be only a manifestation of ambiguity, whether it is innocent or premeditated, that has been accompanying this trilogy (freedom of association, right to strike and right to collective bargaining), with it trying to justify certain types of observations from whose usually are excluded the nuclear dimension of the freedom of association,[4] the freedom to found trade unions and to be an union's member, both in its positive dimension (to found unions and to join them) and in its negative dimension (to not found unions and to not join them or to leave the ones they once joined)?

3. Despite the differences, very significant in some cases, of the systems of labour relations of the Member States, the principles of collective autonomy and collective self-guardianship, alongside the freedom of association, are common basic principles, therefore considered as its characterising elements and, consequently, as characterising elements of an "European model of professional relations" or even, in wider terms, of the generality of the occidental democratic countries' systems.

It is possible to say that both principles constitute instruments of conflict management generated in the scope of labour, especially of the conflicts with origin in the imbalance in contractual power between employees and employers, both consequently inserted in a logic of barrier to its deepening and of removal of the obstacles that generate inequalities.[5] One and the other differ, however, in essential aspects, both from the structural and the functional point of view.

4. From the *structural point of view*, both principles differ, basically, because the unilaterality of one contrasts with the bilaterality of the other. The different expressions of the right to collective action are of exclusive exercise from the respective holders, not requiring the consent or the contest of third parties, whether it is the employer, the employers association or others, except the cases where, exceptionally, one of its particular aspect or dimension interferes with its legal sphere (as it is the case of the right to trade-union action in the company, from which the right to assembly, particularly during the working hours,[6] is just an example). Diversely, the several expressions of the principle of collective autonomy are, logically, of joint exercise: of workers and/or workers' representative structures, on one side, and of employees and/or employee's representative structures, on the other).

---

[3] See the case *Demir* in the scope of the ECtHR case-law (judgment of 12 of November 2008, no. 34503/97, especially recitals 153 to 155) and judgment *Viking*, 11 December 2007, Case C-438/05, ECLI:EU:C:2007:772 and *Laval*, 18 December 2007, Case C-341/05, ECLI:EU:C:2007:809 in the scope of the CJEU case-law (see below IV.3).

[4] Freedom to found unions and freedom to freely join unions, both in its positive dimension (to found unions and to join them) and in its negative dimension (to not found unions, to not join them or to withdraw from the ones once joined).

[5] António Baylos Grau, "Diálogo social y autonomia colectiva comunitária", *Revista de Trabajo*, year 2, no. 3 (2006): 71.

[6] Jorge Leite, "Direito de reunião sindical na empresa", separata no. 1 from the *Boletim do Conselho Distrital de Coimbra da Ordem dos Advogados*, no. 12 (December 2001).

Also from the *functional point of view*, the rights to collective action are different from the rights to collective bargaining, being that, in principle, the former are instrumental or levers of the latter. Not without some exceptions the former are destined to create conditions of exercise or of success of the latter. The rights to bargaining have as a direct goal to solve or to help solve problems or conflicts that the rights to action only indirectly or instrumentally fulfil.

5. Article 28 and Article 12 assume a particular importance in the European framework since they can – this question is still contentious – be considered as factors of construction or constitutive elements of a European system of labour relations, although very incipient and fragmentary. It is indeed thought that we can already talk about the existence of the embryo of a system that has as components:

- the existence of structures of collective representation of employees and employers at a European level, ones inter-sectoral and the others sectoral;[7/8]
- the elaboration of criterions of representativeness of the said structures (see the Report of September 1999 from the University of Louvain, solicited by the General Direction of Employment, Industrial Relations and Social Affairs of the European Commission);[9]
- the creation of several organisms of community scope, involving the social partners, of different nature (public or private), composition (tripartite or bipartite) and functions;[10]

---

[7] The structures representing the social partners are numerous and very diverse. Both employers' and workers' organisations can be classified, in particular, as intersectoral (interprofessional) – general [CES, BUSINESSEUROPE (ex-UNICE) e CEEP] and particular (UEAPME, CEC e EUROCADRES) – and sectoral representing workers (International Association of Civil Airports – European Region, Association of Telecommunication workers, etc.). In addition to the above, there are also (sectoral) committees of social dialogue, of which there are around half a hundred, created, according to EUROFUND, "*to be the central forums of consults, joint initiatives and negotiation.*" On the composition and functioning of the social dialogue committees see SEC(2010)964 – final. Also see what is usually called s*pecific organisations*, as is the case of EUROCHAMBRES (Association of European Chambers of Commerce and Industry). With a different role but associated to social dialogue, we have to take into consideration the several tripartite structures at European level, such as the EESC (European Economic and Social Committee), the ESFC (European Social Fund Committee) and the Tripartite Summit for Growth and Employment, which was created by a Council's decision on 6 March 2003.

[8] On the role of the social partners in industrial relations and in the European social dialogue, see Article 152 TEU (reinforcement of social dialogue) and Articles 154 and 155 TEU (institutionalised collective bargaining and autonomous collective bargaining). In addition to being represented in the EESC, the social partners have a fundamental role in the application of the objectives of the Lisbon's strategy for growth and employment, through the creation of projects and initiatives at European and national level, with its action being supported by the European Social Fund, particularly in the regions related to the convergence objective.

[9] There is no rule in the Community legal order defining representativeness, even though it is an essential issue, particularly after the approval of the Agreement on Social Policy annexed to Protocol 14 of the Maastricht Treaty, for determining which organisations are eligible for the consultation provided for therein. The path followed by the European Union is not without its critics. In fact, instead of the legislative option, the Union preferred the administrative route, preceded by studies and dialogue with the social partners, but clearly lacking in democratic legitimacy, with little respect for the principle of the independence of organisations representing employers and workers, with insufficient regard for the principle of the rule of law and exposed to suspicions of legal censure as to its compatibility with ILO standards. The Communications of the Commission from 1993 and 1998 [COM(98) 322 final of 20 May 1998], the first on the implementation of the aforementioned Agreement and the second on the framework for the institutionalisation of committees for social dialogue, are still defining issues in this field. The studies on representativeness were carried out until 2006 by the Catholic University of Louvain and after that by Eurofound.

[10] See the final part of the note 8.

• means of actions that the interlocutors have, practices that they privilege, levels of conflict and procedures of solution they recur to, greater or lesser presence of public entities, etc.;
• An involving normative frame from which is part, in particular, the Articles 151 to 161 and the several Directives about work conditions or connected to that.[11]

II – Sources and other background of Article 28

1. In accordance with the updated notations of the *Praesidium* of the Convention, Article 28 is based on Article 6 of the European Social Charter (approved in 1961 and revised in 1996) and on the no. 12 and 13 of the Community Charter of the Fundamental Social Rights of Workers, approved in 1989.

These notations provide three more important indicators: (i) the one respecting to recognition, previously mentioned, by the ECHR, of the right to collective action as an element of the right of association established in Article 11 of the ECHR; (ii) the one related to the appropriate levels of negotiation (the notation remits to the notations on Article 27); and (iii) the one regarding the modalities of exercise of the right to collective action, including strike, and its limits that "*are important* – goes the notation – *the national laws and practices, including what comes to the question to know whether may be lead in parallel in several Member States*" (convergent and/or simultaneously).

Despite the information of the *Praesidium* about the origin of Article 28, it is important to briefly assess its more distant backgrounds in the history of the construction of the EU.

2. If the *social dialogue*[12] was an expression used for the first time in the Programme of Action of the European Commission of 1984 and solemnly established in the Treaty in its first great revision[13] – the Article 118-B added by the Single Act of 1986 –, the expression *collective bargaining* is contemporary of the original version of the Treaty of Rome. In fact, as provisioned by Article 118(1)(7), "*the right to form trade unions and the collective bargaining between employers and employees*" was one of the matters of social domain that was up to the Commission

[11] About the various Articles on the chapter about social policy, see João Leal Amado, João Reis, Jorge Leite e Joana Nunes Vicente, in *Tratado de Lisboa Anotado e Comentado,* ed. Manuel Lopes Porto and Anastácio Gonçalves (Coimbra: Almedina, 2012).

[12] Social dialogue can be, according to different criteria, tripartite or bipartite (whether it involves the social partners and the European institutions, or just the former), intersectoral or sectoral; see footnote 8, and see, among several other documents, the Communication from the Commission of 22 June 2002 – The European social dialogue, a force for innovation and change, COM(2002)341 final. Community social dialogue manifests itself in any form of "encounter and exchange of convergent opinions between the social actors in the search for convergent positions about problems of common interest", as written by M. Rocella, T. Treu, *Diritto Comunitario del Lavoro*, 1st edition (Padua: Cedam, 1995) 374. See also, among other authors, J-L Siweck, "Le dialogue social au niveau communautaire: d'où visent-on où en est-on?", *Revue du marché Commun et de L'Union Européenne*, no. 427 (1999): 377; M. Rodriguez-Piñero y Bravo Ferrer, «Ley y dialogo social en el Derecho Comunitario Europeo", *Revista del Ministerio de Trabajo y Asuntos Sociales*, no. 3 (1997): 49.

[13] See Sabina Santos, *La negociación Colectiva Europea, Institución Privilegiada en la Regulación de la Política Comunitaria* (PhD diss., University of Salamanca, 2005) in which she reports on the reference to this expression and similar expressions in decisions adopted within the framework of the 1974 Social Action Programme and its meaning in the international context (ILO) and in the European context (European Council).

to promote in strict contact with the Member States through studies and reports and according to the organisation of consults, both for problems of a national scope and for questions with interest for the international organisations. The Commission had the role of '*social encouraging.*'

It is certain that the Treaty of Rome expressed in other norms, yet very incipiently, some social concerns (see the provisioned in some subparagraphs of Article 3 and in the norms about the EESC and about the Social Fund) and is also certain that it directly dealt with some *aspects of social relevance*, such as equality and non-discrimination in the access to employment and in the employment on the ground of nationality, the wage equality and non-discrimination between male and female workers and the maintenance of the existing equivalence between Member States of the paid leave regime. However, that was not due to any *objective of autonomous social relevance*, to recall an expression of F. BORGOGELLI, or of protection of fundamental rights, but for reasons connected to the construction of the common market and to the freedoms connected to it.

It is no wonder. After all, the social dimension was never a goal or an objective persecuted by the constructors of Europe. Truly, this was never a 'star of the European firmament', in the sense that it never was a star to which the constructors of Europe wanted to give its own light. It could happen – it would even be desirable – that it would receive sufficient heat and light from the economic stars of the universe in construction. To paraphrase MANCINI (...), "*all the better if that happened, but not more than all the better.*"[14]

It is also certain that Article 117 stated, in its 1st paragraph, that "*Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained*", but then in its 2nd paragraph, in an unequivocal manifestation of liberal faith, rushed to clarify: "*Member States believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action*", a belief that its successors maintained [Article 136(3), as presented in the Treaty of Amsterdam and Article 151(3) as presented in the Treaty of Lisbon], even though with a slightly different wording.

3. The Single Act, name of the first great revision of the founding Treaties, whose main objective was the creation of the *internal market* – that "will imply", as Article 8-A added by the Article 13 established, a space without borders in which the free movement of goods, people, services and capitals is assured in accordance with the provisioned in the Treaty –, added two important articles to Chapter I (Social provisions) of the Title IV (Social Policy): (i) Article 118-A, which para. 1 stated the commitment of the Member States to promote the improvement, namely, of the work conditions, prescribed on its para. 2, to contribute to the realisation of such objective, the possibility given to the Council to adopt, by a qualified majority, minimum prescriptions progressively applicable, and (ii) Article 118-B, in terms of which the Commission would make an effort to "develop the dialogue

[14] Jorge Leite, "Uma viagem pela (história da) Comunidade Europeia", in Fundamentos do Direito do Trabalho, Estudos em Homenagem ao Ministro Milton de Moura França (desde fundamentos até França em itálico), ed. Francisco Giordani, Melchíades Martins e Tárcio Vidotti (França: LTr, 2000), 19.

between social partners at an European level" that could "lead, if the latter find it reasonable, to conventional relations."[15]

4. The Community Charter of the Fundamental Social Rights of Workers, approved in Strasbourg, in 1989, after affirming, in no. 11, the right of employers and employees to associate in order to constitute professional organisations and unions of its choice for the defence of its economic and social interests and to proclaim the freedom of all employers and of all the employees to join or not to join these organisations without that entailing any personal or professional harm, contemplates, in no. 12 that "*employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice*", adding that "*the dialogue between the two sides of industry at European level which must be developed, may, if the parties deem it desirable, result in contractual relations in particular at inter-occupational and sectoral level.*" No. 13 is about the "*the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations arid collective agreements*", and "*in order to facilitate the settlement of industrial disputes the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice.*"

5. The Treaty of Maastricht kept the wording of the previous Articles 117 to 122, naturally including the Articles 118-A and 118-B and it did not eliminate nor added any other article about social policy to the previous Treaties, but it did not leave everything just the same. Its influence on this matter was actually substantial, what can be summed up in three distinct moments:

(a) In the paragraph 3 of the preamble it can be read: "*Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law*";

(b) In the text of the Treaty per se, especially in its Article F, whose para. 2 states: "*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*";

(c) In the Agreement on Social Policy annexed to Protocol 14, from which resulted the two social Europes: the Europe of the then 12 Member States, to which was applicable the Treaty of Rome with the alterations that were previously introduced and, due to the self-exclusion of the United Kingdom, the Europe of the 11, to which "*for wishing to advance in the way mapped by the Social Charter of 1989*" would then be applicable the said Agreement on Social Policy.

---

[15] The paragraphs 3 and 5 of the Preamble of the Single Act Treaty state the following:
"*DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.*
AWARE of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter."

Well, this Agreement expanded the social objectives of the Community and of the Member States (Article 1), broadened the matters about which the action of the EU may focus on, forthwith normative [Article 2(1)], attributed to the social partners a new role in the making of the community social norms [Article 2(4)], diversified the means and the proceedings of the Community to support and complete the action of the Member States [Article 2(2)], introduced rules about institutionalised and non-institutionalised collective bargaining (Articles 3 and 4) and defined some others about the principle of equality on the remuneration of male and female workers (Article 6).

6. With the Treaty of Amsterdam, some progress was seen in the protection of the fundamental rights, including social rights. In fact, (a) in the Preamble of the TEU now appears a new Recital in which is confirmed the "*attachment to fundamental social rights as defined in the European Social Charter (...) and in the 1989 Community Charter of the Fundamental Social Rights of Workers*"; (b) Article 13 established, with general and universal character, the principle of non-discrimination based on "*gender, race, ethnic origin, religion, belief, disability, age or sexual orientation*"; (c) Article 6 (ex-Article F) reaffirms the founding principles of the Union and of the Member States and reinforces the protection of fundamental rights; (d) Article 2 (ex-Article B) (i) adds to the objectives of economic and social progress the "high level of employment and [the one of] the realisation of a balanced and sustainable development (indent 1), (ii) considers the institution of European citizenship as a mean to reinforce rights and interests of the nationals of its Member States (indent 2), (iii) affirms the maintenance and development of the Union as a "space of freedom, security and justice (...)" (indent 3) and (iv) adds a new number to Article 6 in terms of which (re)affirms that the Union is set on the principles of freedom, democracy, respect for human rights and for fundamental freedom, as well as on the rule of law, principles that are common to the Member States.

On the other hand, the chapter of the Treaty on social policy incorporated, with slight alterations, the Agreement on Social Policy. It recovers the principle of equalization in the progress; expressly refers to the European Social Charter and improves the wording of the article about the principle of equal opportunity and treatment between men and women employees. It must be said that the third subparagraph of Article 137(2) (numbering of the Treaty of Amsterdam) introduced a novelty in what regards the *fight against social exclusion*.

7. The next steps – approval of the Charter and the Treaty of Lisbon – are also part of the history of the fundamental rights of the European Union but not, naturally, of the backgrounds of the Article here commented.

III – Article 28 – some of its issues

1. It would not take a great effort to show the ambiguity[16] in Article 28, a characteristic common to other norms about the same matter, such as the case, in particular, of the norms on social dialogue (Articles 118-B of the Treaty; 1 and following of the Agreement on Social Policy; 138, 139 and 140 in the numbering of the Treaty of Amsterdam and 154 and 155 in the TFEU – numbering of the Treaty of Lisbon), what, without a doubt, poorly harmonises with the programme "better regulation" so many times forgotten by its creator.

[16] What adds complexity to a norm in itself already complex enough.

2. To determine whether Article 28 is a norm of recognition of the rights it reports to – the rights to action and collective bargaining – constitutes, in my opinion, the first and main challenge to be faced. By establishing that the workers and the employers or their representatives have – accordingly or with EU law and the national laws and practices – right to action and to collective bargaining is that norm acknowledging the rights at stake, with the consequent blocking of the sources a*d quem* hierarchically inferior that provide otherwise and/or the imposition to alter the ones that are non-compliant with it? Is it just a conditioned acknowledgement, dependent on what is established on the matter or on what will be established by the Union legal order or the national laws and practices?

The answer to these and other questions of identical nature remits to the interpretation of the article at stake, searching, before anything else, for the notes that characterise it. What kind of a norm is this that seems to run away from the questions that, at first sight, should be solving? The following can be said about Article 28:

a) It is a *norm of reference* in the sense that it is a norm that does not directly answer the question or the questions it reports to. In fact, Article 28 (i) does not identify, or identifies insufficiently, the holders of the rights at stake, especially regarding the organisations of employees and employers, (ii) it says nothing, something that is usual in this type of norms, about the respective legal system, being that (iii) it leaves well-founded doubts about the central problem of the recognition of the rights at stake;

b) Article 28 is a *norm of double reference*. The references in accordance to the level in which each question is raised, can be intra-systematic or to EU law, and extra-systematic or to the law of each Member State,[17] despite the deep connexion between both 'systems';

c) The reference on Article 28 *is not* a *static or formal reference*, in the sense that it does not incorporate the remitted norm in force at the date of the beginning of its validity, *but* a *dynamic or material reference* so that the norm summoned or called by will be the one in force in each of the successive moments of its application. Although, as the majority of the scholars conclude,[18] the remissions are in principle formal, the circumstances of each case must always be attended, since the interpretation of this type of norms is a complex task that demands much weighting. All points that Article 28 contains a dynamic reference;

d) Article 28 *is not*, however, a *rule of conflicts*, precisely because, contrary to one such rule, it does not solve the issue(s) it raises.[19] In fact, none of

[17] It must be reminded that, even to have an idea of the complexity referenced in the previous note, that the community law refers to the rights of collective action and of collective bargaining in the Article 153(5) (union right, right to strike and right to lock-out, in the terminology of its antecessors), to exclude them from the scope of competence of the European Union and in the Article 156 paragraph 1 indent 7 and yet in what regards the right to negotiation, in the wide sense, in the Article 152 and, specially, in the Articles 154 and 155, covering the institutionalised and non-institutionalised negotiation.

[18] See, among others, Baptista Machado, *Âmbito de Eficácia e Âmbito de Competência das Leis*, (Coimbra: Almedina, 1970), Almedina, ibidem, particularly, 300 and following, and *Introdução ao Direito e ao Discurso Legitimador*, (Coimbra: Almedina, 1983), 105 and following; Menezes Cordeiro, *O Direito*, 1989, year 121, 194.

[19] The problem with the conflict rule is to determine, based on different criterions, which is, among the laws that contact with the case, the law to apply: the law of the country where the building is

the problems Article 28 reports to finds solution in it. Neither the problem (controversial, it must be recognised) to know if the rights contemplated there, or at least some of them,[20] are granted to employees, employers and their respective representatives, nor (assuming that the former question is answered in the positive) the problem of its legal regime. For example, as said before, it will be the remitted law to identify the organisations of workers and the organisations of employer's that are holders of the rights at stake, to establish the conditions of its exercise, etc.

e) Once the reference is a legislative technique destined to avoid repetitions, as it is the case with other referral norms (legal fictions, absolute presumptions and several norms of transitory law[21]) the norm of Article 28 cannot be considered a complete norm without the convocation of the norms that complement it (the norms *ad quem* or "the norms attracted to its orbit"[22]), from all (remitter norm or fundamental norm and norm or norms remitted or complementary norms) resulting the answer to the raised question.

We can say, at last, that some problems raised by Article 28 are very difficult to answer, or at least incite very controversial answers. What are, for example, the representatives of employees and employers at the EU level? How is it defined and who defines the greatest representativeness of organisations if various invoke such quality? Do the practices of the EU institutions, in this domain, respect the principles concerning freedom of association?

3. What are, then, the questions that Article 28 reports to? Although the answer may be different whether the framework is the EU or the national one and even the right it is about (right to collective action or right to collective bargaining), the questions regard the holding of the rights (employees and/or representatives and employers and/or representatives), to the determination of the representatives to take into account for this purpose, to the legal regime of each one of the rights and even to some of its dimensions, etc.

At first sight, it might be said that, despite the boldness, this truly is a *singular norm*: it seems to not establish, not prohibit nor even allow or, perhaps better, it seems to prescribe, prohibit or allow in accordance with what, is established by the Union's law or the national laws and practices about each one of the rights and the aspects contemplated in it. Article 28 would not be, in this sense, a norm that, with autonomous value, seals, prescribes or allows; it shall prohibit, prescribe or allow in accordance with the established in the remitted norms, in this case the EU law or the national laws and practices, without forgetting that Article 153(5) of the TFEU excludes from the Union's circle of powers the matters of actions and of collective bargaining. Article 28, to recur again to an uncompromised expression, contemplates the rights to action and to bargain *accordingly* or *in accordance* with EU law and the national laws and practices, so therefore, for instance, holders of the right to collective action and of the right to collective bargaining are those whom,

---

placed, of of the work or service provision, of the subjects nationality, of the event? The conflict rule does not only solve directly its problem in the cases in which its remission is to another rule of conflicts. See Baptista Machado, *Âmbito de Eficácia e Âmbito de Competência das Leis*, cit., particularly, 297 and following.

[20] Or if they are only in the measure that the *ad quem* norms recognise it.

[21] See José Oliveira Ascensão, *O Direito, Introdução e Teoria Geral, Uma Perspectiva Luso-Brasileira*, 10th edition (Coimbra: Almedina, 1997), 508 and following.

[22] Opinion of *Procuradoria-Geral da República* no. 7/93, of 17 of August 1993.

in each Member State, the national law determines, except, regarding it, when the community level is at stake.[23]

Maybe it can be said, turning to VON WRIGHT's theory[24] about prescriptive or directive norms, that Article 28 is a *norm of a relative fluid nature;* after all, it does not impose, prohibit or allow; thus it does not consist of an imposing, prohibitive or permissive norm, all seeming to depend on the nature of the norm it remits to. The invoked norm is the one of the moment of application of the norm of reference that, for being dynamic, does not crystallises the one from the date of its beginning of validity, configuring for that a dispositive norm in relation to the remitted norms.

To sum up, with the reference it makes, Article 28 states, firmly, that it approves whatever on the matter is established by the norms *ad quem* regarding the determination of the holders of the rights at stake and, specially, of its representatives and about the legal regime of each of the said rights. However, doubts remain about the scope of the reference, in particular on what respects to the *question of the acknowledgement of the rights it reports to*, although everything indicates, in that converging the majority of scholars, that the corresponding answer should be affirmative in the described conditions.

IV – Economic freedoms and work fundamental rights, a relation of hostility?

1. One of the matters with the most winding path in the history of the EU's construction is, perhaps, the matter of fundamental rights, oddly enough. In fact, it may be proper to talk, in this respect, about not one, but several histories. Moreover, from this point of view, the European construction started as the *history of the protection of the economic freedoms or market freedoms*, or, in the expression that would make its way, of the *fundamental freedoms* (free movement of goods, services, capitals and workers, including the freedom of establishment). It is certain, some authors add, that the Treaty of Rome also addressed, since its origins, other freedoms. Not so much, however, – or not mainly – to protect them but especially to make them useful or functional, putting them at service of the "established" or "sacred" fundamental freedoms, as, for example, upon equality and non-discrimination between workers for nationality reasons; wage equality and non-discrimination between men and women employees, and others of similar nature. The Treaty of Rome, from 1957, did not include any catalogue, short or long, of fundamental rights or any general clause of fundamental rights protection to which the created entity or the respective institutions were bound to in its normative (legislative), administrative or legal activity. The Treaty did not express any "feeling" or any concern with the fundamental rights that should be considered, in case of conflict, bound to the economic freedoms, therefore

[23] Or, in relation to any other, insofar as they are rights included in the communitarian acquis by one of the routes that the CJEU has been generalising: that of common constitutional traditions or those resulting from texts to which the Member States are bound (see Judgments *Stauder*, 12 November 1969, Case 29-69, ECLI:EU:C:1969:57; *Internationale Handelsgesellschaft*, 17 December 1970, Case 11-70, ECLI:EU:C:1970:114; *Nold*, 14 May 1974, Case 4-73, ECLI:EU:C:1974:51 and *Rutili*, 28 October 1975, Case 36-75, ECLI:EU:C:1975:137).

[24] See G. H. von Wright, *Norma e acción. Una investigación lógica*, trans. Pedro García Ferrero (Madrid: Tecnos, 1970), in which chapter V refers to the structure of legal norms "in an attempt to show that their complexity was greater than that which seemed to result from H. Kelsen's thinking", quoted by C. Santiago Nino, *Introducción al Análisis de Derecho*, 6th edition (Barcelona: Ariel, 1995), 67 and following.

leaving unprotected people and non-community instances that felt one or some of the mentioned rights harmed by an act of the Community or by an act of the national entities when applying EU law. It can be said that, in the community framework, fundamental rights were, in this phase, set inside brackets or even considered the unwanted relatives or the relatives excluded from the family of rights.

As it is known, in the years following the institution of the EEC, the CJEU, by invoking said Treaties' omission and its consequent incompetence, refused to control the validity of the acts of the Community based on the fundamental rights recognised by the national legal order.[25] It was a phase of *value agnosticism*, as MARIA LUÍSA DUARTE named it, or phase of *sweet indifference*, as others prefer, or even, forgive us for the boldness, *phase of not much than all the better*, to disseminate a suggestive expression from FREDERICO MANCINI (see above II.2, 2nd paragraph) with which he intended to identify one of the characteristics of the first years of life of the institution created by the Treaty of Rome – the one of the belief in the market functioning (see the original wording of the paragraph 2 of Article 117).

2. Then an acute controversy was generated, in which the Constitutional Courts of some Member States were the protagonists, namely the German and the Italian, whose main object, also involving the question of primacy, was the protection of the fundamental rights, controversy that, with some prudence, walked into a convergent solution.[26] The case *Solange I* (1974) is from that time to which would follow, years later, the case *Solange II* (1986) in which the Constitutional Court of the Federal Republic of Germany "*reserved the right to scrutinise the validity of the community law in the light of the fundamental rights guaranteed in the German Constitution if and in the measure that the EEC is not bound to the rights and fundamental guarantees in terms substantially equivalent to the German fundamental law.*"[27]

Then a new phase starts, that some authors have been naming with different expressions – *phase of the principles case-law* or *phase of the active recognition*[28] – staring, with that, the healing of an old fracture that, however, was still far from knowing its ending. The subsequent "constitutionalisation" (Maastricht) of this orientation naturally facilitated the path initiated before, but did not close it.[29]

The Treaty of Amsterdam also did not solve this "mishap" of the history of fundamental rights in the construction of the EU, although having lent an air of legal face to the social policy.

The CFREU, in 2000, and afterwards the Treaty that establishes a Constitution to Europe, signed in Rome in October 29th 2004 that incorporated the Charter but did not enter into force, represented attempts to overcome the problem under analysis. Though creditors of well-founded hope that, precisely, many deposited in them, both would end up frustrated. It was still necessary to close this cycle of the

---

[25] See the case law of the time, in particular *Storck*, 4 February 1959, Case 1/58, ECLI:EU:C:1959:4 and *Comptoirs*, 12 February 1960, Joined cases 36, 37, 38 and 40/60.

[26] Maria Luísa Duarte, *Estudos de Direito da União e das Comunidades Europeias* (Coimbra: Coimbra Editora, 2000), 19. The CJEU could even be agnostic – we say, from a positivist point of view, with reasonable grounds – but not the Treaties. What actually happened was that fundamental rights were not considered as parameters for assessing the validity of Community acts or their content – see the previously mentioned *Storck* (1959) and *Comptoirs* (1960) cases.

[27] See *Stauder*, *Internationale Handelsgesellschaft*, and *Nold.*

[28] In Manuel Lopes Porto and Anastácio Gonçalves (ed.), *Tratado de Lisboa Anotado e Comentado*, *cit*., 1397, Vital Moreira asserts that "*it was a serious threat to the community law's autonomy.*"

[29] Maria Luísa Duarte, *Estudos de Direito da União e das Comunidades Europeias*, *cit*., 20.

history of fundamental rights in the construction of the EU, also because it was still necessary to provide answers for the increasing conflict between economic freedoms and labour fundamental rights.[30] After all, the EU still lacked a true catalogue of fundamental rights, keeping the CJEU as a wide space of decision what, furthermore, was a factor of legal uncertainty. However, this question would only be given the answer that had been claimed for years with the Treaty of Lisbon (Article 6).[31]

3. In December 2007,[32] the CJEU judged two cases that raised heated controversy, involving union representatives and employers representatives, jurists, academics, public entities from the Member States and, inclusively, European institutions, namely the European Parliament, divided about the case application of the "protection parameters" of the free competition and the economic freedoms, on one hand, and of labour fundamental rights, on the other, especially of the rights to collective action and to collective bargaining.

This "new manifestation of an old question" – after all, as it was said before, a question that has been accompanying the community construction – would enter a new phase.[33]

In the case *Viking Line*, the Finnish company owner of the Rosella boat that since August 2003 made the connection between Helsinki and Tallinn, to whose workers, mostly Finnish, the collective agreement subscribed by Viking and FSU (The Finnish Seaman's Union) was applicable, according to the Finnish normative frame, reported to FSU the decision to (re)flag Rosella in Estonia, justifying the decision with the damages caused by the direct competition of the Estonian boats, with lower wages. The Finnish union disagreed with such decision and reported the facts to the ITF (International Transport Workers' Federation), of which it was a member, requiring the application of its policy regarding the flags of convenience (since 1984 the ITF opposed to the flags of convenience precisely to avoid practices of social dumping, supporting that the work conditions, including the wage, should be negotiated by the union of the country of the owner's headquarters). The ITF reported, in its turn, the situation to its federations, reminding that only FSU was able to negotiate a collective agreement applicable to Rosella.

Differently went the case *Laval*, in which a company from Latvia recruited 35 workers to perform a series of work in a municipality in Sweden within a construction work contract in the scope of a public contract. After the construction activities initiated, the local section of the Swedish federation of construction workers contacted the Latvian company in order to conclude a settlement to adhere to the collective agreement of that sector. The company refused to adhere to the agreement, opting to conclude an agreement with a union from Latvia. The

---

[30] Maastricht established the rights enunciated in the ECHR and the rights that result from the common constitutional traditions as general principles of the community legal order's law. However, writes Vital Moreira in "Anotação geral» to the CFREU, Manuel Lopes Porto and Anastácio Gonçalves (ed.), *Tratado de Lisboa Anotado e Comentado*, *cit*., 1396, "*in the lack of reception and enunciation of the said rights, there was still a manifest deficit of recognition and protection of fundamental rights at an EC/EU level.*"

[31] An old problem that the responsible for the European construction insisted on postponing and that would end up answered in the Treaty of Lisbon and, even then, with risky concessions (see Protocol United Kingdom, Poland, etc.)

[32] See José Gomes Canotilho and Mariana Canotilho, "Anotação ao artigo 6.º TUE", in *Tratado de Lisboa Anotado e Comentado*, ed. Manuel Lopes Porto and Anastácio Gonçalves, *cit*., 39 to 42.

[33] It should be remembered that these judgments concern cases from 2005 and that the Treaty of Lisbon, although approved in 2007, only came into force in 2009.

Swedish union then initiated several collective actions, including a blockage that *paralysed* the company's activity. The construction work did not reinitiate, so the municipality of Vaxholm terminated the contract with Laval.

In the respective judgments – of 11 of December 2007, case C-438/05 and of 18 of December 2007, case C-341/05 – the CJEU analysed the cases in the light of the called fundamental freedoms or, in wider and perhaps more rigorous terms, in the light of the provisions in the Treaty about construction and about the functioning of the internal market.

Truly, the controversy seems to be reduced to the following question: did the collective actions at stake impair or disturb the market's functioning? Did they go against the right of free competition and/or some of the four freedoms of movement?

With such a framing, the CJEU made its opinion clear about the horizontal effectiveness of the norms of the Treaties on such matters, considering those applicable not only to the Member States but to all entities, public or private. Whether the origin was, any action susceptible to go against the mentioned provisions should be understood as contrary to the EU law.

But, if it was indispensable, would it suffice to support such conclusion?

As it can be seen, the CJEU did not feel the need to question the resource to the collective action, including strike and collective bargaining. What was at stake after all? At stake would be the relation between, on one hand, the economic freedoms protected by the Treaty and, on the other hand, and the social-labour rights protected by the legal order of each Member State. The conflict would then seem to have as "protagonists" the community normative framework, that protected the economic freedoms but omitted any reference to the labour rights, and the national normative framework of each Member State, that protected the latter without a bind to the former.

It is, in this precise measure, a "europeanised" conflict with a final decision favourable to the protection of the economic freedoms, so the collective action and the collective bargaining end up to being considered obstacles, real or potential, to the free functioning of the internal market, namely, to the freedom of competition and to the other economic freedoms (freedom of establishment and freedom to provide services included).

This was the understanding that outraged many of the social and politic actors and disquieted many more, mainly because such case-law seemed to open the doors to those interested in showing the existence of national laws and practices as true obstacles to the functioning of the market, therefore "encouraged" to appeal to the CJEU in order to obtain restrictive decisions to the exercise of the collective rights at stake.

The judgments *Viking* and *Laval* and, later, the judgments *Ruffert* and *Commission v. Luxembourg* caused a strong reaction on the social partners that, on a joint report from 19 of March 2010, showed fears for its consequences, especially regarding the protection of posted workers, the capacity of the unions to keep promoting the defence of their interests, the adequacy to the Union's rules, namely the ones respecting freedom to provide services and freedom of establishment.[34]

[34] In the case *Schmidberger*, 12 June 2003, case C-112/00, ECLI:EU:C:2003:333, an ecologists' association held a demonstration that blocked a motorway with the aim of raising public awareness and the authorities' awareness of the pollution problems caused by traffic, particularly freight transport; the

4. Three aspects of the mentioned judgments deserve to be highlighted:
a) The acknowledgement, for the first time, of the right to collective action, including strike, as a fundamental right and as integral part of the general principles of the EU which observance is assured by the CJEU. In recital 44 of the *Viking case* it is said, in this matter, that "*Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is contra bonos mores or is prohibited under national law or Community law.*"
In its turn, similar consideration is on the judgment *Laval*, in which Recital 91 says "*although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices*";
b) The affirmation of the necessity to adjust the rights that result from the Treaties' provisions about the four freedoms and the objectives of social policy among which figure, namely, the improvement of life and work conditions, an adequate social protection and the social dialogue (Recitals 79 of the case *Viking* and 105 of the case *Laval*);
c) The recognition of the right to collective action with the goal to protect workers as a *legitimate interest* susceptible to justify, in principle, restrictions to fundamental freedoms with the subsequent conclusion that the *workers protection constitutes one of the imperative reasons of general interest*.

It must be noted, in this respect, like it is said on the Recital 77 of the judgment *Viking*, that the right to trigger a collective action that has as an objective the protection of workers is a *legitimate interest* susceptible to justify, in principle, a restriction to one of the fundamental rights granted by the Treaty[35] and that the protection of workers figures between the *imperative reasons of general interest* already recognised by the CJEU,[36] identical consideration as the one in the Recital 103 of the case *Laval*.[37]

---

case *Albany*, 21 September 1999, C-67/96, ECLI:EU:C:1999:430 dealt with the following question: was the collective agreement setting up the pension funds whose membership was made compulsory by the signatory employer subject to the provisions of Article 85 of the EC Treaty (currently Article 101), or should it be understood that, in view of its nature and purpose, it exceeded the scope of that Article? On the judgment *Schmidberger*, see Filipe Miguel Torrão Guerra, "Protecção jurisdicional dos direitos fundamentais na União Europeia, Comentário, Acórdão do Tribunal de Justiça de 12 de Junho de 2003", available at http://www.cedu.direito.uminho.pt/uploads/Coment%C3%A1rio%20-%20Ac.%20TJ%20Schmidberger.pdf.

[35] To follow the CJEU's developments, see the most recent judgments *Commission v Germany*, 15 July 2010, Case C-271/08, ECLI:EU:C:2010:426 and AG2R *Prévoyance*, 3 March 2011, Case C-437/09, ECLI:EU:C:2011:112.

[36] See, with interest, judgment *Schmidberger*, already mentioned in footnote 35, especially recital 74.

[37] See, namely, the case-law mentioned in it: *Arblade and o*., 23 November 1999, Joined cases C-369/96

The impact of the fears caused by these judgments of the CJEU was greater than the merits some give it, namely the primacy of the economic freedoms over the exercise of the fundamental rights and the possibility to subject the exercise of the mentioned rights to certain restrictions.

As reminded by the Mario Monti Report, the judgments of 2007 exposed the divisions between the single market and the social dimension at a national level.[38] [39] "*Revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level.*" It then underlined that "*the revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration.*"

Truly, the problem caused by the 2007 judgments awakened the old disputes between, on one hand, the norms in force about social protection, mainly exercised or to exercise in the context of the economic freedoms and, in particular, in the context of freedom to provide establishment and posting. Specially, the union representatives understood that the mentioned judgments affirmed or reaffirmed the primacy of the economic freedoms over the fundamental rights, allowing, or even encouraging, the social dumping and unfair competition. Besides that, they added "*the Court of Justice ends up declaring that the exercise of the right to collective action may be subjected to certain restrictions*" (recitals 44 of the case *Viking* and 91 of the case *Laval*), what would end up harming "*the capacity of unions to initiate actions to protect the rights of workers.*"

Meanwhile, with the Treaty of Lisbon, approved in 2007 but applicable since 2009, it became clear that the EU would then have a true catalogue of fundamental rights and that, in addition, the text that embodied it shared the characteristics of primary law, *i.e.,* that the Charter would have the same legal value of the Treaties, as unequivocally results from Article 6 of the TEU.

Maastricht had also affirmed as a goal of the EU the social objective, alongside the economic purpose. In fact, according to Article 3(3) of the TEU the internal market should engage in a social market economy highly competitive including in its goals the full employment and social progress.

The rights enshrined in Article 28 of the Charter are not absolute, such as the generality of others, the ECtHR also recognised in its judgment from 21 of April 2009, *Enejeri Yapi-Yol v. Turkey* (no. 68959/01, recital 32), with the exercise subjected to restrictions that also may result from national Constitutions, laws and practices. The rights contemplated in Article 28 must be exercised in accordance with EU law and the national laws and practices.

The same has to be concluded, as reason dictates, in relation to the economic freedoms, equally subjected to restrictions if aiming towards legitimate objectives compatible with the Treaty and when imperative reasons of general interests justify

---

and C-376/96, ECLI:EU:C:1999:575, recital 36; *Mazzoleni and ISA*, 15 March 2001, Case C-165/98, ECLI:EU:C:2001:162, recital 27; and *Finalarte and o.*, 25 October 2001, Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, ECLI:EU:C:2001:564, recital 33.

[38] "*See, at this regard, the right to initiate a collective action with the objective to protect the workers of the host State against a potential practice of social dumping may constitute an imperative reason of general interest, in the meaning given by the Court of Justice's case-law, susceptible to justify, in principle, a restriction to one of the fundamental freedoms assured by the Treaty*" (see, in this sense the judgments referred in note 37).

[39] "A new strategy for the single market", report presented to the President of the Commission, 9 of May 2010, 68.

it. Well, one of the advantages from of the 2007 judgments was the recognition that the protection of workers' interests was a case of legitimate interest susceptible to justify, in principle, restrictions to the fundamental rights, with the subsequent conclusion that the workers' protection constitutes one of the imperative reasons of general interest.

Jorge Leite

ARTICLE 29

Right of access to placement services

Everyone has the right of access to a free placement service.

1. The introduction of this Article in the CFREU is related to the growing importance and development of fundamental social rights of workers within the EU.

The genesis is in Conventions numbers 88, 96 and 181 of the ILO, in Article 1(3) of the European Social Charter of 1961, revised in 1996, and in the Charter of the Fundamental Social Rights of Workers of 1989 – Title I, section 6 – "Every individual must be able to have access to public placement services free of charge."

2. This right is enshrined in the CFREU as a way of, prior to the exercise of the right to work and even to help to get one, create a system that allows all citizens the right of access to a free placement service, without suffering any kind of discrimination and respecting the International and EU principles.

3. The recognition of this right cannot be dissociated from a fundamental principle in the EU, which is the free movement of workers laid down in Articles 45 to 48 TFEU. Article 46 establishes that "The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular: a) "*by ensuring close cooperation between national employment services*" and d) "*by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.*" This right is a fundamental freedom guaranteed by EU law and it means that all nationals of a Member State are entitled to work in any other Member State. The CJEU has understood that, as the definition of worker is one of the core principles of the notion of freedom of movement, it should not be interpreted in a narrow sense.

It also means that if a citizen of the EU wants to work in another Member State he/she has to be treated in exactly the same way as their national colleagues as regards working conditions, including, *inter alia*, pay, training, dismissal and reinstatement. The CFREU enshrines the right to freedom of movement. In the Preamble, it defends this right and Article 15(2), states that "*Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.*"

4. Regulation (EEC) no. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, was adopted to enshrine that duty and that the implementation of the free movement principle implies the "*abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Community in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health.*"

Taking into account the principle of non-discrimination, every citizen of a Member State has the right to seek a job in another Member State and to enjoy access to the same services as a national of that State, benefiting from the same priority in access to employment.

However, to the full satisfaction of this objective it is necessary, as stated by the same regulation, "*to strengthen the machinery for vacancy clearance, in particular by developing direct co-operation between the central employment services and also between the regional services, as well as by increasing and co-ordinating the exchange of information in order to ensure in a general way a clearer picture of the labour market.*"

The second part of the Regulation deals with the contact and the clearing of vacancies and applications for employment. In the third part of this Regulation it is established committees for ensuring close cooperation between the member states in matters concerning the freedom of movement of workers and their employment, like an Advisory Committee and a Technical Committee.

5. The inspiration sources to this Article are the various ILO conventions on this matter and the European Social Charter.

There are three ILO Conventions since 1933: Conventions numbers 88, 96 and 181, the latter of which is currently in force in this area. There is a growing recognition of the right of access to a free employment service and the consecration of obligations on public authorities regarding the respect of fundamental rights and the principle of non-discrimination.

Convention no. 181 of 1997 on private employment agencies applies to all private agencies defined in Article 1 as "*any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services*", to all categories of workers and to the various sectors of economic activity.

With this Convention there are two aims. First, to allow the activity of private employment agencies and to protect workers that use them, making it essential to safeguard the defence of some of their fundamental rights, such as the right to freedom of association and collective bargaining in Article 4, and the prohibition of any discrimination based on race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability, in accordance with Article 5. Second, the Convention aims to ensure the protection of the right to protection of personal data, establishing that any treatment that takes place complies with the requirements laid down in national legislation.

The Convention adopted a new regulatory framework of private employment agencies, aimed at ILO better matching the needs of the labour market and allow for greater security and more effectiveness of the fundamental rights of workers.

This Convention was ratified by Portugal and it involved the amendment of national legislation. Decree-Law no. 260/2009 of 25 September should be taken into account with all the amendments that were made.

This statue enshrined the principle of equal opportunities and the prohibition of direct or indirect discrimination based, *inter alia*, ascendant, age, gender, sexual orientation, maternity, paternity, marital status, family situation, genetic heritage, reduced work capacity, disability or chronic disease, nationality, ethnic origin, religion, political beliefs, religious or trade union membership, in accordance with Article 23 (1) (b). It was established also in paragraph d) of this Article the protection of personal data, as well as in paragraph g), the compliance with the rules on minimum

age for admission. Regulated in Article 27, paragraph 1, paragraph c), the respect for the rights of freedom of association and collective bargaining.

It is also relevant to incorporate the principle that these services are free as well as a set of a rights and duties.

6. Article 29 of the CFREU was also inspired by Article 1(3) of the revised European Social Charter, which enshrines the Member States to ensure the effective exercise of the right to work, should establish or maintain free employment services for all workers.

The mission of the European Committee of Social Rights (ECSR) is to judge that State Parties are in conformity in law and in practice with the provisions of the European Social Charter. The ECSR has interpreted this article as establishing an obligation for States to establish or maintain free employment services throughout its territory.

This obligation rests with the State. Nonetheless, private employment agencies can be created.

In Portugal, the reports made by the European Committee of Social Rights, consider that the situation is in conformity with the Charter.

The idea that the service is free has been understood as extensible not only to workers but also to the employers.

The participation of all is essential for the proper functioning of free employment agencies, including the social partners, to the extent that the trade unions and employers' associations are in a privileged position because they know the real needs of the job market and can identify more accurately the specific needs of the same.

7. Everyone is entitled to a free employment agency and all Member States have to create or maintain services which provide free of charge and without any direct or indirect discrimination the access to this right for workers or for employers, respecting their fundamental rights, including the right to equal opportunities, personal data protection and respect for freedom of association and the right to collective bargaining. These services must act independently of any influence, particularly the political one.

8. It is important to highlight some of EU law related with this topic.

First the Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States that on *Guideline 7: Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality* establishes that "*Employment services play an important role in activation and matching and they should therefore be strengthened with personalised services and active and preventive labour market measures at an early stage. Such services and measures should be open to all, including young people, those threatened by unemployment, and those furthest away from the labour market.*"

Also, Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, on Article 21 – *Placement by public employment services* determines that Member States may determine that the placement of seasonal workers shall only be carried out by public employment services.

Another important legal instrument is Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations (EU) no. 492/2011 and

(EU) no. 1296/2013, amended by Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) no. 883/2004, (EU) no. 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 on Article 3 – *Definitions*, establishes that *"(1) 'public employment services' or 'PES' means the organisations of the Member States, as part of relevant ministries, public bodies or corporations falling under public law, that are responsible for implementing active labour market policies and providing quality employment services in the public interest; (2) 'employment services' means a legal entity lawfully operating in a Member State which provides services for workers seeking employment and for employers wishing to recruit workers; (3) 'job vacancy' means an offer of employment which would allow the successful applicant to enter into an employment relationship that would qualify that applicant as a worker for the purposes of Article 45 TFEU; (4) 'clearance' means the exchange of information and processing of job vacancies, job applications and CVs; (5) 'common IT platform' means the IT infrastructure and related platforms set up at Union level for the purpose of transparency and clearance in accordance with this Regulation; (6) 'frontier worker' means a worker pursuing an activity as an employed person in a Member State and who resides in another Member State to which that worker returns as a rule daily or at least once a week; (7) 'EURES cross-border partnership' means a grouping of EURES Members or Partners and, where relevant, other stakeholders outside of the EURES network, with the intention of long-term cooperation in regional structures, set up in cross-border regions between: the employment services on regional, local and, where appropriate, national level; the social partners; and, where relevant, other stakeholders of at least two Member States or a Member State and another country participating in the Union instruments aiming to support the EURES network; (8) 'European Labour Authority' means the body established pursuant to Regulation (EU) 2019/1149 of the European Parliament and of the Council*" and on Article 4 – *Accessibility*, that "*1. Services under this Regulation shall be available to all workers and employers across the Union and shall respect the principle of equal treatment. 2. Accessibility for persons with disabilities to the information provided on the EURES portal and to support services available at national level shall be ensured. The Commission and the EURES Members and Partners shall determine the means to ensure this with regard to their respective obligations*."

Teresa Coelho Moreira

ARTICLE 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

1.[1] According to Article 151 of the TFEU, the main objectives of EU social policy are the following: the promotion of employment; improved living and working conditions – harmonising whilst ensuring improvement; proper social protection; dialogue between social partners; the development of human resources with a view to lasting high employment; combating exclusion. To accomplish the goals enunciated in Article 151, the Union will support and complete the action of the Member States in several domains, namely regarding the "*protection of workers where their employment contract is terminated*" [Article 153(1)(d) of the TFEU]. The protection against unjustified dismissal is one of the areas of social policy in which the EU has harmonising competences, and Article 153(2) demands unanimity in the adoption of EU secondary law in this specific domain. There are, moreover, a significant number of directives that, directly or indirectly, contain laws relating to dismissal. The same theme – the legal regime of dismissal – constitutes the central object of Article 30 of the CFREU. It is not hard to understand why, considering the magnitude of the values at stake.

2. Despite the intention, even vocation, to be an enduring relationship, it can be said, quoting VINÍCIUS DE MORAES, that a work contract is like love: eternal while it lasts! The truth is that, like so many others, sooner or later the legal-labour relationship ends up extinguishing itself, producing, then, the definitive rupture of the labour bond. The theme, as is widely recognised, is of enormous importance both from the theoretical point of view and the practical one, not least because many of the questions pertaining to the legal-labour situation are only discussed at the time of (or after) its termination, as it is often only then that the worker feels able to judicially probe the employer's behaviour.

The cessation of a work contract is a particularly sensitive issue, within which social, human and economic aspects, of the greatest relevance, end up criss-crossing. The extinction of the work contract entails, for the worker, the loss of his/her job. We know that when loss of employment happens without or against the worker's will, its consequences, at a social and human level, can be devastating, especially when it comes to low qualified and not-so-young workers.

In the current context of flexicurity, the emphasis is often on de-dramatising job loss. The focus is placed on the idea of transition ("*transitional labour markets*"), whereby the dismissed worker would not actually be unemployed, but in a "gap between jobs." Looking at things from this point of view, both employment and unemployment are, by definition, transitory situations, so there is a call to rely on

[1] All excerpts quoted in this text that are not extracts from texts that were originally written in Portuguese have been translated into English freely by the Author.

the "empowerment" of people, in the reinforcement of their position in the job market, in the promotion of their employability, so they can answer the emerging challenges without existential anxieties. Along these lines, Robert Reich writes, exemplarily: "*In the previous generation, to be dismissed corresponded to a moral failure, a personal failure, and a deep wound. Dismissal meant that the person could not do what was expected of her or of him, or that she or he was no longer capable of doing it. Therefore, dismissal dragged a deep loss of self-esteem.*"[2]

3. However, it remains unclear whether the dismissal corresponded to a fault, a failure, a wound, or whether it still does, or whether it triggered a loss of self-esteem, for that matter. In this context, the following words by Jorge Leite, written a quarter of a century ago, are very striking and are still relevant today: "*The job loss implies for the worker the loss of his or her main or exclusive source of income and transport with itself consequences of a psychic, family and social nature, for which the material assistance in unemployment policy hardly compensates and surely does not erase, as generous as it may be. The trauma caused by the job loss profoundly affects the worker's own personality, causing, very often, physiological and psychic perturbations: the worker feels humiliated, useless, wounded in his professional pride, victim of an unfair measure, object of public or private pity. His or her everyday life changes, the time and rhythm of his or her life is altered, the circle of his or her socialisation becomes restrained or modified. He or she often feels guilty in front of the members of his or her household, leading to a deterioration of those relationships, in some cases. In unemployment situations, mainly when they are longstanding, the tendency to marginality or even suicide becomes accentuated.*"[3]

4. It is true that the new economic era, globalised, dynamic, innovative and fiercely competitive obeys an ephemeral, volatile and unpredictable logic, incompatible with the ideal of "a job for life" that, to some extent, reigned during the previous century. We live in "liquid times", it is said that the job for life has disappeared. Nevertheless, we cannot inexorably proceed to a legal order which has to accept arbitrary dismissals, dispensing with the need for the employer to provide a justification for his decision and exempting such decisions from judicial scrutiny. The notion of job stability should not be reduced to something useless and disposable, while enshrining the principle of free dismissal principle or *ad nutum*, according to which the employer, free to hire and fire, can dismiss the employee for any reason, or even without any reason, in line with a famous US court decision from the late 19th century, in which it was affirmed "*Men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.*"[4]

The doctrine of employment-at-will represents, without a doubt, the maximum level of labour flexibility (contractual flexibility). It has, however, the serious consequence of leaving the employer's discretion untrammelled, instituting precariousness as the indelible trait of all and any work relationship – thereby legitimising the term "precarious." Indeed, allowing dismissal purely based on the employer's free choice, without any process of evaluation or a verifiable motive, could undoubtedly subject employees to arbitrary outcomes or even to individual persecution. To sum up, it is worth remembering, following Maria

[2] Robert Reich, *The Future of Success* (Lisbon: Terramar, 2000), 133.
[3] Jorge Leite, *Coletânea de Leis do Trabalho* (Coimbra: Coimbra Editora, 1985), 239.
[4] Supreme Court of Tennessee *Payne v Western & Atlantic Railroad Company*, 1884.

Vittoria Ballestrero, that labour precarity, for several clear reasons, is effectively a devaluation, while work stability, on the other hand, is a value.[5]

5. In our understanding, job stability is an important value – it is certainly not an absolute value (because stability does not mean non-removability, since the worker can lose his job against his own will), but it is not obsolete either. This is even confirmed by Article 30, integrated as it is within a CFREU which, in the trusted words of J. J. GOMES CANOTILHO, possesses a "*dimension of material fundamentalisation*" since the rights consecrated in it "*are constitutive of the basic structures of the European Community and Union. Besides being a "political and moral legitimisation" of a political-organisational structure, they confirm the European Union as a values and principals' community that is legally regulated.*"[6]

6. Having regard to the rule under consideration, it may be said that a worker's right to protection in the event of unjustified dismissal flows from and into, in the fitting words of ANA MARIA GUERRA MARTINS, "*the common heritage of Europeans*" in this respect.[7] It is a right that, ultimately, represents a guardianship of the worker's dignity, a right that seeks a serious and well-pondered reason to justify the deprivation of work.[8] From another perspective, and additionally, the right not to be dismissed without a fair cause constitutes an expression of professional freedom and the right to work, both consecrated in Article 15 of the CFREU.[9]

7. The right under consideration is broadly in line with the provisions in the European Social Charter of 1961, revised in 1996 (approved, for ratification, by the Assembly of the Republic's Resolution number 64-A/2001, of October 17th), and in Convention number 158 of the ILO, of 1982, concerning the cessation of the work relationship on the employer's initiative (approved for ratification by the Assembly of the Republic's Resolution number 55/94, of August 27th). These two international texts were, without a doubt, the main sources of inspiration. In fact, according to Article 24 of the European Social Charter, and aiming to assure the effective exercise of the right to protection in case of dismissal, the signatories agreed to recognise: a) the employee's right not to be dismissed without a valid reason connected to their aptitude or behaviour, or based on the operational requirements of the company, establishment or service; and b) the right of workers dismissed without a valid reason to receive appropriate compensation or other suitable reparations. To that effect, the parties to the European Social Charter assured workers dismissed without a valid reason the right to appeal against the dismissal before an impartial body. Furthermore, in Article 4 of Convention number 158 of the ILO, in the section related to "justification for termination", we read that "*the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*"

---

[5] Maria Vittoria Ballestrero, "Il valore e il costo della stabilità", *Lavoro e Diritto*, no. 3 (2007): 394.

[6] J. J. Gomes Canotilho, *et al.*, *Carta de Direitos Fundamentais da União Europeia*, Corpus Iuris Gentium Conimbrigae, no. 2 (Coimbra: Coimbra Editora, 2001), 13.

[7] Ana Maria Guerra Martins, *A Carta dos Direitos Fundamentais da União Europeia e os direitos sociais*, Estudos de Direito Público, vol. I (Coimbra: Almedina, 2003), 37.

[8] In this regard see, for example, Silvana Sciarra, "Derechos sociales. Reflexiones sobre la Carta Europea de Derechos Fundamentales", *Temas Laborales*, no. 62 (2001): 20.

[9] See, for instance, Ulrich Zachert, "Los derechos fundamentales de los trabajadores en la Carta Europea de Derechos Fundamentales", *Temas Laborales*, no. 65 (2002): 21.

8. To summarise, the support for a system of causal, motivated or justified dismissal, already assumed by the European Social Charter and by Convention number 158 of the ILO, is enforced by the CFREU, in its Article 30.[10] Notwithstanding, it must be recognised, as Maria Amparo Ballester Pastor sustains, that the right consecrated in this norm is, however, a "*conditioned social right*", given the double conditioning that results from the remission made to the provisions of EU law and to the national laws and practices.[11]

In any case, the remission to the "national laws and practices", that appears on the final part of the norm, finds full accommodation in the Portuguese framework. The CPR, in its Article 53, elevates job security and the prohibition of unjustified dismissal to the status of workers' fundamental rights, endowing it with the privileged regime of the rights, freedoms and guarantees (Article 18 of the CPR). Therefore, if our perspective is correct, there can only be one conclusion: between the "old" Article 53 of the CPR and the "young" Article 30 of the CFREU the harmony is complete. Indeed, and contrary perhaps to expectations, the precept in the CPR finds a total correspondence in the Charter; hence, the former is not an outdated and maximalist precept, nor does it represent a strange Portuguese singularity in the Union's framework.

9. We should note, nevertheless, that the emphasis placed by the CPR on the fight against unjustified dismissal does not find a parallel in any other Constitution of a Member State of the EU.[12] Indeed, whilst the constitutional concept of fair cause is a relatively undetermined concept it is not a concept devoid of normative content. In fact, it is a pre-constitutional concept, whose content was the product of a firm legislative and doctrinal evolution and whose densification must therefore respect the normative array of this concept, as reflected in the CPR. As a consequence, the constitutional amplitude of "just cause" safely covers dismissals on disciplinary grounds, based on illicit and wrongful conduct of the respective worker. It is also defensible that dismissals based on objective causes, connected to the functioning of the company (economic, technological, structural or market motives that can result in a collective dismissal, individual redundancy, or in a dismissal for maladaptation), are covered in our legal-constitutional order. However, subjective motives, of a non-infringing nature and connected to the worker's aptitude (weak yield, low productivity, poor performance, etc.), will hardly find a place in Article 53 of the CPR, even though these aptitude-related motives are foreseen in Article 24 of the European Social Charter and Article 4 of Convention number 158 of the ILO. This dissimilarity is unsurprising; it is a logical and almost unavoidable corollary of the remission made by Article 30 to "national laws and practices", when it comes to the definition of the right to protection in the case of an unjustified dismissal.

10. As set out above, the protection of workers against unfair dismissal under Article 30 will take place "in accordance with Community law." The essential thrust of Community activity has focused on the protection of workers facing contractual vicissitudes related to the employer or the enterprise. This impetus can be found in

---

[10] Underlining this point, see, for example, Manuel López Escudero, *et al.*, *Carta de los Derechos Fundamentales de la Unión Europea – comentario artículo por artículo*, Title IV, Solidaridad (Fundación BBVA, 2008), 526.

[11] Maria Amparo Ballester Pastor, "Los derechos sociales en la Carta Comunitaria de derechos fundamentales y en el Tratado de Lisboa", *Actualidad Laboral*, no. 15 (2009): 1762-1763.

[12] As stated in Pérez de los Cobos Orihuel, "El reconocimiento de los derechos sociales fundamentales en la Unión Europea", *Foro, Revista de Ciencias jurídicas y sociales*, Nueva época, no. 9 (2009): 24.

the following Directives: i) Directive 75/129/EEC, of 17 February 1975, meanwhile replaced by Directive 98/59/EC, of 20 July 1998, that focuses on the protection of employees in the case of a collective redundancies; ii) Directive 80/987/EEC of 20 October 1980, altered by Directive 2002/74/EC of 23 September 2002, concerning the protection of employees in the event of the insolvency of their employers; iii) Directive 2001/23/EC of 12 March 2001, relating to employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, that coded and replaced Directive 77/187/EEC of 14 February 1997, altered by Directive 98/50/EC of 29 June 1998.

11. When it comes to dismissal, Directive 98/59/EC merits special mention, the aim of which is to approximate the laws of the Member States relating to the rules and procedures relating to collective redundancies, in order to enforce the employees' protection in these matters. For the purposes of applying this Directive, "collective redundancies" are understood to be the dismissals made by an employer, for one or many reasons not inherent to the employees, when those redundancies cover a certain minimum number of employees, as laid out in Article 1(1)(a). The employer who intends to make collective redundancies must consult, in a timely manner, the employees' representatives in order to arrange a deal. Those consultations will focus on the possibilities to avoid or to reduce the collective dismissals, as well as on the means to attenuate the consequences thereof, using social measures of monitoring. During the consultations, the employer must provide the employees' representatives with all the relevant information, communicating to them in writing: i) the reasons for the dismissal, as well as the period during which the employer intends to make those redundancies; ii) the number and the categories of the employees usually employed and to be dismissed; iii) the criteria to be used in the selection of the employees to be dismissed; and iv) the calculation methods of the possible compensation to be owed to the affected employees.

The Directive describes the process which must be followed, summarised as follows: i) in principle, the employer must notify in writing the competent public authority with regard to any project of collective redundancies, a notification that must contain all the useful information about the dismissal project and the consultations held; ii) the employer will send a copy of that notification to the employees' representatives, who can present their observations to the competent public authority; iii) the collective redundancies can only take effect thirty days after the notification, a period during which the competent public authority will seek solutions to the problems created by the planned collective dismissals.

12. As a specification of the protection against unjustified dismissal, Article 33 of the CFREU underlines that every person has the right to protection from dismissals where the motivation is connected to maternity. This rule is in line with Article 5 of the above-mentioned Convention number 158 of the ILO, which includes as non-valid motives for dismissal [d] pregnancy or [e] absence from work during maternity leave. The provisions in Article 8(3) of the European Social Charter, as well as in Article 16 of Directive 2006/54/EC of 5 July 2006, regarding the application of the principle of equal opportunity and equal treatment between men and women in domains connected to employment and professional activity, provide further reinforcement of this protection.

13. Although the content of the right to protection against unjustified dismissals oscillates according to the law of each Member State, it can be said that it cannot

fail to integrate the three following elements: i) the right not to be dismissed unless there is a valid motive for the dismissal, whether this motive relates to the aptitude or behaviour of the employee, or whether it is based on the company's operational needs; ii) the right to appeal or to contest the decision of the dismissal before an impartial entity (maxime a court), in the event that the employee considers himself/herself to have been the target of a dismissal without just cause; iii) the right to an adequate compensation or to other proper reparation (for example, reintegration in the company), in case of an unjustified redundancy.

Obviously, any dismissal that represents the violation of a fundamental right or the practice of a discriminatory act must be considered unjustified – to this purpose, see, especially, the provisions laid out in Article 5 of Convention number 158 (which expressly denies validity to dismissal based on the membership of unions or the participation in activities promoted by those unions, the condition of being the employees' representative, the filing of any complaint or participation in proceedings brought against the employer due to alleged violations of law, or dismissal based on the race, colour, sex, marital status, religion, political convictions, national ancestry or social upbringing of the employee), as well as in Article 4(1)(c) of the Directive 2000/43/EC of 29 June 2000 (equal treatment between people, without distinction of an ethnic or racial nature), in Article 3(1)(c) of Directive 2000/78/EC of 27 November 2000 (general framework to fight against discrimination due to religion or convictions, a disability, age or sexual orientation, when it comes to employment and to professional activity), and in Article 14(1)(c) from the above-mentioned Directive 2006/54/EC (equality between men and women). It is worth saying that the application of the principle of equal treatment and the anti-discrimination mandate has repercussions on many levels of the labour relationship, including as regards dismissal on the part of the employer.

14. Whilst Article 30 assumes an undeniable importance, particularly when we consider that, in the provisions of Article 6 TEU, the CFREU possesses "*the same legal value as the Treaties*", one should not make the mistake of overvaluing its normative efficiency. Indeed, as stated in Article 51(1) of the CFREU, "*the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principal of subsidiarity and to the Member States only when they are implementing Union law*." Furthermore, as Article 51(2) adds "*this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties*." To quote the words of Maria Amparo Ballester Pastor, "*the Charter does not configure a catalogue of rights that must be applied by the Member States, but only the way the community precepts must be interpreted by the national bodies.*"[13] It is worth saying that, even though nowadays the Charter has the value of a Treaty, its true normative range is more modest than it may appear to be. In this regard, reference is made to the notation on Article 51 of the CFREU. Nonetheless, recent case-law from the CJEU appears to promote the application of the CFREU in a manner that extends its effects to the internal level (of Member States), enriching the EU *acquis*, and imposing compliance with the EU's level of protection.

João Leal Amado

[13] Maria Amparo Ballester Pastor, "Los derechos sociales en la Carta Comunitaria de derechos fundamentales y en el Tratado de Lisboa", cit., 1756.

ARTICLE 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

1. *General remarks*. The rights established in Article 31 of the CFREU refer to the subject of working conditions in a wide sense. The protection of these rights constitutes one of the key topics of the development of social law in the EU. Article 31 focuses on two topics: hygiene, safety and health at work, in paragraph 1; and the organisation of working time, in its various aspects, addressed in paragraph 2.

The relies on relevant provisions in the Treaty establishing the EEC, Articles 117, 118, 118-A and 120 and in the Treaty establishing the European Community, Articles 136, 137(1)(a)(b) and 142, respectively. The TFEU establishes the goal of improved living and working conditions in Article 151, the shared competence between the Union and Member States in the matter of workers' health and safety protection is outlined in Article 153(1)(a) a reference to working conditions is made in Article 153(1)(b), and the right to annual paid leave is inserted in Article 158.

Article 31 of the CFREU is also based on nos. 7, 8, 9 and 19 of the Community Charter of Fundamental Social Rights of Workers, of 9 December 1989, concerning improved working conditions, and Articles 2, 3 and 26 of the European Social Charter (Revised).

Lastly, the norm is inspired in the most important directives in the area of work security and health (with a special focus on Directive 89/391/EEC, of 12 of June 1989, which is the Framework Directive in this field) and the organisation of working time (here with special focus on Directive 93/104/EC of 23 of November 1993).

The rights established in this Article are those traditionally acknowledged at the EU level, which the CFREU consolidates.

As other fundamental rights inscribed in the CFREU, the rights recognised in this Article apply to workers, and underline the importance and autonomy of European Social Law, that is commonly recognised today.[1]

2. *Comment on paragraph 1*. Workers' rights to health, safety and dignified working conditions, as the CFREU establishes in Article 31(1), are traditionally recognised in the EU and are projected, at the level of the secondary sources, in a vast array of Directives and other normative instruments, as well as in abundant EU case-law.

The most important Directive in this regard is Directive 89/391/EC of 12 of June 1989 [subsequently amended by Regulation (EC) no. 188/2003 of 19 of September 2003 and by Directive 2007/30/EC of 20 of June 2007] as the Framework

[1] For further developments on this topic, see Maria do Rosário Palma Ramalho, *Direito Social da União Europeia* (Coimbra: Almedina, 2009), 36 *et seq.*

Directive in the area of work security and health and one of the foundations of the norm under notation. This Directive was developed by a significant number of Directives of a more specific scope – in compliance with the provision of Article 16(1) – that, as a whole, allow for the identification of three significant strands of the EU protection in this area: general workers' health and safety protection; workers' health and safety protection against specific risks related to the precise nature of the labour activity or the particular conditions of its execution; and the health and safety protection of specific categories of workers.

In the first line of development of the Framework Directive we can identify several Directives on general safety and health issues (for example, Directive 89/654/EC of 30 of November 1989, concerning the minimum standards in the issue of safety and health security in the workplace; Directive 89/655/EC of 30 of November 1989, related to the minimum standards of safety and health in the use of work equipment, later changed by Directive 2001/45/EC of 27 of June 2001; Directive 89/656/EEC of 30 of November 1989, addressing the minimum standards of security and health regarding workers equipment of personal protection; or Directive 92/58/EEC of 24 of June 1992, setting out the minimum standards of safety signals in the workplace). In the second line of development we can find Directives regarding specific professional risks that result from the nature of the work itself, or from the conditions under which it is carried out, in such a large number that it is impractical to list them here. Lastly, in the third line of development of the Framework Directive we find a set of Directives that reinforce the level of protection in relation to the security and health of specific categories of workers that are considered more vulnerable (as in the case of Directive 91/383/EEC, of 25 June 1991 relating to the security and health of fixed-duration and temporary workers; Directive 92/85/EEC, of 19 October 1992, related to the safety and health of employees who are pregnant, who gave birth recently or who are breastfeeding; or Directive 94/33/EC of 22 June 1994, focusing on the protection of young people at work).

3. The main goal of EU law in this respect, as displayed in Article 1(1) of Directive 89/391/EEC, is to encourage improvements in the safety and health of workers. Towards this end, the Directive establishes a set of general principles to prevent risks and to protect safety and health in the workplace, including the participation and training of workers in this specific area [Article 1(2)].

To develop these general orientations, the Directive establishes a broad range of duties for the employer: to ensure the safety and health protection of workers in every aspect related to the work [Article 5(1)]; to prevent risks, through regular risk assessment and by granting the workers adequate information and training [Article 6(1)(3)]; to institute health services within the company, in collaboration with employees' representatives (Article 7); to arrange for first aid (Article 8); to inform workers about work risks and safety and health in the workplace (Article 10); to consult and allow the workers to participate in the decisions regarding health and safety (Article 11); to train workers in this area (Article 12); and to comply with several duties of communicating and informing the responsible authorities on these issues [Article 9(d)]. On the other hand, employees also have to comply with a number of duties of care in this field (Article 13).

The notion of worker for the purpose of this Directive is a wide notion, as it includes not only any person employed by the employer but also trainees and apprentices [Article 3(a)], and not only workers in the private sector, but also

workers in the public sector. The Directive applies to both private and public sectors, excluding, only, in the public sector, activities such as the armed forces, the police or specific activities related to civil protection services [Article 2(1)(2)]. Therefore, as this Directive is one of the main sources of inspiration for Article 31(1) of CFREU, the concept of worker of this article can also be understood in broad terms.

Lastly, it is important to say that this Directive is to be considered as the minimum level of protection in this field. In this sense it allows for more favourable European or national provisions in this regard [Article 1(3)].

4. In relation to the development Directives, the above-mentioned Directive 92/85/EEC, regarding the safety and health protection of workers who are pregnant, who recently gave birth or who are breastfeeding, and Directive 94/33/EC, regarding the protection of young people at work are worth mentioning. Specifically in the matter of safety and health at work, these Directives establish measures of additional protection, including the restriction or prohibition of dangerous jobs, and in the case of young workers, the restriction of activities that can be harmful to their physical or psychological or educational development.

5. In Portugal, security and health of workers is addressed by the CPR. In this sense the right to safe and healthy working conditions is a fundamental right of workers [Article 59(1)(c) of the CPR].

The Framework Directive was transposed into national legislation by Decree-Law 441/91, of November 14th. Several development Directives have also been transposed in separate legislation. Currently, the main principles are inscribed in the Portuguese Labour Code, approved by Law 7/2009, of 12 February and in Law no. 102/2009, of 10 September.

The Labour Code [which expressly mentions in Article 2(b)(c) the transposition of Directives 92/85/EEC and 94/33/EC] establishes in Articles 281 and 293, the general principles regarding safety and health at work, but refers further details to special legislation. This development is found in Law no. 102/2009 – whose Article 2 mentions the transposition of Directive 89/391/EEC and also the partial transposition of the Directives on health and work conditions of workers who are pregnant, who just gave birth or who are breastfeeding, of young people, of fixed-term and temporary workers (Directives 92/85/EEC, 94/33/EC and 91/383/EEC, respectively), as well as several Directives concerning the protection of workers from risks related to the exposure to carcinogens or mutagens at work – establishing the legal rules regarding the promoting of safety and health at work (Article 1). National rules in this area comply with EU law.[2]

6. *Comments on paragraph 2*. Article 31(2) CFREU directly deals with tie issues related to of working time and protects the following rights of workers: right to a maximum number of working hours; right to daily and weekly resting periods; right to an annual paid leave.

These rights correspond to the traditional claims of employees in all countries. However, their establishment and development at the EU level was not precocious and has not been linear.

Notwithstanding the lack of a specific reference to the working time patterns in the Treaty establishing the EEC, the European rules on this matter began to evolve in the general reference to Article 118(a) of this Treaty to the duty to promote the

[2] For further developments at the national level, see Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho – Parte II Situações Laborais Individuais*, 9th ed. (Coimbra: Almedina, 2023).

improvement of work conditions to order to protect the health and safety of workers, and in the reference to Article 120 of the same Treaty related to annual paid leave, which in fact led to the approval of the main Directive in this area – Directive 93/104/EC of 23 November 1993 regarding certain aspects of working time. The separate references to the safety and health of workers and to working conditions, respectively, only emerged in the Agreement on Social Policy, annexed to the Treaty of Maastricht (Article 2), integrated within the European Court of Auditors (ECA) only with the approval of the Treaty of Amsterdam [Article 137(1)(a)(b) of the ECA, corresponding to the current Articles 153(1)(a)(b) and 158 of the TFEU].

The matter of working time is also mentioned in two articles of the 1989 Community Charter of the Fundamental Social Rights of Workers: Article 7, which establishes the improvement of working conditions as an objective of the internal market, namely in as regards working time arrangements and atypical forms of labour, such as fixed-term and temporary work, part-time work and seasonal work; and Article 8, which grants the worker the right to resting periods and to annual paid leave.

Article 31 of the CFREU was therefore inspired by this set of legal instruments, thus showing the strong link between the issues of working time and safety and health at work. It is, in fact, this link that explains the presence of both matters in the same Article.

On the other hand, the evolution of EU law regulating working time has not been as linear as in the national systems on the same subject. The EU ruling in this respect is not systematically oriented in favour of workers but seek to reconcile the protection of workers in this respect with the employer's interests that are much more in favour of flexible working time arrangements and aim to optimise human resources. Here, as in other matters, EU social law has been trying to strike a precarious balance between the value of workers' protection and management interests, revealing an undoubted compromise.[3]

The compromise underlying EU social law is also evident in Article 31 CFREU: on the one hand, workers' rights as regards working time correspond to a minimum level of protection; but on the other hand, these rights are established in rather vague formulas that must be complemented and implemented by other legal sources.

Nevertheless, the norm is useful because it clearly establishes these rights as the EU level of minimum level of protection of workers as regards working time.

7. The development of EU law on working time has covered two areas: working time in a strict sense and atypical labour relationships.

As regards working time and working time arrangements in a strict sense, Directive 93/104/EC was of fundamental importance, regarding certain aspects of working time arrangements. Meanwhile, this Directive was replaced by Directive 2003/88/EC of 4 November 2003. Directives regarding working time in specific professional sectors have been issued, such as the following: Directive1999/63/EC, of 21 June 1999, which regulates working time of maritime workers; Directive 2000/79/EC, of 27 November 2000, on working time of workers in civil aviation and Directive 2002/15/EC, of 11 March 2002, concerning the terrestrial transport sector. Lastly, Directives concerning the protection of safety and health of specific workers, such as young people or those who are pregnant, who recently gave birth or who are breastfeeding (Directives 94/33/EC and 92/85/EEC, respectively), should not be

[3] On this point, see Maria do Rosário Palma Ramalho, *Direito Social da União Europeia*, 105 *et seq*.

overlooked in this context because some measures of protection of these specific workers have a direct impact on working time.

As regards atypical work relationships, Directive 97/81/EC, of 15 December 1997, on part-time work, and Directive 1999/70/EC, of 28 June 1999, on fixed-term contracts, should be highlighted. More recently, it is important to mention Directive 2008/104/EC of 19 November 2009, on temporary work, which specifically cites Article 31 CFREU.

8. As stated before, the most important projection of the Treaty's norms in the context of working time was Directive 93/104/EC of 23 November 1993, regarding certain aspects of work time organisation. This Directive was changed by Directive 2000/34/EC, and ended up being replaced by Directive 2003/88/EC of 4 November 2003 (Recast Directive), which is currently in force.

In line with the previous Directive, Directive 2003/88/EC establishes the minimum requirements regarding working time arrangements [Article 1(1)(2)] and is closely linked to the Framework Directive on safety and health in the workplace [Article 1(4)]. This Directive has a wide scope since it applies to all sectors, private and public, excluding only some specific areas [Article 1(3)]. Given the fact that this Directive replaced Directive 93/104/EC, which inspired the Charter's norm, the concept of worker for the purpose of this norm must be interpreted in a wide sense.

On the other hand, this Directive has a general nature, so it does not prevail over EU legal instruments with a more specific scope or with directed towards special categories of workers (Article 14). It is also a legal instrument that grants minimum and subsidiary protection, in the sense that Member States can introduce more favourable provisions for workers at national level (Article 15).

In developing its objective, the Directive unfolds in four parts.

First, the basic operative notions of working time are established – the notions of working time, rest periods, night time, night worker, shift work and shift worker, mobile worker, offshore activity, and adequate rest (Article 2) and the definition of the concepts of reference periods, that are necessary for the application of some of the provisions in the Directive (Article 16).

Secondly, minimum rules are imposed regarding the duration of working and resting periods – minimum duration of daily rest, breaks, minimum duration of weekly resting time and maximum duration of weekly working time, and minimum duration of paid annual leave – Articles 3 to 7. Hence, this part of the Directive meets the workers' rights set out in Article 31(2) of the CFREU.

Next, the Directive especially addresses the questions related to night work, establishing maximum limits and imposing additional duties to evaluate the health of night workers (Articles 8 to 12) and to follow appropriate patterns of work.

Lastly, it establishes the possibility of derogations and exceptions to its own rules, in Article 1 and thereafter. Founded on different criteria – that range from the workers' categories to the dimension of the company, or the nature of the activity, among others – and covering the overwhelming majority of the Directive's rules, these derogations and exceptions significantly weaken the Directive, showing the precarious balance between the value of the workers' protection as regarding working time and the interests of the companies in flexible working time arrangements adapted to the management's needs.

9. Precisely due to the tension between the protection of workers' rights and management's interests, directed towards flexibility, the issue of working time has

been a difficult area of development at the EU level, and this explains the successive and repeatedly unsuccessful attempts to review the Directive on working time, over recent years.

At the same time, this is a matter that has been closely scrutinised by EU case-law, that debates the concepts of working and resting time, both in general and in relation to specific categories of workers,[4] the problem of the qualification of the worker's availability periods,[5] as well as several problems related to night work,[6] among others.

10. The rights established in Article 31 of the Charter are recognised at national level. In a formulation that is, in fact, very close to the Charter, Article 59(1)(d) of the CPR establishes, as the fundamental rights of workers, the right to resting periods and to leisure, the right to a maximum number of working hours the right to weekly rest and to a period of annual paid leave.

The transposition of the Framework Directive in this field was only necessary in specific issues because, in general, the national legal system already complied with European law and, almost always, national rules are more favourable to the workers that EU law in this regard. Hence, in Portugal, the partial transposition of Directive 93/104/EC only occurred in the context of the legal frame regarding flexible working time (approved by Law 21/96, of July 23rd) that transposed the notion of reference periods and, in a more systematic way, by Law 73/98, of 10 November, that transposed the fundamental operative concepts of the Directive and its provisions regarding the maximum duration of weekly work, of daily and weekly rest and of night work. Directive 97/81/EC, on part-time work, was transposed into national law by Law no. 103/99, of 26 July and Directive 1999/70/EC, on fixed-term work, was transposed by Law no. 18/2001, of 3 July, amending Decree-Law no. 64-A/89, of 27 February, which, at the time, contained the legal regime for fixed-term labour contracts. Lastly, the provisions of the Directives focused on employees who are pregnant, who recently gave birth or who are breastfeeding, as well as those regulating the work of young people, have resulted in some changes to the Labour Contract Law (DL no. 49/408, of 24 November 1969), and the Law on the Protection of Maternity and Paternity (Law no. 4/84, of April 5th).

Currently, in Portugal, the rules on working time are set out in the Labour Code, where express reference is made to the transposition of Directives on part-time work, fixed-term work and working time [Article 12(f)(h)(n) of Law 7/2009, of February 12th]. In the Labour Code, matters related to working time arrangements are dealt with in Articles 197 and following; night work and shift work are regulated in Articles 220 and following and Article 223 and following; the issues related to daily and weekly resting periods are addressed in Article 214 and Articles 232 and following; the entitlement to annual paid leave is ruled by Articles 237 and following; fixed-term and part-time work contracts are regulated in Articles 140 and following and 150 and following and, lastly, the specific rules applicable to working time limits for minors and for employees who are pregnant, who recently gave birth or who are breastfeeding are stated in Articles 74 to 80 and 58 to 60, respectively.

---

[4] See, for example, Judgments CJEU *Landeshauptstadt Kiel*, 9 September 2003, Case C-151/02, ECLI:EU:C:2003:437 and *Pfeiffer*, 5 October 2004, Case C-403/01, ECLI:EU:C:2004:584.

[5] See Judgment CJEU *Simap*, 3 October 2000, Case C-303/98, ECLI:EU:C:2000:528, a leading case regarding this matter.

[6] See, for example, Judgment CJEU *Stoeckel*, 25 July 1991, Case C-345/89, ECLI:EU:C:1991:324, on the relation between European Law on gender equality and Convention no. 189 of the ILO prohibiting women from night work.

The Portuguese national legal regime in this area complies with EU law and is, in general, more favourable to workers; the Portuguese legislation has not implemented many of the derogations and exceptions to the general rules on the organisation of working time provided for in the Directive.[7]

Maria do Rosário Palma Ramalho

[7] For further analysis of the national provisions regarding these issues see Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho - Parte II Situações Laborais Individuais, cit, passim*.

ARTICLE 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

1. *The prohibition of child labour.* The first principle set forth in Article 32 of the CFREU is the prohibition of child labour. To fully comprehend the significance of the legal wording, and how it ties into the other sections of the article, we firstly have to clarify the concept of child labour.

It is commonly considered that, in principle and for most purposes, a child is a person below the age of eighteen (Article 1 of the Convention on the Rights of the Child). However, according to the ILO's Conventions, namely 138 and 182, as far as the prohibition of employing children is concerned, the concept of the child stems from the combined evaluation of two factors: on the one hand, age, but, on the other hand, the set of ethical values which are behind that prohibition, taking into account that, if certain conditions are met, employment might even foster a child's development and the acquisition and improvement of skills, helping them to enter the labour market in the future. As such, while any activity considered to be dangerous is prohibited for persons of less than eighteen years of age (Convention 182), others may be authorised for young people who have already completed compulsory schooling or, in any case, who are at least fifteen years old (Article 2 of the Convention 138). An identical regulation was adopted in the European Social Charter (Article 7), in the Community Charter of the Fundamental Social Rights of Workers (paragraphs 20 and 22) and, despite a different choice of terminology, in Directive 94/33/EC, of 22 June of 1994 (Articles 3 to 5 and 7).

It is from this point of view that we should begin, in order to determine the meaning of Article 32 of this Charter. The text starts by establishing the prohibition of work if performed by certain groups of young people and, immediately afterwards, admits that some young individuals may be employed, provided that their development is not harmed/affected. In these terms, the prohibition of child labour referred to in the first part of Article 32 addresses *(i)* young people aged below the minimum established in the following segment of the legal text; and *(ii)* any young person, as regards activities likely to inhibit the various aspects of their development.

According to the wording of the Article under analysis, the minimum age of admission to employment corresponds to the minimum school-leaving age. However – and this point is particularly important in this context – there is an admission that different rules may be applied provided that they are more favourable to young people. The fact that the minimum age of admission to work may be defined by other legal texts, namely national legislation, with reference to the duration of compulsory

schooling, has been widely criticised. At the same time, it has been suggested that the minimum and non-derogable age of admission to employment should be fifteen; a suggestion that results from an analysis focused on the genesis of this rule.

In fact, both Convention 138 [Article 2(2)] and the European Social Charter [Article 7(1)] and also the Community Charter of the Fundamental Social Rights of Workers (paragraph 20) state that fifteen years of age is the minimum age for admission to employment, while recognising that the minimum may be higher if it reflects the minimum school-leaving age. On the other hand, Directive 94/33/EC defines *child*, for the purposes therein concerned, as "*any young person of less than 15 years of age or who is still subject to compulsory full-time schooling under national law*" [Article 3-b)] and *adolescent* as "*any young person of at least 15 years of age but less than 18 years of age who is no longer subject to compulsory full-time schooling under national law.*" It seems clear, on the one hand, that these legal texts have had a significant influence on the enactment of the Charter, for which they provide a referential basis for its interpretation. On the other hand, Article 32 itself states that it only applies if a more favourable regime is not available, a reference which surely includes not only national legislation but also European regulation.

At the international and European level, the technique which is adopted is, therefore, to prohibit the access to employment of young people who have not completed compulsory schooling or, in any case, who are less than fifteen years old. Consequently, fifteen years of age ends up being the definitive minimum standard of protection.

At this point, we should note that Portuguese legislation has been found to be compliant with such standard. According to the Labour Code (enacted by Law 7/2009, of 12 February) and also the legislation that pre-dated it, the minimum age for access to employment is sixteen. However, access to employment is allowed for individuals less than sixteen years old, provided that they have already completed compulsory schooling, the tasks to perform are light and straightforward, not likely to be harmful to their health or development nor likely to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority, nor their capacity to benefit from the instruction received (Article 68, paragraph 3). Currently the duration of compulsory schooling has been extended to twelve years (Law 85/2009, enacted of 27 August), so any young person who completes their schooling will be more than sixteen years old. But, in the meantime, an amendment to the Labour Code has taken place (with Law 47/2012, of 29 August), according to which attendance of the last three years of current compulsory education (10th, 11th, 12th series) and the completion of the compulsory schooling required, presently but also before (nine years), are equivalent as far as the admission to employment is concerned. In any case, the age for starting the 10th year of schooling is not normally less than fifteen, which leads to the conclusion that the Portuguese legislation is compliant with the legal texts mentioned above. Even before these amendments, when compulsory schooling lasted for nine years, the conclusion was the same, mainly because, according to Statement 301/93, of 31 August, the minimum school-leaving age was fifteen. However, in 1998, the International Jurists Commission filed a complaint against the Portuguese Government, on the grounds of the *de facto* violation of that international requirement, namely Article 7 of the European Social Charter. The European Committee of Social Rights concluded, precisely, that in practice Portugal violated Article 7, since a significant number

of children performed work in several economic sectors, notwithstanding the legal prohibition in the national legislation, which was in accordance with the Charter. This decision might have had the effect of strengthening the campaign against child labour in Portugal.

The prohibition established in Article 32 shall be understood in broad terms, concerning its material circle of application. In principle, therefore, any activity is off limits for minors – in any economic sector; regardless of the type of undertaking, including family enterprises, and also regardless of the terms under which the activity is performed (*e.g.,* paid or unpaid) – according to the European Committee of Social Rights, which has already clarified that point, in the context of the interpretation of Article 7 of the European Social Charter.

The final segment of paragraph 1 of Article 32 mentions the possibility of exceptions to the principle that young people under the minimum defined age shall not perform work, provided the exceptions are well delineated. We might identify, at this point, a reference to Directive 94/33/EC, which allows the Member States to make legislative or regulatory provisions (or "a" provision) allowing children of at least 14 years of age to work under a combined work/education scheme or a company work-experience scheme. Such work must meet the conditions laid down by the competent authority. Light work in cultural, artistic, sports or advertising activities is allowed provided a prior authorisation is granted by the competent authority in individual cases.

Other types of light work may also be performed by children aged fourteen and above, and even by children aged thirteen for a limited number of hours per week in the case of categories of work determined by national legislation. The Portuguese framework, Law 105/2009, of 14 September, allows children to perform cultural, artistic or advertising activities, but sets out several conditions in order to make sure that the children's safety, health and general development are not harmed (Articles 2-11). In fact, the main purpose of the prohibition of child labour is the protection of their psychical, psychological, moral and cultural development. This is also evidently the concern underlying the provision of these exceptional situations.

2. *Protection of young people admitted to work*. Article 32(2) grants young people admitted to employment the right to be protected at work. Relying on the concept of child labour, as defined in paragraph 1, the expression "young people" used in paragraph 2 covers, according to the terminology of Directive 94/33/EC, any person of less than eighteen years of age having an employment contract or an employment relationship defined by the law in force in a Member State. This means that the rights of young people referred to in paragraph 2 concern: *(i)* young people of at least the minimum age of admission to employment – that is, the minimum school-leaving age or fifteen years of age; *(ii)* young people who are younger than that minimum but are admitted to work in the light of the exceptions referred to in paragraph 1, *in fine*.

Provided that the requirements mentioned in paragraph 1 are met, paragraph 2 intends to make sure that the young worker, whose development is yet in progress, performs work in conditions adjusted to his/her age and personal circumstances, without harming his/her health, safety and physical, psychological and moral development, preventing, especially, risks stemming from lack of experience, awareness and strength.

According to the first part of paragraph 2, "*young people admitted to work must have working conditions appropriate to their age.*" The text does not attempt to define "*conditions appropriate to their age.*" Notwithstanding, it is possible to approach a definition by considering, on the one hand, the purposes behind Article 32 and, on the other hand, the elements found in other international and European legal texts, in particular Article 7 of the European Social Charter, paragraph 22 of the Community Charter of the Fundamental Social Rights of Workers and Articles 8 to 13 of the Directive 94/33/EC. Thus, by putting these regimes side by side, we may conclude that the adjustment of working conditions to age must address the following factors: a) working time limits and daily, weekly and annual periods of rest b) appropriate timetabling of working time so as not to prejudice school attendance; c) the inclusion of training periods as working time; d) limitation of night work; and e) periodical medical exams.

However, it must be stressed that the duty of arranging working conditions according to young workers' circumstances, pursuant to these legal texts, does not mean that any person aged under eighteen years of age is entitled to equal conditions. The objective is a differentiated accommodation model, according to age and education/ training experiences. For example, in what concerns working time duration, the European Social Charter (Article 7, paragraph 4) prescribes its limitation for young people of less than sixteen years of age depending on the requirements imposed by their level of development, the European Committee of Social Rights having clarified that any legislation authorising workers aged under sixteen to work eight hours a day or forty hours a week violates the Social Charter, whereas those limits comply with that Charter if applicable to young workers with at least sixteen years of age. As for night work, Directive 94/33/EC, according to a gradual model, does not permit child labour to be performed between 10 p. m. and 6 a.m. or between 11 p.m. and 7 a.m., but admits exceptions in specific economic sectors, created by legislative or regulatory provision. In the Portuguese legislation, this differentiated protection can be found on several levels. Young people aged under sixteen are not allowed to perform work between 9 p.m. and 7 a.m. (Article 76 of the Labour Code), are entitled to a break of at least one hour and less than two hours [Article 77(1)] and to a daily period of rest of at least fourteen consecutive hours between periods of work on two successive days [Article 78(1)]. In contrast, as far as young workers of sixteen years of age or more are concerned, the Portuguese legislation not only prescribes less strict limits (*e.g.,* night work is prohibited only between 10 p.m. and 7 a.m.; daily rest of only twelve hours), but also foresees the possible revocation of these prescriptions by means of collective regulatory instruments, provided that some minimum standards are observed [Articles 76(3), 77(2) and 78(2)].

According to Article 32(2), apart from performing work in age-appropriate conditions, young people shall also be protected against economic exploitation, similarly to what is prescribed in other legal conventions (Article 32 of the Convention on the Rights of the Child). Despite the fact that the meaning of the concept of economic exploitation is not determined in the text itself, the European Committee of Social Rights considers that economic exploitation of young people at work involves the practice of receiving work without payment or paying significantly less than the remuneration paid to adult workers, imposing excessive working periods, providing insufficient breaks, etc., pursuant to the European Committee of Social Rights.

Regarding remuneration issues, protection against economic exploitation entails the right to a fair wage [as recognised in Article 7(5), of the European Social Charter and paragraph 21 of the Community Charter of the Fundamental Social Rights of Workers], and the right not to be discriminated against on the grounds of age. The amount of wage paid should consider the real nature and characteristics of the work performed by the young person in question. The fact that their performance is less productive if compared to work performed by adults shall not justify economic treatment that does not correspond to young workers' effective capacity and actual effort.

Finally, young workers' right to protection at work restricts the ambit of activities they may perform, considering that they are more vulnerable, less experienced and less aware of the existing and potential risks linked to a certain activity. Pursuant to Article 3 of the ILO Convention 138, the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young people shall not be less than 18 years, and these activities are among those considered by the ILO to be the worst forms of child labour [Article 3(d), of the Convention 182]. More specifically, it stems from Article 7 of Directive 94/33/EC that no young person shall be admitted to carry out work which is objectively beyond their physical or psychological capacity, namely work involving: harmful exposure to agents which are toxic, carcinogenic and can cause hereditary genetic damage, or harm to an unborn child or which in any other way chronically affect human health; harmful exposure to radiation; the risk of accidents which it may be assumed cannot be foreseen or avoided by young people owing to their lack of awareness of safety or lack of experience or training; or work in which there is a risk to health from extreme cold or heat, or from noise or vibration. It is also according to these assumptions that the imposition established in Article 32 must be read.

In the Portuguese legislation, apart from the general principle that work performed by young people shall never harm their safety or health or interfere with their development, Statute 102/2009 sets out activities that are totally interdicted or only conditionally open to young people, a list of substances young workers shall not be in contact with, unless, in some cases, risks are evaluated and controlled, and also a set of working conditions that shall not be offered to young workers, unless, again, in some limited cases, when there is compliance with the required legal conditions (Articles 61 to 72).

Joana Nunes Vicente & Milena Silva Rouxinol

ARTICLE 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

1. Inserted in Chapter IV of the CFREU, dedicated to "*Solidarity*", Article 33, entitled "*Family and professional life*", enshrines, in its paragraph 1, a general principle of (legal, economic and social) protection of family and, in its paragraph 2, deals more specifically with the issue of reconciling family and professional life. Although the EU has no competence in the field of family law, Article 33 CFREU demonstrates that the protection of family life and the reconciliation of family and professional life represent two key components of the legal status of the family under EU law. Moreover, "*respect for family life*" was identified by the CJEU as "*one of the fundamental rights which (...) are recognized by Community law*" even before the CFREU had been proclaimed.[1]

2. The protection of family as such is guaranteed by numerous international legal instruments of fundamental rights' protection, namely the UDHR (Article 16), the ICCPR (Article 23) and the ICESCR (Article 10). In these instruments, the family is regarded as "the natural and fundamental group unit of society." The protection of family is also guaranteed by Articles 8 and 12 ECHR, concerning, respectively, the right to respect for private and family life and the right to marry – provisions that are, in turn, the basis of Articles 7 and 9 CFREU.

In turn, according to the Explanations relating to the CFREU, Article 33(1) is based on Article 16 of the European Social Charter,[2] that, similar to the aforementioned instruments of international law, also describes the family as a "fundamental unit of society." The CFREU does not, however, go as far as the European Social Charter: the CFREU does not recognise (at least not explicitly) the family as a "fundamental unit of society", neither does the CFREU specify the means by which the protection of the family may be ensured, by mechanisms such as "social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

Article 33(1) CFREU enshrines a general principle of – legal, economic and social – protection of family, which is closely connected with various provisions of the CFREU, and in particular Article 7, as it enshrines the right to respect for family life, Article 9, guaranteeing the right to marry and to found a family, Article 24 on the rights of children, and Article 33(2), that lists a number of rights aimed at reconciling family and professional life. Article 33(1) CFREU does not include, in itself, a set of subjective rights for family protection, nor does it include a concept of

[1] See Judgment *Commission v. Germany*, 18 May 1989, Case 249/86, EU:C:1989:204, para. 10.

[2] As well as on Article 16 European Social Charter (Revised).

family relevant for the application of the CFREU or EU law in general. This concept and those rights are to result from a joint reading of the provision together with other related provisions of the CFREU, as well as from the implementation of the principle by the EU and national legislators [Article 51(1) CFREU] and the Court of Justice, in particular taking into account the relevant case-law of the ECtHR under Article 52(3) CFREU.

Article 33(1) CFREU should also be read in close connection with two other provisions of the CFREU, namely Article 15 on the freedom to choose an occupation and right to engage in work and Article 45 on the freedom of movement and of residence. Indeed, the exercise of these fundamental freedoms often raises issues regarding the movement of members of the family to join the EU citizen who has exercised such freedoms. The CFREU does not expressly enshrines a right to family reunification.[3] The CJEU has even stated that the right to respect for family life "*is not to be interpreted as necessarily obliging a Member State to authorise family reunification in its territory.*"[4] However, consideration of Article 33(1) CFREU may strengthen the right to family reunification, not only because family reunification promotes the social protection of the family, but also because it is a measure aiming to reconcile family and professional life in a space as increasingly borderless as the EU.[5]

3. Article 33(2) CFREU, contrary to its paragraph 1, is of a more subjective nature, enshrining three rights, qualified as fundamental rights, aimed at reconciling family and professional life.

According to the Explanations relating to the CFREU, Article 33(2) is based on Directives 92/85/CEE and 96/34/CE,[6] as well as Article 8, regarding protection of maternity, and Article 27, related to the right of workers with family responsibilities to equal opportunities and equal treatment, of the European Social Charter. The general principle of reconciling family and professional life that can be inferred from the provision, as well as the rights it enshrines in its implementation, should be read in light of the principle of equality between women and men enshrined in Article 23 CFREU and implemented by Directive 2006/54/EC,[7] with the principle also being enshrined in Article 3(3/2) TEU and Article 8 TFEU. Of a clearer social orientation, Article 33(2) CFREU should therefore be understood in the broader context of the social policy defined by the EU (Articles 151 *et seq.* TFEU).

---

[3] See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, 77-123. As for the right to family reunification of third-country nationals residing legally in the EU, see Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, 12-18.

[4] See Judgment *Parliament v. Council*, 27 June 2006, Case C-540/03, EU:C:2006:429, para. 66.

[5] See Carine Laurent-Boutot, "Une vision nouvelle de la vie familiale en Europe", in *La Charte des Droits Fondamentaux de l'Union Européenne après le Traité de Lisbonne* (Paris: IDHAE - Institut des Droits de l'Homme des Avocats Européens, 2010), 178 and 179.

[6] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ L 348*, 28.11.1992, 1-7; and Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996, 4-9.

[7] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, 23-36.

The relevance of Article 33(2) CFREU lies in the proclamation of three subjective rights aimed at reconciling family and professional life: the right to protection from dismissal for a reason connected with maternity, the right to paid maternity leave and the right to parental leave following the birth or adoption of a child. Each of these rights is protected under acts of secondary EU law and has witnessed important developments in the case-law of the CJEU.

(a) With regard to *protection from dismissal for a reason connected with maternity*, Article 10(1) of Directive 92/85/EEC prohibits the dismissal of workers during the period from the beginning of pregnancy to the end of the maternity leave (save in exceptional cases not connected with maternity, which are permitted under national legislation and/or practice). Before the entry into force of the Directive, the CJEU had recognised a special protection against dismissal, not only during maternity leave, but also throughout pregnancy, since the dismissal during these periods can only affect women, thus constituting "*direct discrimination on grounds of sex.*"[8] According to settled case-law, the reason for the prohibition lies in the "*risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions.*"[9] Called upon to interpret this prohibition, the CJEU held, in *Dita Danosa*, that a member of a company's board of directors, who provides services to that company and is an integral part of it, must be regarded as having the status of worker if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the board member receives remuneration, thus falling under the prohibition of dismissal of pregnant workers; hence, a national law permitting the unrestricted dismissal of a board member is incompatible with the prohibition on dismissal laid down in the above-mentioned provision.[10] In *Virginie Pontin*, the CJEU also considered incompatible with EU law a national law that denies a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages whereas such an action is available to any other employee who has been dismissed, as such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy.[11]

The CJEU's case-law affords a broad protection of motherhood and pregnancy. In *Mary Brown*, for example, the Court objected to the dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.[12] In *Dekker*, the Court denied the right of an employer to refuse to enter into a contract of employment with a female candidate where such refusal is based on the possible adverse consequences of employing a

[8] See Judgments *Handelsog Kontorfunktionærernes Forbund*, 8 November 1990, Case C-179/88, EU:C:1990:384, para. 13; *Mary Brown*, 30 June 1998, Case C-394/96, EU:C:1998:331, paras. 16, 24 and 25; *McKenna*, 8 September 2005, Case C-191/03, EU:C:2005:513, para. 47; and *Paquay*, 11 October 1007, Case C-460/06, EU:C:2007:601, para. 29.

[9] See, among others, Judgments *Tele Danmark*, 4 October 2001, Case C-109/00, EU:C:2001:513, para. 26; *Sabine Mayr*, 26 February 2008, Case C-506/06, EU:C:2008:119, para. 34; and *Dita Danosa*, 11 November 2010, Case C-232/09, EU:C:2010:674, para. 60.

[10] See Judgment *Dita Danosa*, paras. 56 and 62.

[11] See Judgment *Virginie Pontin*, 29 October 2009, Case C-63/08, EU:C:2009:666, para. 76, with a thorough analysis of the procedural rules in question in the light of the principles of equivalence and effectiveness (paras. 43-76).

[12] See Judgment *Mary Brown*, para. 28.

pregnant woman.[13] In *Tele Danmark*, the Court ruled against the dismissal of a worker who failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded.[14] The Court decided, in *Parviainen*, that although a pregnant worker who has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to that transfer is not entitled to the pay she received on average prior to that transfer, such a worker is nevertheless entitled, in addition to the maintenance of her basic salary, to pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications.[15]

It should also be noted that, according to the Explanations relating to the CFREU, the term "maternity" covers the period from conception to weaning – two key moments on which the CJEU has had opportunities to comment.

In *Sabine Mayr*, in a case involving the use of medically assisted procreation techniques by a female worker, the Court stated that "*it is the earliest possible date in a pregnancy which must be chosen to ensure the safety and protection of pregnant workers.*"[16] In the case under examination, the Court did not consider, for reasons of legal certainty, that the protection established by Article 10(1) of Directive 92/85 should be extended to a worker who is at an advanced stage of *in vitro* fertilisation treatment as, on the date she was given notice of her dismissal, the *in vitro* fertilised ova had not yet been transferred into her uterus; nevertheless, the Court held that the dismissal of a female worker essentially because she is undergoing an important stage of *in vitro* fertilisation treatment constitutes direct discrimination on grounds of sex (as the treatment in question directly affects only women), contrary to the objective of protection pursued by Directive 76/207.[17]

As regards the second question, the CJEU had the opportunity to rule in *Roca Alvarez*. The dispute opposed Mr Roca Álvarez and his employer concerning the company's refusal to accord him a so-called "breastfeeding" leave on the ground that the mother of his child was not employed but self-employed, the mother's employment being an essential condition of entitlement to that leave under the applicable national law. According to the referring court, the evolution of the national legislation and its interpretation by the courts had "*detached*" the leave from the "*biological fact of breastfeeding*", thus being considered as "*time purely devoted to the child and as a measure which reconciles family life and work following maternity leave*" that could "*be taken by the mother or the father without distinction, on the sole condition that the father's status is that of an employed person*."[18] The Court considered, however, discriminatory on grounds of sex a national measure which provides that female workers who are mothers and whose status is that of an employed person are entitled to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person[19] – a notable ruling by the Court when no instrument of secondary EU law recognises a right to

[13] See Judgment *Dekker*, 8 November 1990, Case C-177/88, EU:C:1990:383, para. 14.
[14] See Judgment *Tele Danmark*, para. 34.
[15] See Judgment *Parviainen*, 1 July 2010, Case C-471/08, EU:C:2010:391, para. 73.
[16] See Judgment *Sabine Mayr*, para. 40.
[17] See Judgment *Sabine Mayr*, paras. 41-42 and 50-54.
[18] See Judgment *Roca Alvarez*, 30 September 2010, Case C-104/09, EU:C:2010:561, paras. 28-29.
[19] See Judgment *Roca Alvarez*, paras. 24-25.

leave for breastfeeding and before the CFREU, and its Article 33(2), had acquired legal binding force.

(b) As for the *right to paid maternity leave*, Articles 8 and 11 of Directive 92/85 require Member States to take the necessary measures to ensure that pregnant workers are entitled to a continuous period of maternity leave of at least 14 weeks (including a compulsory maternity leave of at least two weeks) allocated before and/or after childbirth, and to ensure their rights connected with the employment contract and the maintenance of a payment and/or entitlement to an adequate allowance, in accordance with national legislation and/or practice. Under Article 9, pregnant workers are also entitled to time off, without loss of pay, in order to attend antenatal examinations, if such examinations have to take place during working hours.

According to the Court's case-law, the maternity leave granted to a worker is "*intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth.*"[20] However, if "*workers taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection*", their situation "*is not comparable either with that of a man or with that of a woman actually at work, or on sick leave*", so that they cannot "*claim that they should continue to receive full pay while on maternity leave as though they were actually working, like other workers.*"[21]

The minimum protection guaranteed under Directive 92/85 does not require the maintenance of full pay, but the maintenance of a payment and/or entitlement to an adequate allowance in order to ensure, in accordance with Article 11(3), an income at least equivalent to that which the worker concerned would receive in the event of an absence on grounds connected with the state of her health, subject to any ceiling laid down under national legislation – without prejudice to more favourable protection schemes provided under national law. That is why, in *Gassmayr*, after considering the pay scheme provided for by the national legislation in question as more favourable to workers on maternity leave than that required by Directive 92/85, the CJEU did not object to a "*national legislation which provides that a worker on maternity leave is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her maternity leave, with the exception of the on-call duty allowance.*"[22]

After the end of the period of maternity leave, a woman is, under Article 15 of Directive 2006/54, entitled to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence. In *Alabaster*, the CJEU had already stated that, if the benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working, "*[the] principle of non-discrimination therefore requires that a woman who is still linked to her employer by a*

[20] See, among others, Judgments *Hofmann*, 12 July 1984, Case 184/83, EU:C:1984:273, para. 25; *Thibault*, 30 April 1998, Case C-136/95, EU:C:1998:178, para. 41; *Griesmar*, 29 November 2001, Case C-366/99, EU:C:2001:648, para. 4; *Merino Gomez*, EU:C:2004:160, 18 March 2004, Case C-342/01, para. 32; *Kiiski*, 20 September 2007, Case C-116/06, EU:C:2007:536, para. 46; *Gassmayr*, 1 July 2010, Case C-194/08, EU:C:2010:386, para. 81.

[21] See Judgments *Gillespie*, 13 February 1996, Case C-342/93, EU:C:1996:46, paras. 17 and 20; in *Alabaster*, 30 March 2004, Case C-147/02, EU:C:2004:192, para. 46; and *Gassmayr*, paras. 80-82.

[22] See Judgment *Gassmayr*, paras. 90-91.

contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if back-dated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave", as "*[to] deny such an increase to a woman on maternity leave would discriminate against her since, had she not been pregnant, she would have received the pay rise.*"[23] Also, in *Thibault*, the CJEU held as contrary to EU law (as constituting discrimination on grounds of pregnancy and maternity leave and, therefore, discrimination on grounds of sex) national rules which deprive a woman of the right to an assessment of her performance and, consequently, to the possibility of qualifying as a result of absence on account of maternity leave.[24] In *Merino Gomez*, the Court stated that "*a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce.*"[25]

(c) Finally, as regards the *right to parental leave following the birth or adoption of a child*, Directive 2019/1158 on work-life balance for parents and carers[26] recognises to each worker an individual right to parental leave for a period of at least four months on the grounds of the birth or adoption of a child, that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement (Article 5).

As the CJEU reiterates, parental leave "*is granted to parents to enable them to take care of their child*",[27] allowing "*the new parents (...) able to provide their child with the assistance that his or her age requires and to make provision for measures organising family life with a view to their return to work.*"[28] Thus, in *Zoi Chatzi*, the CJEU rejected the interpretation according to which the child would be given an individual right to parental leave; the Court further stated that the right to protection and care, as is necessary for their well-being enshrined in Article 24 CFREU, "*does not mean that children have to be acknowledged as having an individual right to see their parents obtain parental leave*."[29]

The CJEU has also had the opportunity to rule on the relationship between parental leave and maternity leave. In *Commission v Luxembourg*, the Court held that, according to their different purposes, parental leave, "*granted to parents to enable them to take care of their child*", is distinct from maternity leave which "*is intended to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment*", that being the reason why parental leave "*may not be reduced when it is interrupted by another period of leave which pursues a purpose different (...), such as maternity leave.*"[30] Furthermore, in *Kiiski*, the Court considered "*reasonable that, with a view to obtaining an alteration of the period of that leave, the worker should be able to rely on events occurring after the application for or grant of leave, which, incontestably, make it impossible*

[23] See Judgment *Alabaster*, paras. 47-48, and again in *Gillespie*, para. 22.
[24] See Judgment *Thibault*, paras. 32-33.
[25] See Judgment *Merino Gomez*, para. 41.
[26] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, 79-93.
[27] See Judgment *Commission v Luxembourg*, 14 April 2005, Case C-519/03, EU:C:2005:234, para. 32.
[28] See Judgment *Zoi Chatzi*, 16 September 2010, Case C-149/10, EU:C:2010:534, para. 57.
[29] See Judgment *Zoi Chatzi*, paras. 39-40.
[30] See Judgment *Commission v Luxembourg*, paras. 32-34.

for him to look after the child under the conditions originally foreseen."[31] In the case under examination, on becoming pregnant again, Ms Kiiski applied for an alteration of the decision granting her parental leave. The Court considered, at first, that "*pregnancy does not appear, as such, to bring about, in principle, fundamental changes or changes of such importance so as to make it impossible to care for the child in the conditions envisaged at the time when the child-care leave was requested*." However, in view of the essential changes faced by the woman concerned during the final period which precedes childbirth and in the first weeks following it, changes of an order that may prevent her from looking after her first child, and considering the purpose of protection granted to mothers in the form of maternity leave to help them avoid multiple burdens, the Court ruled that "*the period of at least 14 weeks preceding and after childbirth must be regarded as a situation which restricts the achievement of the purpose of the parental leave provided for under the framework agreement and therefore as a justified ground for authorising an alteration of the period of that leave*."[32]

According to the above-mentioned Directive, rights acquired or in the process of being acquired on the date on which parental leave starts shall be maintained until the end of such leave and, at the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply (Article 10).

In *Meerts*, the CJEU clarified the nature and scope of the concept of "rights acquired or in the process of being acquired" "*as articulating a particularly important principle of Community social law*" and as covering "*all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts*", including rights and benefits "*relating to employment conditions.*"[33] Regarding the case under examination, in which a full-time employee, who was working half-time as a result of parental leave, was dismissed without the statutory period of notice being observed by the employer and subject to payment of compensation for dismissal calculated on the basis of the salary she was receiving at the time, which was reduced by half because of the equivalent reduction in her working hours, the CJEU found that *"[that] body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the basis of the salary relating to his employment contract*"; such result "*could discourage workers from taking such leave and could encourage employers to dismiss workers who are on parental leave rather than other workers*", thus running directly counter to the overall goal of reconciling family and professional life.[34]

Sophie Perez Fernandes

[31] See Judgment *Kiiski*, para. 38.
[32] See Judgment *Kiiski*, paras. 44-46 and 50-51.
[33] See Judgment *Meerts*, 22 October 2009, Case C-116/08, EU:C:2009:645, paras. 42-44.
[34] See Judgment *Meerts*, paras. 46-47.

ARTICLE 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

1.[1] Article 34 appears in the chapter of the CFREU with the heading "Solidarity" and is designed to reassert the *European social model*, in compliance with Member States' powers in this subject matter.[2] Its analysis shall take into consideration the horizontal provisions foreseen in Articles 51 to 54 of the Charter.

2. In this regard, Article 12 of the European Social Charter and Article 10 of the Community Charter of Fundamental Social Rights of Workers are particularly relevant as sources of inspiration. Considering the wording of Article 34, other texts – including the European Code of Social Security and respective Protocol, Articles 22 and 25 of the UDHR, Articles 9 to 11 of the ICESCR and several texts of the ILO – are also relevant. Finally, under the Portuguese legal framework, Article 63 of the CPR[3] and the framework granted by Law no. 4/2007 of 16 January, which approves the general framework of the Portuguese social security system, are apposite in this context.

3. It is the EU's purpose to contribute to a *high level of social protection* and *quality of life* in Member States. Within this scope, Article 34(1) fosters, in accordance with the logic of distributive justice, access to adequate resources for a decent existence.[4] This provision restricts the "*material scope of protection*": "*protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment.*" In fulfilment of the principles asserted herein, Regulation (EEC) no.

---

[1] This commentary has taken into account scholars' opinions, case law and documentation available up to May 2011.

[2] Referring to this right as a "*moral obligation*", see Jeff Kenner, "Economic and social rights in the EU legal order: The mirage of indivisibility", in *Economic and social rights under the EU Charter of Fundamental Rights – A legal perspective*, ed. Tamara K. Hervey and Jeff Kenner (University of Nottingham: Hart Publishing, 2003), 23.

[3] "*The right to social security is included within the scope of the chapter regarding social rights. Effectiveness of the right to social security, set out in constitutional provisions rather less densified, is widely dependent upon the materialisation, by the ordinary legislator, in view of the resources available in each historical moment, of the constitutional programme of article 63 of the Constitution and, more specifically, of the State's compliance with the duty to organise, coordinate and support the social security system*", in *Constituição Portuguesa Anotada – Tomo I*, 2nd edition, ed. Rui Medeiros and Jorge Miranda (Coimbra: Coimbra Editora, 2010), 1284-1285.

[4] See Andrea Giorgis, "Sicurezza sociale e assistenza sociale", in *L'Europa dei Diritti, Commento alla Carta dei diritti fondamentali dell'Unione Europea*, ed. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: Il Mulino, 2001), 240-244.

1408/71 of 14 June governed the application of social security schemes to employed persons and to members of their families moving within the Community. This regime was subsequently developed in Regulation (EEC) no. 574/72 of 21 March. Essentially, the aim was to ensure an "*equal treatment* and *the possibility to benefit from social security benefits*, *regardless of their place of employment or residence*", for all national workers of Member States. Since their initial wording was devised, and considering their long validity, these regulations have been subject to several amendments which, on the one hand, enabled the adjustment of the respective provisions to the changes registered in the meantime in national laws and in the progressively established case-law of the CJEU[5] and, on the other hand, also contributed to the complexity of the coordination rules – requiring an urgent revision of its respective framework.

Regulation (EC) no. 883/2004, of 29 April, together with Regulation (EC) no. 987/2009, of 16 September, finally provided for new coordination rules as from 1 May 2010.[6]

4. Article 34(1) aims to ensure protection against "*social risks*" that may cause loss of income. Accordingly, the coordination rules of Regulation (EC) no. 883/2004 are applicable to the following: (i) "*sickness, maternity and equivalent paternity benefits*" (Articles 17 to 35); (ii) "*benefits in respect of accidents at work and occupational diseases*" (Articles 36 to 41); (iii) "*death grants*" (Articles 42 and 43); (iv) "*invalidity benefits*" (Articles 44 to 49); (v) "*old-age and survivors' pensions*" (Articles 50 to 60); (vi) "*unemployment benefits*" (Articles 61 to 65); (vii) "*early retirement benefits*" (Article 66); (viii) "*family benefits*" (Articles 67 to 69) and (ix) "*special non-contributory cash benefits*" (Article 70).[7]

On the other hand, Title II of Regulation (EC) no. 883/2004 deals with the "*Determination of the competent State and of the legislation applicable.*"[8] These rules aim to ensure that workers moving within the EU are subject to a social security regime of a *single* Member State, thereby avoiding the overlapping of legislation in an area that already involves a significant level of technical complexity. Accordingly, the CJEU highlights that these provisions "*constitute a complete and uniform system of rules of conflict of laws which purpose is to subject workers moving within the Community to a social security regime of a single Member State, in order to avoid the accumulation of applicable national laws and the complications that may arise thereof.*"[9]

In this regard, it should be noted that as a general rule the worker is subject "*to the legislation of the Member State in which territory the same pursues an activity as an employed person.*"[10] There are, however, special rules which provide for specific circumstances to be taken into account.[11] One such exception arises where the employment is

---

[5] The long-standing validity of this framework, in fact, justifies that the relevant case law from the CJEU is still the consolidated case law in regard to these Regulations.

[6] On the other hand, Regulation (EU) 1231/2010, of 24 November 2010, extended the scope of these Regulations "*to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State*" (Article 1). This Regulation is not applicable to the United Kingdom nor to Denmark.

[7] For precision in the attribution of these references, see Judgment *Paola Piscitello*, 5 May 1983, Case 139/82, ECLI:EU:C:1983:126.

[8] See Recital 17 and Articles 11 to 16 of this Regulation.

[9] Judgment *Huijbrechts*, 13 March 1997, Case C-131/95, ECLI:EU:C:1997:147, §17. The same resulting from Judgment *Plum*, 9 November 2000, Case C-404/98, ECLI:EU:C:2000:607.

[10] See Article 11 of Regulation (EC) no. 883/2004.

[11] See Articles 12 to 16 of Regulation (EC) no. 883/2004.

carried out in a Member State other than that in which the employing company has its head office.[12] The purpose of the exception is to "*avoid that a company having its head office located in a territory of a Member State be obliged to register its workers, usually subject to the social security legislation of that Member State, at the social security regime of another Member State where they are posted to work with a limited duration in time – which would cause restrictions to the exercise of the freedom to provide services.*"[13] However, in order for such to occur, it is necessary that the company normally exercises its activity in the first State. This exception is not, therefore, "*applicable to workers of a construction company established in a Member State who are allocated to construction works in the territory of another Member State where such company exercises, except for purely internal management activities, the entirety of its activities.*"[14]

5. As foreseen in the final part of no. 1 of Article 34, the admissibility "*[of] the entitlement to social security benefits and social services providing protection*" is restricted "*in accordance with the rules laid down by Union law and national laws and practices.*" The existing services are, accordingly, recognised, "*without such imposing the creation of new services thereof, when the same are not implemented.*"[15]

The modernised *coordination* of social security systems is thus fostered:[16] the rules foreseen herein "*neither replace*" the national social security systems nor disregard the inevitable differences, verified within this scope.[17]

Within the specific scope of Article 63 of the CPR, it has been noted that "*recognition of a right is not confused with a fixed guarantee of a standard of an existence compatible with the dignity of a human being, as this naturally depends upon the specific social conditions (economic, technological and cultural) of each country*".[18] The ECtHR also verifies a "*wide diversity in legislations and jurisprudence of the European Council's Member States in what regards the legal nature of the right to insurance benefits due within the scope of Social Security schemes*", recognising the absence of a "*common rule pointing to a uniform European notion in this regard.*"[19]

Coordination is, therefore, a commitment to what is possible within this range. In fact, the CJEU explained from the very outset that the purpose intended in this scope would be "*the coordination of the Member States' legislations and not a harmonisation.*" Therefore, "*the substantive and formal differences between the social security regimes of each Member State* are not affected and, consequently, *the rights of the persons working therein.*"[20]

---

[12] See Article 12 of Regulation (EC) no. 883/2004.

[13] Judgment *Plum*, §20, our italic.

[14] Judgment *Plum,* summary, our italic.

[15] See notes of *Praesidium* of the Convention that drafted the CFREU, published in the OJEU, (C303), of 14 December 2007.

[16] Regarding coordination fostered within this scope, see R. White, "Social Security", in *The European Union Charter of Fundamental Rights*, ed. S. Peers and A. Ward (Oxford/Portland: Hart Publishing, 2021), 310-312. See also T. Hervey, *European Social Law and Policy* (New York/London: Longman, 1998), 82-83.

[17] Accordingly, Article 153, no. 4 of the TFEU states that the purposes defined within this scope "*shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof.*" The coordination policy is also emphasised in Article 156 of the TFEU.

[18] Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 4th edition (Coimbra: Coimbra Editora, 2007), 814.

[19] Judgment ECtHR *Giancarlo Lombardo v. Italy*, 26 November 1992, no. 12490/86, our italic.

[20] Judgment *Pinna*, 15 January 1986, Case 41/84, ECLI:EU:C:1986:1, §20, our italic.

Such divergences should not, however, excuse discriminatory practices that defraud the foreseen protection. It may be said, as an example, that "*if it is true that, in the absence of harmonisation at the community level, it is up to each Member State's legislation to determine the conditions of the right or of the obligation to register in a social security regime, Member States should, however, when exercising such powers, comply with the community law (...). Therefore, the fact that national regulations (...) deal with Social Security financing does not imply the exclusion of the applicability of the Treaty rules and, namely, those regarding free movement of workers.*"[21] The CJEU clarified, in this regard, that "*a more heavy charge with benefits falling upon a worker who transfers his residence from a Member State to another to exercise therein a paid activity, in principle, in opposition with Article 48 of the Treaty, may not be justified neither from a legislation pursuing a purpose of simplification and coordination of collection of the tax over income and Social Security benefits, nor by the difficulties of technical nature that are related with the adoption of other types of collection, nor even by the circumstance of, in certain situations, other benefits related with the tax over income being able to compensate, or even exceed, the disadvantage related with Social Security benefits.*"[22]

Lastly, it should also be noted that "*coordination*" also pertains to certain "*concepts*", which restrict the applicability of the regime. It may be cited as an example, still in light of Regulation (EEC) no. 1408/71, that "*just as the qualification as employed or self-employed, for the purposes of the Regulation, results from the national social security regime in which the worker is registered in, it should be understood that employed activities and self-employed activities, within the meaning of title II of the Regulation, are those activities deemed as such by the legislation applicable in Social security matters in the Member State where such activities are performed.*"[23/24]

6. *Coordination* results, among other mechanisms, from the "*aggregation of the relevant periods, within the scope of the several national legislations*", for the acquisition, retention and calculation of the right to benefits.[25/26] Therefore, for the "*determination of the minimum insurance period required by national law to acquire a right to a retirement pension by a migrant worker, the competent institution of the Member State in question (...) shall take into account all insurance periods completed during the professional life of the migrant worker, including those completed in other Member States*"[27] – thus ensuring the retention of the rights and benefits acquired or about to be acquired, "*in the event of moving within the Union.*"[28]

---

[21] See Judgment *Terhoeve*, 26 January 1999, Case C-18/95, ECLI:EU:C:1999:22, §§34 and 35.

[22] Judgment *Terhoeve*, §47, our italic.

[23] Judgment *Inasti*, 30 January 1997, Case C-221/95, ECLI:EU:C:1997:47, §21. In this regard, see also Judgments *Banks and Others*, 30 March 2000, Case C-178/97, ECLI:EU:C:2000:169, and *Tanja Borger*, 10 March 2011, Case C-516/09, ECLI:EU:C:2011:136.

[24] See also Judgment *Slanina*, 26 November 2009, Case C-363/08, ECLI:EU:C:2009:732.

[25] Refer to Recital 16 and Article 6 of Regulation (EC) no. 883/2004.

[26] Regarding the right to a consecutive unemployment benefit by a frontier worker, see Judgment *Huijbrechts*.

[27] Judgment *Tomaszewska*, 3 March 2011, Case C-440/09, ECLI:EU:C:2011:114, our italics. Also resulting from the same principle that the right *"to the benefits due under the legislation of a Member State where a parent resides with his/her children, for the benefit of whom these benefits are granted, may not be partially suspended"* because the *"ex-spouse, who is the other parent of the children in question, would be, in principle, entitled to the family benefits under the legislation of the State where he/she works (...) but he/she does not actually receive such benefits, once a request has not been submitted in this regard"* (Judgment *Schwemmer*, 14 October 2010, Case C-16/09, ECLI:EU:C:2010:605, summary).

[28] Judgment *Petroni*, 21 October 1975, Case 24-75, ECLI:EU:C:1975:129, §13. See also Robin White, *EC Social Security Law* (Essex: Pearson Education Limited, 1999), 14-15.

Overall, besides relevant considerations regarding rules of access, aggregation and the transfer of benefits, European case-law highlights the importance of the principles of "*equality of treatment*" and of "*non-discrimination*", as "*interpretation techniques of the right to social benefits.*"[29] This is the direction of the case-law from the courts of the EU. Thereby, "*a national legislation which foresees, in a Member State, a right to a grant to an adult with a disability, benefitting the nationals of that Member State residing therein*" is also applicable "*to an adult with a disability who is* a *national from another Member State* and who, *never having worked in the State of that legislation, lives therein supported by his father, employed in the same State as worker* (...)."[30]

An identical reasoning imposes consideration of the specificities of each case, not authorising the applicability, by the competent authorities of a Member State, of national legislation that subjects "*the right to disability benefits from the elapsing of a primary disability period of one year, thereby causing a migrant worker to have paid to the social security regime of that Member State contributions without any consideration, sustaining, in this way, a disadvantage in view of a non-migrant worker. The applicability of this legislation by the competent authorities is contrary to community law given that, on the one hand, it is prejudicial to such worker in relation to those who are in the same condition of definitive disability but did not exercise such freedom and, on the other hand, causes payment of social contributions without any consideration thereof.*"[31/32]

In addition, the ECtHR concluded that denying the right to a benefit since the applicant is not a national of a certain State, as imposed for the acquisition of a certain benefit, constitutes an "*unjustified and discriminatory act*" (based on nationality), in opposition to the provisions of Article 14 of the ECHR together with Article 1 of the respective Protocol no. 1.[33] More recently, the ECtHR decided that the refusal by the competent institutions from the United Kingdom to update pensions in line with the rate of inflation for citizens who, at a certain point in their lives, have emigrated to other countries, would also not comply with these provisions.[34]

7. Article 34(2) is inspired by Article 14(4)(a) of the European Social Charter, implementing a logic of a wide personal scope. In fact, the provision also recognises the right to social security benefits and social advantages, "*in equal terms*", to the nationals of the Contracting Parties, regardless of movement within the respective territories.

Similarly, the Community Charter of Fundamental Social Rights of Workers sets out in Title I, no. 2, a "*reciprocity principle*", considering the general principle of free movement of workers within the European Community.

From the 1970s, with the approval of secondary community legislation in social security matters, the right of free movement of workers was extended to their families,[35] to employed and self-employed workers who have ceased their professional

[29] Regarding the relevance of the "*equality of treatment*", see recital 8 and Articles 4 and 5 of Regulation (EC) no. 883/2004. As to the importance of such principle within the scope of Article 12 of the European Social Charter, see R. Birk, "European Social Charter", in *International Encyclopaedia for Labour Law and Industrial Relations*, Vol. I, ed. Roger Blanpain (Kluwer International, 2007), 392-394.
[30] Judgment *Inzirillo*, 16 December 1976, Case 63-76, ECLI:EU:C:1976:192, our italic. See also Judgment *Castelli,* 12 July 1984, Case 261/83, ECLI:EU:C:1984:280.
[31] Judgment *Layman*, 1 October 2009, Case C-3/08, ECLI:EU:C:2009:595 (summary, with our italic).
[32] See also Judgment *Clean Car Autoservice*, 7 May 1998, Case C-350/96, ECLI:EU:C:1998:205, §2.
[33] Judgment ECtHR *Gaygusuz v. Austria*, 16 September 1996, no. 17371/90.
[34] Judgment ECtHR *Carson and Others v. United Kingdom*, 16 March 2010, no. 42184/05.
[35] The CJEU, in the Judgment *Mr. and Mrs. F. v. Belgian State*, 17 June 1975, Case 7-75, ECLI:EU:C:1975:80,

activity and to students, removing the *purely economic nature* of the free movement of persons recognised up to that point.[36]

Furthermore, the Maastricht Treaty established *European citizenship*, recognising to every citizen of the Union the right to move and reside freely within the community area, regardless of being economically active persons.[37] Lastly, Regulation (EC) 859/2003, of 14 May, extended the applicability of social security regimes to "*nationals of third countries*" who are not already covered by those provisions of previous regulations, solely on the grounds of their nationality.[38] Such extension was strengthened in 2004, with the previously cited Regulation (EC) no. 883/2004,[39] which includes, for the first time, within the scope of the personal applicability of social security regimes, those who are in an irregular situation, such as "*stateless persons and refugees.*"[40]

8. This provision establishes the *scope* of the social protection right: the passive subjects are the Member States and then the EU; the active subjects of this right are those "*residing and moving legally within the European Union*." In this context, the concept of "*Member State where they reside*" is, according to the CJEU, the same as the beneficiaries' habitual State of residence, as well as their "*habitual centre of interests.*"[41] According to the settled case-law, the notion of "*social benefits*" includes all the advantages – related or unrelated to an employment contract – generally granted to national workers because of their objective status or because they live in national territory. Essentially, the recognition of workers from other Member States aims to facilitate mobility within the EU.[42]

By referring to the "*national laws and practices*" this provision shows the "*shared competences*" and the application of the "*subsidiarity principle*" between the EU and the Member States[43] – also reflected in Article 51 CFREU.

9. According to settled CJEU case-law, only those who are "*exercising a right of free movement within the European Union*" have the right to social benefits.[44] In the *Petit* judgment,[45] the Court points out that the Treaty rules on the free movement of persons, thereof the acts adopted in pursuance of the Treaty, shall not be applicable to activities with no connection to the situation covered by EU law, or when all

---

§16, decided, pursuant to Article 2(1) together with Article 3(1) of Council Regulation (EEC) no. 1408/71, that the family members of a worker who do not carry out any employed, professional or any other activity shall also benefit from the protection granted, in social security terms, in the Member State of their residence – and on equivalent conditions to those recognised to the respective nationals.

[36] Catherine Barnard, *The Substantive Law of the EU: The four freedoms*, 2nd edition (Oxford: Oxford University Press, 2007), 249 onwards.

[37] Refer to Article 8-A no. 1.

[38] Refer to Article 1 and recital 5.

[39] Refer to Article 2 which defines the scope of "Persons Covered" and recital 7.

[40] However, Directive 2004/38/EC, of 29 April, foresees that those exercising their right of residence should not, however, become an unreasonable burden on the social security system of the host Member State (refer to recital 10).

[41] Judgment *Swaddling*, 25 February 1999, Case C-90/97, ECLI:EU:C:1999:96, §§28 and 29.

[42] See Judgment *Schmid v. Belgian State*, 27 May 1993, Case C-310/91, ECLI:EU:C:1993:221, §18, and Judgment *Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout*, 27 March 1985, Case 249/83, ECLI:EU:C:1985:139, §20.

[43] The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties [see Article 5 of the Treaty of European Union (TEU), particularly, paragraph 3].

[44] In this sense, see Judgment *Koua Poirrez v. Caisse d'allocations familiales de la Seine-Saint-Denis*, 16 December 1992, Case C-206/91, ECLI:EU:C:1992:523.

[45] See Judgment *Petit v. Office national des pensions*, 22 September 1992, Case C-153/91, ECLI:EU:C:1992:354.

the relevant facts relate to a single Member State.[46] The Court considers this to be the case when the worker's situation is connected with a "*third country*" and a "*single Member State*".[47] This understanding would be extended to "*stateless workers*" and to "*refugees*".[48]

The essential nature of this connection – "*between free movement of people and coordination of social protection systems*" – is found in the coordinating regulations on social security: not applicable to situations confined to a single Member State.[49]

10. Article 34(3) is based on Article 3(3)(2) and Article 3 TEU, and Article 8 TFEU, stating the Union's commitment to combatting "*social exclusion and discrimination*" and promoting "*justice and social protection, equality between men and women, solidarity between generations and the protection of children's rights.*" The TFEU moreover professes the responsibility of the EU to ensure "*adequate social protection*" and the "*fight against social exclusion*" (see Article 9). It also provides that the EU is committed to supporting and complementing the action of Member States in the field of social exclusion, with the European Parliament and the Council[50] having a responsibility to adopt in this context the "*measures designed to encourage cooperation between Member States*" [see Article 153(1)(j)].

In this perspective, the concept of "*social assistance*" closely follows the provisions of Article 13 of the European Social Charter, according to which the parties undertake to ensure that those who do not have "*sufficient resources*", who do not fulfil the necessary conditions to earn those resources, have "*appropriate assistance.*" The right to social assistance still finds correspondence in Articles 30 and 31 of the European Social Charter, which enshrine the right of protection against poverty and social exclusion and the right to housing.

Furthermore, paragraph 10 of the Community Charter of Fundamental Social Rights of Workers provides for a "*right to extended social protection*", including protection against social exclusion and poverty. While the ECHR states the right of respect for private and family life, which covers the right to home and correspondence protection (see Article 8, paragraph 1), the UDHR establishes the "*right to an adequate standard of life*", including the right to social assistance and housing (see Article 25). Finally, the ICESCR establishes the recognition of a *"right of everyone to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and the continuous improvement of living conditions*" (see Article 11, no. 1).

---

[46] See also Judgment *Kapasakalis and others v. Elliniko Dimossio*, 2 July 1998, joined cases C-225/95, C-226/95 and C-227/95, ECLI:EU:C:1998:332, and *Terhoeve*.

[47] See Judgment *Aldewereld v. Staatssecretaris van Financiën*, 29 January 1994, Case C-60/93, ECLI:EU:C:1994:271; with the same perspective, see Judgment *INPS v. Baglieri*, 20 October 1993, Case C-297/92, ECLI:EU:C:1993:849.

[48] See Judgment *Khalil and Others*, 11 October 2001, joined cases C-95/99 to C-98/99 and C-180/99, ECLI:EU:C:2001:532.

[49] See paragraph 13 of Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April. While recognising that the rules analysed have the objective of coordination rather than harmonisation, the CJEU admits that "*the achievement of the objective of securing free movement for workers within the Community*" would be "*facilitated if conditions of employment, including social security rules, are as similar as possible in the various Member States*" (Case *Pinna*, § 21, our italic).

[50] Article 19, no. 1 of the TFEU is a Council enabling provision exercised in accordance, namely, with Article 3, no. 3, § 2 of the TEU. In order to ensure the fulfilment of the right to social protection, Article 21, no. 3 of the TFEU provides that the Council may act in accordance with a special legislative procedure, unanimously and after consulting the European Parliament, when Treaties do not provide powers of action in this matter.

At the EU level, the recognition of this right came through *action programmes* and *recommendations*. However, after the Lisbon European Council,[51] implementation continued through an "*open method of coordination*" combining national action plans and Commission initiatives, aimed at closer cooperation between Member States and the EU. The national law also provides for a general right to housing (see Article 65, paragraph 1, of the CPR). It should be noted that the right to a public benefit that guarantees a decent existence was considered by the National Constitutional Court to be a "*binding and justiciable positive law*",[52] although not directly resulting from the law.[53]

11. Article 34(3) provides for a "*general principle of combatting social exclusion and poverty*", seeking to ensure through an effective social welfare system and housing assistance a decent existence for those who do not have sufficient resources.

According to the understanding already expressed by the Institutions of the EU, the term "*poverty*" and the term "*social exclusion*" refer to all situations where people are prevented from participating fully in economic, social and civil life, and/or when access to income and other resources (personal, family, social and cultural) is so inadequate as to deprive them of a level/quality of life that is considered acceptable in the society in which they live[54] – in this context, "*access to adequate housing*" is fundamental for the integration and participation of each individual in society.[55]

However, Article 34(3) does not establish an imperative model of care, or (even) a specific binding level of social protection and housing assistance, only recognising instead the "*right to social assistance and housing assistance*" – thus allowing *discretionary* authority of the Member States to implement a timely and appropriate model in order to ensure a minimum level of care and a dignified existence.[56] Therefore, it does not provide a "*general right to housing*" – that would be impractical – but a mid-term solution: "*housing assistance*". Finally, by allowing the recognition of this right "*to all those who lack sufficient resources*", Article 34(3) encompasses all EU residents, whether they are citizens of the EU, nationals of third countries, refugees or expatriates.

12. The CJEU's case-law has repeatedly defended that Member States have "*wide discretion*" in choosing the measures appropriate to the pursuit of social policy objectives and the combatting of social exclusion.[57]

Regarding the right to housing, the CJEU concluded[58] that a rule which restricts the right of a non-resident in a Member State to housing violates the principle of

---

[51] It considered the high number of people living below the poverty line and in social exclusion in the EU unacceptable and felt that there was an urgent need for measures and targets to make decisive progress in the eradication of poverty. The European Council in Nice agreed these objectives on 7, 8 and 9 December 2000.

[52] Judgment of the Portuguese Constitutional Court, 19 December 2002, no. 509/02, Case 768/02.

[53] See in this context, and defining the concept of "*deprivation situations*", Joaquim Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, 818 *et seq*.

[54] See the Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Draft joint report on social inclusion, of 10 October 2001, COM (2001) 565 final.

[55] See the Commission Communication – 'The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion', COM (2010) 758 final.

[56] In this sense, see Andrea Giorgis, "Sicurezza sociale e assistenza sociale", 242.

[57] Judgment *Krüger*, 9 September 1999, Case C-281/97, ECLI:EU:C:1999:396, §28; in the same perspective, see Judgment *Nolte v. Landesversicherungsanstalt Hannover*, 14 December 1995, Case C-317/93, ECLI:EU:C:1995:438, § 33.

[58] See Judgment *Commission v. Greece*, 30 May 1989, Case 305/87, ECLI:EU:C:1989:218, §18.

free movement of people – since the right of residence and access to housing and ownership of property constitutes a "*corollary*" of freedom of movement. The CJEU also states that any restriction on the right to housing should be understood as an obstacle to the exercise of professional activity.[59]

In *Salesi v. Italy*,[60] the ECtHR recognises as resulting from the case-law *Feldbrugge v. Netherlands*[61] and *Deumeland v. Germany*[62] a broad interpretation of Article 6(1), of the ECHR, admitting its application in the context of social assistance. As to the right to housing specifically, the Court concluded in *Chapman v. UK* that Article 8 of the ECHR does not recognise a general and imperative right to housing,[63] and that the allocation by Contracting States of funds to allow citizens to have a home is a *policy option* not subject to judicial scrutiny. However, in *Cyprus v. Turkey*,[64] considering the denial of citizens' right of access to their homes in Northern Cyprus, the ECtHR concluded that there was a violation of the right of respect for private and family life – since this action would prevent these families from being reunited – and a violation of the right to respect for their home.[65]

Finally, the ECtHR promoted a comprehensive interpretation of Articles 3 and 8 of the ECHR, hence imposing a duty upon all Contracting States to guarantee a "*minimum level*" of effectiveness in terms of "*social assistance and help*" towards those who lack sufficient resources, and to provide minimum requirements in terms of human dignity.[66]

José João Abrantes & Rita Canas da Silva & Mariana Sousa e Alvim

[59] See Judgment *Commission v. Italy*, 14 January 1988, Case 63/86, ECLI:EU:C:1988:9, §16.
[60] Judgment ECtHR *Salesi v. Italy*, 26 February 1993, no. 13023/87.
[61] Judgment ECtHR *Feldbrugge v. Netherlands*, 27 July 1987, no. 8562/79.
[62] Judgment ECtHR *Deumeland v. Germany*, 29 May 1986, no. 9384/81.
[63] Judgment ECtHR *Chapman v. UK*, 18 January 2001, no. 27238/95, §99.
[64] Judgment ECtHR *Cyprus v. Turkey*, 10 May 2001, no. 25781/94.
[65] Also, in *Lopez Ostra v. Spain*, 9 December 1994, no. 16798/90, the ECtHR implicitly recognises the right to adequate housing when it concludes that Spain violated Article 8 of the ECHR because the Spanish State could not achieve the right balance between the economic interests of a particular city in keeping an industrial water treatment plant and the effective respect of the applicant's housing and privacy rights.
[66] Judgments ECtHR *Larioshina v. Russia*, 23 April 2002, no. 56869/00; *Z and others v. United Kingdom*, 10 May 2001, no. 29392/95; *D. P. & J.C. v. United Kingdom*, 10 October 2002, no. 38719/97; *E. and others v. United Kingdom*, 26 November 2002, no. 33218/96; *Marzari v. Italy*, 4 May 1999, no. 36448/97; and *La Parola and others v. Italy*, 30 November 2000, no. 39712/98.

ARTICLE 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

1. Methodological remarks

1.1. Preliminary cautions[1]

a) As *abstract* and *general* legal *criteria*, *statutory norms* are doubly transcended by problematic realities on the one hand and *substantive values* on the other. From a jurisprudential point of view, which underscores their role as *judgment rules* (continually re-densified through the dialectic of *sense-meaning*, *system, and problem-case*), one is led to agree with Castanheira Neves' lesson: in legal and practical terms, these norms constitute a problematic *posterius rather* than a normative *prius.*

However, taken to its ultimate consequences, such an acknowledgement might compromise the relevance and utility of legal commentary altogether, at least when the absence of judicial and societal mobilisation of the precepts at stake risks rendering the endeavour a purely abstract analysis of texts, thereby undermining its practical significance.[2]

Therefore, regardless of the centrality conferred upon the aforementioned *jurisdictional intentionality* – namely as a distinctive feature of law's *material autonomy* (threatened by instrumentally *functionalist* and formally *normativist* obliterations) – its crucial to underline (i) norms' parallel roles as *axiological* standards for practical evaluation and *sociological* rules of action, (ii) their constitutive and institutionalising dimensions,[3] as well as (iii) their proverbial *secondary functions* within the legal system. The interweaving of axiological, deontic, teleological and even technological moments within this most political source of law (and its ensuing criteria) becomes even more significant from a constitutional perspective, especially one *committed* to the *redemptive hope* in the *struggle* for a transcultural project of freedom and social responsibility, whose specific *validity* and *effectiveness* (including its phenomenological sources, objectifications and actualisations) beg for investigation and discussion within the new political constellations such as the EU.

---

[1] On the legal practice of the *commentary*, regarded as a *Gestalt* and *medium* of legal thought, communication and action, see Luís A. M. Meneses do Vale, "Artigo 4.º do Protocolo Adicional 4 à CEDH (Proibição de Expulsão Colectiva de Estrangeiros)", in *Comentário À CEDH,* Volume III (Universidade Católica, 2020).

[2] Not coincidentally this is true for some of the provisions of the Charter of Fundamental Rights of the European Union.

[3] Connected to social programming, structuring and transformation and to the behavioural framing, direction and evaluation.

b) But even aside from that, *EU norms* pose specific methodological challenges[4] due to the distinctive characteristics of the EU legal and political system and its correlated *community/context* of *practical-problematic realisation* of law's substantial value. Its dispersed array of references, multilingual network of translations, severe socio-political disfunctions and recursive interaction with the legal systems of the Member States, all attest to Europe's cultural pluralism, generating a kaleidoscopic effect that a mere interpretation of isolated norms will probably miss and silence.

c) Finally, since the norms of the CFREU are exclusively addressed to EU institutions, bodies, offices and agencies, as well as to the Member States when they are implementing EU Law, and they should not modify the established *roles* and division of powers outlined in the Treaties, nor extend the scope of EU law, the later can end up being very limited, particularly when the issues at stake, according to the principle of subsidiarity, remain outside of EU competences.

That is precisely what happens in relation to the first part of Article 35: because the EU does not provide for any *common* health care system,[5] the provision's relevance is basically confined to national policies falling within the ambit of EU Law implementation. For the present purpose, three key sets of norms (together with the corresponding case-law), especially when combined with anti-discrimination law, deserve our attention: firstly, the general provisions of EU free movement law, public procurement law and competition law; secondly, Regulation 883/2004/EC on the coordination of social security systems, Directive 2011/24/EU on patients' rights in cross-border health care, as well as the EU law on migration (concerning, for instance, *long-term residence* or the *asylum system*); thirdly, regulations on economic and fiscal policy, bearing a huge (although indirect) impact on national health systems.

As for the second sentence of Article 35, in contrast, its wording suggests an extremely broad field of application, as it purports to cover *all the Union's policies and activities*. Therefore, any failure to ensure a high level of health protection, whether in EU Law or policy or in their implementation by Member States, would generally constitute a breach of the Article.[6]

The interpretation of EU Law must live up to this standard, be it with regard to nuclear internal matters[7] – by interpreting Union Law in line with the latest concepts and agendas (aiming for *Health in All Policies*, *One Health* or *Integrated Care*) –, or in the assessment of the Union's external relations (*e.g.*, concerning the

[4] Karl Riesenhuber (ed.), *Europäische Methodenlehre Handbuch*, 4., neu bearbeitete Auflage (Berlin: De Gruyter, 2021).

[5] As Tamara Hervey and Jean McHale observe, *"No Union institutions, bodies, offices or agencies are responsible for 'preventive health care' or 'medical treatment'."* See Tamara Hervey and Jean McHale, "Art 35 – Health Care", in *The EU Charter of Fundamental Rights: A Commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (Beck/Hart/Nomos, Oxford, New York, Dublin: Bloomsbury, 2021), 1007 and ff.

[6] The CJEU appealed to the principle in *Léger*, 29 April 2015, Case C-528/13, ECLI:EU:C:2015: 288, paras 57–59, in order to consider whether French national legislation implementing EU law on blood safety was consistent with EU law on non-discrimination; Article 35 was also invoked by the plaintiffs in *Rossius and Collard*, 23 May 2011, joined cases C-267 and 268/10 (Order of the Court).

[7] For instance, correcting the case law on free movement or competition. Until this moment, two decisions of the CJEU, concerning the consistency of national laws regulating pharmacies with internal market law, have relied on Article 35 with respect to whether restrictions on freedom of establishment are justified – *Susisalo*, 21 June 2012, Case C-84/11, ECLI:EU:C:2012:374; *Pérez and Gómez*, 1 June 2010, joined cases C-570 and 570/07, ECLI:EU:C:2010:300.

EU development aid[8] or its external trade policy),[9] which regrettably arey too often overlooked.

1.2. Modest proposal

That being said, we have been striving to take Article 35 as the *vanishing point* of a *trias perspectica*, delineated by three guiding lines – (1) *health policy in Europe*, (2) *fundamental rights in Europe* and (3) *Social Europe* – thus examining *the EU treatment of health from a human rights perspective, aligned with the Charter of Fundamental Rights, and especially attentive to the social/solidarity component of the European project* (which this provision is supposed to be part of).

To honour this purpose, it would be necessary not only to delve deeply into general contributions stemming from fields as diverse as history and social, political, and legal theory, health law dogmatics, not to mention the practice of health law and the right to health in general (particularly within the EU),[10] but also to trace their relationship with the specific normative-legal meaning of Article 35 and its constitutive elements. Now, whereas the former issues will only run underground throughout the following pages, the historic, teleological-systematic, and problematic[11] aspects of the norm at stake warrant an explicit albeit brief, epitomized, and allusive reference, as they provide the crucial prerequisites and foundational basis for the subsequent reflections.[12]

---

[8] One could not agree more with Tamara Hervey and Jean McHale in their conclusion that the EU's *'new generation' trade and development agreements do very little to support* the access to 'essential medicines', including vaccines, because *they prohibit states parties from taking advantages of flexibilities in the WTO's TRIPS [Agreement on Trade-Related Aspects of Intellectual Property Rights] agreement that would otherwise allow developing and least developed countries, for instance, to issue compulsory licences for manufacture and marketing of in-patent medicines in cases of national emergency, such as 'HIV/AIDS, tuberculosis, malaria and other epidemics', which of course include COVID-19* – Tamara Hervey and Jean McHale, "Art 35 – Health Care", *op. cit.*, 1022.

[9] It is true that the EU uses *general exceptions and specific schedules*, on the one hand, and *human rights clauses*, on the other, with the avowed purpose of protecting the EU's market, and its national health systems, in the first case and the Union's values and principles, in the second. Nevertheless, both strategies and their alleged motives face an increasing and legitimate scepticism, on account of their ambiguous meaning and ambivalent effects. As a matter of fact, EU competences remain uncertain when it comes to the negotiation of agreements involving trade in health services (privately funded ones have already been included in some of them – like the Trade in Services Agreement or the EU-Caribbean and EU-Korean FTAs) and the *human rights conditionality*, for its part, remains largely underdeveloped with regard to social rights. In the opposite direction, despite the fact that the GATT did not include services supplied in the exercise of governmental authority – which is to say, by public (regional or national) monopolies free at the point of use and financed through taxation –, Article 35 EU CFREU could be used to interpret aspects of the Union's common commercial policy, where market activities fall within the Agreement: as *extra-Union-cross-border health service provision where only the service itself moves (telemedicine, outsourced medical transcription); movement of service recipients (medical tourism outside of the Union); commercial presence in the host state (foreign companies and foreign direct investment providing health services); and movement of human service providers/professionals (movement of medical professionals into the Union to provide services) – Ibidem*, 1020, 1021.

[10] See Luís A. M. Meneses do Vale, "Saúde", in *Direito da União Europeia*, ed. Alessandra Silveira, Pedro Madeira Froufe and Mariana Canotilho (Coimbra: Almedina, 2016), 945-1086.

[11] For the intertextual, intersemiotic and intercultural aspects, see our notes in the portuguese version of this work.

[12] For a slightly more detailed analysis of these elements, see Luís A. M. Meneses do Vale, *Anotação ao artigo 35.º da Carta dos Direitos Fundamentais da União Europeia* (Coimbra, 2011), 4 to 34.

1.3. Main elements

a) Firstly, consideration should be given to the *histor*(icit)*y* of the norm in question, taking into account not only its *context of emergence* (the enfolding *socio-historical reality* and *collective conscience*, as well as the *legal system* at the time) and its *prescriptive genesis* (in its formal-procedural and intentional-material aspects), but also its *subsequent life* and *eventual metamorphosis*, as a cultural phenomenon. *Hic et nunc*, and in a very expeditious way, this entails pondering, among others thins, upon the diachrony and narrative of EU protection of health, social and human rights the set of material preconditions underlying the creation of the Common Frame of Reference (CFR); the reasons behind Article 35 and the sources thereof;[13] the gestational process of the diploma and the prescriptive *will* that culminated in the solution contained therein;[14] the insertion of the latter into the legal system of the EU; and the most important milestones concerning EU health since then. These would probably include the threefold traumatic experience of the successive *financial*, *austerity and migratory crises* and their health consequences;[15] the indisputable frailness and pusillanimity of the new *social pillar*,[16] the Covid-19 pandemics[17] and, in its aftermath, the launching of the *European Health Union*,[18]

[13] The main influences come from the ECHR, UN Treaties (*maxime* the International Covenant on Economic, Social and Cultural Rights), and other Council of Europe Treaties (European Social Charter). Several conventions focused on particular categories of persons (Women, Children, Victims of Racial Discrimination, Migrants, Workers).

[14] In this regard, it is worth mentioning the famous Explanations, accepted within the TUE due to British pressure and which, in addition to a not insignificant heuristic value, can prove to be useful in case of disagreements, especially considering that any difficulties will be faced, in the first place, by the States and their courts.

[15] Especially in Greece. The same way the Social Charter and the International Covenant on Economic and Social Rights were called upon to challenge some of the austerity measures, giving way to interventions both from the European and the International Committees on Social Rights, something somewhat similar could have happened under Article 35, with the argument that such policies were adopted by national acts of implementation of EU law. However, in *Pringle*, Case C-370/12, 27 November 2012, ECLI:EU:C:2012:756, the CJEU expressly struck down the argument, finding that the establishment of the European Stability Mechanism could not be conceived as an implementation of EU Law, according to Article 51 (1) and (2) of the CFREU.

[16] Advancing a set of 20 social policy principles, complemented by a Social Scoreboard of 14 indicators, the Pillar aims at supporting *fair and well-functioning labour markets and welfare systems* and more resilient economic structures, thus leveraging *Europe's recovery* and acting as a *compass* in a *renewed process of convergence* towards better working and living conditions, and a socially fairer and more just future in the EU. Albeit conceived for the euro area the initiative is open to all EU Member States. Principle 16, in particular, is about health care, stating that "*Everyone has the right to timely access to affordable, preventive and curative health care of good quality.*" The monitoring framework provided by 'the social scoreboard' allows for a comparation between countries and the mapping of progresses. It is linked to the European Semester – the EU's annual cycle of economic and social policy coordination – and efforts to achieve the Sustainable Development Goals.

[17] Susan Bergner, "The role of the European Union in global health: The EU's self-perception(s) within the COVID-19 pandemic", *Health Policy*, 127 (2023): 5-11; Eleanor Brooks, "European Union health policy after the pandemic: an opportunity to tackle health inequalities?", *Journal of Contemporary European Research* 18 (1) (2022): 67-77; Eleanor Brooks, Anniek de Ruijter and Scott L. Greer, "Covid-19 and European Union health policy: from crisis to collective action", in *Social policy in the European Union: state of play 2020*, ed. Bart Vanhercke, Slavina Spasova, Boris Fronteddu (OSED, European Trade Union Institute, 2020).

[18] In a strict sense, the European Health Union designates a package of regulations which is a key part of the Commission's response to the COVID-19 pandemic and future public health emergencies: the Regulation on Serious cross-border health threats, the Regulation on the extended mandate of the European Centre for Disease Prevention and Control (ECDC), and the Emergency Framework

firmly backed, but largely surpassed, by citizens proposals within the *Conference on the Future of Europe*;[19] and, finally, the EU reaction to the war in Ukraine.[20]

b) Inasmuch as the EU legal order, like any other juridical system, is deemed to be the *tensional* (problematic and dogmatic) expression of a practical-normative project of values and ends, the normative substance of Article 35 will reflect its formal and material integration in that *axiotelic enterprise.*

From a formal standpoint, attention should be directed towards the neighbouring provisions (dedicated to *Work* and *Family*, *Social security and social assistance*, on the one hand, and *Access to services of general economic interest* and *environmental protection*, on the other), the overarching chapter (*Solidarity*) to which they belong and its placement within the Charter (between *equality* and *citizen's rights*), as well as their status within the broader context of the Union. A pragmatic and normative conception of the sources, system, and realisation of law, allows us to materially plunge Article 35 into a thick broth of legal criteria.

i. As far as principles are concerned, one should recall the axiological heritage, shared by the Member States (comprising values such as *human dignity*, *freedom*, *democracy*, *rule of law* and *respect for human rights*), upon which the EU is founded, as well as its alleged engagement with a normative-social project characterised by *pluralism*, *tolerance*, *non-discrimination*, *justice*, *solidarity* and *equality between women and men* (Article 2 of the TEU). Taking those references as *real tasks* or *responsibilities to fulfil*, the EU commitment to promote *economic, social and territorial cohesion, social justice and protection, equality and solidarity*[21] [Article 3(2)(3) of the TEU] comes as no surprise either. Article 35 relies on this *acquis* for its grounding, constitutive and regulatory validity, but its precise legal content and meaning only comes to light within the intricate web interwoven by EU primary and secondary law – particularly through a mutually illuminating dialogue with the other norms of the Charter, the fundamental rights ensured by the ECHR, and those derived from common constitutional traditions shared by the Member States(which also constitute general principles of the Union's law).

ii. Hence, attention should equally be drawn to the connections and interactions with other CDFRUE norms, like the ones devoted to *dignity* (Article 1), *life* (Article 2), *integrity* (Article 3), *equality and non-discrimination* (Articles 20 and

---

Regulation to provide extra powers to the European Health Emergency Preparedness and Response Authority (HERA), etc. – for a wider view, see Anniek de Ruijter, "What do we actually mean by a 'European Health Union'?", *Eurohealth*, vol. 26 (3) (2020): 30 ff.

[19] The *Conference on the Future of Europe* was a pioneering series of citizen-led debates and discussions that ran from April 2021 to May 2022, via an innovative Multilingual Digital Platform where any European could share ideas, within national and European Citizens' Panels. The final report delivered by the Co-Chairs of the Executive Board contains 49 proposals – including general principles and objectives and more than 300 concrete measures, organized around 9 topics – addressed to the Presidents of the European Parliament, the Council and the Commission. Leaving aside the ones with indirect relevance for the present case (concerning climate change and the environment; a stronger economy, social justice and jobs; values and rights; education, culture, youth and sport, etc.), four of them (7-10) bear a direct relation to health: *Healthy food and healthy lifestyle*; *Reinforcement of the healthcare system*; *A broader understanding of Health*, and *Equal access to health for all*.

[20] The hasty conversion of many Member-States to the creed of (an alleged) wartime *Realpolitik*, having had significant effects on budgetary allocations (such as increased defence expenditures, for instance) and impinging on the main political options concerning energy or food supplies does not bode well for health concerns; especially if one favours a holistic perspective on them, emphasising the importance social and environmental determinants.

[21] Between generations, between Member States and between peoples [Articles 3(3)(2), 3(3) and 4(2)].

21), *social protection* (Article 34), *freedom of movement* (Article 45) or *services of general economic interest* (Article 36)[22] – not to mention all the relevant provisions within EU secondary law[23].

iii. With regard to the *precedents* arising from the EU Courts, and rather unsurprisingly, the most relevant case-law on health matters does not rest upon Article 35: to this date we are not aware of any effective judicial review claims brought before the Member State's courts against national implementing acts under this provision. Only one case has so far been heard by the CJEU on the basis that a Union law or policy failed to ensure a high level of health protection, and even the substantive judicial citations of the Article remain scarce in this forum.[24]

Even so, to the extent that they participate in the delicate efforts to reconcile the Union's economic and social dimensions, and preserve the division of powers between the EU and its Member States, mention must be made to the judgments and rulings on the relationship between national health care and social security systems and European competition rules, on the one hand, and between healthcare coverage systems and the principles of free movement, on the other.[25]

The former have analysed the qualification of *healthcare providers as companies*,[26] debating, among other questions, the *nature of healthcare services* and the *concept of remuneration*. The latter, treading a path that culminates in the notorious directive on cross-border healthcare, basically examined two types of *restrictions on the freedom of movement* of healthcare in the EU - prior authorisation schemes, whether grounded in Article 22 of the Regulation (EEC) no. 1408/71 of 14 June 1971, or not, on one hand; and obstacles connected to the costs of healthcare, on the other. Among other issues, the courts had to assess the reasons and conditions behind the restrictions to freedom of movement, as well as the differences between reimbursement systems based or not on the regulation, hospital treatment and outpatient treatment,

[22] For more examples of the interaction and composition of Article 35 with other provisions from the CFREU (Articles 7, 8, 13, 14, 31 and 32), see Luís A. M. Meneses do Vale, *Anotação ao artigo 35º da Carta dos Direitos Fundamentais da União Europeia*, *op. cit.* (Coimbra, 2011), 22 to 23. Apart from them, certain classes of people – women (Article 23), children (Article 24), the elderly (Article 25), people with disabilities (Article 26) – are often granted greater access to health care systems.

[23] With special attention to the Directive on cross-border health care, see *ibidem*, pages 23 to 25.

[24] See Judgment *Deutsches Weintor*, 6 September 2012, Case C-544/10, ECLI:EU:C:2012:526; *Susisalo*, 21 June 2012, Case C-84/11, ECLI:EU:C:2012:374; *Pérez and Gómez*; *Commission v Austria*, 21 December 2011, Case C-28/09, ECLI:EU:C:2011:854; *Venturini*, 5 December 2013, joined cases C-158/12, C-161/12, ECLI:EU:C:2013:791; *Léger*, 29 April 2015, Case C-528/13, ECLI:EU:C:2015:288; *Pillbox 38 (UK) Ltd*, 4 May 2016, Case C-477/14, ECLI:EU:C:2016:324; *PI v Landespolizeidirektion Tirol*, 8 May 2019, Case C-230/18, ECLI:EU:C:2019:383. See also *Rossius and Collard*, 23 May 2011, joined cases C-267 and C-268/10, ECLI:EU:C:2011:332 and *Široká*, 17 July 2014, Case C-459/13, ECLI:EU:C:2014:2120, even though they were held inadmissible for lack of jurisdiction, or *Boston Scientific*, 5 March 2015, Case C-503/13, ECLI:EU:C:2015:148; *Daouidi*, 1 December 2016, Case C-395/15, ECLI:EU:C:2016:917, where Article 35 was also in question.

[25] Koen Lenaerts, *Droit communautaire et soins de santé: les grandes lignes de la jurisprudence de la Cour de justice des Communautés européennes*, available at http://www.ose.be/workshop/files/ LenaertsFR.pdf, 1-17; Pedro Cabral, "As difficult as finding one's way in Chinatown: O enquadramento jurídico-comunitário da liberdade de acesso a cuidados de saúde transfronteiriços na União Europeia", *Revista da Ordem dos Advogados* (2004); Luís A. M. Meneses do Vale, *Racionamento e Racionalização no acesso à saúde: contributo para uma perspetiva jurídico-constitucional* (Coimbra, 2007), volume II, chapter 2.

[26] Judgments *Luisi and Carbone*, 30 January 1984, joined cases 286/82 and 26/83, ECLI:EU:C:1984:35, page 377, recitals 10 and 16; and *Grogan*, 4 October 1991, Case C-159/90, ECLI:EU:C:1991:378, in particular recital 21.

medical expenses and incidental costs, systems of reimbursement and systems of benefit in kind; etc.[27]

iv. With the caveat that its legally constitutive effects do not escape close scrutiny, the practical models excogitated by scholars, think tanks and activists, as part of their critical-reconstructive reflection on law, along with doctrinal allegations issued by the General Advocates,[28] or the insights and proposals flowing from institutions such as the Committee of Experts on Social Rights, the EU Agency for Fundamental Rights (FRA)[29] or the European Committee of Social Rights (in the framework of the European Council), also offer a valuable contribution to the legal densification of the provision under analysis.

c). Finally, in the subsequent examination of Article 35, we will seek to teleologically align all pertinent theoretical and practically decanted legal contents, thus articulating general legal purposes with the aims of EU Law, the goals pursued by the CFREU protection system and those associated with the solidarity chapter, not forgetting the *teloi* of the norm itself. Given the problematic intentionality of the law, this venture must necessarily include the constitutive mediation provided by legal cases, even if the *judicial enforcement of the norms* is far from exhausting the scope of this research.

2. Analysis

2.1. Basic grounding

However dubious its legal precision may be, the foundation of an alleged *right* to healthcare, as the cornerstone of Health Law,[30] ultimately lies in the recognition of human dignity (and its dialectical corollary principles of *self-determination* and *communal responsibility*) as the ultimate value of our civilisational horizon.

Therefore, both the *dignity of human beings* and the guarantees of *solidarity, and political, economic, social and cultural democracy* see themselves legally intertwined in the protection of health care set out in Article 35, through the establishment of a *right to preventive health care* and *a right to benefit from medical treatment* (sentence 1), together with an objective *principle* (sentence 2) that demands a *high level of human health protection*.

---

[27] See *Decker*, 28 April 1998, Case C-120/95, ECLI:EU:C:1998:167; *Kohll*, 28 April 1998, Case C-158/96, ECLI:EU:C:1998:171; *Vanbraekel*, 12 July 2001, Case C-368/98, ECLI:EU:C:2001:400; and *Smits and Peerbooms*, 12 July 2001, Case C-157/99, ECLI:EU:C:2001:404. See also *Ferlini*, 3 October 2000, Case C-411/98, ECLI:EU:C:2000:530; *Müller-Fauré* and *van Riet*, 13 May 2003, Case C-385/99, ECLI:EU:C:2003:270; *Leichtle*, 18 March 2004, Case C-8/02, ECLI:EU:C:2004:161; *Inizan*, 23 October 2003, Case C-56/01, ECLI:EU:C:2003:578; *Keller*, 12 April 2005, Case C-145/03, ECLI:EU:C:2005:211; *Watts*, 16 May 2006, Case C-372/04, ECLI:EU:C:2006:325; *Acereda Herrera*, 15 July 2006, Case C-466/04, ECLI:EU:C:2006:405; *Stamatelaki*, 19 April 2007, Case C-444/05, ECLI:EU:C:2007:231; and *Elchinov*, 10 October 2010, Case C-173/09, ECLI:EU:C:2010:581.

[28] Unfortunately, only a few Opinions of Advocates General incorporate this provision in their reasoning – Tamara Hervey and Jean McHale draw attention to *Stamatelaki*; *Josemans*, 16 December 2010, Case C-137/09, ECLI:EU:C:2010:774; *Abdida*, 18 December 2014, Case C-562/13 ECLI:EU:C:2104:2167, AV and *BU v Comune di Bernareggio*, 19 December 2019, Case C-465/18, ECLI:EU:C:2019:812. Tamara Hervey and Jean McHale, "Art 35 – Health Care", *op. cit.*

[29] The FRA has developed a noteworthy reflection on the health rights of vulnerable people.

[30] For a reflection concerning the legal problems that relate to health and its characterisation as a legal good, see Luís A. M. Meneses do Vale, *Racionamento e Racionalização no acesso à saúde: contributo para uma perspetiva jurídico-constitucional*, *op. cit.*, volume II, chapter 1.

2.2. Subjects

Since the article is *formulated* as a right, its *subjective scope* seems amenable to analysis in terms of holders or bearers of rights and duties (*i.e.*, active and passive subjects).

a) Thanks to the *vis expansiva* of its personal matrix, the health rights enshrined in the Charter conform to a fundamental principle of universality,[31] all the more so given that Article 35 avoids any clear delimitation of its subjective recipients, preferring instead to exclusively rely on the demarcation of EU law competence and application. Moreover, this point was critically discussed in the Convention, where the option for an inclusive regulation ultimately prevailed.[32] Aditionally the FRA also emphasised, more than once, the application of the law to all individuals, regardless of their status.[33] Finally, certain secondary legislation and the ensuing case-law on migration appear to uphold such an interpretation, either directly[34] or through basic analogical reasoning.[35]

Consequently, in terms of personal scope, both the rights to preventive health care and to benefit from medical treatment are not limited to EU citizens, but also extend to individuals from third countries, even when they are illegally present in EU territory.

With regard to the principle enunciated in the second sentence, some authors[36] try to frame it in a quasi-relational scheme, able to sustain subjective legal positions – more precisely, a collective fundamental right vaguely held by the community. However, rigorously speaking such a *construction* appears somewhat strained. It seems more accurate to acknowledge that we are dealing with a principle incapable of directly upholding a clearly carved legal entitlement, either individually or collectively – a circumstance which does not empty its normative content , as one can easily elicit from the significant effects that Article 52 still attributes to it.[37]

b) On the *passive side*, the right of access to preventive health care and the right to benefit from medical treatment display a universal vocation, at least in their negative facet. In fact, as absolute rights of defence (immunities or liberties) they produce *erga omnes* effects, begetting a universal passive obligation not to disturb the preventive measures of health care or the provision of medical treatments already ensured (A. Lucareli). Conversely, on closer inspection, it is not entirely clear against whom these rights can be adequately asserted regarding their specifically

---

[31] António Vitorino, *Carta dos Direitos Fundamentais da União Europeia* (Cascais: Principia, 2002).

[32] Initially, apart from the consensus o a minimum standard of *Versorgung*, given the scarcity of resources and, more particularly, the lack of preventive health measures, the issue remained contentious due to the EU lack of competence. However, the alternative proposal to simply abandon this reference faced significant resistance and was discarded, owing to the central nature of the determinations, which are closely linked to human dignity.

[33] European Agency for Fundamental Rights, *Healthcare entitlements of Migrants in an Irregular Situation in the EU 28 States* (Luxembourg: Publications Office of the EU, 2016).

[34] See Articles 30(1) and (2) of the *qualification Directive* 2011/95/EU, Article 17 (2) of the *reception conditions Directive* 2013/33/EU [Article 17(2)] and Article 14(1)(b) of the *returns Directive* 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals.

[35] Similarly, the CJEU extended the requirement of non-discriminatory access, created by the long-term residence Directive (2003/10/EC) from social assistance entitlements to housing benefits in *Kamberaj*, 24 April 2012, Case C-571/10, ECLI:EU:C:2012:233.

[36] Angelica Nußberger, "Artikel 35º - Gesundheitsschutz", *in Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, ed. Peter J. Tettinger/Klaus Stern (Munich, 2006), 586 to 594.

[37] In one of the draft versions of this provision the option was to a simply r*eference* Article 152 of the Treaty. However, in the final version, the decision to effectively *repeat* the precept's text prevailed. In any case, as in many other norms in this chapter, we are dealing with a transversal clause (*Querschnittsclausel*).

positive dimensions, whether *protective*, *facilitating*, *promotional* or *fulfilling* in nature. Nevertheless, in accordance with Article 51(1), theseis provisions apparently treats the EU institutions and the Member States, when implementing EU law, as the primary bearers of those rights (more or less) corresponding duties or obligations.

In turn, while the general principle, enunciated in the second sentence, seems to be aimed solely at the Union, there are no reasons for narrowing its scope by excluding implementation activities undertaken by the Member States. At the same time, precluded from creating new competences, it still obliges the EU to abide by a high level of protection of healthcare, both in the design and implementation of all its programmes and activities, even those immediately unrelated to health issues.

Notwithstanding governed as it is by the crucial principles of *subsidiarity* and *conferral*, the EU's role in this domain, – whether fostering cooperation among the Member States or galvanising their inter-coordination – will remain complementary to the national policies. It should respect the responsibilities of the different countries both with regard to the definition of theire health policies and to the organisation and provision of health services and medical treatments, which includes managing and distributing the resources that are assigned to them [Article 168(5) TFEU].

Nonetheless, considering the *specific competence* established in Article 168 of the TFEU, it is worth remembering that all norms containing principles can be implemented both through legislative and executive acts by the institutions, bodies, and organisms of the Union[38] and through actions by the Member States when applying Union law in the exercise of their competences.[39] The point is particularly relevant in our days, marked by the increasing entanglement of law and public policies. National administrations are assuming more responsibilities to implement transnational administrative law, thus becoming central agents of the Union's policies and actions, whether in terms of formal delegation or through the more undefined contours of national cooperation and implementation.[40]

Lastly, despite the dogmatic and theoretical sophistication of the latest *Drittwirkung* theses, uncertainties persist as to whether the legal protection of health can also extend its effects, albeit reflexively, to private entities or third states. It is true that, in the absence of an express answer, Articles 51(1) and 52(2) might still provide some clues. But not much more. [41/42]

---

[38] In other words, all the instances created by the Treaties or by acts of secondary law.

[39] See the comments by Johannes Christian Wichard on Articles 152 (now 168) of the TFEU and 35 of the CFREU included in Christian Calliess and Matthias Ruffert, *EUV/EGV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar*, 6. *Auflage* (Munich: C. H. Beck, 2022).

[40] Suzana Tavares da Silva, *Direito Administrativo Europeu* (Coimbra: Imprensa da Universidade de Coimbra, 2010).

[41] We are witnessing a gradually broadening teleological extension (of course ultimately contingent on the specific circumstances of each case) of these obligations to private entities under certain conditions. Thus, where the competing tasks of the European Union and the Member States are concerned, the principle of subsidiarity must be applied. Member State entities are bound by the obligations of the Article when they apply EU law. With regard to private entities, for the time being, apart from the cases in which they are implementing EU Law in a public capacity, they will only be obligated if these rights are explicitly incorporated into the rules of the Community Treaties which have a direct horizontal effect. See Gerald G. Sander, *Internationaler und europäischer Gesundheitsschutz. Gesundheit in WHO, FAO/CAK, WTO und EU, unter besonderer Berücksichtigung des Lebensmittelrechts* (Baden-Baden: Nomos Verlagsgesellschaft, 2004), 30 and following.

[42] The European Social Charter stimulates the States to act in cooperation with public and private entities.

2.3. Object (material scope)

The norm contained in Article 35 protects some components of the complex *social* and *existential domain* defined by health.

Nevertheless, it does not yield an unequivocal notion of the pertinent good in question. Quite to the contrary: it remains to be ascertained whether the normative references to the concept of public health within EU law, (particularly in Article 35), all convey the same (or similar) content, reach and scope; namely if they intend to encompass the widest circle of public health or just sectoral *Gesundheitswesen*; Health or Healthcare; socio-political and legal *Gesundheitsschutz* or mere medical and nursing services; primary, secondary, tertiary or even palliative, long-term and mental care. If there were still any doubts on the topic, this difficulty confirms the inseparable relationship between the *indirect or material object* of this provision, the *types of obligations* it imposes and the *substantive content* of those obligations.[43]

Searching for a potential solution, an harmonisation with general international law could perhaps be achieved by endorsing the World Health Organization (WHO) concept of health. For some of those who advocate this possibility, Article 168 has already adopted that well-known notion – an argument which, nonetheless, seems difficult to sustain[44] unless one signs up (as, in principle, we believe one should)[45] to a comprehensive understanding of public health, comprising all its levels of determinants, from the structural to the environmental, from the social and the medical to the psychic and genetic. Otherwise, the TFEU wording and, even more so, its implementation, speak almost exclusively of the micro-level improvement of public health and the modest prophylactic action regarding diseases and causes of danger to health, both physical and mental: in other words, it fails to guarantee the consistent provision of health services and products, falling short of its own potential promoting public health.[46]

An alternative hypothesis would consist in the construction of an autonomous EU-specific notion of health, based on Article 3 of the CFREU, which covers the spiritual and physical dimensions of integrity,[47] but ignores health's social determinants.

Finally, some scholars differentiate (at the risk of some normative consistency) among three notions of health; two for the rights articulated in the first part of the Article and the third for the concept undergirding the principle in the second sentence: the pursuit of a high level of health would require a wide approach to health, close to

---

[43] To give an example, having defined the right to health along the lines of a "*minimum core*" doctrine, the FRA placed under its purview the access to "*essential primary healthcare*" and to "*primary and emergency medical care.*"

[44] One need not to go further than the WHO Constitution (1946), which envisages not simply a *higher level* but "*...the highest attainable standard of health*", and not as a mere *objective principle* but "*as a fundamental right of every human being.*"

[45] Alex de Waal, for instance, convincingly urges us to evolve *Toward Democratic Ecological Public Health* – Alex de Waal, *New Pandemics, Old Politics: Two Hundred Years of War on Disease and its Alternatives* (New Jersey: Wiley, 2021).

[46] No significant action was taken during (or since) the austerity crisis – on the basis of the well-established knowledge regarding the circular connections between social justice or equality and health – Michael Marmot, *The Health Gap: Improving Health in an Unequal World*, (Bloomsbury, 2016); Michael Marmot, Peter Goldblatt, Jessica Allen, *et al*., "Fair Society, Healthy Lives (The Marmot Review)", *Institute of Health Equity* (2010); Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (London: Penguin, 2010); Ibidem, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-Being* (London: Penguin, 2019); David Stuckler and Sanjay Basu, *The Body Economic: Why Austerity Kills*: *Recessions, Budget Battles, and the Politics of Life and Death* (New Editions, Basic books, 2013).

[47] Johannes Christian Wichard, "GRCh, Art. 35, [Gesundheitsschutz]", *op. cit.*

the WHO paradigm, in order to include social well-being, while both rights seem to relyi on narrower definitions, leaving aside social factors, without relinquishing bodily and spiritual integrity.[48] Meanwhile, if *Gesundheitsvorsorge* subsumes *all* the measures aimed at avoiding the onset of diseases (with their physical or spiritual damage to individual health), *arztliche Versorgung* embraces all means of medical assistance, whether they aim to cure, to prevent the deterioration of the state of health, or to extend life.[49]

2.4. Nature, structure and content

a) Article 35 explicitly establishes two rights and a principle, all socially imbued. Legal and democratic *sociality* calls for an updated *institutionalisation*[50] of a *molecular project of social justice*, committed to the subjective and objective actualisation of the *solidary responsibility* incumbent upon each and every member of the society, in order to ensure the sort of *equal liberty* and *effective participation* in social life to which everybody is entitled to, simply by virtue of being a person. To that end, it requires the provision of the means deemed necessary to fulfil certain individual needs (passive, beneficiary dimension) as well as to ensure everyone's *partaking* in the social and political processes and economic and cultural life (active dimension).[51/52] Nowadays,

---

[48] See the comment on Article 3 in Christian Calliess/Matthias Ruffert, *EUV/EGV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar*, *op. cit.*

[49] According to J. Wichard, the *Gesundheitsvorsorge* covers all the measures that function in the prevention of physical or spiritual damage to health. The *ärztliche versorgung* is about the *gesundheitsbezogene* activity of doctors and hospitals – "GRCh, Art. 35, [Gesundheitsschutz]", *op. cit.*, 2670.

[50] See, for instance, Roberto Esposito, *Istituzione* (Bologna: Il Mulino, 2021); Ubaldo Fadini, *Il tempo delle istituzioni. Percorsi della contemporaneità: politica e pratiche sociali* (Verona: Ombre Corte, 2016).

[51] Therefore, refining and correcting what was thought and stated in the Portuguese version, we stand somewhere in-between Poiares Maduro and T. Hervey's perspectives, advocating for the *mandatory* (not inevitable, nor arbitrary) distributive implications of social rights, provided they do not contravene the demands stemming from the principle of social equality (and this, so as to mitigate the individualist shift – bolstered by the subjective structure of rights and the judicial nature of its enforcement – we have been assisting to in some of the legal systems that have championed their protection and promotion). See Tamara K. Hervey, "The 'Right to Health' in European Union Law", in *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, ed. Tamara K. Hervey/Jeff Kenner (Oxford - Portland, Oregon: Hart Publishing, 2003), 193 to 222; "We Still Have Not Found What We Have Been Looking For The Balance Between Economic Freedom And Social Rights In The European Union", *FDUNL Working Papers*, no. 4 (1999); and "Europe's Social Self: «The Sickness Unto Death»", *Webpapers on Constitutionalism & Governance beyond the State*, no. 2 (2000), available at http://ssrn.com/abstract=1576087. That does not entail the dilution of the prevalent subjective dimension of those rights in their respective objective-institutional projections. It truly is about affirming that the social rights recognised in the context of communities guided by principles of dignity, democracy and solidarity require a legal institutionalisation in which they are carefully weighted and combined. Every *socius* is equally entitled to the fulfilment of some basic social needs as acknowledged by law by the simple fact that they are persons, full members of the community. If they are obliged to respect the limits imposed by individual freedoms, they also have the right to participate in both the successes and failures of society, regarded as a cooperative enterprise; the same is to say, they should contribute to, and benefit from, the community project(s) to the extent of their capacities and needs. As a matter of fact, "*The CJEU seems to be increasingly sympathetic to the need to apply a reasonably generous standard of justification where the collective realisation of the right to health is jeopardised by individual litigation based on free movement or competition. This is consistent with the idea of health services as services of general interest, and reflects a growing sympathy of the CJEU to those aspects of European welfare systems, where challenged by individual litigants relying on Union internal market law, perhaps following Article 3(3) TEU's notion of a 'social market economy'. Article 35 could be used to ensure that EU involvement in matters concerning human health protects the values that are encapsulated in a 'right to health*'" – see Tamara Hervey and Jean McHale, "Art 35 – Health Care", *op. cit*., 1023ff.

[52] See the principles established in the *Commission's White Paper*, of 23 October 2007.

thanks to the moral hegemony of the human rights idiom, this fundamental endeavour tends to be conceptualised, structured and actualised around a complex notion of fundamental social rights, considered both as subjective legal positions and objective-institutional principles. Be that as it may, the *criteria* for determining the *sociality* of a principle, a rule, or a right remain largely ambiguous, oscillating between *historical*, *dogmatic-analytical*, and *structural* approaches as well as *teleological*, *final*, or *functional* perspectives.[53]

Although some of *health's* dimensions clearly *extend beyond* the core of sociality – nowadays probably coincident with the recognition of a *status positivus socialis* –, the fact is that, whether historically, axiologically, and teleologically, or structurally and analytically, the right to health has been consistently conceived and postulated as a *social* right or directive principle. This holds true in the EU and across most of its Member States. The CFREU, in particular, follows an original thematic organization, whereby the provision on *health care* is placed in the chapter dedicated to solidarity,[54] alongside collective and individual social rights, or complex and multidimensional rights (Article 34), even if it does not specifically prescribe social rights to benefits in the strictest sense.[55]

Finally, the principle contained in Article 2 clearly belongs to the EU social dimension, vaguely "*understood as a complex of programmes, structures, objectives and financial resources.*"[56]

---

[53] For some, social rights historically emerged from the Social Question and the resulting advancements, with labour rights at the forefront (although these can also encompass true freedoms, guarantees, and negative rights). For others, the distinctive factors lie precisely in the pursued aims or the functions performed by these rights, distinguishing those that seek to promote well-being, utility, or social cohesion from those that focus on respecting or protecting individual freedoms. Accordingly, from a structural standpoint, at their core, social rights are typically associated with positive rights, *Leistungsrechte*, or *droits-créances*, that is, rights to (facilitating, promotional or providing) actions or to some specific social benefits (services, products, etc.) - to distinguish them from the state's *duties of protection* demanded by fundamental freedoms)». Regarding social rights in the context of the ECHR, the European Union in general and the CFREU, see Julia Iliopoulos-Strangas, "Soziale Grundrechte", in *Handbuch der Grundrechte in Deutschland und Europa VI/1: Europäische Grundrechte I*, ed. Detlef Merten/Hans Jurgen Papier, vol. 6 (Heidelberg/Munchen/Landsberg/Frechen/Hamburg: Müller Jur.Vlg.C.F., 2010), 299 and following; Eberhard Eichenhofer, "Soziale Rechte", *ibidem*, 825 and following, and Christine Langenfeld, "Soziale Grundrechte", *ibidem*, 1117 and following; and also Thorsten Kingreen, "Soziale Grundrechte" (§18), in *Europäische Grundrechte und Grundfreiheiten*, *De Gruyter Lehrbuch, 3. Auflage*, ed. Dirk Ehlers (Walter de Gruyter, 2009), 640 and following; and Cecile Fabre, "Social Rights in European Constitutions", in *Social Rights in Europe*, ed. Grainne de Burca, Bruno de Witte (Oxford: Oxford University Press, 2005), 15 to 28.

[54] The notion of solidarity has many applications in the law, in general, and in the European Union's law, in particular, rendering it difficult to delimit. According to Thorsten Kingreen, within the context of the European Union it also serves as an *Oberbegriff* and overarching principle asserting a joint responsibility for the public good, which cannot be fulfilled by free competition (something that should resonate with the echoes of *Daseinvorsorge* detected in Article 36 – "Soziale Grundrechte", *op. cit.*). In the realm of health, solidarity is reputed as one of the major axiological references shared among Member States share and pivotal to the Union's internal and external policy. It stands alongside *universality*, *access to medical treatment*, *quality and fairness* – and is expressly linked to the financial regime of health systems and the need to ensure [universal] access to medical treatment.

[55] According to Christine Langenfeld the CFREU contains three types of social rights (alongside the *Sozialrechtliche Prinzipien*): the freedoms with a social dimension or range (Articles 28, 25 and 26); the claims for legal-social protection (Articles 27, 30, 31, 32 and 33) and the rights to participation (*Teilhaberechte*), among which can be seen the right to health care and the rights on the Articles 29, 34 and 14 – "*Soziale Grundrechte"*, *op. cit*., 1144 and following (on the right to health care).

[56] Alberto Lucareli, "La protezione della salute (art. 35)", in *L'Europa dei diritti: commento alla carta*

b) Before dissecting the content of the rights and the principle enshrined in Article 35, it is important to briefly outline the structural distinctions between them.

i. The distinction between right and principle[57] stems from EU Law itself and, more particularly, from Article 52(5) of the CFREU. At the Cologne Council, "economic and social rights" (of which Article 35 is undoubtedly an example) were distinguished from mere "objectives for action by the Union", but this dichotomy didn't make it into the final text. To complicate matters further, although Article 35 itself refers to the "right" to health care, the accompanying explanations instead emphasize the "principles" set out therein.

Moreover, even in relation to the two rights worded in the first sentence the distinction between subjective legal positions and mere non-relational legal duties, common in the constitutional traditions of many countries, has been theoretically and dogmatically disturbed by the conception of fundamental rights as principles (Dworkin, Alexy, Borowski). We will then have entitlements that are not immediately actionable and justiciable (corresponding to prima facie rights) and a set of objective-institutional refractions that go beyond mere jus-subjectivity (rights as institutions). Even those, like Tamara Hervey, who seem hesitant to see the first part of Article 35 as guaranteeing a true subjective right, nonetheless distinguish between the individual entitlement derrived from it and the mainstreaming obligation stipulated in the second part of the provision.

ii. On the other hand, the differences between the two jus-subjective positions established in the first part of Article 35 relate to the distinction sometimes drawn between a simple *right of access to prevention* and the *right to obtain or benefit from medical care*.

While some are inclined to place the right to prevention and the right to medical care in the same generic category of absolute subjective rights (Lucareli),[58] others try to establish some differences between the two. They argue that the right of access to prevention primarily constitutes a negative or defensive right (*Abwehrrechte*). Simultaneously, through an integrated interpretation with cross-cutting principles, such as equality and non-discrimination, specific *obligations to provide protection* can also be gleaned from it, thus bringing this entitlement closer to what the German doctrine has coined as *Schutzrechte*.[59]

If we were referring to a fully realised political and social community of people and peoples, the right to health care should be translated into a right to participate in the global social production and distribution of health goods, under conditions of equality and freedom (*Teilhaberecht*). Given the normative and factual circumstances at hand, one would be more than content with an interpretation which strives for

---

dei diritti fondamentali dell'Unione Europea, ed. Raffaele Bifulco/Maria Cartabia/Alfonso Celotto (a cura di) (Bologna: Il Mulino, 2001), 246.

[57] For example, Thorsten Kingreen, "Soziale Grundrechte", *op. cit*., 641 and following. Recognising that the social rights are a *nebulösen Sammelbegriff*, Kingreen also distinguishes them based on the function they perform (643 and following).

[58] *I.e.*, operating before public and private entities protected by the courts (besides being necessarily inserted in a health organisation equipped with structures capable of ensuring respect for the principle of substantial equality and the obligation of universal service).

[59] Concerning the specific meaning of access to fundamental social benefits, within public law, see "Access to Health Care between Rationing and Responsiveness: Problem(s) and Meaning(s)", in *Boletim da Faculdade de Direito da Universidade de Coimbra*, vol. LXVIII, Tomo I, 2012.

real opportunities (recursively self-reinforcing capabilities) to take part in health provision systems organised by States, and, in this way, for a right to the necessary normative benefits that each Member State, in the exercise of its competences, chooses to adopt in view of the respective structuring and conformation.

Under social-democratic constitutional conditions, akin to those historically fostered by many early European expressions of transformative constitutionalism (Marc Graber), the entitlement to preventive health and medical benefits – shaped by national legislation, practices, and conflicting subjective legal *positions* – also supports derivative rights (*derivative Teilhaberechte*) to access medical care and medication, potentially resembling substantive rights to tangible benefits (*Leistungsrechte im engeren Sinne*).[60/61]

Alongside the abovementioned *Individualrechte* stands a principle doctrinally portrayed as a *Zielbestimmung*, as it assigns a broad (although imprecise) goal (*the assurance of a high level of health*) to guide the actions of the bodies and institutions of the EU and the Member States when implementing EU law. Whilst not setting out a determined and positive task (*Aufgabe or Auftrage*) it still is a genuine legal principle rather than a mere programmatic maxim.

c) Viewed comprehensively (*Als Ganzes*), fundamental rights are complex clusters or bundles of multi-layered (*mehrschichtigen*) claims. At least in theory, the right to health can also be broken down into several *dimensions*, *plans or levels* (*Ebenen*), which can be matched to obligations of *respect*, *protection* and *fulfilment* – as distilled by the international doctrine of the Committee on Economic, Social and Cultural Rights (CESCR), on the basis of the typologies advanced by Henry Schue or Asbjørn Eide –,[62] In the present case, these duties are additionally accompanied by a *principle of social right.*[63]

---

[60] As is the case of the legal power to request all the provisions deemed necessary to obviate discriminatory treatments in the access to health services and products. At the same time, from the intersection of Article 35 with Articles 2(1) and 3(1) a *subjective right to health protection* (A. Nu ßberger) seems to arise at least when it comes to fatal diseases. For an analysis of its relationship with the protection given to other rights and a brief survey of the subjective rights it may generate, see the reflections of Sabine Michaelowski that focus in particular on the prohibition of inhuman or degrading treatment (Article 4), the right to integrity of the person [Article 3(1)], the principle of free and informed consent [Article 3(2)], the prohibition of eugenic practices, the prohibition on making the human body and its parts as such a source of financial gain and the prohibition of the reproductive cloning of human beings – "Health Care Law", in *The EU Charter of Fundamental Rights: politics, law and policy*, ed. Steve Peers/Angela Ward (Portland – Oregon: Hart Publishing, 2004), 287 to 308.

[61] Undoubtedly social rights to health care are dependent upon health infrastructures that are adequate to supply the preventive care or treatment (A. Lucareli).

[62] The first requires the State to abstain from interfering, directly or indirectly, in the enjoyment of the right to health care; the seconds calls for the adoption of State measures to prevent interferences from third parties; the last demands legal, administrative, judicial, budgetary, promotional, etc. measures aimed at fully realising the right to health care. According to the United Nation's Committee on Economic, Cultural and Social Rights, this last obligation to realise the right to health care can be divided into three types of duties: to *facilitate*, to *provide* and to *promote*. While the first is about the demand for the State to take positive measures in order to give individuals and the community the possibility to enjoy the right to health care, assisting them in that enjoyment, the second pertains to individuals or groups who, due to reasons beyond their own control, are unable to realise the right to health care, using their own means the third requires the State to undertake actions intended to create, maintain or restore the health of the population – Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Utrecht: Intersentia, 2003); Brigit Toebes, *The Right to Health as a Human Right in International Law* (Antwerpen: Intersentia/Hart, 1999); John Tobin, *The Right to Health in International Law* (Oxford: OUP, 2012).

[63] See Christine Langenfeld, "Soziale Grundrechte", *op. cit*., 1146 and following.

As a rule, the rights established in the EU's framework demand, at minimum, an *obligation of respect* from its institutions and bodies as well as from Member States, whenever their *central*, *regional and local authorities* and other *public bodies* act within the scope and in execution (*lato sensu*) of EU law.[64]

In practice, the conciliation between human rights protection and the definition of attributions and competences (A. VITORINO)[65] gives rise to some serious difficulties since the content and the specific effects of the said *obligation of respect* remain somehow imprecise. As a defensive *right*, it encompasses various claims against public entities, including the *non-impediment of certain actions*, the *non-interference with legal-subjective situations* or even *the non-elimination of subjective legal positions*. But such rights – and the correspondent obligations to *refrain from* (or *omit*) any interventions, disturbances and limitations affecting the righs established under national laws and practices – already presume the assurance of factual and normative conditions necessary for their own realisation and a (minimal) level of previous effectiveness (sought – even if absent – from Article 35); hence the need for this right to non-intervention that impends upon the States, the Union and its bodies and institutions, to be complemented, at least, by a right of protection.

In short, within their respective competences, both the Member States and the EU have to *respect* rights, which implies that these continue to exist, in the ways established by law. With the constraints defined by the limited scope of this provision, the addressees (whoever they may be in specific situations) have an (undetermined) obligation to ensure the right of access to preventive healthcare and the right to benefit from medical treatment, under the terms they justifiably consider most adequate. While it is true that the Member States only have to comply with this duty when they are implementing EU law, the way health concerns crosscut all societal spheres and the extent to which existing health systems and policies are implicated under this provision, makes it almost impossible for such implementation of EU law not to intersect with health matters. In a way, the reference to the national laws and practices allows for a wide degree of freedom as to the *quomodo,* the *quando* and the *quantum* of preventive and provisional measures, but it binds them to underlying and already assumed norms, as well as to certain normative guidelines such as the ones that derive from the principle of equality: all Member States are supposed to ensure preventive health measures, as well as a *right to benefit* – universal principle – from medical treatment. Let us see the point in more detail.

i) The right of access to preventive health care. Unlike other social rights provisions found in the Charter, Article 35 does not merely stipulate that the Union *acknowledges and respects* the right of access to preventive health care; instead, this right is *recta via* assumed ("*Everyone has it"*). However, according to commentators like A.NUSSBERGER , the legal warranties of Article 35 only cover the two first levels or content dimensions of the right to health care: a right of defence and the right to equal conditions (*gleichberechtigten*).[66]

[64] See the notes on the Article 51(2) and the cited judgments from the CJEU.

[65] Absolutely necessary if we want to preserve the fundamental principle of subsidiarity and the very moderate intentions and scope of the Charter.

[66] However, the author admits that equality itself has three dimensions: at the first level, it imposes on states the prohibition of limiting in any way the equal access of all to determined provisions; at the level of protection, it obliges them to guarantee that everyone has the same access to provisions; at the third level, it determines the promotion of the preparation and creation of institutions or infrastructures informed by equality.

The negative dimension is not clearly enunciated but contains a *minus* of legal guarantee: the Union and the Member States, in the development of the Union's law, cannot limit or suppress each person's right to access preventive health care.[67]

At a second – eminently *protective* – level, the principle of legal equality also stands out. In fact, the right of access necessitates the ability to obtain a certain benefit without suffering any unfair discrimination, and provided that other conditions are met (concerning equal access).[68] Moreover, from the simple right to preventive health care (not be reduced to some service that can be accessed) an individual's *claim* to the creation and maintenance of living, environmental and employment conditions that do not jeopardise his health, may also legitimately be raised.[69] According to T. Hervey, such prerequisites for good health – in the sense imparted by many national and international doctrines and practices regarding the collective (or even diffused) right to health – fall effortlessly into the generous lap of the English concept of *preventive health*.

ii) The right to benefit from medical treatment. Whereas the right above was mainly limited to safeguarding access, without necessarily mentioning the benefits themselves,[70] in the case of the right to medical treatment the emphasis shifts to a (third level) duty of fulfilment (*Erfullungsanspruch),* displaying – at least some of – the typical contours of a social right.[71] The argument that the EU lacks the necessary competences in this regard sounds fragile from the moment one acknowledges that Article 35(1) concerns the measures adopted by the States themselves. In a certain way, under that assumption, if EU law turns out to be involved (the *frontiers* of its *implementation* therefore becoming an essential point of dispute), the Union is expected to care and zeal for the compliance with the fulfilment of these rights in accordance with the conditions established by the law of each State. It is almost an

[67] The practical meaning of this right appears in the *stress field* (*Nußberger*) generated by the interaction between the market's freedom and competition's prohibition (in principle invoked to sustain certain conditions of health care provision), on one hand, and the principle of solidarity subjacent to the health systems, on the other (*Haztopoulos*). The jurisprudential limitations arising from the requirements of public interest in the event of danger to the financial balance and access to health protection are reinforced by the defensive dimension of the right to health care.

[68] The notion of access furthered by European Union has served to legitimise many fainthearted interpretations of fundamental rights (Article 29 CFREU offers a lamentable example) brutally truncating the counterfactually normative potential this category could have released into the current fragmented society, dominated by an economy of services, increasingly globalised and dematerialised. Under the apparent differentiation of societal subsystems, the prevalence of the economic mercantile and capitalist rationality, its code, program, communications and institutions (a real *Lebensform*, in the words of Rahel Jaeggi) has infused all aspects of life reducing substantial and structurally transformative demands into questions of punctually legal control of access to the different markets of existence, under conditions of monetized competition. We have been detracting from this viewpoint, looking for access in search of its emancipatory potential as a constitutive dimension of the equal freedom of people and, in that extent, crucial piece to the urgent reconsideration and reconfiguration of the means of institutional and performative realization of the social legality with a public or collective interest in the new society scenario. For a re-densification test of the *Zugangsgerechtigkeit* through its mainly and constitutive reference to the *Teilhabegerechttigkeit*, see "Sobre o sentido jurídico do acesso aos bens sociais fundamentais: breves apontamentos a partir do direito inter- e trans-constitucional da saúde (os ensinamentos do CDES da ONU, em particular)", *e-cadernos* CES, 15 (2012).

[69] Alberto Lucareli, "*La protezione della salute (art. 35º)*", *op. cit.*, 247.

[70] Even though the creation of the necessary conditions to the respective realisation are implicit as a precondition of access and its legal assurance.

[71] The German version is less clear in this particular case, not highlighting the differences between the forms of *guarantee* (*Gewahrleistungsformen*).

Erfüllungsgarantie, very relevant in cases of uncertainty, as it may lead to EU legal action against Member States for violations of the Treaty (J. WICHARD).

A. LUCARELI is particularly adamant when it comes to this point: the national legislators may choose their approach, as long as they ensure that each individual has the right to prevention and medical treatment. Otherwise the increasingly frequent and almost inevitable contact with the EU order will activate the review and potentially the legal enforcement of these provisions. In a sense, from a social-democratic constitutionalist perspective – that provides for an updated reading of the category used by Article 168(7) of the TFEU[72/73] – political freedom is tightly tied to the fulfilment of some of its constitutionally conditioning rightss; as such, their guarantee indirectly becomes a real responsibility for the Member States.

iii) *The principle of a high level of human health protection.* The second sentence does not establish a right but a mere principle [in the sense of Article 52(2)], resuming the obligation of purposes (*Zielverpflichtung*) already stated in Article 168 of the TFEU.

The Member States are not directly obliged to put forward a certain standard of protection, nor does the Union have the competences to operate a process of harmonisation of the several health care systems. However, within its competences in this domain, the EU is constrained to ensure a high level of human health protection which at least involves a prohibition of *omission* and an obligation to *create, organise and shape* adequate means to bring about the realisation of that task (*Gestaltungsauftrag*).

On the one hand, as already highlighted by A. NUßBERGER, to reaffirm the need for active measures the CFREU used an expression (*wird sichergestellt*, in the German version) far stronger than the simple wording of *acknowledgment* and *respect* that appeared in other Articles.

On the other hand, the *sole* demand made is for a high level of human health protection, leaving out the superlative used in other precepts. Based on an initial reading, the right to health care does not seem to incorporate[74] a *principle of more favourable treatment*:[75] as a matter of fact, by disregarding the pressing force of this

---

[72] Not limited to talk about *competences* in the traditional sense of *distribution of functional powers*.

[73] Also in accordance with Maria Luísa Duarte, although a pattern of common guardianship is not established nor a prohibition of retreat in face of the levels of protection already ensured is imposed, it makes sense to ask if, at least, the States are not generically attached to bringing forward a health system that in principle is accessible to all. In fact, according to the Portuguese professor, the formulation used – *according to the measures of the States* – seems to assume it (more than just allow it) since it must be interpreted, in her view, in such a way that the national law only regulates the different details ("A União Europeia e os Direitos Fundamentais – Métodos de Protecção", in *Portugal-Brasil Ano 2000*, Stvdia Ivridica (Coimbra Editora, 1999), 27 and following). To Wichard, the right, as ensured by the Charter, is empty (*leer*), being primarily filled, from a material point of view, by the determinations of the Member States. Consequently, the specific provisions may diverge, both in reach and approach (*Art und Umfang*) from country to country. However, despite the loose margin of appreciation the principle may accommodate, the clause is still justiciable, imposing a *Gesundheitsvertraglichkeitsprufung*: legal acts must take into account the interests of health care protection – "GRCh, Art 35 [Gesundheitsschutz]", *op. cit.*, 1694.

[74] In a strict and rigorous sense.

[75] Alessandra Silveira, *Princípios de Direito da União Europeia*, 2nd edition (Lisbon: Quid Iuris, 2011); Mariana Rodrigues Canotilho, *O princípio do nível mais elevado de proteção em matéria de direitos fundamentais* (Coimbra, 2008). Developed within the context of current multi-level, networked, and inter- or transconstitutional legal and political systems, the *principle of the most favourable treatment* purports to address the increasingly complex normative conflicts arising from the interconnection

Optimisierungsgebot, the protection of health becomes increasingly dependent upon the contingent standing and evolution of technical means, economic conditions and guiding policies (*Rechnung*).

However, for J. KENNER and T. HERVEY the preference for reiterating the content of Article 168, rather than merely referencing it, aims to produce a *super-mainstreaming*[76] effect, strengthening and broadening the legal protection of health care.[77]

Additionally, in a horizontal reading, this clause must be combined with its counterparts devoted to environmental and consumer protection, thereby intertwining, as fruitfully as possible, the objective dimensions of the third generation of rights.

At the same time, whereas all the actions and policies of the Union should aim for a high level of human health protection, considered as a *secondary objective* (A. Nußberger), the emphasis naturally falls on those primarily bound to its enactment and enforcement, as specified in Article 168.

Finally, in strict accordance with Article 52(5), the principle holds relevance in the courts, with regards to the Charter's interpretation and in relation to choices concerning its legal adequacy (*Rechtmassigkeit*), but, not as much - as a standard to be used in the health policy of the Member States.

3. Legal regime

A better understanding of the legal effects triggered by Article 35 can certainly be attained in the light of the general regime established in Article 50 and following.

Indeed, somewhat confirming their interconnection, all rights are subjected to a common group of norms[78] set out at the end of the Charter.[79] As they are related to such important characteristics as the legal nature, binding strength, enforceability, direct applicability and justiciability of rights, they help us tackle some of the problems raised by the right to health, as well as doubts about its functions, objectives and effects.

---

of legal systems across different territorial and functional levels. In the case of the EU and concerning social rights, this entails an interpretation in accordance with universal or regional international law, EU law, and the laws of the Member States, determining a preference for the most favourable solution at stake. However, this requirement sparks numerous controversies and encounters significant obstacles, particularly regarding the question of what constitutes more favourable treatment, the correct method of comparison, and which principles should govern the required prioritization. Can normative solutions be compared without considering the legal institutes they integrate or even the subsystems and legal systems of regulation they are part of? What timeframe should be taken into account, given that legal systems are dynamic, and the direction of their evolution can be more or less favourable? How, then, to determine the *relata* and the *tertium comparationis*? Normative statements like those in Article 35, by eschewing superlatives (and merely requiring a high level of protection), appear to spare us from these anxieties, leaving little room for a comparative interpretation aimed at optimization. Nonetheless, it would seems reasonable to argue, on its behalf, that the level guaranteed by the Charter and other binding international instruments should not be lowered without some very thorough and convincing arguments. Conversely, scholars like J. Pereira da Silva still believe any objections to *reformatio in pejus* of established regimes are merely political.

[76] J. Kenner, *apud* Tamara K. Hervey, "We Don't See Connection: The 'Right to Health' in the EU Charter and European Social Charter", in *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, ed. Tamara K. Hervey/Jeff Kenner (Oxford – Portland, Oregon: Hart Publishing, 2003), 315, note 59.

[77] *Ibidem*, 315.

[78] Articles 51 to 54, on the subjective and material scope of the Charter and its provisions, its sources and purposes, rules of interpretation and restriction, and the distribution and limits of attributions and competences between the Member States and the Union when it comes to its implementation.

[79] Regarding this choice, see António Vitorino, *Carta dos Direitos Fundamentais da União Europeia*, *op. cit.*

As a right of solidarity, the protection of human health in Article 35 is guaranteed against restrictions by the principles of *legality (legal reserve), proportionality* and respect for *essential content*, equivalent to the traditional *limit on the limits* of fundamental rights. Adapted to the EU law, these principles mean that restrictions on the right are admissible, but they must be subjected to *legal mediation*, a double test of proportionality and the guarantee of an indispensable core of protection.[80] In order to pass the test, they must be deemed necessary, adequate and proportional to the realisation of other objectives of a general interest, and to the protection of other rights also sheltered by EU law.[81] In what regards the *minimum essential content* mentioned by Article 52(1) the other paragraphs of that provision offer some indications as to its adequate materialisation.[82]

More generally, it is no less necessary to consider the Explanations' appeal to the European Social Charter and to the Community Charter of the Fundamental Social Rights of Workers, even though they seem not to add that much to the content of Article 35. In fact, these references will only serve to enlighten the normative meaning of the precept as far as they are joined by a due consideration of the doctrinal work developed around this and other documents (such as the case-law on positive social rights produced *a latere* by the ECtHR), and the new progressive agendas connected to the Social Rights Pillar and the European Health Union project.

Finally, even though no explicit provision addresses the remedies applicable to violations of Article 35, a Union institution, body, or agency found in breach of Article 35 would probably be subject to the declaratory remedy provided in Article 264 TFEU. The main problem persists, however: it is one thing to qualify the right to health as an individually enforceable right within EU law, and another, very different, to regard it as mere 'principle' in the sense of Article 52(5) CFREU: judicially cognisable only in rulings on the interpretation and validity of Union acts, which is to say, not inherently justiciable at the behest of an individual.

While it is acknowledged that the Charter was not exactly groundbreaking and did not introduce substantial legal advancements in health compared to the *acquis communautaire*, its impact went beyond the simple definition of a lowest common denominator. As a matter of fact, it prompted a reassessment of concepts such legality, binding nature and the enforceability of sanctions.

Consequently, once the main content had been established, the issue arose of whether it could be invoked, *i.e.*, whether it had immediate applicability. Having already discussed the active and passive aspects of the right, the question of before whom it can be invoked remains unanswered.

---

[80] As always, the problem exists in the tabulation of the restrictive nature of the normative interventions, when the respective competence remains with the States and the rights do not have defined contours or borders.

[81] On the pertinent case law densification, see the note on Article 52.

[82] For those rights which are also ensured by the ECHR, this document acts as a parameter; rights that are derived from the national traditions require an interpretation at least consonant with the negative and defensive aspects of health protection; with respect to the others, it is important to look for the main content in the Charter. That is the reason why we think it'spossible to search for an intercultural foundation to the protection of the right to health care, in spite of the differences between the national laws. Indeed, if the reference to the national laws may cause considerable divergences with respect to the definition of its content, it can also act as the remedy but equality, especially in the treatment of citizens of other Member States, may begin to act as the remedy to some of the distortions generated.

In principle, these rights can be invoked before the judicial bodies of the Union. The particular difficulties raised by the nature of solidarity rights should not mislead us, but rather provide an opportunity to undo some recurring misconceptions. After all, legality is both more and less than justiciability, although the latter represents the ultimate proof of the binding nature of the right as its most concrete form of effective realisation.

Social fundamental rights are true rights[83] at least partially amenable to judicial enforcement. Nevertheless, similar even to certain dimensions of freedom rights', they often are not, fully complete and determined, therefore lacking immediate *self-executing* effects.

Regarding the principles mentioned in Article 52, P. ALSTON[84] is right to point out that, from the perspective of the network of independent experts, being labelled as aprinciple does not imply non-justiciability. At most, principles are distinguished from enforceable rights by their specific justiciability, rather than by their actual possibility of invocation before judicial authorities. Experts have even claimed that, when acting within the framework of EU law, neither the Union nor its Member States can adopt measures that are clearly incompatible with some of the principles recognised in the Charter.

In addition, when read in conjunction with other provisions such as Article 21(1), it becomes clear that the dimension of non-discrimination in social rights and principles is certainly justiciable. Therefore, in this case, the expression non-justiciable must be put aside because it is both misleading and derogatory to the importance of social rights. It is more appropriate to classify them as non-self-executing.

From Article 52(2) P. ALSTON extracts the need to urge the institutions and bodies of the EU to adopt laws and executive measures able to give effect to the rights and generate a certain justiciability.

All of this leads to the conclusion that social rights have significant legal effects. The enshrinement of rights in the Charter was as much about *legal certainty* (highlighting the community's axiological-normative acquis and confirming the level of consolidation already conquered) as it was about legitimisation (A. VITORINO). Whilst not creating new competences or new powers, Article 35 is nonetheless a source of inspiration for the law. It has the capacity to shape and drive the substantive content or the political and legislative approach in the EU, namely by (i) influencing secondary law, (ii) acting as an interpretative canon, (iii) providing a platform for the development of new measures and (iv) enhancing the role of the European Social Charter (as far as social rights are concerned) in the legal order both of the EU and the Member States. As long as it is seen as an expression of the values underlying European polity, it can inspire legislative, administrative and legal activity in an even more subtle way, obliging the Union's bodies to achieve a high level of human health care protection as a secondary objective, whenever they are pursuing other objectives.

Luís Meneses do Vale

[83] See, for example, the role played by the *FRA* in the monitoring and control of the respect for the rights.

[84] Philip Alston, "The contribution of the Agency to the realisation of social and economic rights", in *Monitoring Fundamental Rights in the EU: The contribution of the Fundamental Rights Agency*, ed. Philip Alston/Olivier de Schutter (Hart, 2005).

ARTICLE 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Services of General Economic Interest: introductory remarks.[1] Within the context of the Welfare State,[2] public services were synonymous with public ownership, even though their management could be entrusted to private entities, namely by way of concession contracts.

As more than an organisational model, public service embodied the core of the State and mirrored the philosophy of the relation established between public action and the social *corpus*: the welfare civilisation was based on the public ownership of services aimed at the satisfaction of social interests.

Due to budget deficits and the inefficiency of *res publica* management, the classical notion of Public Service has been called into question: its subjective dimension overshadowed by the substantive dimension of that concept.

In this sense, the satisfaction of society's vital needs is paramount, regardless of whether this end is pursued by way of traditional public services, provided by the state or concessionaires, or by private entities subject to "public interest obligations".

Indeed, the trend of privatisations and liberalisations, community influence and the emergence of the regulatory state, is leading to the dismantling of many classic public services and to the market taking over many of the tasks previously monopolised by public power.[3]

As such, the so-called "french-style of public service" is replaced by Services of General Economic Interest (SGEI), a community formulation[4] which stresses

---

[1] Note: quotations included in this text that were not originally written in English were freely translated by the author.

[2] In accordance with our Fundamental Law, the Welfare State is considered a structural principle of the Portuguese State. As Gomes Canotilho and Vital Moreira assert, "among us the Welfare State is still an expression of the democratic understanding of the CPR (social democracy as a component of democracy, alongside political democracy). It is an extension of the Legal and Democratic State to economic, social, and cultural organisation, and particularly to the labour market." See Gomes Canotilho and Vital Moreira, *Fundamentos da Constituição* (Coimbra: Coimbra Editora, 1991), 86.

[3] Despite the dismantling of the Public Service State, national and community law do not prevent the State from taking on responsibility for the provision of economic services, even if this entails entrusting their management to private individuals. Regarding public service as a State task and the respective management models, see Pedro Gonçalves and Licínio Lopes Martins, "Os Serviços Públicos Económicos e a Concessão no Estado Regulador", in *Estudos de Regulação Pública – I*, ed. Vital Moreira (Coimbra: Coimbra Editora, 2004), 224 *et seq.*

[4] As Fausto de Quadros states, "The public service institute is a good example of the systematic and dogmatic interaction that has always been established between administrative law and community law and that, over the last fifty years, has led to the evolution of both these areas of law." See Fausto de Quadros, "Serviço Público e Direito Comunitário", in *Os caminhos da privatização da Administração Pública*, *Boletim da Faculdade de Direito da Universidade de Coimbra* (Coimbra: Coimbra Editora, 2001), 280.

the common interest mission[5] and entails the neutrality (?) of the EU *vis-à-vis* the public or private nature of the public service provider.[6]

In the words of Ana Maria Guerra Martins, "*the cohabitation of the public service figure and the pursuit of public interest with the community's principles and rules on competition are not always easy, or, in order not to use euphemisms, it has indeed proved to be very difficult.*"[7]

Within the remit of the EU, SGEI are the elements that aim to ensure the link between market primacy and social values. Compliance with competition rules does not necessarily involve the satisfaction of all general interests, thus those rules must be limited or disregarded in favour of other factors, in particular of a social nature.[8]

SGEI definition: exclusion of social and authority services. The concept of SGEI does not include the functions of State sovereignty and activities in the social area. Thus, only services of an economic nature are subject to community competition rules.[9]

On the relationship between administrative law, community law and the new concept of European administrative law, see Fausto de Quadros, *A nova dimensão do direito administrativo – O Direito Administrativo português na perspectiva comunitária*, (re-printed) (Coimbra: Almedina, 2001) and Suzana Tavares da Silva, *Direito Administrativo Europeu* (Coimbra: Imprensa da Universidade de Coimbra, 2010).

[5] As José Luis Martinez López-Muñiz notes, community law "has preferred the notion of services of general economic interest, (...) a *material or objective concept* rather than of a subjective notion of the referred reality [that of public services] which only encompassed services belonging to the State or reserved to the ownership of any of the public powers of the States" (our italics and parentheses). See José Luis Martinez López-Muñiz, "Servicio Público, Servicio Universal y «Obligación de Servicio Público» en la perspectiva del Derecho Comunitario: Los servicios esenciales y sus regímenes alternativos", in *Os caminhos da privatização da Administração Pública*, *Boletim da Faculdade de Direito da Universidade de Coimbra*, 257.

[6] According to Robert Kovar, «*the Treaty establishing the EEC preferred the expression "undertakings entrusted with the management of services of general economic interest" at the expense of "public service", although the wording of secondary community legislation refer to "undertakings which provide universal service"*». These choices derive from the intention to favor a terminology thought to be more neutral than a concept [public service] that carries a very particular and ideological meaning" (our parentheses). The Author does not deem the choice of wording as innocent, but rather resulting from a phenomenon of secularization of the concept of public service: "*A certain conception of service of general interest is opposed to a certain sacralization of public service.*" See Robert Kovar, "Droit Communautaire et service public: esprit d'ortodhoxie ou pensée laicisée", *Revue trimestrielle de droit européen*, issue 2, year 32, Dalloz, Paris, April-June (1996): 220-221.

[7] See Ana Maria Guerra Martins, "A emergência de um novo Direito Comunitário da Concorrência – As concessões de serviços públicos", *Revista da Faculdade de Direito da Universidade de Lisboa*, vol. 42, issue 1, Coimbra Editora (2001): 79.

[8] See Article 106 (2) of the TFEU [former Article 86 (2) TEC], which states: "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*"
For further developments on exceptional circumstances where SGEI companies may not be subject to competition rules, by virtue of the specific nature of the mission they are entrusted with, see João Nuno Calvão da Silva, *Mercado e Estado – Serviços de Interesse Económico Geral* (Coimbra: Almedina, 2008), 227 *et seq.*

[9] In this sense, the Commission states that the conditions of Article 86 of the EC Treaty (now Article 106 TFEU) are not applicable "to non-economic activities (such as compulsory schooling or social protection systems) or to the so-called "*realengas*" that are part of the exercise of public power (namely, security, justice, diplomacy, marital status). See Communication from the Commission – Services of General Interest in Europe, DOC/00/25, Brussels, 20 September 2000, § 18, 9.

Insofar as the development of the Common Market mainly focused on the economic component, industrial and commercial services are subject to community competition law, while social and public authority services have been excluded from its scope. Therefore, Article 106 TFEU refers to services of general *economic* interest (SGEI) rather than to services of general interest (SGI).

In other words: while SGEI are subject to competition rules, which may exceptionally be waived in light of the general interest role carried out, social and public authority services are not subject to competition regulation, unless otherwise chosen by Member States.

As such, *authority services* are not considered enterprises, since they typically carry out sovereign functions of the State (defence, security...), which justify the exercise of prerogatives beyond the reach of ordinary law.

The foregoing means: in the performance of tasks of State sovereignty, the exercise of public authority is not compatible with compliance with several TFEU[10] provisions, in particular competition rules.

In this regard, the CJEU stated in the well-known *Eurocontrol* judgment: "*Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.*"[11]

Furthermore, social services of general interest (*e.g.* health and social security) are also not covered by community competition rules. These are areas where solidarity, not mere efficacy, must prevail: market forces alone involve too serious a risk in areas of extreme delicacy to people.[12]

In the judgments *Höfner*[13] and *Poucet*,[14] the CJEU has defined an *undertaking as any entity engaged in an economic activity*, irrespective of its legal status and the way in which it is financed: social services are therefore excluded from that concept.

---

[10] By way of example, the application of the provisions on the right of establishment (Article 49 *et seq.* TFEU) could lead to the loss by the State and its nationals of core areas of sovereignty. Hence the exception provided for in Article 51 TFEU: "*The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.*"
However, in the interpretation of the CJEU, "*the exception to the freedom of establishment provided for by the first paragraph of article 55 [current Article 51] must be restricted to those activities referred to in Article 52 [current Article 49] which in themselves, involve a direct and specific connection with the exercise of a public authority*" (parenthesis). See Judgment *Jean Reyners v. Belgian State*, 21 June 1974, Case 2-74, ECLI:EU:C:1974:68. Concerning the scope of Article 51 TFEU, see João Nuno Calvão da Silva, "Nacionalidade como requisito de acesso ao notariado e não transposição da directiva relativa ao reconhecimento das qualificações profissionais pelo Estado português", *Revista do Notariado*, issue 1, May (2009): 67 *et seq.*, and *Estudos em Homenagem ao Professor Doutor Paulo de Pitta e Cunha*, vol. I (Coimbra: Almedina, 2010), 323 *et seq.*

[11] See Judgment *SAT Fluggesellschaft MBH v. Eurocontrol*, 19 January 1994, Case C-364/92, ECLI:EU:C:1994:7, paragraph 30.

[12] For example, in health care, how does one exclude the risk of adverse selection or anti-selection? Given the goal of profitability pursued by private operators in a competitive context, how does one ensure that someone will not be seen as a cost but as a person, regardless of their economic power?

[13] See Judgment *Klaus Höfner and Fritz Elser v. Macroton GmBh*, 23 April 1991, Case C-41/90, ECLI:EU:C:1991:161, paragraph 21.

[14] See Judgment *Christian Poucet v. Assurances Generales de France* and *Caísse Mutuelle Regionale du Languedoc-Roussillon and Daniel Pistre v. Caísse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans*, 17 February 1993, joined cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 17.

However, the distinction between economic activities and social activities is not clear. According to GIUSEPPE TESAURO, "*the necessary element for an entity to be classified as an undertaking is the exercise of an economic activity which can be entrusted, at least in principle, to a private undertaking and for the purpose of profit.*"[15]

Thus, in the *Höfner* judgment, the CJEU considered that "*an entity such as a public employment agency integrated in the employment placement business may be classified as an undertaking for the purposes of applying the community competition rules*" (paragraph 23).

In contrast, in the *Poucet* judgment the CJEU excluded from the concept of undertaking, within the meaning of Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 TFEU), *"bodies which contribute to the management of the public* service of social security, which have *exclusively a social function and carry on an activity which is not for profit, based on the principle of national solidarity.*"[16]

In short: it is not always easy to identify a social service[17] or a service of public authority, especially insofar as their activity also assumes an economic nature; however, it is important to emphasise the non-applicability of the competition rules to these services, unless otherwise provided for by States, under the principle of subsidiarity.

SGEI and the principle of subsidiarity. Within the scope of the community principle of subsidiarity,[18] the definition of SGEI and the entities, public or

---

[15] See Giuseppe Tesauro, "Presentation generale – Une lecture de la jurisprudence communautaire sur l'article 90, paragraphe 2, du Traité", in *Service Public et Communauté européenne: entre l'intérêt général et le marché – Tome VI Approche transversale et conclusions*, ed. Robert Kovar and Denys Simon (Paris: La Documentation Française, 1998), 327.
On the notion of «economic activities», with an analysis of the most relevant community case-law in the densification of this concept, see Júlio Baquero Cruz, «Beyond Competition: Services of General Interest and European Community Law», in *EU Law and the Welfare State: In Search of Solidarity*, ed. Gráinne de Búrca (Oxford: Oxford University Press, 2005), 179-185.

[16] See summary, our italic. For an analysis of this and other CJEU judgments relevant in the area of social services of general interest, see Sara Gobbato, "Diritto comunitario della concorrenza e servizi di interesse generale di carattere sociale. Note a margine della recente giurisprudenza della Corte di giustizia", *Il Diritto dell'Unione Europea*, 4 (2005): 797 *et seq.*

[17] According to the European Commission, social services are the following: healthcare services; "*statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability*"; "*other essential services provided directly to the person. These services that play a preventive and social cohesion role consist of customised assistance to facilitate social inclusion and safeguard fundamental rights. They comprise, first of all, assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addiction or family breakdown). Secondly, they include activities to ensure that the persons concerned are able to completely reintegrate into society (rehabilitation, language training for immigrants) and, in particular, the labour market (occupational training and reintegration). These services complement and support the role of families in caring for the youngest and oldest members of society in particular. Thirdly, these services include activities to integrate persons with long-term health or disability problems. Fourthly, they also include social housing, providing housing for disadvantaged citizens or socially less advantaged groups.*" See Communication from the Commission – Implementing the Community Lisbon programme: Social services of general interest in the European Union, Brussels, 26/04/2006, COM(2006)177 final, 1.1.

[18] The principle of subsidiarity is a general principle of the EU legal framework enshrined in Article 5(3) of the TEU, which provides the following: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*" Amongst others, on the principle of subsidiarity, see Ana Maria Guerra Martins, *Curso de Direito Constitucional da União Europeia* (Coimbra: Almedina, 2004), 256 *et seq.*; Fausto de Quadros, *O princípio da subsidiariedade no direito comunitário após o Tratado da União Europeia* (Coimbra: Almedina, 1995)

private,[19] in charge of their provision is a matter for the Member States, since national authorities are better aware of the reality of their country and the needs of their citizens than European institutions.[20]

Although the definition of general interest falls within the remit of State sovereignty, the definition of a service as a SGEI can be determined by the European Commission[21] and the CJEU, albeit as a measure of control limited to cases of manifest error of assessment.[22]

(Coimbra: Almedina, 2004), 102 *et seq.*; Gorjão-Henriques, *Direito da União*, 6th ed. (Coimbra: Almedina, 2010), 383 *et seq.*; João Mota de Campos and João Luiz Mota Campos, *Manual de Direito Comunitário*, 4th ed. (Lisbon: Fundação Calouste Gulbenkian, 2004), 280 *et seq.*; Jónatas Machado, *Direito da União Europeia* (Coimbra: Coimbra Editora, 2010), 89 *et seq.*; Maria Luísa Duarte, "A aplicação jurisdicional do princípio da subsidiariedade no direito comunitário – pressupostos e limites", in *Estudos Jurídicos e Económicos em Homenagem ao Professor João Lumbrales* (Lisbon: Faculdade de Direito da Universidade de Lisboa, 2000), 719 *et seq.*

[19] Notwithstanding the principle of neutrality (Article 345 TFEU), SGEI have increasingly been provided by private entities. According to Manuel Porto, "*the established experience has been decisive to the developments that have taken place, experience that, contrary to pre-conceived ideas, has been unequivocal in terms of the best performances achieved by competitors,* e.g., *with private participation: by ensuring that services are rendered with better quality and at a lower price, while ensuring – always within the framework of demanding and stimulating regulation – the satisfaction of all other requirements of an universal public service. In addition to the enhanced benefits provided to the recipients of these services, indispensable resources can be deployed to other social sectors (from healthcare to old-age care) where the State cannot dismiss its intervention, and taxpayers are not so penalized with an increase of taxation which, with an inevitable recourse to indirect taxation, places disproportionate weight on the poorest members of society (regardless of the goodwill to avoid it).*" See Manuel Porto, "A lógica de intervenção nas economias: do Tratado de Roma à Constituição Europeia", in *Colóquio Ibérico: Constituição Europeia – Homenagem ao Doutor Francisco Lucas Pires*, *Stvdia Ivridica*, issue 84, *Boletim da Faculdade de Direito da Universidade de Coimbra* (Coimbra: Coimbra Editora, 2005), 636-637.

[20] In the European context, SGEI development is primarily characterised by heterogeneity. Regarding Portugal, see Manuel Porto, "Serviços Públicos e Regulação em Portugal", *Revista de Direito Público da Economia*, year 1, issue 3, *Fórum*, Belo Horizonte, July/September (2003): 161 *et seq.*; more recently, see, from the same author, "Abertura ao Mercado e Regulação: uma primeira avaliação da experiência portuguesa nos sectores da energia, das comunicações e dos transportes", *Revista de Direito Público da Economia*, issue 10, *Fórum*, Belo Horizonte, April/June (2005): 169 *et seq.*

For an overview of the legal framework of public services in Germany, Benelux, Finland, Sweden, Greece, the United Kingdom, Ireland, Italy and Spain, see Franck Moderne and Gérard Marcou (eds.), *L'Idée de Service Public dans le Droit des États de l'Union Européenne* (L'Harmattan, 2001), 83-365.

[21] Article 106(3) TFEU states the following: "*3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*" On the Commission's attributions within the scope of the foregoing provision [former Article 86(3) EC Treaty] see Santiago Muñoz Machado, *Servicio Público y mercado*, I (Madrid: Civitas, 1998), 201 *et seq.*

[22] Paragraph 22 of the 2001 Commission Communication: "*Member States' freedom to define means that Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of the activities. This definition can only be subject to control for manifest error (...). In areas that are not specifically covered by Community regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error.*" See See Communication from the Commission – Services of General Interest in Europe.

In the words of Jörn Axel Kämmerer, "*competence for regulating is attributed by the EC Treaty to both the Commission [Article 86(3)] and to common policies. In the absence of community regulation, Member States are allowed a wide margin of discretion. This discretion derives from the principle of subsidiarity and is valid for defining public interests in the provision of services, with only the Commission entitled to correct "ostensible flaws»*". See Jörn Axel Kämmerer, "Strategien zur Daseinvorsorge – Dienste im allgemeinem Interesse nach der «Altmark» – Entscheidung des EuGH", *Neue Zeitschrift für Verwaltungsrecht*, issue 1, Frankfurt (2004): 29.

The case-law of the CJEU has been particularly relevant in this area, concluding that, for the exception in Article 106(2) TFEU to apply, it is sufficient that the public service mission be defined by an act of public authority.[23]

In the *Corbeau*[24] and *Almelo*[25] judgments, the CJEU made a substantial exposition of the concept of SGEI, based on a set of common elements (*e.g.*, universality, continuity, quality, protection of users) without, however, hampering States' competence in the definition of SGEI.[26]

SGEI and the principle of proportionality. States' freedom to define SGEI is not absolute: the Commission and the CJEU control cases of manifest error, thus ensuring the community interest.

In other words, the application of Article 106(2) TFEU depends on community control of the proportionality of competitive restrictions implemented at a national level in the name of upholding general interest;[27] the principles of subsidiarity and proportionality must be read in tandem.[28]

At the outset, the community interpretation of Article 106(2) TFEU was very restrictive: competition rules could only be disregarded where their application made the public interest task *impossible* to render.

In this regard, in the *Sacchi* judgment, the CJEU stated: "*if certain Member States treat undertakings entrusted with the operation of television, even as regards their commercial activities, in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the same prohibitions [current Article 102 TFEU] apply, as regards their behavior within the market, by reason of Article 90 (2) [current Article 106 (2) TFEU], so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks.*"[29]

---

[23] For an analysis of the most relevant case-law, see João Nuno Calvão da Silva, *Mercado e Estado – Serviços de Interesse Económico Geral*, 225-226. There we conclude that "*more than the difficulty in overcoming the inherent vagueness of the general interest concept, caution and respect for State sovereignty sustains the position of the CJEU*" (226).

[24] See Judgment *Corbeau*, 19 May 1993, Case C-320/91, ECLI:EU:C:1993:198, paragraph 15.

[25] See Judgment *Gemeente Almelo and Others v. Energiebedrijf IJsselmij*, 27 April 1994, Case C-393/92, ECLI:EU:C:1994:171, paragraph 48.

[26] In defining the meaning of mission of general interest, the CJEU uses the classic "Roland laws", which embody the typical public service principles: continuity, equality, mutability. For further analysis, see João Nuno Calvão da Silva, *Mercado e Estado – Serviços de Interesse Económico Geral*, 213 *et seq.*

[27] According to Jean-Yves Chérot, Article 90(2) of the EC Treaty [now Article 110(2) TFEU] is a "*key provision recognising the priority given to general interest, even if defined by Member States, over competition rules. Nonetheless, it lays the groundwork for close scrutiny by the Commission and the Court over national regulations and policies.*" See Jean-Yves Chérot, "L'article 90, paragraphe 2, du traité de Rome et les entreprises de réseau", *L'Actualité Juridique – Droit Administratif*, issue 3 (1996): 173.

[28] According to Stefan Storr, a specific "principle of cooperation" between Member States and the European Community, enshrined in the EC Treaty, underpins public services. This principle can be perceived from two points of view: *pursuant to 86 (2) of the EC Treaty* [now Article 106 (2) TFEU], *Member States may define and configure SGEI, while the European Commission may define the Community interest and monitor its proportional compliance; on the other hand, this division of powers cannot be strictly maintained, since the principle of proportionality requires ponderation. Therefore, the European Community must be able to monitor whether a SGEI provision or a privilege are required.* (our parenthesis). See Stefan Storr, "Zwischen überkommener Daseinsvorsorge und Dienste von allgemeinem Wirtschaftlichem Interesse – Mitgliedstaatliche und europäische kompetenzen im Recht der öffentlichen Dienste", *Die Öffentliche Verwaltung*, *Heft* 9, May (2002): 357 *et seq*., in particular, 368.

[29] See Judgment *Giuseppe Sacchi*, 30 April 1974, Case 155-73, ECLI:EU:C:1974:40, paragraph 15. On that basis, the burden of proof regarding the impossibility of performing the task of general interest arising from the application of the competition rules lies with the relevant undertaking or State. (Our parenthesis).

Also in the *RTT* judgment, the CJEU adopted a strict view of the current Article 106(2) TFEU when it considered that "*the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without any objective necessity, reserves to itself a neighboring but separate market, (...), thereby eliminating all competition from other undertakings, constitutes an infringement of Article 86 of the Treaty (current Article 102).*"[30]

Similarly, in the *Navewa-Anseau* decision, the European Commission stated: "*Such undertakings [SGEI] are exempt from the requirement of compliance with the rules on competition only in so far as the application of such rules would obstruct the performance, in law or in fact, of the particular task assigned to them. It is not sufficient in this regard that compliance with the provisions of the Treaty makes the performance of the particular task more complicated. A possible limitation of the application of the rules on competition can be envisaged only in the event that the undertaking concerned has no other technically and economically feasible means of performing its particular task.*"[31]

More recently, however, the CJEU has relaxed its position by more generously interpreting the scope of the current Article 106 (2) TFEU: competition rules can be excluded not only when their application makes the public interest task *impossible* to comply with but also *to the extent that the economic balance of the undertaking entrusted with the SGEI can be hampered*.

Thus, in the *Corbeau* judgment, the CJEU states that the exclusion from competition is not justified "*when specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders' address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right.*"[32]

In this vein, in the *Almelo* judgment, the CJEU ruled that "*restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.*"[33]

---

[30] See Judgment *Régie des télégraphes et des téléphones v GB-INNO-BM SA*, 13 December 1991, Case C-18/88, ECLI:EU:C:1991:474, paragraph 19. (Our parenthesis).

[31] See Commission Decision of 17 December 1981 relating to a proceeding under Article 85 of the EEC Treaty, 82/371/EEC, 17 December 1981, paragraph 66. (Our parenthesis).

[32] See Judgment *Corbeau*, paragraph 19.

[33] See Judgment *Almelo*, paragraph 49.

Naturally, it is assumed that restrictions to competition are justified only where strictly necessary for the performance of the general interest task, as expressly stated in the transcribed paragraph, and as already enshrined in *Corbeau*.

In the words of Denis Waelbroek: "*The derogation from Article 90(2) [current Article 110 (2) TFEU] can only be called upon as last resort. It must be demonstrated that there are no less restrictive means of guaranteeing services of general economic interest than derogating the normal rules of the Treaty*" (Our parenthesis). See Denis Waelbroek, "Les conditions d'applicabilité de l'article 90 §2 du Traité CE", in *Service Public et Communauté européenne: entre l'intérêt général et le marche - Tome II: Approche transversale et conclusions*, ed. Robert Kovar and Denys Simon (Paris: La Documentation Française, 1998), 455.

In this judgment, when referring to "*regulations, particularly in the environmental area*", the CJEU extended the possibility of derogating competition rules to situations in which the specific mission of general interest rendered by the SGEI provider can be compromised by non-financial circumstances, even if its economic balance is not at stake.

More openly, in the *Commission v Netherlands* judgment the CJEU confirmed the trend towards considering non-economic factors by invoking Article 86(2) EC Treaty [current Article 106(2) TFEU] as the appropriate legal basis: "*for the Treaty rules not to be applicable to an undertaking entrusted with a service of general economic interest under Article 90(2) of the Treaty [current Article 110(2) TFEU], it is sufficient that the application of those rules obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking. It is not necessary that the survival of the undertaking itself be threatened.*"[34/35]

In short: the analysis of the most relevant case-law of the CJEU evidences an ever-broader interpretation of the current Article 10(2) TFEU, which reflects the growing importance of SGEI in the community framework.

SGEI and the Charter of Fundamental Rights of the European Union (Article 36). The CFREU, which is a true bill of rights[36] of the EU, has a binding legal nature despite not being part of the Treaties (see Article 6 TEU).[37]

This raises the issue of the extent of the protection conferred by Article 36 of the CFREU: are we before a right of access to SGEI or a mere programmatic rule?

In our view, this provision does not confer any right of access to SGEI enforceable in court; indeed, the wording ("the Union recognizes and respects...") differs from that of the rules conferring actual rights ("have the right to..."). Article 36 of the CFREU enshrines an objective principle, a goal, or the reinforcement of the border of services deregulation.

By not producing direct effects, in the sense of constituting subjective positions directly conferred on individuals to require specific services from Member States and the EU, the present provision grants a public subjective right to respect and

---

[34] See Judgment *Commission of the European Communities v Kingdom of the Netherlands*, 23 October 1997, Case C-157/94, ECLI:EU:C:1997:499, paragraph 43.
In this judgment, the CJEU's intention was to ease the application of Article 106(2) TFEU, as paragraph 58 confirms: "*Whilst it is true that it is incumbent upon a Member State which invokes Article 90(2) [current article 110(2) TFEU] to demonstrate that the conditions laid down by that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardized, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions.*"

[35] Similarly, see Judgment *Commission of the European Communities v. French Republic*, 23 October 1997, Case C-159/94, ECLI:EU:C:1997:501, paragraph 59.

[36] See Moura Ramos, "A Carta dos Direitos Fundamentais da União Europeia e a protecção dos direitos fundamentais", in *Estudos em Homenagem ao Prof. Doutor Rogério Soares*, *Stvdia Ivridica*, issue *61*, *Boletim da Faculdade de Direito da Universidade de Coimbra* (Coimbra: Coimbra Editora, 2001), 981. For an overview of the stages of recognition of the importance of the protection of fundamental rights within the community, including the proclamation of the Charter, see Alves Correia, "Os direitos fundamentais e a sua protecção jurisdicional efectiva", *Boletim da Faculdade de Direito da Universidade de Coimbra*, vol. 79 (offprint), Coimbra (2003): 90 *et seq.*

[37] For a critical view of the method which allowed the CFREU to have the same legal value as the Treaties and the derogations granted to certain Member States, see Maria José Rangel de Mesquita, *A União Europeia após o Tratado de Lisboa* (Coimbra: Almedina, 2010), 33 *et seq.*

recognition in access to public services through Union bodies, with a direct duty to ensure that they do not jeopardise access to SGEI nor allow others to prevent such access. Citizens can, therefore, react against Union measures that hinder access to SGEI.[38]

In short, given its symbolic importance[39] and in so far as it may favour or even impose more restrictive interpretations on competition by the CJEU, Article 36 of the Charter is of paramount importance.

João Nuno Calvão da Silva

[38] With the same reasoning, regarding a similar provision of the European Constitution, see *Markus Krajewski*, "Öffentliche Dienstleistungen im europäischen Verfassungsrecht", *Die Öffentliche Verwaltung*, 58 *Jahrgang*, *Heft* 16 (2005): 667-668. With a close line of reasoning, although referring to other provisions, see Maurizio Maresca, "L'accesso ai servizi di interesse generale, de-regolazione e ri-regolazione del mercato e ruolo degli *Users' Rights*", in *Il Diritto dell'Unione Europea*, ed. Antonio Tizzano, 3 (Giuffrè, 2005), 448.
Another annotation to Article 36 of the Charter, while it did not yet have a legally binding nature, stated: "*This article, which fully observes the provisions of art. 16 of the EC Treaty does not create any new right but merely establishes the principle that the Union respects the access to services of general economic interest provided for in national provisions, as long as they are compatible with community law.*" See Ana Luísa Riquito, *et al.*, *Carta dos Direitos Fundamentais da União Europeia* (Coimbra: Coimbra Editora, 2001), 143.

[39] As Moura Ramos has always taught, "although it does not intend to constitute more than the fruit of codification and the progressive development of the pre-existing system, the Charter inspires, regardless of its legal value, a framework of valuations of the community jurisdiction, and might have a spill-over effect on other mechanisms (national and international) on the protection of fundamental rights." See Moura Ramos, "A Carta dos Direitos Fundamentais da União Europeia e a protecção dos direitos fundamentais", 989.

ARTICLE 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

1. *Emergence of environmental concerns in European law*. The influence of the UN Declaration on Environment and Development, adopted in 1972 in Stockholm, was immediately felt at the regional level, in the EEC. Even without a legal support in the Treaty, the European Institutions adopted several environmental protection measures: the first Action Programme, in 1973, the Directive 75/439/EEC of June 16, on waste oils, and the Directive 79/409/EEC of April 2, on wild birds and their habitats. In 1985, in a preliminary ruling on the waste oils directive, the CJEU declared, for the first time, that the environment was an "essential objective" of the EEC (case 240/1982, of February 7, 1985). Driven by this statement, the European legislative production on different aspects of environmental policy (air, water, soil, noise, chemicals, biodiversity and more recently biotechnology and climate) has grown exponentially.

In 1986, with the Single European Act, the environmental action of the Community appeared explicitly in the Treaties and became a major *constitutional* goal, conditioning the environmental policies of the Member States. Today, the number of national environmental legal acts influenced by European law is copious.

2. *The environment in the Charter*. The inclusion of environmental protection in the CFREU is the culmination of the protection systems already existing in several the Member States and also of the growing importance of environmental policy in the EU. Article 37 cannot be interpreted without reference to the wider European context.

3. *Relationship with the Treaties*. Article 37, on the fundamental right to the environment, is essentially based on Article 3 of the TEU, on the tasks of the Union, and Article 191(2), of the TFEU, laying out the core rules of European environmental policy. However, the pervasive nature and impact of environmental problems is the reason why there are several references to environmental protection throughout the Treaties [for instance, the general provisions on the external action of the Union – Article 21 d) and f) of the TEU]. Even more clearly, the duty to integrate the protection of the environment into other policies and the overarching goal of sustainable development are common to the Treaties (Article 11 of the TFEU) and to the Charter.

4. *Relationship with other protection systems*. In contrast with the ECHR, the CFREU does include an express provision on the environment. The absence of such a rule in the ECHR obliged the ECtHR to perform far-reaching interpretations in order to protect citizens whose rights (to private life, to property, etc.) had been injured as a consequence of environmental damage. In the primordial and well-known environmental case decided in Strasbourg on December 9, 1994, the Court

considered that the pollution and nuisance caused by the operation of a wastewater treatment plant, adjacent to a dwelling, constituted an unacceptable intrusion in the private and family life of the applicants. This case – *Lopez Ostra v. Spain* (application no. 16798/90) – confirmed that the total absence of environmental conditions, may result not only in the violation of other fundamental rights – in this specific case, the right to private life and to a home – but may also jeopardise, ultimately, the right to life. In January 2009, the case *Tatar v. Romania* (application no. 67021/01) represented another step forward in the recognition of the fundamental right to environmental protection by the Member States of the Council of Europe.

Fortunately, in the context of the EU, the normative landscape is very different because the duty to protect the environment is one of the twelve solidarity rights of the Charter. In fact, the environment is consecrated in the Charter in such a way that it would be difficult, with any other formulation, to say so much with so few words. We are referring, first, to the requirement of a high level of environmental protection, and second to the requirement of integration: environmental protection shall be the secondary objective of each and every Union policy.

A high level of protection is also mandatory for the protection of human health (Article 35) and for consumer protection (Article 38). Yet, in what concerns integration, no other fundamental right is imperatively taken into account in all other policies.

Comparing the Charter and the national legal system, the CPR seems to go even further. In Article 66, the environment is recognised as a subjective right of citizens, which can be enforced, as such, against the State. But does this mean that in the EU, the environmental rights of citizens are less protected than at the national level? We do not think so. In the EU, environmental protection is a goal that has been seriously assumed as a priority by the European Institutions. In recent years the environment has clearly gained increasing centrality in the policies and actions of the Union. This phenomenon is visible both in the number of legal acts on the environment in EU law (more than 3300 acts are listed in the *repertoire* of European legislation) and in the growing number of court cases in European Courts. In fact, in the environmental cases heard before the national courts, European environmental law is the strongest argument against environmental threats, and in the CJEU environmental directives have been used as an instrument for the legal defence of other fundamental rights. In the *Delena Wells* case (C-201/02 of January 7, 2004) the CJEU went remarkably far in the interpretation of the direct effect of directives. The directive on environmental impact assessment was pivotal in the defence of the right to good administration and citizens' participation [Article 41(2) of the Charter].

5. *A vision for environmental protection in Europe*. Article 37 of the Charter encapsulates the essence of European environmental law. This article presents three fundamental principles in a *concentrated formula*: the principle of integration, the principle of the high level of environmental protection and the principle of sustainable development. None of the principles is a novelty created by the Charter. They were all previously enshrined in the Treaties and have been reiterated in the Charter, confirming the long-standing Union *vision* for environmental protection in Europe.

A major advantage of these three framework principles is the provision of coherence in the implementation of the operational principles enshrined in Article

191 of the TFEU: precaution, prevention, polluter pays, correction at the source and subsidiarity.

The three principles of the Charter frame the implementation of controversial and complex rules and principles, sometimes preventing ill-considered applications with potentially serious social and economic consequences.

For instance: does it make any sense to prohibit the application of certain phyto-pharmaceutical products due to the fear of future risks (alleged and not yet proven), in spite of the well-known proven advantages for human health? Or is it reasonable to apply the polluter pays principle to the fullest extent, requiring the assumption of all environmental costs, even if it means mass bankruptcy of industrial facilities, disregarding the social costs of implementing the measures? Is it necessary to require that each factory is fully equipped with its own means of preventing environmental damage at the source (such as landfills or wastewater treatment plants), when territorial planning seems to require a more concentrated solution and important economies of scale could be gained if those activities could be transferred to other operators upon payment?

These examples show the role of the framework principles in complex sustainability decisions, which require simultaneously environmental damage prevention, the promotion of economic development and the support of social improvement. The advantage of applying the principles is to help decision-makers to harmonise conflicting interests or to weigh the prevailing interest when reconciliation is not possible.

We will now consider the specific questions that are addressed by each of the principles.

a) The principle of the high level of protection aims to respond to the question of "how much?". How protective of the environment shall the Union be? Shall it be more or less protective than the Member States? In their quest for environmental protection, can the States go further than the EU? And shall environmental protection be increasingly wide and strong, or can other social or economic values justify a moderate environmental regression, temporally limited as long as it is duly justified?

b) The principle of integration is a response to the question of "how?". Effective protection of the environment implies seriously taking into account the development of all human activities that can affect the environment directly or indirectly. It is hard to imagine any area of activity, public or private, that has no impact on the environment. From industrial policy to civil protection, from agriculture to education, from tourism to social protection. Relevant environment policies are not only those that require direct interventions in terms of nature or landscape, but also those leading to changes in individual attitudes or social behaviour.

c) The principle of sustainable development aims to respond to the question of "what for?". Is environmental protection an end in itself or a means to ensure a decent life? The answer depends on the weighing of the dimensions of sustainable development: environment, society and economy. Nevertheless, it is true that in the classic trilogy of sustainable development, the environment has a very special weight because it supports all life forms. Therefore, it is not sustainable to allow human activities that put the very basis of our natural existence at risk. The *millennium ecosystem assessment report*, presented in 2005 by the UN, analyses and explores the four essential services of the ecosystems: provisioning services, regulating services, supporting services and cultural services.

We will analyse next how the three above-mentioned principles can be distinguished, what their core meaning is and how they can be articulated.

6. *Principle of environmental integration*. The principle of integration is one of the core principles underpinning environmental law in the EU. First, we shall consider *where* environmental protection should be integrated and then *how* to undertake such integration.

I. *Integrating... is recognising the fundamentally transversal nature of the environment*. All EU policies must now include environmental concerns. According to Article 11 of the TFEU, "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*" In fact, the principle of integration can be explained based on the idea of transversal policies.

Nevertheless, transversal protection is not a unique feature of environmental policy. After the Treaty of Lisbon, the number of values that must be taken into account in the design of other policies increased. Now there are other values that demand integration as well:

- the elimination inequalities and the promotion of equality between men and women (Article 8 of the TFEU);
- the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health (Article 9 of the TFEU);
- the fight against discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10 of the TFEU).

Notwithstanding, in the Charter the protection of the environment is the only value that must be integrated into all the other policies.

Looking at the secondary law of the Union it is clear that the environmental impact assessment of projects is the main tool for integration. The prevalence of environment issues is apparent in the list of types of projects subject to environmental impact assessments: projects relating to agriculture, forestry, aquaculture, industry, tourism, leisure, infrastructures, waste disposal, wastewater treatment, sludge treatment, scrap metal storage, engine testing, manufacture of mineral fibers, recovery or destruction of explosive substances, etc. (categories included in Annex II to Directive 2011/92 of December 13, on the assessment of the effects of certain public and private projects on the environment, amended by Directive 2014/52 of April 16).

Another tool is the strategic assessment of plans and programmes. Here, the range of plans or programmes that must integrate environment protection is huge: plans or programmes in the field of agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use [Article 3(2(a) of Directive 2001/42 of 27 June 2001]. Other areas, such as health, education, consumption or taxation, must all take environmental issues into account, so that sustainable development becomes a reality.

Finally, environmental licensing, under Directive 2010/75 of November 24 on industrial emissions, is also a crucial tool for integration of environmental concerns in the development of various activities, such as extractive industries, energy production, the processing of metals, mineral extraction, and other industries (chemical, food, textile, leather, wood, paper and rubber production).

II. *Integration ... is taking into account the environment*. The idea of integrating the environment into other non-environmental policies means that both legislative and administrative measures, adopted in the framework of policies, should consider the relevant environmental effects.

It is worth mentioning that the relevant effects are not just the direct and immediate effects but also the "*indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects*" (Annex IV, no. 4 note 1 of the Directive on environmental impact assessment).

Further, based on this principle and on the perceived environmental effects, it is possible to challenge legislative or administrative measures adopted in the context of other policies (commerce, industry, transport, energy, agriculture, fisheries, etc.). It is also the integration principle that can justify, for environmental reasons, restrictions to the basic fundamental freedoms of European law. For instance, the prevention of air pollution derived from burning industrial waste oils justified restrictions to the free circulation of goods (*ABDHU*, case 240/83 of February 7, 1985). Integrated management of packaging waste was also the reason behind the restrictions to the free circulation of goods (*Danish Bottle, case 302/86* of September 20, 1988). Preventing atmospheric pollution and climate change through an emissions trading scheme grounded the restriction on the freedom of establishment (*Arcelor*, case T-16/04, of March 2, 2010).

However, the main weakness in the application of the principle of integration is the precise meaning of "taking in consideration" or "taking into account".

First of all, "taking into account" means to consider properly. It means balancing the environmental aspects against the non-environmental ones (namely economic and social), in accordance with the legal balancing criteria enshrined in European law. Some of these criteria are:

- Priority of environmental values (reflected in the principle of a high level of protection);
- Preference for prevention at the expense of compensation (based on the principle of prevention);
- Internalisation of environmental protection costs (in accordance with the polluter pays principle);
- Acting with reflection and circumspection (in line with the precautionary principle).

Moreover, "taking into account" also means that in environmentally relevant decision-making procedures there must be compliance with the duty to promote effective and timely public participation. The right to participation arises from the Aarhus Convention of June 25, 1998, on access to information, public participation in decision-making and access to justice in environmental matters. The Convention of the UN Economic Commission for Europe, signed and ratified by all Member States and approved by the EU through Regulation 1367/2006 of September 6, 2006, is an integral part of EU law. Therefore, in the interpretation of the CJEU, the Convention includes provisions likely to benefit from direct effect, as stated by the Court in the *Lesoochranárske zoskupenie* case (C-240/09, of March 8, 2011).

Finally, adequate deliberation and participation additionally requires full transparency in respect of decision criteria, as well as of relevance and the content of participation. This is another aspect of the Aarhus Convention, which means, in other words, that it is not enough to take into consideration, but it is also

necessary to demonstrate that environmental interests were properly analysed and balanced. This implies the publication of all the data on which these decisions were based (to show the relevant interests and their relative weight) and the reasoning for every decision having environmental effects (to demonstrate the legal reasoning and the grounds behind the deliberations).

7. *The principle of a high level of environmental protection*. This principle is central to European environmental law, both in the Treaties, and in the secondary law. After the Treaty of Lisbon, the high level of protection is stated in Article 3(3), of the TEU and in Articles 114 and 191(2) of the TFEU. In secondary law, the 2010 industrial emissions Directive is the most visible expression of its importance, repeating ten times the objective of establishing a high level of environmental protection. Surveying the European environmental *acquis*, we realise that the level of environmental protection is undeniably high, both qualitatively and quantitatively.

In qualitative terms, the different sectors of environmental policy are covered despite the subsidiarity of Union competence. Water, soil, air, biodiversity, genetically modified organisms, climate, noise, chemicals, waste and sea are the main areas covered by the EU Law. Furthermore, a wide variety of instruments have been issued: environmental impact assessments, emissions trading, access to environmental information, labels and ecological certification, are just some of the instruments used in the European legislation.

In addition, quantitatively the European level of protection is indeed high. This is the direct result of imposing strict emission limit values, rigorous environmental quality standards, best available techniques, substituting hazardous substances and reducing pollution to the lowest level reasonably achievable.

a) *Minimal content of the high level of environmental protection principle*. When this general principle of European environmental law emerged in 1992, with the Treaty of Maastricht, it was applicable only to the Commission's proposals for the approximation of legislation in the context of the common market. Before that time, unanimity was the rule in environmental policy, and the level of protection – high or low – was decided unanimously by all Member States. After Maastricht, majority decisions became the rule. As a consequence, the establishment of the high level of protection, as a principle, was intended to prevent the risk of reducing the level of environmental protection in Europe. Historically this was the first purpose of the principle. It reflected the desire for a strong European environmental policy, which would go further than the lowest "common denominator" among the environmental policies of the Member States.

b) *Medium content of the high level of environmental protection principle*. Today, a systematic interpretation of the principle, under the Treaty, reveals other even more interesting aspects. Establishing a high level of environmental protection allows the Member States to go further than the European Union, if they wish, in the protection of the environment. This is the solution provided for in Article 193 of the TFEU: after the harmonisation of the environmental, regulatory and administrative provisions necessary for the establishment and functioning of the internal market, Member States may maintain or introduce national provisions granting enhanced protection to the environment. This possibility was accepted by the CJEU in the *Deponiezweckverband Eiterköpfe* case (C-6/03 of April 14, 2005).

Currently, it is possible to defend an even more comprehensive understanding of the high level of environmental principle. It means that after adopting a certain

level of protection it should be sustained, prohibiting regression. To put it simply: progress in the protection of relevant ecological interests should be irreversible (except for exceptional situations). Thus, the high level of protection principle is the legal grounding for the ban on environmental regression.

c) *Maximum content of the high level of environmental protection principle*. Interestingly, the CFREU seems to require an even stricter interpretation. In fact, in addition to a high level of environmental protection, the Charter also mentions *the improvement of its quality*. This means that to ensure a high level of protection, it is not enough to refuse the degrading of natural resources or the damaging of the environmental equilibrium. On the contrary, the improvement of environmental conditions [also mentioned in Article 3(3) of the TEU], seems to require a proactive and dynamic protection; investments in the restoration of degraded habitats, the reintroduction of native species, reforestation of burnt areas, re-naturalisation of rivers, bio-remediation of contaminated soils, creation of artificial coastal reefs, etc.

8. *Sustainable development principle*. Sustainable development is currently one of the most dense and complex concepts. Transmitting the subtle balance of interests and the holistic understanding envisaged by sustainability demands an in-depth study based on multidimensional approaches. Nevertheless, we will try to uncover the contours of the principle through a synthetic analysis, and a very structured and systematic presentation, highlighting the strength and potential of this umbrella principle.

Sustainable development can be analysed from different angles, which reveal the interlinked dimensions of time and space on the one hand, and form and substance, on the other.

Sustainable development in time and space. Diachronically, the principle of sustainable development reflects the idea of intergenerational justice, *i.e.* the responsibility of present generations towards future generations. This intertemporal dimension, clearly visible in the designation of the principle in French – *développement durable*, or lasting development – is of particular relevance to policies wielding strong future impacts, such as social security, military policy, genetic engineering, spatial planning and, of course, environmental policy. It is no coincidence that intergenerational concerns are present in the preamble to the Charter: "*enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations*" (§ 6).

When using scarce ecological resources or undertaking urban development activities involving strong environmental impacts, the legitimate interests of future generations must always be taken into consideration. In addition, a precautionary approach counters the argument that it is difficult to identify the interests of generations not yet born, thereby deconstructing an alibi for inaction.

In the synchronic dimension, the principle of sustainable development expresses the idea of spatial justice. In other words, sustainability refers also to justice in the relations between different regions, peoples and individuals, within and outside Europe. This dual approach – internal and external to the EU – is clearly present in the references to sustainable development in the Treaties. *External* justice is present in Article 21 d) and f) of the TEU on "*Union's action on the international scene.*" The Union shall "*foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*" and "*help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure*

sustainable development." *Internal* justice, among Member States, is referred to in paragraph 9 of the Preamble of the TEU ("*determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection*"), but also in Article 3.3 of the TEU ("*it shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment*"), and Article 11 of the TFEU ("*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*").

Sustainable development in form and substance. From a procedural (formal) perspective, the principles of participation and openness (Articles 10 and 11 of the TEU) explain the functioning of the principle of sustainable development. The validity of the current decisions with future implications depends on the degree of civic participation and on the consideration of the citizens' interests, including both citizens of today and future citizens. This is one of the most complex challenges when applying the principle of sustainable development: how is it possible to imagine today the interests of future citizens? One possible way to give a "voice" to future generations is to organise an institutional representation of future generations, through an agency (such as the experience of the Hungarian Parliamentary Commissioner for future generations, http://jno.hu) whose role is to represent the presumed interests of future generations. Another way is to recognise children's crucial role, as living representatives of future generations.

In a more conventional approach to the material dimension of the principle of sustainability, three components have to be taken into account: the environment, society and economy. From this point of view, the book by Klaus Bosselmann, *The Principle of Sustainability, transforming law and governance* (Ashgate, 2008) is an essential reference.

The environmental aspect of sustainability emerges from the duty to manage and use the earth's natural resources in a sustainable manner, respecting the carrying capacity of the ecosystems, safeguarding the renewability rate of natural resources and preserving non-renewable resources as far as possible.

The social aspect of sustainability is closely attached to the ideas of environmental democracy (through public participation in environmentally relevant processes) and environmental justice (the elimination of situations of injustice arising from the fact that very often it is the weakest and the most vulnerable citizens, communities and peoples who suffer, helplessly, the adverse effects of environmental impacts and degradation of natural resources).

Finally, the economic aspect consists, firstly, in the promotion of sustainable economic activities. Sustainable economic activities are those that are based on renewable resources while respecting their renewal capacity, as well as those activities that promote the full internalisation of environmental and social costs of economic activities, in accordance with the polluter pays principle, and those that ensure a fair redistribution of costs, in accordance with the principle of common but differentiated responsibility.

The CJEU has, over the years, undertaken the task of performing a practical harmonisation of the different aspects of sustainable development in symbolic

cases such as the *Marshes of Santoña* case (C-355/90, of August 2, 1993), the *Caretta-Caretta* case (C-103/00 of January 30, 2002) or the *Castro Verde* motorway case (C-72/02 of June 24, 2003).

9. *Conclusion*. Sustainable development presupposes understanding and respecting the environment as more than an external limit to human activities. The environment is the *natural framework* of human life. As a consequence, more than a mere limit or constraint, it should be seen as a *premise* and its protection an *objective* of human activities. To exemplify: if the goal is to move towards sustainable development, not only recycling of waste has to become mandatory, but also the promotion of circular economy, ecodesign and dematerialisation as compelling strategies; it is not enough to ban polluting activities in natural areas, rather it is also necessary to invest in environmental restoration and the recovery of degraded natural areas; a new polluting industrial activity should only be permitted in an area already under severe environmental pressure if, firstly, it respects the emission limit values set out in the law moving towards zero pollution, and secondly, provided that it contributes positively to the improvement of the environmental quality of the area by creating an industrial symbiosis.

In short, sustainable development requires prevention as the priority, limiting compensation measures as an excuse to develop activities with environmental impacts and acknowledging that pro-active protection of the environment is as important as a mere abstention from harmful actions.

It is certain that the environment is not an absolute value, to which all other dimensions of human life must be submitted. Humans are not a mere component of an untouchable Planet, a perfect machine that cannot be disturbed. For better and for worse, humans are an integral part of the Planet. The prominent place of humans does not result from any anthropocentric *privilege* in the access to natural resources, but from a factual predominance. Quantitatively, humans are an overabundant species; qualitatively, our scientific and technological capacity of interference with every natural system – from the smallest DNA, to the most complex planetary climate system – is undeniable.

The new geological age of the *Anthropocene* has definitively arrived, connoting a special duty of care and a particular responsibility for preventing reckless uses of the powers to control, exploit and transform the Planet.

Alexandra Aragão

ARTICLE 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

1. *Framework of consumer protection rules*. Under the subject "solidarity", in Title IV of the CFREU, are established rules focused in the protection of various interests (Articles 28 to 38).

In the context of these interests, emerges a group of rights regarding workers, as well as the protection of family, general economic interests, environment and, finally, consumers.

This is the set of subjects which is important to emphasize here. For this purpose, see Article 38, with the heading "consumer protection", and which determines that: "Union policies shall ensure a high level of consumer protection".

The Explanations Relating to the CFREU (2007/C 393/02) were published in 2007. In the preamble it is stated that "*originally prepared under the authority of the Praesidium of the Convention which drafted the CFREU. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.*"

In relation to the cited Article 38, the explanation is narrowed down to the formal perspective, only highlighting that "*The principles set out in this Article have been based on Article 169 of the Treaty on the Functioning of the European Union.*"

The latter is much more extensive and determines the following:

"*1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them."

2. *Consumer protection in particular.*[1] The consumer protection policy has suffered several difficulties throughout the past years resulting, among other aspects, in factors, interests and social, economic and financial influences.

So, it is important to describe the legislative outlook and its adaptation to the ongoing reality, trying to understand what has happened in several key areas (five in particular), both at the community level and the national level, in order to discover if the protection is effective and if its evolution is positive.

First phase: minimum harmonisation Directives and their transposition. To begin with, the most relevant community act (the Directive) expressed a minimum orientation of consumer protection which Member States must incorporate. Though, internally they could adopt measures establishing a higher level of consumer protection.

In this phase – which generally can be placed between the last quarter of the previous century and the beginning of the current century – the protection of consumer interests was amplified in addition to being incipient in an initial moment and slightly incisive as regards effectiveness.

The national legislator (in particular the Portuguese) would rarely go beyond the community rules, limiting itself to reproducing them.[2] When granted greater protection to the consumer, it would be in a limited way and, sometimes, under the specific granted protection, it would lack effectiveness.[3]

Furthermore, there was a certain fragmentation of the Member States national rules.

In summary, we can conclude that minimum harmonisation Directives expressed a sound foundation of consumer protection, although scarce, but which would just be established to the same extent in the majority of Member States.

Distance selling. In the first piece of legislation governing distance selling – Decree-law no. 272/87, of 3 July (subsequently amended by Decree-law no. 243/95, of 13 September) –, Articles 8 and 12 stood out, its chapter was called "mail order sells."

This text was later repealed – after Directive 97/7/EC, of 20 May 1997, of minimum harmonisation[4] – by Decree-law no. 143/2001, of 26 April, which has been amended several times.[5] Directive 97/7/EC would later be repealed by Directive

---

[1] Our main concern in this text is the private law perspective of consumer law. Therefore, this will be our focus.

[2] On reproducing Community directives in general, see Roberto Calvo, "La vittoriosa lotta del legislatore britannico contro il copy-out delle direttive comunitarie", *Contratto e impresa. Europa*, (2002): 1205.

[3] This was the case, for example, in the framework of the first legal regime of consumer credit (Decree-law 359/91, of 21 September), where a specific regime, adequate and effective for the right of withdrawal (Article 8, no. 1 to 5) – Directive 87/102/EEC, of 22 December 1986, nothing was foreseen on the matter – but on the last number of the rule, the financier was allowed to cause the consumer to waive this right – see Gravato Morais, *Contratos de Crédito ao Consumo* (Coimbra: Almedina, 2007), 153, and, in particular, 163.

[4] Article 14 (under the heading "minimal clause") determined that "*Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection. Such provisions shall, where appropriate, include a ban, in the general interest, on the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts, with due regard for the Treaty.*"

[5] See Declaration of Rectification no. 13-C/2001, Decree-law 57/2008, of 26 Mach, repealing Articles 26, 27, 28 and 29 of Decree-law 143/2001, of 26 April [see also Article 27 (b)]. Furthermore, Decree-law 82/2008, of 20 May, disconnected from any community act, presented significant and important amendments relating to consumer protection, Decree-law 317/2009, of 30 October [which, in Article

2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights and, in this context, Decree-law no. 143/2001 replaced by Decree-law no. 24/2014.

The regime of contracts concluded electronically, which are a "*subspecies of distance selling*",[6] can be found in Decree-law no. 7/2004, of 7 January, which transposes Directive 2000/31/EC, of 8 June 2000. In this piece of legislation, we will find some rules (or numbers), specially in Chapter V, connected to consumer protection (see, *v.g.* Articles 27, 28, 29).

Contracts concluded in the consumer's home. For several decades now, we have specific rules regulating this issue, integrated in the cited Decree-law no. 272/87 (with the abovementioned amendments), regulating the said type of contracting in Chapter I and Articles 1 to 7. That Decree-law was later repealed by Decree-law no. 143/2001, itself was repealed by Decree-law no. 24/2014, which currently regulates this matter.

Sale of consumer goods. In Portugal, the sale of consumer goods, had already been (although indirectly) regulated in the Consumer Protection Law (Law no. 24/96, of 31 July) – more specifically in Article 12.

This rule has been amended due to the transposition of the corresponding community Directive – Directive 1999/44/EC, of 25 May 1999[7] – with the correspondent – Decree-law no. 67/2003, of 8 April –, dealing with "certain aspects" of the sales for consumption, particularly the obligation to deliver a good according to the contract.

Recently, Directive 1999/44/EC was repealed by Directive 2019/771/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods. In addition, the European legislator also passed Directive 2019/770/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and that lays down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital services. In Portugal, the legislator opted to transposed both Directive 2019/770/EU and Directive 2019/771/EU with one legal instrument: Decree-law no. 84/2021 of 18 October.

Package travel. Regarding the contract of package travel and after several years without a complete and adequate legal regime, and without having established an autonomous discipline for the package travel contract,[8] finally emerges the first piece of legislation on the subject – Decree-law no. 198/93, of 27 May. This text, transposing Directive 90/314/EEC, of 13 June 1990,[9] was later repealed by Decree-

9 (d), repeals Article 10 of Decree-law 143/2001, although being "transferred" to Article 71, becoming, with the new wording, more comprehensive and simpler], which approves the legal regime on the access to the activity of payment institutions and the provision of payment services, transposing into the national legal order Directive 2007/64/EC, of 13 November 2007.

[6] See Oliveira Ascenção, "O comércio electrónico em Portugal. O quadro legal e o negócio, Introdução á perspectiva jurídica", in *Guia da Lei do Comércio Electrónico* (Lisbon: Centro Atlântico, 2004), 104.

[7] From paragraph 4 followed that "*whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection.*"

[8] About the evolution in Portugal, see the interesting data collected by Miguel Miranda, *O contrato de viagem organizada* (Coimbra: Almedina, 2000), 78.

[9] Article 8 of the Directive states that "*Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer.*"

law no. 209/97, of 13 August. The transposition was made in two stages, because the 1993 regime prejudiced Portuguese travel agencies in relation to their European counterparts. The text was subject to amendments by Decree-law no. 12/99, of 11 January, 76-A/2006, of 29 March, and 263/2007, of 20 July.

However, the Decree-law of 1997, had already been repealed by Decree-law no. 61/2011, of 6 May, which adapted the legal regime of the traveling agencies and tourism activity to the amendments resulting from the transposition of the Directive 2006/123/EC (mentioned below) into the national legal order, which has already been amended by Decree-law no. 199/2012, of 24 August.

Directive 90/314/EEC would then be replaced by Directive 2015/2302/EU of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, a maximum harmonization Directive. This Directive was implemented in the Portuguese national framework by Decree-Law no. 17/2018, of 18 March.[10]

Meanwhile, Directive 2006/123/EC, of 12 December 2006, on services in the internal market, establishing the principles and criteria that must be observed by the regimes of access and exercise of service activities within the EU, was transposed into the national legal order by Decree-law no. 92/2010 of 26 July. This piece of legislation led to less bureaucracy, faster and dematerialized procedures, tacit approval, easier access to the activity and greater responsibilities for the economic agents for the activity they develop. The said text brought relevant modifications on the legal regime of travel agencies, and, hence, the publication of Decree-law 61/2011, of 6 May, which repealed the previous one.

Consumer credit. The first legal document on consumer credit came late, dating from the beginning of the 90s of the XX century – Decree-law no. 359/91, of 21 September –, resulting from the transposition of Directive 87/102/EEC, of 22 December 1986, on consumer credit (amended by Directive 90/88/EEC, of 22 February 1990 – which amended the national legal regime through Decree-law no. 101/2000, of 2 June[11] –, and by Directive 98/7/EC, of 16 February 1998), which, once again, followed the way of minimal harmonization.[12]

Second phase: the maximum harmonization Directives. As far as consumer law is concerned, the growing option for maximum harmonization started to stand out in the current century such as Directive 2019/770/EU, Directive 2019/771/EU, and Directive 2015/2302/EU.[13]

Such European legal documents adopt a different perspective from the previous reality, although their outline is specific, not without going through a phase of manifest difficulty[14] and not without criticism.[15]

---

[10] Complemented by Decree-Law no. 78/2018, of 8 of March.

[11] Legal document from 1991, also amended by Decree-law no. 82/2006, of 3 May.

[12] Article 15 of the community text states that "*This Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers....*"

[13] Or the less recent Directive 2011/83/EU, of 25 October 2011, on consumer rights – amending Directives 93/13/EEC, of 13 April 1993, and 1999/44/EC, of 25 May 1999, and repealing Directives 85/577/EEC and 97/7/EC.

[14] Cf. Norbert Reich, "Von der Minimal- zur Voll- zur «Halbharmonisierung» – Ein europäisches Privatrechtsdrama in fünf Akten" *Zeitschrift für europäisches Privatrecht*, no. 1 (2010): 7.

[15] Cf. Norbert Reich, «Die Mc-Donaldisierung des Verbraucherrechts – oder: Von der „vollständigen Harmonisierung" im EU-Verbraucherrecht zur „vollständigen Abschaffung" eines eigenständigen nationalen Verbraucherschutzrechtes?», *Verbraucher und Recht*, no. 10 (2009): 361.

Let us focus on the scope of this harmonisation.

If, on one hand, the maximum protection granted is only uniform in the strict framework of the established regulation, the European text comprises areas of freedom for Member States in certain matters (this normally occurs in the framework of the exclusions regime, although it does occur in other domains). But in addition, and in all that is not regulated in the Directive, the Member State may adopt specific rules which do not conflict with the Directive.[16]

Directives on specific matters. The distance marketing of consumer financial services, a special regime in relation to the general regime of distance selling, is one of the areas where the tendency of full harmonization manifested itself.

Thus, Decree-law no. 95/2006, of 29 May, addresses this issue in our legal order, transposing Directive 2002/65/EC, of 23 September 2002,[17/18] already thrice amended as of this writing.

Two years afterwards, consumer credit was one of the areas where there was need for change – even of the title –, resulting in the adoption of Directive 2008/48/EC, of 23 April 2008, on credit agreements for consumers, repealing the previous text from 1987 and which also is an act of maximum harmonization.[19] Our country was pioneer concerning the moment of transition, having been operated through Decree-law no. 133/2009, of 2 June.

Directives bringing together several subjects. One maximum harmonization Directive with a very different characteristic is Directive 2011/83/EU,[20] of 25 October 2011 as it brought together several Directives, which we have referred to in a different framework.

Thus, Directive 2011/83/EU, of 25 October 2011, on consumer rights – amending Directives 93/13/EEC, of 13 April 1993, and 1999/44/EC, of 25 May 1999, and repealing Directives 85/577/EEC and 97/7/EC – becoming from now on an important and decisive frame of reference in the political measures of consumer protection.[21]

---

[16] The evolution of community law resulting from the CJEU with a reflection in the harmonisation must not be disregarded, Vanessa Mak, "Harmonisation through Directive-Related Case Law: the Role of the CJEU in the Development of European Consumer Law", *Zeitschrift für europäisches Privaterecht*, *op. Cit.*, 129.

[17] Therefore, paragraph 13 states that "*a high level of consumer protection should be guaranteed by this Directive, with a view to ensuring the free movement of financial services. Member States should not be able to adopt provisions other than those laid down in this Directive in the fields it harmonises, unless otherwise specifically indicated in it.*"

[18] Please note that paragraph 29 of this community act states that "*this Directive is without prejudice to extension by Member States, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.*"

[19] In chapter VII, on "*implementing measures*", Article 22, under the heading "*harmonisation and imperative nature of the directives*", states in its no. 1 that "*Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.*" Although there is openness for the consecration of other rules, either through the choices of the national legislator under the light of the directive (see, for example, paragraphs 9 and 10), either through the non-regulation of subjects in the directive (which originates several rules in the transposing diploma, stressing out, v.g. Article 20 of Decree-law no. 133/2009).

[20] Directive 2011/83/EU, of 25 October 2011, on consumer rights – amending Directives 93/13/EEC, of 13 April 1993, and 1999/44/EC, of 25 May 1999, and repealing Directives 85/577/EEC and 97/7/EC.

[21] In paragraph 13 of the Community text the non-absolute character of the full imposition "*throughout the Community directives on maximum harmonisation*", but there is still a tendency to apply the same to other subjects who are not consumers, which is the result of a barely perceptible

Concerning distance and off-premises contracts, the previous community legislation was repealed, this harmonization is deemed "*necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity*" (paragraph 4),[22] it should be noted that the amendments to other community acts are much more cautions than originally planned (as far as general contractual terms and the sale of consumer goods are concerned).

3. *Final remarks*. Throughout the years, the level of consumer protection has been increasingly high and effective. The way to full harmonization has contributed to avoid a breach of consumer rights, which could be found here and there internally.

In any event, the EU itself appears to have a lack of certainty about the precepts and the future of consumer law. If, on one hand, the rules around it are increasing, on the other hand, the paths designed to carry this out show some uncertainty on how to achieve it, which might cast doubt on its effectiveness.

Fernando de Gravato Morais

permissiveness. Thus, it states that "*Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises....*"

[22] Article 4 refers to a "*level of harmonisation*", stating that "*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.*"

ARTICLE 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

1. Article 39 CFREU sets out EU citizens' rights of political participation in elections to the European Parliament. Whilst these rights were only elevated to the fundamental rights category with their inclusion in the Charter, the rights were previously acknowledged in the Community legislation and, owing to the provisions of Article 52(2) CFREU, are still subject to the conditions and limits defined by the Treaties. More specifically, the right of every European citizen to participate in the elections to the European Parliament in the Member State of residence, on equal terms with the nationals of that state, acknowledged in Article 39(1) CFREU, corresponds to the right guaranteed in Article 20(2)(b) and Article 22(2) TFEU. On the other hand, Article 39(2) CFREU, which established the democratic principle in the foundation of the election of the European Parliament, corresponds to Article 14(3) TEU.

2. The rights to vote and to stand as a candidate at elections, whether in elections to the European Parliament or in the municipal elections in the country of residence (see Article 40 CFREU), are part of the set of European citizen's rights that are listed in Title V of the Charter. Regarding the systematic insertion of Articles 39 and 40 CFREU, it must be noted that Title V, by partially inverting the order followed by the Treaties, ended up granting precedence to these political rights, which exemplifies their special relevance to European citizenship. Such relevance is in line with the normative provision of the main international instruments in the matter of human rights' protection: as seen in Article 21 of the UDHR, Article 25 of the ICCPR, Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women, as well as Article 3 of the Protocol no. 1 to the ECHR.

3. Political rights, and especially the rights to participate in politics, are a direct and immediate expression of the idea of European citizenship. The intention to institute European citizenship goes back to the beginnings of the history of European integration. In fact, the preamble of the Treaty of Rome already alluded to the objective of creating "*an ever closer union among the peoples of Europe*", an objective that reflects an unequivocal will to deepen a political and constitutional reality, moving beyond a merely economic vision. The outline of the Union's citizenship would only be expressly assumed in 1992 with the Treaty of Maastricht. Deemed as a bonding relationship between the citizens and the EU, hypostatized

into a set of rights and duties, European citizenship became a propitiating factor of community identity and the enabler to greater involvement of citizens in the common politics. The establishment of the Union's concept of citizenship also contributed to the reinforcement of the democratic legitimacy of the European project. In fact, the acknowledgement of citizen status is an essential precondition to the formation process of a European *demos*, without which the democratic legitimisation of the Union would be devoid of sense and content.

4. The concept of citizenship is, therefore, the key to understanding the reach of the political rights acknowledged in the CFREU. However, this does not establish the criteria of entitlement, acquisition and loss of citizenship. In the Charter's silence, and by dint of the already mentioned Article 52(2), there is a reliance on the wording enshrined in the Treaties, more exactly in Articles 9 TEU and 20 TFEU, according to which "*every person holding the nationality of a Member State shall be a citizen of the Union.*" The recognition of the status of Union citizen does not operate in autonomous terms, but it does so by reference to the entitlement of the national citizenship of a Member State. The national frameworks of the Member States are, therefore, the "*reference orders*" to the determination of the *status* of European citizen.

The lack of a harmonised approach to the attribution of nationality causes some notable difficulties. Community case-law has evolved, however, towards admitting that European citizenship imposes certain limitations upon the Member States' liberty of regulation. Thus, one may clearly observe, in the way the CJEU solves the problem of the positive conflict of foreign nationalities, the prevalence given to EU Member State nationality instead of nationalities of non-member countries, regardless of the fact that the first is or is not the effective nationality of the individual. The conflict is, therefore, solved beyond the national legal frameworks, given that the exclusive competence of the Member States cannot fail to be exercised "*in respect to the community law.*" The Micheletti case [judgment (CJEU) *Micheletti*, of 7 July 1992, C-369/90] is, in this context, exemplary. The Spanish authorities denied an Italian citizen, who also possessed Argentine nationality, a definitive residence card. A provision in the Spanish Civil Code was invoked as justification, according to which the nationality of the last place of residence prevails (and it was, in fact, Argentina). The CJEU concluded that "*the provisions of Community law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of the non-member country.*" In keeping with the reasoning of the Court, it can then be said that the respect for the Union's principles precludes a Member State from changing the legal criteria of attributing the national citizenship, if such change does not correspond to a serious interest of the respective state or if it harms the interests of another Member State. Likewise, in this regard, the recent judgment (CJEU) *Janko Rottman v. Freistaat Bayern*, of 2 March 2010, C-135/08, the Court, without questioning the state's competence, expressly pointed out that "*having regard to the importance which primary law attaches to the status of citizen of the European Union, when examining* [the proportionality of] *a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of rights enjoyed by every citizen of the Union*", noting the need to "*establish,*

in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality" of another Member State.

To sum up, without prejudice to the validity of certain limitations of a community nature, European citizenship remains an "overlapping citizenship", whereby the subjective scope of application is delimited by reference to the national citizenship, clearly distant from a federal-type approach such as the North-American model.

5. In practical terms, the attribution of European citizenship will be an enlargement of the set of rights that are exercised by the citizens of the Member States. Amongst these rights associated to European citizenship, electoral rights can be mentioned, but also, according to the list contained in the Treaties, (i) the right to move and reside freely within the territory of the Member States; (ii) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (iii) the right to apply to the European Ombudsman; (iv) the right to petition the European Parliament; (v) the right to address the European institutions, in writing, in any of the Treaties' languages and to obtain a community answer; as well as, more recently, (vi) the right to a good administration; (vii) the right of access to the European institutions' documents; and (ix) the initiative of European citizenship.

6. It is important, however, to note that these rights cannot be deemed as exclusively reserved to EU citizens, necessitating a case-by-case analysis of this question of entitlement. It is, in fact, the Treaty itself that extends the scope of application of some of these rights to people who are not citizens of the Union. It suffices to recall Articles 227 and 228 TFEU, where it is acknowledged that "*any natural or legal person residing or having its registered office in a Member State*" has the right to address petitions to the European Parliament and complaints to the European Ombudsman (see Articles 43 and 44 CFREU). Nevertheless, even in what concerns the rights of political participation, traditionally understood as an exclusive prerogative of citizens, the Union's case-law has been evolving towards conceding to the Member States an important margin of discretion in this domain, whether it is to extend the right to vote to citizens of non-Member States or to establish limitations regarding entitlement and/or even exclusion of some categories of citizens, as long as there is a guarantee of respect for the general principles of EU law, namely, the principle of equal treatment or non-discrimination [Judgments (CJEU) *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland*, of 12 September 2006, Case C-145/04, and *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag*, of 12 September 2006, Case C-300/04].

Thus, in the judgment delivered in the case C-145/04, the CJEU considered that "*in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law*" and that *"Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other*

than their own nationals or citizens of the Union resident in their territory." Therefore, and "*in the absence in the Community treaties of provisions stating expressly and precisely which persons have the right to vote and to stand as a candidate in elections to the European Parliament*", the Court concluded that the United Kingdom, by adopting a law that broadened the right to vote and to stand as a candidate in elections to the European Parliament to the nationals of non-Member States residing in Gibraltar, had not violated EU law, having, on the contrary, acted to assure compliance with the judgment (ECtHR) *Matthews v. United Kingdom* of 18 February 1999, no. 24833/94, according to which not holding elections to the European Parliament in Gibraltar was contrary to Article 3 of Protocol 1 to the ECHR, which sets out the obligation of the contracting parties to hold free elections at reasonable intervals by secret ballot, ensuring free expression of opinion to the people in the choice of the legislature.

On the other hand, in case C-300/04, the CJEU decided that "*the provisions of Part Two of the Treaty relating to citizenship of the Union do not confer on citizens of the Union an unconditional right to vote and to stand as a candidate in the elections to the European Parliament.*" With this in mind, and finding support in the case-law of the ECHR, which admits the possibility of the contracting States opting for the residence criterion in order to determine who is entitled to exercise the right to vote [Decision of the ECtHR *Hilbe v. Liechtenstein* 31981/96 and judgments (ECtHR) *Melnychenko v. Ukraine* of 19 October 2004, no. 17707/02 and *Hirst v. United Kingdom* (no. 2) of 6 October 2005, no. 74025/01], it acknowledged that EU law was not opposed, in principle, to the Member States limiting the entitlement to electoral rights, defining the "*conditions of the right to vote and to stand as a candidate in elections to the European Parliament by reference to the criterion of residence in the territory in which the elections are held.*" It considered, however, that by excluding Dutch citizens (and, for that matter, also Europeans) residents in The Netherlands Antilles or in Aruba from exercising their right to vote, the Kingdom of the Netherlands had violated the principle of equal treatment, since such rights were recognised to the Dutch nationals residing in a non-member country and this difference in treatment had not been objectively justified.

7. It should be noted that the *acquis* of rights affirms itself without prejudice to the rights inherent to the legal status of a national subject, since, according to Article 9 TEU and Article 20 TFEU, "*citizenship of the Union shall be additional to and not replace national citizenship.*" European citizenship is, therefore, an effect of accumulation and not an effect of substitution. European citizenship is, thus, the expression of what Lucas Pires aptly referred to as "the multiples of citizenship": we are Portuguese citizens and (in consequence) we are also European citizens.

8. The rights to participate in politics that Article 39 CFREU refers to gain particular relevance in light of the political and democratic dimension of the citizenship that was mentioned in point 3. This norm materialises the assurance that the Union is based on representative democracy (Article 10 TEU). The principle of electing the European Parliament by direct, free and secret universal suffrage, enunciated in paragraph no. 2 of Article 39, is the "principle of reference" of modern democracies [judgments (ECtHR) *Mathieu-Mohin* and *Clerfayt v. Belgium* of 2 March 1987, no. 9267/81 and *Hirst v. United Kingdom* (no. 2)]. The rule stated in paragraph no. 1 refers solely to how the rights to participate in politics granted to European citizens are exercised and, in this matter, it has been seen more as a

corollary of the full accomplishment of the freedom of movement and residence than as a provision established for the reinforcement of the European *demos*. Accordingly, it is argued that the proclamation of the election of the European Parliament by universal suffrage should logically precede the provision on the right to vote and the right to stand as a candidate at the elections to the European Parliament in the Member State of residence.

9. Article 39(2) CFREU does not represent a complete novelty, because it descends from the electoral regulation of 1976. After a first phase in which the deputies – of the initially named Common Assembly of the ECSC, renamed, in 1958, Parliamentary Assembly of the Council of Europe and, as of 1962, European Parliament – were appointed by the members of the national parliaments, the principle of the direct eligibility of the European Parliament was established in Article 1(3) of the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to the Council's Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (Act of 1976). The first direct election occurred in July 1976 and, since then, the European Parliament has steadily seen its powers reinforced in a process that translated into a progressive "parliamentarisation" of the institutional system, which aims to "compensate" for the chronic democratic deficit of the Union.

10. Until now, however, it has not been possible to reach a political deal to approve a community rule that regulates the elections to the European Parliament in a uniform way, as foreseen in Article 190(4) of the Treaty of Maastricht. The Treaty of Amsterdam "softened" this demand, introducing, in Article 138(3), the possibility, in the absence of a uniform procedure, to hold elections to the European Parliament following a procedure "*in accordance with principles common to all Member States.*" On that basis, it became possible to alter the Act of 1976, which was duly done by Council Decision of 25 June and 23 September 2002 (2002/772/EC, Euratom)[1] which, in essence, introduced the principle of proportional representation, the incompatibility between national and European terms of legislature, as well as the possibility to establish a minimum limit to attribute mandates on the basis of a percentage not inferior to 5% of the votes cast. Yet, apart from these and some other common rules – that address, namely, the number of mandates and distribution amongst the Member States [Article 14(2) TEU], the uniform period in which elections should be held (Article 10 of the Act of 1976) or some eligibility requirements to stand as a candidate at elections to the European Parliament (Article 7 of the Act of 1976) – the regulation of electoral procedure in elections to the European Parliament is a national-level matter (Article 8 of the Act of 1976). Now, beyond the difficulties of a practical nature that such a situation may give rise to – seen, as an example, in the case of Jean-Marie Le Pen, the loss of his mandate as a member of the European Parliament, declared by the French authorities, led to the discussion as to whether the European Parliament should be fully bound by a national decision, or on the contrary, should have a certain margin of discretion [judgments (Court of First Instance, now GC) of 10 April 2003, case T-353/00 and (Court of Justice) of 7 July 2005, case C-208/03; see also, regarding the requests for interim measures, the order from the President of the Court of

[1] And, more recently, in 2018, by Council Decision (EU, Euratom) 2018/994, of 13 July 2018, amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976.

First Instance, of 26 January 2003 and the order from the President of the Court of Justice, of 31 July 2003]. The absence of a uniform or harmonised European electoral system has been described as a "lost opportunity" in the reinforcement of the political and democratic authority of the European Parliament. This is a subject of much debate and has given rise to proposals for the creation of a single European electoral constituency and for the direct election of the President of the European Commission.

11. Article 39(1) CFREU establishes the right of every citizen to vote and to stand as a candidate at elections to the European Parliament in the Member State of residence, under the same conditions as nationals of that State. In contrast with the times when nationality was the determining factor in the right to vote, the "valorisation" of residence is an incentive to people's mobility and a condition to the full exercise of the freedom of movement and residence – all with the strictest respect towards the principle of non-discrimination on the grounds of nationality, provisioned in Article 18 TFEU and reproduced in Article 21(2) of the Charter.

These conclusions are relevant not only to the European elections, but also to the rights to participate in local elections, referred to in Article 40 CFREU. In fact, "*every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.*" Once more the aim is to fully integrate people in their country of residence and, as such, the rights provisioned in Article 40 constitute a necessary complement to the right of free movement and residence and moreover the prohibition of discrimination between nationals of different Member States. Whereas the rights in Article 40 serve more immediately a purpose of internal integration, the rights in Article 39 look directly to form a European political consciousness.

In this matter, it is useful, in fact, to add that the insertion of the concept of European citizenship worked not so much as a radical, innovative, factor, but more as a decisive impulse to the generalisation of an existing tendency in the EU countries. In fact, even before Maastricht, the intensification of the migratory flows in Europe had already led some Member States to acknowledge electoral rights on a residence basis. Therefore, in what concerns the local elections, the electoral rights of resident foreigners were already the object of provisions in countries like Denmark, Sweden, Norway, Ireland and The Netherlands; on the other hand, in the matter of European elections, the UK, Belgium, The Netherlands and Ireland also recognised the right to vote based on national laws. The European law was, therefore, more a catalyst than a creator of this wave of acknowledgment and extension of citizenship rights.

12. Regarding the operating conditions to exercise the right to vote and to stand as a candidate at elections to the European Parliament in the Member State of residence, we should look at the provisions set out in Directive 93/109/EC, of 6 December 1993, altered by the Directive 2013/1/EU, of 20 December 2012.

According to this regime, EU citizens are able to freely choose between the Member State of origin and the Member State of residence as *locus* of the exercise of their own rights to participate in politics in elections to the European Parliament (Article 4). Registration on the electoral rolls and the presentation of an eventual candidacy in the host country depends on the presentation of an express declaration of will by the citizen for this purpose (Article 8; see also Articles 9 and 10 where the elements that may comprise the formal declaration are specified). The point is to assure that no citizen will vote more than once in each election, nor stand as a

candidate in more than one Member State in the same election. To this effect, the voter must declare that he or she will only exercise his or her right to vote in the Member State of residence or that he or she is not simultaneously a candidate to the European Parliament in another Member State. Furthermore, as a safety valve, a mechanism was established to exchange information between States in order to avoid the risk of a double vote and double candidacy [Article 4, Article 9(2)(c), Article 10(1)(c) and Article 13].

13. Once the elector decides to exercise his or her rights in the Member State of residence, the rules applied to those citizens will follow the same terms provisioned for the respective national citizens.

This principle of equal treatment admits, however, some exceptions. Member States in which the percentage of non-nationals and resident EU citizens of voting age exceeds 20% of the electorate may adopt derogations, establishing a period of residence higher than the requirement for national electors. Those provisions are, nevertheless, not enforceable against those who, due to their residence outside the country of origin and the respective duration thereof, are deprived of the right to vote and the right to stand as a candidate in the Member State of which they are nationals (Article 14 of the Directive 93/109/EC). Until now, only Luxembourg has benefited from such a regime, obliging European citizens, at the time they register on the electoral roll or present a candidacy, to prove at least a five-year period of residence in order to have their right to vote and to stand as candidates at elections to the European Parliament in Luxembourg territory [Report from the Commission to the European Parliament and the Council on granting a derogation pursuant to Article 19(2) of the EC Treaty, presented under Article 14(3) of Directive 93/109/EC on the right to vote and to stand as a candidate in elections to the European Parliament, of 20 December 2007 – COM/2007/846 final].

In the other Member States, despite the existing disparities concerning the concept of residence, the requirements applicable in the matter of duration and proof of residence do not differ from the conditions applicable to nationals. In Portugal, for instance, it is recognised the active and the passive electoral capacity of every registered citizen of the EU, not nationals of the Portuguese state [Article 3(1)(c) and Article 4 of the Electoral Law of The European Parliament, approved by the Law 4/97, of April 29 and altered by the Law 4/94 of March 9, by the Organic Law 1/99 of June 22, by the Organic Law 1/2005 of January 5 and by the Organic Law 1/2011 of November 30]. For the purpose of registration (voluntary, in this case), citizens must identify themselves with a valid document of identification and present proof of legal residence in Portugal, either in the form of bank records, utility bills, a residence certificate issued by the Parish Council, a certificate of registry as a citizen of the EU or a certificate of permanent residence as an EU citizen [Articles 4(b), 9(4), 27(3), 34(2), 36(2) and 37 to 39 of the Elector Register Law, approved by Law 13/99 of March 22 and revised by Law 3/2002 of January 8, by the Laws 4/2005 and 5/2005 of September 8 and by Law 47/2008 of August 27; see also, regarding the conditions to obtain a certificate of permanent residence and the certificate of registry as an EU citizen, Law 37/2006 of August 9].

14. Regarding the right to vote, and in the absence of a uniform and harmonised electoral process at the European level, the provisions in the legal order of the country of residence have to be taken into account, namely in regard to the minimum age to vote. In Portugal, active electoral capacity is acquired at

the age of 18, likewise in most other Member States, with the exception of Austria, where the right to vote is acquired at the age of 16.

It is important, nevertheless, to mention the electoral incapacities specified, in the Portuguese case, in Article 2 of the Electoral Law of the Assembly of the Republic (approved by the Law 14/79 of May 16 and altered by the Law 8/81 of June 15, Decree-Law 400/82 of September 23, Law 14-A/85 of July 10, Decree-Law 55/88 of February 26, Law 5/89 of March 17, Law 19/90 of July 24, Law 31/91 of July 20, Law 55/91 of August 10, Law 72/93 of November 30, Law 10/95 of April 7, Law 35/95 of August 18, Organic Law 1/99 of June 22, Organic Law 2/2001 of August 25, Organic Law 3/2010 of December 15, and Organic Law 1/2001 of November 30). According to the provisions of Article 7 of Directive 93/109/EC, the Member State of residence can always ascertain that the EU constituent is not deprived of the right to vote in her or his country of origin, following an individual decision in a civil or criminal matter, preventing the individual, in the affirmative scenario, from exercising the right to vote in her or his territory of residence. It would, indeed, be unacceptable for the barred citizen to use the European rules to circumvent impediments through "vote shopping".

15. Pertaining to passive electoral capacity, Article 6 of the Directive 93/109/EC states the principle of double demand: for citizens of the Union that decide to exercise their rights to participate in the elections to the European Parliament in the country of residence, the regime of the State of residence and the regime of the State of origin are simultaneously applicable. Accordingly, any citizen of the Union who is not eligible, due to an individual judicial decision, whether it is under the law of the Member State of origin or the law of the Member State of residence, is unable to present himself or herself as candidate at the European elections in the country of residence.

Concerning the list of incompatibilities and ineligibilities, the above-mentioned Article 7 of the Act of 1976 should be taken into account, as well as the provisions in the national legal frameworks of the Member States in question. Therefore, a European citizen residing in Portuguese territory who intends to present himself or herself as a candidate for Member of the European Parliament in Portugal must take into consideration not only the incompatibilities and ineligibilities provisioned at the Community level and in his or her country of origin, but also those that result from Articles 5 and 6 of the Electoral Law of the European Parliament and Articles 2 and 5 of the Electoral Law of the Assembly of the Republic.

16. The exercise of electoral rights in the Member State of residence is not free of obstacles and difficulties from a practical and factual standpoint, as attested by the scarce use of this right, although it is been provisioned since 1992. Among the obstacles that still remain, in accordance with the last report from the Commission concerning citizenship of the Union, is a lack of adequate information, the demand for the citizen to be the bearer of a national identity document from the country of residence, or the obligation to renew registration prior to every European election. Such requirements prevent the potential candidates from exercising their electoral rights on equal terms with nationals. This is compounded by the obstacles placed by some Member States on the registration and founding of political parties by non-nationals, as well as the bureaucratic burden resulting from Community rules on the certification that the virtual candidate to the European Parliament

is not deprived of his or her right of eligibility in the country of origin and also related to the system of information exchange destined to avoid double candidacy and double voting [EU Citizenship Report 2010 – Dismantling the obstacles to EU citizens' rights COM(2010) 603 final, pages 18 to 21]. In what regards the procedures provisioned in Directive 93/109/EC, the Commission proposes to promote the simplification of the process. Moreover, it should be underlined that in 2006 the Commission had already presented a proposal to reform the Directive, with the aim of facilitating the exercise by the Union's citizens of their electoral rights, proposing suppression of the obligation to present a certificate of eligibility and the abolition of the current system of information exchange, making way for a system of *ex-post* control of the situations of double vote and double candidacy, complemented by the reinforcement of the sanctions applicable in these situations [Proposal for a Council Directive amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to vote and stand as candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals – COM(2006) 791 final; see also, on this proposal, the Position of the European Parliament of 26 September 2007]. Ultimately, the proposal was not approved, as it was blocked at Council level. However, in 2013, a partial agreement was reached that enabled the approval of Council Directive 2013/1/EU of 20 December 2012, which eliminated the demand to present a certificate of eligibility, replacing it with a declaration from the candidate confirming that he or she has not been deprived of the right to stand as a candidate in his or her Member State of origin, which is subsequently verified by the Member State of residence, alongside the competent authorities from the country of origin [Article 6 and Article 10(1)(d) of the Directive 93/109/EU, in its current wording].

Another one of the problems identified by the Commission in the above-mentioned Report regards the specific situation of the national citizens of a Member State who reside in another European Union country. In fact, contrary to what happens in Portugal, where every national living in a foreign country has the possibility to register and participate in the many internal elections [Article 4(a) of the Electoral Register Law], according to the law of various Member States (Ireland, Hungary, Denmark, Malta and Austria) their citizens lose the right to participate in the national elections if they reside in another Member State during a certain period of time. Now, given that some Member States do not recognise the right of resident non-nationals to participate in internal elections, many citizens of the Union may, therefore, be unable to vote in any internal elections, whether they are held in their Member State of origin or their Member State of residence. Such a situation is, naturally, a matter of concern for European institutions. The Commission, alongside the Member States in question, proposes the launching of a debate to identify the political options to ensure that the Union's citizens do not lose their political rights due to the exercise of the freedom of movement. It has been argued that the accession of the EU to the ECHR might, in itself, provide the impacted European citizens with the possibility to prosecute these Member States in the CJEU, based on the violation of Article 3 of the respective Protocol 1.

Paulo Rangel

ARTICLE 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

1. In the democratic functioning of politically organised societies the right to vote and to be elected to exercise public-political functions is fundamental. The core of the democratic dynamic is defined, from a certain classical perspective, by the right to vote freely and to be elected. This right, at its origin, is shaped by the limits of nationality; that is, it is part of the set of rights recognised by states as belonging to their citizens; those to whom they recognise and/or attribute that bond (of nationality). At stake with the full and free exercise of this right is the possibility of participating in the political life, affairs of state and government of the polis.

However, in the context of European integration, the original terms of the "right to vote and to stand as a candidate", determined and shaped by the classic link of nationality (rectius, of classic nationality), would end up being confronted with a logic which would necessarily go beyond this bond.

The introduction of the concept of European citizenship into law and its clarification by the CJEU in its case-law would eventually provide the inspiration – for example, and among other things – for granting all nationals of the Member States the right to vote and to stand as candidates at municipal elections in the Member States in which they reside, even if they are not nationals of that State of residence. And the exercise of that right (to vote and to stand as a candidate) is recognised on the same terms (equality) as it is recognised and enshrined for nationals of that same Member State.

2. The normative enshrinement of the right in question, independently of that which is established in the Charter itself and in Article 40 of the Charter, begins with the Maastricht Treaty [Article 8(b) TEU] and, since then, it has been associated (integrating the respective material scope) with European citizenship. With the Treaty of Amsterdam, however, this right was moved to the former EC Treaty, namely to Article 19 thereof. Currently and subsequently to the Treaty of Lisbon, the "right to vote and to stand as a candidate" has been enshrined in legislation (by way of example) in Article 20(2)(b) of the TFEU (formerly Article 17 TEC).

Furthermore, Article 22(1) of the TFEU – formerly Article 19 of the EC Treaty – stipulates that every "*citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State (...).*"

With the Charter, solemnly proclaimed in Nice on 7 December 2000, and, with the Treaty of Lisbon (via Article 6 TEU), integral to primary law, the "right to vote and to stand as a candidate" acquires the formal dignity of a fundamental right, unequivocally encompassed within the material scope of European citizenship.

3. We emphasise this last observation. In fact, from the perspective of the

affirmation of the EU and, lato sensu, of European integration, as a process of continuous reinforcement and reinvention of the democratic dynamic, in a logic of constitutional proclamation of an effective "Union of democratic law",[1] the normative consecration in the Charter of the "right to vote and to stand as a candidate at municipal elections" will have, above all, a symbolic character. And in political terms, symbolism is decisive!

Now, as we mentioned earlier, the Charter does not innovate by proclaiming the right in question. It was already formally enshrined in the Treaties – as we have noted, this enshrinement, and hence the recognition of its legal value, appeared for the first time with the Maastricht Treaty. Moreover, the Praesidium which drafted the Charter expressly expounds in its explanations the correspondence between Article 40 of the Charter and Article 22 TFEU – the then Article 19 TEC. Thus, the Praesidium itself not only recognises that the Charter does not literally and directly enshrine a new right which did not already exist in the Union legal order, but also dispels any doubt which might arise from the fact that the wording of Article 40 of the Charter and of the (current) Article 22 TFEU are not exactly the same. Therefore, the interpretation of Article 40 of the Charter cannot but be made in a manner which already results from the interpretation of the rules of the Treaty. There is no material autonomy and/or possibility of hermeneutic dissociation – which, to a certain extent, also highlights the "duplicate" character that can be attributed to the Charter in this respect. This "overlapping", however, is not only justified but indispensable, insofar as it underlines the fundamental character – especially given the dynamics of affirmation of integration as a "democratic political integration" – of the "right to vote and to stand as a candidate", which is now being considered.

4. We cannot overlook the fact that, to a large extent, the affirmation and densification (we would say, operational) of European citizenship, undertaken even before the Charter was given the status of an integral instrument of the law of the Treaties (with Lisbon and via Article 6 of the TEU), was developed by the case-law of the CJEU, on the pretext and on the basis of the application of the structuring principles of the Internal Market.[2]

Functionally, the interpretation and application of this fundamental right ("to vote and stand as a candidate at municipal elections") cannot be dissociated from its economic content. In logical terms, it appears as an extension of the very freedom of movement, which has been solidified, particularly by case-law, as an integral part of the fundamental core of citizenship.

More narrowly, the effects (and the indirect content) of the "right to vote and to stand as a candidate in municipal elections" must also be connected with the construction of the Internal Market and, in particular, with the free movement of workers.

If a national of a Member State resides (directly, by virtue of his or her European citizenship) and/or lives and works (benefiting from the free movement of workers) in the territory of another Member State, then he or she should be able to participate in decisions concerning the place and/or the community where he or she lives and

[1] Though different and not mimetic of what the foundations of a "democratic (national) rule of law" are.

[2] Today, to a certain extent, the instrumental function (leveraging the deepening of European integration), which was originally performed by the completion of the Common Market (Internal Market), has been ensured by the political and legal affirmation of citizenship.

is integrated – irrespective of his or her nationality. Otherwise – for example, by making such participation available only to national residents – the result could be unjustified discrimination on grounds of nationality and the hindering of freedom of movement. At least, it would create, in a way, a suggestion of political capitis diminutio and, therefore, of diminished citizenship for such worker (or resident) originating from another Member State.

5. There are also other possible paths for reflection which could be related to this fundamental right, now enshrined in Article 40 of the Charter. Some principles inherent to the objectives and assumptions of integration also provide context for the unequivocal affirmation of the "right to vote and to be elected at municipal elections." "*The organisation of territory and the forms of regional and local government is one of the important areas in which the Member States of the Union have seen no advantage in relinquishing their sovereignty, certainly because they cannot see any significant advantages in its possible cession to common bodies. Thus, the organisation of regional and local powers continues to be a matter for each State and, as such, the governance solutions found at European level are very different from one another.*"[3] However, the strengthening and deepening of the experience of democracy reveals the importance of proximity between those who decide and those who are the recipients of such decisions – the elected and their voters. This proximity is an element that facilitates good political decision-making and, therefore, the accountability of those who exercise power. It is ultimately the (democratic) logic of subsidiarity and its principle of subsidiarity (the fundamental principle of integration), the roots of which go back to Saint Thomas Aquinas, that is being called into question.

6. This fundamental right will therefore be recognised for citizens of a Member State. Namely those who, according to Article 20(1) TFEU, are citizens of the Union: "*Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*"

7. However, the other prerequisite for the personal application of this right is, of course, that the citizen of a Member State is residing in the territory of another Member State. Therefore, citizens of Member States who, in exercising their freedom of movement,[4] reside in a Member State other than that of which they are a national, benefit from this fundamental right. Thus, the "right to vote and to stand as a candidate at municipal elections" enshrined in Article 40 of the Charter is a right which derives from – and, to that extent, is a consequence of – the exercise of the rights enshrined in Articles 20(2)(a) and 21 TFEU. Furthermore, it is also important to consider this fundamental right in connection with – and, in part not exclusively, also as a consequence of – the right enshrined in Article 45(1) of the Charter, which states that every "*citizen of the Union has the right to move and reside freely within the territory of the Member States.*"

We have noted above that the "right to vote and to stand as a candidate" is, in part but not exclusively, also a consequence of the right enshrined in Article 45(1) of the Charter, insofar as (and as we have also stressed, see paragraph 3) there is a strictly political and democratic dimension on which it is (also) autonomously based. From

[3] João Paulo Barbosa de Melo, "A dimensão local da integração europeia", *Estratégia - Revista de Estudos Internacionais, IEEI*, no. 24-25 (2007): 195. Available at: https://www.e-cultura.pt/ieei/centro-de-documentacao/a-dimensao-local-da-integracao-europeia-por-joao-paulo-barbosa-de-melo/.

[4] Whether it (freedom of movement) derives from their European citizenship or from the fact that they are workers and, as such, reside – because they work – on the territory of another Member State.

the perspective of affirming integration as a "democratic political integration", the proclamation, albeit imminently symbolic of the "right to vote and to stand as a candidate" is unavoidable.

8. In a parallel perspective – but also reinforcing the importance of local government as an instrument for democratic life – we cannot fail to refer to the 1985 European Charter of Local Self-Government of the Council of Europe. Portugal, for example, ratified the Charter on 18 December 1990. This Charter also underlines the importance of the "right to participate in the affairs of a local authority", namely through the Additional Protocol to the Charter adopted in Utrecht on 16 November 2009 – "Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority." In particular, we highlight Article 1 of that Protocol, namely, establishing the general principle that the "*States Parties shall secure to everyone within their jurisdiction the right to participate in the affairs of a local authority*", whereby such right means the "*right to seek to determine or to influence the exercise of a local authority's powers and responsibilities*" [Article 1(1) and 1(2) of the Additional Protocol]. In this sense, paragraph 4.1, of Article 1 of the Additional Protocol to the Charter states that each State (party to the Charter) shall "*recognise by law the right of nationals of the party to participate, as voters or candidates, in the election of members of the council or assembly of the local authority in which they reside.*"

9. Returning to freedom of movement, which is therefore affirmed in connection[5] with the right enshrined in Article 40 of the Charter, it should be noted that the terms and conditions for the exercise of the right of movement and residence of Union citizens (*i.e.*, citizens of the Member States of the Union) and their families are set out in Directive 2004/38/EC of 29 April 2004. In Portugal, Law no. 37/2006 of 9 August, [6] transposes that directive into Portuguese law, regulating the conditions of exercise of the right of free movement and residence of Union citizens and their families in Portuguese territory.

However, the so-called "modalities"[7] – under the terms of Article 22(1) TFEU – will be "*adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.*" Thus, the provisions drawn up under the special legislative procedure are addressed to the Member States, which must implement them at a national level.

Pedro Madeira Froufe & Joaquim Freitas da Rocha

[5] It is appropriate, now and in this perspective that stresses the connection between freedom of movement and the right to "vote and stand as a candidate at municipal elections", to say that this freedom is the cause of this right.

[6] Law no. 37/2006 of 9 August – Regulates the exercise of the right of free movement and residence of European Union citizens and members of their families in the national territory and transposes to the domestic legal system the Directive no. 2004/38/CE, of the European Parliament and of the Council, of 29 April. no. 153, Series I, 9 August 2006.

[7] Note: not to be confused with the conditions of access and entitlement to the right.

ARTICLE 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

1. The fundamental right to good administration, established in Article 41, combined with Article 42 – concerning the right of access to documents of the Union's institutions, bodies and organisms – and with Article 43 – which defines the right to refer to the Ombudsman of the Union in cases of maladministration –, establishes a relevant set of rights and warranties for all people in their respective interactions with the administration, highlighting the concept of the Union as one based on the rule of law and reinforcing European citizenship.

It should be noted that Article 41 has a wide subjective scope of application, owing to the fact that it attributes the quality of holder of the right to a good administration to every person, whilst the rights established in Articles 42 and 43 are reserved to any citizen of the Union and to any natural or legal person residing or having its registered office in a Member State.

The subjective scope of application of Article 41 is the most adequate because it covers every person, natural and legal[1] that, regardless of nationality, residence and registered office, and for any reason or in whichever circumstance, establishes a relation with the Administration. Consequently, and for the same reasons, the restriction contained in Articles 41 and 42 is questionable, especially in view of the fact that the latter is susceptible to difficulties of applicability, given the possibility of linking the precepts.

2. The fundamental right to good administration is exercised both *vis-à-vis* the Union's institutions, bodies and organisms and, as a result of Article 51 of the CFREU, *vis-à-vis* the Member States when they are implementing Union law, *i.e.*, the respective administrative organisations at a national, regional or local level. It is an especially pertinent precept, given the relevance of the execution function of the Union's law exercised by the Member States. But furthermore, and in an increasingly intense way,

[1] See Judgment *Orkem v. Commission*, 18 October 1989, Case 374/87, ECLI:EU:C:1989:387.

within the scope of the shared execution or cooperation (Article 197 of the TFEU), which requires joint and coordinated action by the Union's administration and national administrations in the context of a functionally European administration, to ensure the uniform application of Union law. By providing that Member States shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers conferred on the Union by the Treaties, Article 51, harmonised with Article 52(2), limits and renders relative the principle of the organisational and procedural (and also of process) autonomy of the Member States, since that autonomy cannot compromise the uniform application and effectiveness of Union law.

3. The concept of "good administration" is hard to delineate precisely, which means it is important to take into consideration: (a) the case-law of the CJEU; (b) the concept of "good governance", used by the European Commission in the White Paper on European Governance;[2] (c) the concept of "open, efficient and independent European administration" as enunciated in Article 298 TFEU and also (d) the concept of "maladministration", defined in Article 228 TFEU.

(a) Initially conceived as a mere obligation, the principle of good administration was then developed by the case-law as a general principle, until it was enshrined as a fundamental right by the Charter.

The first references emerged in the beginnings of the Community, when a Community judge underlined the obligation of the High Authority of the ECSC to make a profound examination of the interested person's claims [judgment of the CJEU *Usines* of 10 of December 1957, cases 1/57 and 14/57, and *Geiling*, of 12 February 1960, cases 16/59, 17/59 and 18/59]. Likewise, the decisions of the Commission regarding the competition regime [judgments (CJEU) *Societé Techique*, of 30 of June 1966, case 56/65, and Portelange, of 9 of July 1969, case 16/90].[3]

In the 1990s, Community case-law used the principle of good administration as an instrument for monitoring the activities of the institutions in the case of decisions involving a wide margin of discretion or based on more complex technical evaluations.[4]

As stated by the Advocate General Van Gerven, in the Opinion on the *Nolle*[5] case "*in a matter such as this, in which the Community institutions have a wide discretion, it is all the more important that the decision adopted shall be subject to a careful review by the Court with regard to observation of essential formalities and the principles of good administration, which include the duty of care. From the same point of view the Court reviews the question whether, in accordance with the duty of care, an authority on which a wide discretion is conferred has determined with the necessary care the features of fact and of law on which the exercise of its discretion depends. That is why the Court's case-law places emphasis upon the observance of the rights of the defence, the prevention of misuse of power, the requirement of a statement of the reasons on which a decision is based and the duty to take into account all the essential fact*ors."

---

[2] 25 July 2001, COM(2001)428 final.

[3] See Judgments CJEU *Societé Techique*, 30 June 1966, Case 56/65, ECLI:EU:C:1966:38 and *Portelange*, 9 July 1969, Case 10/69, ECLI:EU:C:1969:36.

[4] See Judgments CJEU *Fediol v. Commission*, 22 June 1989, Case C-70/87, ECLI:EU:C:1989:254; *Nölle v Hauptzollamt Bremen-Freihafen*, 22 October 1991, Case C-16/90, ECLI:EU:C:1991:402; and *Technische Universität München v. Hauptzollamt München-Mitte*, 21 November 1991, Case C-269/90, ECLI:EU:C:1991:438.

[5] Opinion of Advocate General, *Nölle v. Hauptzollamt Bremen-Freihafen*, 11 July 1991, Case C-16/90, ECLI:EU:C:1991:317.

In another especially relevant case, the First Instance Court (now GC) underlined that "*the diligent and impartial treatment of a complaint is reflected on the right to a good administration that is part of the common general principles of the rule of law to the constitutional traditions of the Member States.*" In fact, Article 41(1) of the Charter, proclaimed on 7 of December 2000, in Nice, confirms that "*every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*", concluding that "*it is appropriate to consider, first of all, the nature and scope both of that right and of the administration's concomitant obligations in the specific context of the application of Community competition law to an individual case.*"[6]

Whilst certainly the principle of good administration was developed by case-law in the scope of economic law and, especially, competition law (in particular in the scope of State aid), it is also important to emphasise its application in the domain of the European civil service. In recent years, it has been developed in a wide set of other areas, disciplined by the Union's law, such as in the field of public procurement, in particularly entered into by the European institutions, non-contractual liability and the implementation of European funds.

(b) Good governance rests, as defined in the White Paper on European Governance, upon five principles: i) openness that demands transparent action from the institutions, bodies and organisms of the Union, and articulate communication with the Member States and the use of accessible language; ii) participation in the European policies, from conception to implementation; iii) efficacy, which implies the evaluation of the adequacy of policies to achieve stated goals, as well as the definition of procedures to execute policy, both at a European and a national level; iv) coherence of the general policies within the Union's framework; v) accountability, presupposing a division of the attributions and competences of the several "actors", both at the European and at the national level.

However, it is unequivocal that the Charter's writers deliberately and in a cautious way did not explicitly invoke the concept of "good governance", perhaps because of its ambiguity and ideological nature.[7]

Currently, the reference to "good governance" is in Article 15 TFEU, where it is strictly associated to the participation of civil society or principle of participatory democracy and to the principle of openness and transparency, including the right of access to documents from the institutions, bodies and organisms of the Union, also upheld as a fundamental right by Article 42 of the Charter.

(c) The concept of an "open, efficient and independent European administration", established in Article 298 TFEU stands as a necessary precondition to the full pursuit of the attributions granted to the Union's institutions, bodies and organisms.

And if it is certain that the "open administration" presupposes the right of access to documents of the Union's institutions, bodies and organisms, established in Article 15 TFEU and set out as a fundamental right in Article 42 of the Charter, without prejudice to the reservation of the protection of personal data, in Article 16 TFEU and in Article 8 Charter, it is nevertheless important to underline the obligation to adopt legislation that assures the effectiveness and the independence

[6] See Judgment (Court of First Instance) *Max.mobil v Commission*, 30 January 2002, Case T-54/99, ECLI:EU:T:2002:20.

[7] Laurence Burgorge-Larsen, Anne Levade, Fabrice Picod, (eds.), *Traité établissement une Constitution pour l'Europe? Commentaire article par article, Tome 2 – La Charte des droits fondamentaux de l'Union* (Brussels: Bruylant, 2005), 528.

of the European Administration, interpreted according to a functional conception that includes the institutions, bodies and organisms of the Union and the national administration whenever implementing the Union's law.

(d) The concept of "maladministration" as a premise of the fundamental right to refer to the Ombudsman, as required in Article 228 TFEU and established in Article 43 of the CFREU, is the reverse of the concept of "good administration" defined in Article 41 of the CFREU. Even though the Treaty does not define the concept of "maladministration", its first definition dates back to 1995, in the Ombudsman's report, according to which "*there is maladministration if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance.*"

Nevertheless, as the CJEU made clear, the European Ombudsman's finding of maladministration is not binding on the Court which found in *HSBCH v Commission* that public statements made by a Commissioner did not violate the principle of impartiality.[8]

The European Code of Good Administrative Behaviour, approved by a European Parliament resolution of 6 of September of 2001[9] aims to explain the "right to a good administration" according to Article 41 of the Charter, gathering, in a clear, concise and accessible wording, the principles of good administration that must guide the conduct of every public official in interaction with the public, affirming the values inherent to the public service and safeguarding the rights of all in their dealings with the Administration.

Notwithstanding the acceptance that has been given to the European Code of Good Administrative Behaviour, there is a need for a general framework of administrative procedure, binding an entire complex and multilevel Administration before all that relate with it, as it is already in place in several Member States. This framework would contribute to a much-needed legal certainty, required for the effectiveness of the right to good administration.

4. The fundamental right to a "good administration", acknowledged for all those interacting with the Administration, in a matter in which the Union's law is at stake, represents a very positive advance in the reinforcement of the administrative guarantees.

It is an inherently complex right, which rests on the conception of the Union as an entity based on the rule of law and as an inductor of a set of principles and duties to be observed by the Administration, organically European or functionally European, whenever the application of the Union's law is at issue.

This has been repeatedly emphasised by the CJEU, relying on Article 51(1) of the CFREU, which provides that the provisions of the Charter are addressed to Member States *only* when they are implementing Union law. Recalling its case-law, the Court states in *Aklagaren v Hans Akerberg Fransson* that *"[t]hat article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union. The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the*

[8] See Judgment CJEU *HSBCH v. Commission*, 12 January 2023, Case C-883/19 P, ECLI:EU:C:2023:11.
[9] C5-0438/2000/2212 (COS).

Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures."[10]

5. The demand, now in Article 41(1) of the CFREU, for an impartial, fair and timely treatment has been successively specified by the case-law, which has accentuated the need for an attentive examination of the set of facts and appropriate elements that determine the decision, corresponding to an obligation of instruction,[11] encompassing the obligation to take into account the requests or indications provided by the recipient of the decision,[12] as well as all relevant elements of the case.[13]

The duty of a good administration is inseparably connected to a duty of diligence, requiring the pondering of various interests in order to search for a balance between the needs of the administrative action and the protection of those subject to administration,[14] which gains special relevance within the scope of the European civil service.[15]

The reference to a "reasonable time" results from an application of the right to effective judicial protection, as defined in Article 47 of the Charter and in Article 6(1) of the ECHR, and which presupposes the judgment within a reasonable time, to the administrative procedure. In the context of the administrative procedure, the Court has held that unjustified inactivity or evasive conduct by the Administration entails a violation of the right to good administration.[16]

6. The right to a good administration is deconstructed into a set of sub-principles, enumerated, albeit not exhaustively, in Article 41(2).

In Article 41(2)(a) stands the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. Therefore, it establishes the principle *audi alteram partem* that is an expression of the right to a fair hearing for the other party, applied to the administrative procedure. Nevertheless, the Court "*noted that observance of that principle must be guaranteed even in the absence of any rules governing the procedure in question, but that, in order for such an infringement to result in an annulment, it must be established that, had it not been for that irregularity, the outcome of the procedure might have been different.*"[17]

In Article 41(2)(b) stands the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. This is a right of access to the administrative procedure that is obviously different from the right of access to documents found in Article 42. The intent is to guarantee to the interested person the access to the procedure that concerns

[10] See Judgment CJEU *Aklagaren v. Hans Akerberg Fransson*, 26 February 2013, Case C-617/10, ECLI:EU:C:2013:105.

[11] See Judgment (First Instance Court) *Oliveira v. Commission*, 19 March 1997, Case T-73/95, ECLI:EU:T:1997:39.

[12] See Judgment CJEU *Lucchini v. Commission*, 19 October 1983, Case 179/82, ECLI:EU:C:1983:280.

[13] See Judgment CJEU *Masdar (UK) v.Commission*, 16 December 2008, Case 47/07 P, ECLI:EU:C:2008:726.

[14] See Judgment CJEU *France v. Monsanto*, 8 January 2002, Case C-248/99 P, ECLI:EU:C:2002:1.

[15] See Judgment CJEU *Ditterich v. Commission*, 5 May 1983, Case 207/81, ECLI:EU:C:1983:123.

[16] See Judgment GC *Randa Chart v. European External Action Service*, 16 December 2015, Case T-138/14, ECLI:EU:T:2015:981.

[17] See Judgment GC *Euris Consult v. European Parliament*, 30 April 2014, Case T-637/11, ECLI:EU:T:2014:237.

him or her, regardless of the fact that Article 42 establishes a general principle of access to documents, in the scope of an open and transparent administration.

Nevertheless, this right has limits that result from the protection of other legitimate interests of confidentiality and of professional and business secrecy, which are especially relevant in the domain of economic law.[18]

In Article 41(2)(c) stands the obligation of the administration to give reasons for its decisions, also defined in Article 296 TFEU. This has been one of the rights most developed by the CJEU, refocusing appreciation of the sufficient and exact nature of the motivation, which must contain the relevant factual and law elements and highlight in a clear and unequivocal way the reasoning of the decision-maker. The level of demand of the reasoning varies, in line with the case-law, according to the circumstances of the specific case, being more exigent regarding the exercise of acts of discretionary competence and more complex technical evaluations.[19]

7. Article 41(3) establishes that, in the EU, every person has the right to make good any damage caused by its institutions or by its servants in the performance of their duties, as defined in paragraph 2 of Article 340 TFEU. The obligation to compensate will be fulfilled in accordance with the general principles common to the laws of the Member States, without prejudice to consideration of the abundant case-law of the CJEU issued on this matter.

8. In Article 41(4) every person is guaranteed the right to address the Union's institutions in one of the languages of the Treaties and to receive an answer in the same language. It is a reproduction of the provisions set in Article 20(2)(d) TFEU, but with wider parameters – broadening to every person the right given to citizens.

9. The right to a good administration, as established in Article 41, includes the right to an effective judicial protection, as defined in Article 47 of the Charter.

Cláudia Viana

[18] See, *inter alia* Judgment CJEU *BPB Industries v. Commission*, 6 April 1995, Case C-310/93 P, ECLI:EU:C:1995:101.

[19] See the following judgments: *Usinor*, 1 July 1986, Case 185/85, ECLI:EU:C:1986:276; *Atlanta*, 9 November 1995, Case C-466/93, ECLI:EU:C:1995:370; *Commission v Council*, 26 March 1987, Case 45/86, ECLI:EU:C:1987:163; *Tiercé Ladbroke*, 18 September 1995, Case T-471/93, ECLI:EU:T:1995:167.

ARTICLE 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

1.[1] The enshrinement of the fundamental right of access to documents and information held by the institutions, bodies, offices and agencies of the Union in the CFREU highlights the adherence of the Union to a model of public administration ruled by openness and transparency. Article 42 expresses an important commitment to ensure the engagement of the citizens of the EU in decision-making processes, as access to information that is in the sphere of the institutions, organs, and bodies of the EU is a precondition of an enlightened participation, able effectively to contribute to the strengthening of democracy and legitimacy within the EU.

2. With the claim that "*the transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the Administration*" (as stated in the "Declaration on the right of access to information", attached to the Maastricht Treaty's Final Act), a long process was initiated mainly in the last decade of 20th century, that would eventually lead to the recognition of this fundamental right. The concern with strengthening citizens' confidence in the democratic functioning of the Community's institutions was one of the principal drivers of the process of recognition of a right which, especially after the impulse given by the Maastricht Treaty, would occupy a prominent place on the agenda of the Community with regard to fundamental rights. The adoption of the European Council's declarations of Birmingham and of Edinburgh was followed by the approval of the *Code of Conduct on public access to the documents of the Commission and the Council* (see Council Decision 93/731/EC of 20 December 1993, and Commission decision 94/90/ECSC, EC, Euratom of 8 February 1994). After the introduction of this Code, which was intended to discipline the access to Council and Commission documents, specific provisions on the exercise of the right of access to documents of the European Parliament would be adopted (European Parliament Decision 97/632/EC, ECSC, Euratom, of 10 July 1997).

However, the fact that the recognition and ruling of this right was left to the discretion of the institutions, as a matter of internal organisation, did not fail to attract criticism;[2] as it allowed the institutions to call into question the binding

[1] The following commentary is a close version of the one firstly published in Portuguese, in 2013, under the coordination of Professors Alessandra Silveira and Mariana Canotilho. Ten years later, the deadlock over the revision of Regulation (EC) no. 1049/2001 of 30 May 2001 persists, despite the efforts made, in particular by the European Ombudsman, to promote the adoption of new general and binding rules, that incorporate the case-law of the courts of the EU and reflect the impact that new technologies have had on communication processes and patterns over the past two decades. As such, only minor updates were added where found relevant.

[2] Judgment of the CJEU K*ingdom of the Netherlands v. Council of the European Union*, 30 April 1996, Case C-58/94, ECLI:EU:C:1996:171.

nature of those instruments, as well as their ability to effectively confer rights to citizens.[3]

Consistent pressure towards the adoption of legal instruments determining the general terms of access to the documents held by the institutions was sustained by the European Ombudsman and by some Member States. The accession, in 1995, of Sweden – a country in which the recognition of the fundamental right of access to documents, as a corollary of the right of access to information, freedom of expression and press freedom, goes back to the adoption of the Freedom of the Press Act (*Tryckfrihetsförordningen*, 1766) – also contributed to an intensification of the debate about the level of protection conferred by Community law with regard to this fundamental right.

The right of access to the documents held by the European Parliament, the Council and the Commission, would then be enshrined by the Treaty of Amsterdam in Article 255 of the EC Treaty. A few years later, with a text very similar to the first paragraph of that Article, this right would also come to figure in Article 42 CFREU, as proclaimed in December 2000.

In 2001, Regulation (EC) no. 1049/2001 of 30 May 2001 was finally adopted, laying down the general conditions of exercise of the right of access to any document of the European Parliament, the Council and the Commission, as it recognised that "*openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system*", thus contributing to "*strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.*"[4]

3. In its current phrasing, Article 42 is the result of the changes introduced in 2007, following the new proclamation of the Charter, and corresponds to the wording that had been proposed for Article II-102 of the Treaty establishing a Constitution for Europe. Two differences may however be highlighted: the right of access to documents now binds all the institutions, bodies, offices and agencies of the Union; and it covers any document, regardless of its format.

Containing a synthesis of Articles I-50, II-102 and III-399 of the Constitutional Treaty, Article 15 of the Treaty on the functioning of the EU meaningfully *moved* this fundamental right to the chapter devoted to *Principles*. Hence it clarified the close relationship between this fundamental right and the principles of openness and closeness to the citizens (Articles 1 and 10 TEU) and the participation of citizens in decision-making (Article 10 TEU), which must guide the activity of the institutions and bodies of the Union.

4. The explicit consecration of this fundamental right distinguishes the CFREU from other charters and treaties on fundamental rights.

The ECHR is silent as to such a right and the ECtHR, initially, repealed the possibility of interpreting Article 10 ECHR so as to cover, under the freedom of access to information, *inter alia*, the right of access to documents.[5] However, as stated by the Court recently "*the question whether – in the absence of an express reference to access to information in Article 10 of the Convention – an applicant's complaint that he*

[3] Judgment of the GC *WWF UK v. Commission of the European Communities*, 5 March 1997, Case T-105/95, ECLI:EU:T:1997:26.

[4] Regulation (EC) no. 1049/2001, Recital 2.

[5] Judgment ECtHR *Gaskin v. United Kingdom*, 7 November 1989, no. 10454/83.

was denied access can nevertheless be regarded as falling within the scope of this provision is a matter which has been the subject of gradual clarification in the Convention case-law over many years."[6] Important steps were given when the CJEU acknowledged that the restrictions imposed by public authorities on access to documents may be found in breach of freedom of expression and the right to receive and disseminate information enshrined in the Convention under certain circumstances.[7] In the case of *Magyar Helsinki Bizottság v. Hungary* the Court found "*the time had come*" to clarify its case-law and further considered that "*Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right*" (para. 156).

The Council of Europe meanwhile adopted the Council of Europe Convention on Access to Official Documents (also known as the *Tromsø Convention*), opened to signature on the 18th of June 2009, which explicitly recognises a general right of access to documents issued by any public authority, and lays down the terms under which such a right shall be exercised.

Within the framework of the UN, Article 19 (2) of the 1966 ICCPR expressly guarantees the "freedom to seek information", in regard of which the UN Human Rights Committee (UNHRC) has pointed out "that the reference to the right to 'seek' and 'receive' 'information' as contained in Article 19, paragraph 2, of the Covenant, includes the right of individuals to receive State-held information, with the exceptions permitted by the restrictions established in the Covenant."[8] Another milestone was achieved with the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention), signed in June 1998, which protects the right of access to relevant documents held by public authorities only on environmental matters (Article 4 of the Aarhus Convention).

In what regards the national law of the Member States of the Union, currently one may affirm that the right of access to official documents is recognised and respected by the vast majority of the EU countries. Notwithstanding different configurations, the right of access to documents can be found in the Constitutions of several Member States, such as Belgium (Article 32), Spain [subparagraph (b) of Article 105], Finland (Article 12), the Netherlands (Article 110), Poland (Article 61), Portugal (Article 268, paragraph 2), and Sweden (*Regeringsformen*, Chapter 2, Article 1, paragraph 2), amongst others.

5. The right of access to documents is necessarily related to other fundamental rights enshrined in the Charter. First and perhaps most obviously, the right of access to documents is inseparable from the right to good administration, since the

[6] Judgment ECtHR *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, no. 18030/11, paras. 126-133.

[7] See Judgments ECtHR *Társaság a Szabadságjogokért v. Hungary*, 14 April 2009, no. 37374/05; *Kenedi v. Hungary*, 26 May 2009, no. 31475/05 and *Österreichische Vereinigung v. Austria*, 28 November 2013, no. 39534/07.

[8] *Toktakunov v. Kyrgyzstan*, 28 March 2011, Communication no. 1470/2006, para. 6.3.

exercise of the rights specified in paragraph 2 of Article 41, as well as the scrutiny of the impartiality and fairness of the activity of the institutions, bodies, offices and agencies of the Union, is made possible or enhanced by the access to documents they hold. Access to official documents is also a fundamental condition of the exercise of freedom of expression and information (Article 11).

Restrictions upon full access to any document are, on the other hand, imposed with reference to the protection of other fundamental rights, such as rights to respect for privacy (Article 7 CFREU) and the protection of personal data (Article 8 CFREU) as well as by the pursuit of public interests, when these may be undermined by the untimely disclosure of confidential data.

6. Article 15 (3) of the TFEU (under which, in accordance with paragraph 2 of Article 52 CFREU, the right of access to documents shall be exercised) states that this fundamental right is subject to the "*general principles and limits on grounds of public or private interest governing this right of access to documents*", to be "*determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.*"

After two decades in force, Regulation (EC) no. 1049/2001 remains the key legal framework[9] of the exercise of this fundamental right, on the basis of which the case-law of the European Courts was developed, as well as the very relevant contribution of the Ombudsman on this matter. A proper understanding of the applicable legal scheme cannot be obtained without an articulated reading of the treaties, the CFREU and the decisions of the Courts which, faced with a deadlock in the revision of Regulation no. 1049/2001, have sought to make it meet the new demands of the EU stakeholders.

7. As established by Article 42 CFREU and Article 15 TFEU, every citizen of the EU, or any natural or legal person that resides or has its registered office in the territory of a Member State, has the right to access documents, "*either following a written application or directly in electronic form or through a register*" [Article 2 (4) of Regulation (EC) no. 1049/2001, hereinafter called "Regulation"]. This does not prevent the institutions, bodies, offices and agencies of the Union from granting this right to any physical or legal person (Article 2, paragraph 2, of the Regulation), regardless of nationality, residency or place of registered office. But access to environmental information, under Regulation (EC) no. 1367/2006, is granted "to the public" in general, regardless of the nationality, residence or place where the applicant is registered [Articles 1 and 2 of Regulation (EC) no. 1367/2006], so seemingly the trend is to broaden the personal scope of this right.

8. Since it was amended in 2007, Article 42 covers all the bodies, agencies and institutions of the Union. Therefore, not only the Commission, the Council and the European Parliament, but also the European agencies (such as Europol and Eurojust)[10], the services (such as the External Action Service) and the committees

[9] Albeit some matters, such as competition and the environment, are subject to special rules – regarding competition, *v.* the rules especially applicable to the consultation of the Commission process in the context of merger control stand out [Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement (agreement on the European Economic Area) and Regulation (EC) no. 139/2004 (2005/C 325/07)]; with regard to access to environmental information, *v.* the Directive 2003/4/EC of 28 January 2003, which is complemented by Regulation (EC) no. 1367/2006, of 6 September 2006 (on the application of the Aarhus Convention to Community institutions and bodies).

[10] In accordance with Article 65 (2) of the Europol Regulation [Regulation (EU) no. 2016/794 of the

[which are governed, in this respect, by the same principles and rules that apply to the Commission under Article 9, paragraph 2, of Regulation (EU) no. 182/2011, February 16 2011] shall grant access to its documents, as provided for in Article 15 (3) of the TFEU. While exercising administrative tasks, and only then, the CJEU, the European Central Bank and the European Investment Bank shall also observe the same procedures.[11]

In fact, soon after the adoption of the Regulation, the European Parliament, the Council and the Commission agreed "*that the agencies and similar bodies created by the legislator should have rules on access to their documents which conform to those of this Regulation*" [Joint Declaration relating to Regulation (EC) no. 1049/2001], and called on other agencies and institutions to take the initiative to bring their rules into conformity with those provisions. Many have voluntarily chosen to apply the Regulation, or to adopt similar rules regarding access to their respective documents.

9. The right of access, as granted by Article 42, comprises all and any documents (even if the applicant is not directly mentioned in them) that are held by the entities addressed, whether they have been prepared by these, or just received or collected by them [Article 2(3) of the Regulation]. Thus, the documents prepared by third parties may also be disclosed by the addressed entity. In this case, the body that receives the request shall consult the authors of the document concerned, unless there are clear grounds for granting or refusing access [Article 4(4)].

Member States have the prerogative to request that institutions do not disclose documents of their authorship without prior agreement [Article 4(5)]. Doubts were raised as to whether this meant that the *author's rule* – in effect under the 1993 Code of Conduct and according to which the author had the "power of veto" over the disclosure of its documents by an institution of the Union – had after all *survived*, despite the approval of the Regulation. The Court definitely ruled out this interpretation, by stating that "*the institution concerned cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation no. 1049/2001.*"[12]

Even when the question of document authorship is settled, determining what a 'document' is can prove problematic. While the CJEU has clearly held that "*the right of access to documents of the institutions applies only to existing documents in the possession of*

European Parliament and of the Council, of 11 May 2016], adopted the detailed rules for applying Regulation (EC) no. 1049/2001 with regard to Europol documents on 13 December 2016, which may be found at https://www.europol.europa.eu/sites/default/files/documents/decision_of_the_mb_rules_applying_reg_1049_2001.pdf. Recently, detailed rules for applying Regulation (EC) no. 1049/2001 were also adopted by the College of Eurojust – *v.* Decision 2021-12 of 7 December 2021, available at https://www.eurojust.europa.eu/about-us/access-documents/right-access.

[11] The access to documents held by these institutions is ruled by special decisions or guidelines. For the CJEU, *v.* the Decision of the CJEU of 26 November 2019 concerning public access to documents held by the CJEU in the exercise of its administrative functions (OJ C 45, 10.2.2020); for the European Central Bank, *v.* the Decision of the European Central Bank 2004/258/EC, of 4 March 2004 (OJ L 80, 18.3.2004) as subsequently amended; and for more on the European Investment Bank Transparency Policy, *v.* https://www.eib.org/en/publications/eib-group-transparency-policy-2021.htm.

[12] Judgments of the GC *Co-Frutta Soc. coop. v. European Commission*, 19 January 2010, joined cases T-355/04 e T-446/04, ECLI:EU:T:2010:15, paras. 80-82; and in *French Republic v. European Commission*, 5 April 2017, Case T-344/15, ECLI:EU:T:2017:250, paras. 36-37; as well as the Judgments of the CJEU in *Sweden v. Commission*, 18 December 2007, Case C-64/05 P, ECLI:EU:C:2007:802, paras. 58-64, and *IFAW v. Commission*, 21 June 2012, Case C-135/11 P, ECLI:EU:C:2012:376, para. 57.

the institution concerned and that Regulation no. 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist",[13] doubts may arise regarding documents that can be easily generated by a database[14] or that are not usually stored, such as work-related text and instant messages.[15]

In any case, the maintenance of consistent documentation is the necessary condition to the exercise of this right, so the lack thereof is not admissible as a justification to deny access.[16]

10. The refusal of access to documents may, however, be considered legitimate when the protection of relevant public or private interests is at stake. Articles 4 and 9 of the Regulation contain different sets of grounds for restricting this fundamental right. One set refers to public interests; public security, defence and military matters, international relations, and the financial, monetary or economic policy of the Community or of a Member State [Article 4 (1) a)]. Where the disclosure would undermine these interests, and even if there is a legitimate public interest in the dissemination of the information, access to documents shall be denied.[17] These same public interests may also justify the classification of documents as sensitive documents.[18]

A second group of motives for refusing disclosure results from the protection of other fundamental rights, such as the right to privacy and integrity of the individual, and the protection of personal data.[19]

Different from these, are the *relative* exceptions contemplated by Article 4, which refers to those cases in which the refusal will only be admissible if no overriding public interest in the disclosure of information can be substantiated by the applicant.[20] Here we find various typical situations, in which disclosure could jeopardise the regular exercise of the functions of the institutions and bodies concerned: in investigation activities, auditing and inspection;[21] in court proceedings or legal advice;[22] or whenever the disclosure of documents is susceptible to undermine the regular conclusion of a decision-making process.[23]

---

[13] Judgments of the CJEU *Typke v. Comission*, 11 January 2017, Case C-491/15 P, ECLI:EU:C:2017:5, para. 31; and *Strack v. Commission*, 2 October 2014, Case C-127/13 P, ECLI:EU:C:2014:2250, paras. 38 and 46.

[14] See *Typke v. Comission*, paras. 33-41, and the judgment of the GC *Julien Dufour v. European Central Bank*, 26 October 2011, Case T-436/09, ECLI:EU:T:2011:634, paras. 164-167.

[15] See the Decision of the Ombudsman of 12 July 2022, in case 1316/2021/MIG.

[16] Judgment of the GC in *WWF European Policy Programme v. Council of the EU*, 25 April 2007, Case T-264/04, ECLI:EU:T:2007:114, paras. 61-63.

[17] Judgment *WWF European Policy Programme*, paras. 44-45.

[18] Article 9 (1) and the Judgment of the CJEU in *Jose Maria Sison v. Council of the EU*, 1 February 2007, Case C-266/05 P, ECLI:EU:C:2007:75, paras. 82-83 and 86.

[19] Article 4 (1) b), see also the Judgment of the GC *The Bavarian Lager co. Ltd v. European Commission*, 8 November 2007, case T-194/04, ECLI:EU:T:2007:334, as well as the Judgment of the CJEU *European Commission v. The Bavarian Lager Co. Ltd.*, 29 June 2010, Case C-28/08 P, ECLI:EU:C:2010:378.

[20] Article 4 (2) and (4) – see also the Judgment of the CJEU *LPN and Finland v Commission*, 14 November 2013, joined cases C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738, para. 94.

[21] Judgment of the GC *Ryanair Ltd v. European Commission*, 10 December 2010, joined cases T-494/08 to T-500/08 and T-509/08, ECLI:EU:T:2010:511, paras. 70-80; Judgment of the CJEU *Technische Glaswerke Ilmenau v. European Commission*, 29 June 2010, Case C-139/07 P, ECLI:EU:C:2010:376, paras. 61-63.

[22] Judgment of the CJEU *Kingdom of Sweden et al. v. Association de la presse internationale A.S.B.L. (API)*, 21 September 2010, joined cases C-514/07 P, C-528/07 P and C-532/07 P, ECLI:EU:C:2010:541, paras. 130-135, and in *European Commission v. Patrick Breyer*, 18 July 2017, Case C-213/15 P, ECLI:EU:C:2017:563, paras. 40-42.

[23] Judgment of the GC *Access Info Europe v.* Council, 22 March 2011, Case T-233/09, ECLI:EU:T:2011:105, paras. 62-65, and *Emilio De Capitani v. European Parliament*, 22 March 2018, case T-540/15, ECLI:EU:T:2018:167, paras. 63-64.

The commercial interests of a natural or legal person, including intellectual property, may also be taken in consideration, but the interests shall be overridden whenever there is a superior public interest in the disclosure of information.[24]

The limitations to these fundamental rights shall, however, be strictly interpreted.[25] The principle of proportionality demands, for instance, that a partial refusal of access to a document prevails over total refusal, when sufficient to protect effectively the public or private interests concerned.[26] Likewise, if the reasons that justify the refusal cease to subsist so shall the refusal [Article 4 (7)]. Finally, the refusal of access to documents, even sensitive documents, must always be duly reasoned.[27]

11. Within the legal framework of Regulation (EC) no. 1049/2001, documents should, ideally, be made accessible to the public directly in electronic form or through a register that each entity shall keep updated and organised [Articles 2 (4), 11 and 12].

If it is not possible to obtain direct access to documents, the applicant must submit an application to the institution, body or agency where they are held, in writing, in whatever form and with no obligation of stating the reasons for the request [Article 6 (1)], as long as the request for access is made in a sufficiently precise manner to enable the institution to identify the document.[28] The processing of applications, whether initial or confirmatory, must be promptly concluded, leading either to the granting of access to the requested document (Article 10); or a partial or total refusal to grant access to documents, which must be substantiated [Article 7 (1) and 8 (1)]; or a tacit refusal, in case the requested entity fails to respond to the applicant within the prescribed time limits [Articles 7 (4) and 8 (3)]. If after submitting a confirmatory application the refusal is maintained, the applicant may file a complaint with the European Ombudsman[29] in accordance with Article 228 TFEU, or appeal in court against the entity, under Article 263 TFEU.

12. The enforcement and the development of the legal framework of access to documents is now greatly dependent on the review of Regulation (EC) no. 1049/2001, in respect of which the Commission, the Council and the European Parliament have revealed substantial divergences.[30] The Commission's proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) no. 1049/2001 regarding public access to documents held by the European Parliament, the Council and the Commission [presented by the Commission on 21 March 2011, COM (2011) 137 final] merely updated the legal basis of the Regulation in regard

[24] Article 4(2) – on this exception, see Judgment *Co-Frutta Soc. coop.*, paras. 126-140, and the Judgment of the GC *Deutsche Telekom AG v. European Commission*, 28 March 2017, Case T-210/15, ECLI:EU:T:2017:224, paras. 22-47.

[25] See judgment *Emilio De Capitani v European Parliament*, paras. 61-62, and the case-law there cited.

[26] Article 4(6) – see also the Judgment in *WWF European Policy Programme*, no. 50.

[27] Articles 7(1), 8(1) and 9(4) – on this subject see the Judgment of the CJEU *Sweden/Turco v. European Council*, 1 July 2008, joined cases C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, paras. 8-50; also in *Access Info Europe v. Council*, para. 66-69, and in *LPN and Finland v. Commission*, para. 44.

[28] Judgment *Liviu Dragnea v. European Commission*, 13 January 2022, Case C-351/20 P, ECLI:EU:C:2022:8, paras. 68-70.

[29] The European Ombudsman has consistently played a key role in promoting the right of access to documents, as most complaints yearly handled regard the difficulties in achieving a timely and effective access to information (see, for instance, the Annual Report 2021 of 17 May 2022, available at https://www.ombudsman.europa.eu/en/publication/en/156017).

[30] See the European Parliament resolution of 17 December 2009 on the improvements to be introduced in the legal framework for access to documents, following the entry into force of the Treaty of Lisbon, Regulation (EC) no. 1049/2001, 2010/C 286 E/03.

to the Lisbon Treaty's provisions. And although it is acknowledged that "*a failure to agree on a new version of Regulation (EC) no. 1049/2001 would send the wrong signal about the nature of the EU to its citizens, and (...) such a failure would undermine the legitimacy of EU decision-making*",[31] no significant progress seems to have been made in the past decade.

It is difficult not to perceive this impasse as a symptom of a much-needed reform that mirrors, not just the evolution of over two decades, but also the commitment to promote *good administration* within the Union, based on openness, transparency, publicity and participation.

Catarina Gouveia Alves

[31] As stated in para. L. of the European Parliament resolution of 12 June 2013 on the deadlock on the revision of Regulation (EC) no. 1049/2001, OJ C 65, 19.2.2016, 102-104.

ARTICLE 43

European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

1. The establishment, within the framework of the European integration process, of an Ombuds-type institution predates the proclamation of the CFREU. The formal creation of the European Ombudsman was achieved with the TEU signed in Maastricht (1992), in the provisions amending the founding Treaties. Indeed, with the purpose of continuing the "*process of creating an ever closer union among the peoples of Europe*" and bringing citizens closer to this project by strengthening the protection of their rights, the Treaty of Maastricht established a citizenship common to nationals of the Member States – the citizenship of the Union, built upon a catalogue of rights, including the right to apply to the European Ombudsman.[1]

The idea of establishing an Ombudsman at this level had already emerged within the European Parliament in the 1970s.[2] However, in view of the focus of the Commission on its role as the guardian of the Treaties, and the parliamentary control mechanisms already in place at that time, including the right to petition the European Parliament, the following decade failed to deliver any positive outcome in regard to the idea of an Ombudsman. The culmination of the process received a key impetus in the proposals submitted by Spain and by Denmark in the framework of the Intergovernmental Conference on Political Union (1990/1991), where a consensus on the matter was then reached, setting out the idea of an Ombudsman not only acting but also established at the Community level (rather than at national level). This consensus was finally reflected in the Treaty of Maastricht.

The introduction of an Ombudsman in the EU to deal with complaints of maladministration falls within the characteristic profile of the institution originally established in Sweden in 1809, where it was genetically conceived as an integral part of the principle of separation of powers and the parliamentary control over the executive power. The Swedish Ombudsman (*ombudsmän*) – a gender-neutral word for a person who looks after the interests of others – arose as a "delegate" of Parliament, whose mission was to "*supervise the compliance with the laws and regulations*" by public authorities and their officials. In line with these origins, the current parliamentary

[1] As for the Treaty establishing the European Community (EC Treaty), see Articles 8(d) and 138(e), as resulting from the Treaty of Maastricht. These Articles correspond, successively and respectively, to Articles 21 and 195 of the EC Treaty, according to the new numbering provided for by the Treaty of Amsterdam (1997), maintained by the Treaty of Nice (2001), and to current Articles 24 and 228 of the TFEU, following the Treaty of Lisbon (2007).

[2] At that time, the issue of the parliamentary appointment of an Ombudsman in the framework of the European Communities had not gone unnoticed also by the Council of Europe. See Report of the Legal Affairs Committee, Parliamentary Assembly: Conclusions of the meeting with the Ombudsmen and Parliamentary Commissioners in Council of Europe member states, Doc. 3516 (2/12/1974).

Ombudsman acts as a non-judicial mechanism for independent control over the public administration: it is empowered to investigate complaints submitted by citizens, or even intervene upon its own initiative, and to recommend to the authorities concerned the necessary preventive or corrective action, defending legality and justice in the exercise of public powers. Serving as a mechanism designed to defend citizens' rights *vis-à-vis* public administration, as well as easy access, free of charge, informal, flexible and prompt action, the worldwide spread of the Ombudsman, especially after World War II, attests to the success of the institution as a means of non-contentious protection: not only adding to the traditional parliamentary and judicial control procedures but also potentially intervening in spheres that are unreachable to other control mechanisms and go beyond the contingencies inherent to their respective functioning. In line with developments in the international protection of human rights and their effects on national legal systems, the Ombudsman is now also recognised as having a role as a fundamental rights – and, more broadly, human rights – defender. Furthermore, it inherently has a strong personalising function, even when, residually, performs its duties as a collegiate body: the Ombudsman is an institution with a face that people can easily identify, in contrast with the administrative machinery that may be perceived by citizens as too anonymous, heavy, or bureaucratic.

In this context and in light of the specificities arising in the protection of fundamental rights at a Community level, it is not surprising that, along with the growing universalisation of the Ombudsman institution, the Treaty of Maastricht innovatively accomplished its Europeanisation – here understood as the incorporation of the classic model of parliamentary Ombudsman within the momentum of the European integration process. As the latter materialises an existing reality, endowed with its own institutional framework as well as specific procedures and instruments for legislative production – in short, an autonomous supranational legal system, directly applicable to the citizens –, the establishment of the European Ombudsman should also be regarded as part of the rule of law architecture of the Union. The European Ombudsman replicates, within the Union, an institution established at national level that serves as an intermediary between people and public administrations. Thus, the creation of the European Ombudsman sought to encourage, along with the other citizenship rights, a "sense of belonging" (R. M. Moura Ramos) of the citizens of the Member States to the EU (after all, the ultimate desideratum of the transposition of the concept of citizenship at this level). Moreover, it stands as a non-judicial body for the protection of the rights recognised under the legal system from which it originates, with specific remit and no decision-making power. Therefore, by increasing the available means for the protection of rights within the Union, the European Ombudsman represented a step forward in the safeguarding of all those who come into contact with the Union, in a process that culminated with the incorporation of the Ombudsman institution in Article 43 CFREU.

2. It should be noted that, ever since its foundation, the European Ombudsman has not been hindered or limited by the concept of citizenship of the Union. In fact, under the Treaty of Maastricht and subsequent legal regulation (*i.e.*, method of appointment, statute and competence) of the new institution enshrined in the founding Treaties and operationalised in 1995, the right to complain to the European Ombudsman is recognised not only to nationals of Member States, but also to any natural or legal person residing or having its registered office in one of those

States. This openness, which is also reflected in Article 43 CFREU, is all the more significant as the application of Union law does not only affect the nationals of Member States, meaning that others may need the protection of a body such as the European Ombudsman.

On the other hand, still bearing in mind that constitutive moment, and the reference made in Article 8d to Article 138e of the EC Treaty (corresponding to former Articles 21 and 195 of the EC Treaty, and to current Articles 24 and 228 TFEU; within the structure of the Treaty, the second provision belongs to the institutional provisions and, more concretely, those relating to the European Parliament), it should be highlighted that this institutional framework reveals an umbilical connection between the European Ombudsman and the parliamentary institution. This is not surprising as the classical model of the Scandinavian Ombudsman, in which the parliamentary framing stands out, inspired to a significant extent the shaping of the European Ombudsman. Reflections of this approach can immediately be found in the election of the European Ombudsman by the European Parliament and in the synchronising of its term of office to Parliament's term [see Article 228(1) and (2) TFEU]. Similarly, although the European Parliament cannot dismiss the European Ombudsman, it is empowered to initiate a dismissal procedure, in which the final decision rests ultimately with the CJEU. In addition, a close relationship with the European Parliament is shown, for example, by the possibility of the exercise of the right of complaint to the European Ombudsman via a Member of the European Parliament, as well as by the submission, to the latter, of an annual report on the outcome of the Ombudsman's inquiries. Finally, and regarding the European Ombudsman's practice, it should be mentioned that normally no grounds are found for initiating an inquiry if a complaint has already been dealt with as a petition by the Committee on Petitions of the European Parliament "*unless new evidence is presented.*"[3]

3. The inclusion in the CFREU of a provision with the normative scope outlined in Article 43 (this provision is framed within the Charter section on "Citizenship", in line with the genetic pattern of the European Ombudsman, and preserves, in its current wording, the core of the formula previously proclaimed in Nice (2000), without prejudice to the necessary adjustments) highlights the fundamental legal dimension of the right to make a complaint to the European Ombudsman. Moreover, it mirrors the "material convergence" (Jónatas Machado) of the rules relating to European citizenship and fundamental rights and freedoms, something that is not unknown as the system for the protection of fundamental rights in the Union has evolved. The setting out of the right to complain to the European Ombudsman in the CFREU is also meaningful from the point of view of the general significance and scope of the Charter itself within the development of fundamental rights protection in the Union, with a focus on the following aspects: centrality of the subject of rights (the person, in its multi-dimensionality, at the heart of the European integration process); codification (*i.e.*, predictability and legal certainty); increased visibility (public awareness of the rights and respective remedies); autonomisation and axiological identity (the Union as a space of common values, source of substantive legitimacy of its legal rules). Ultimately, all these dimensions have emerged strengthened from the recognition of the legally binding force of the CFREU and its incorporation into Union primary law [Article 6(1) TEU].

[3] The European Ombudsman, *Annual Report 2009*, 29.

Other consequences arise from the right to complain to the European Ombudsman as a fundamental right and as enshrined in a fundamental rights catalogue originating from the Union itself. This anchoring emphasises its importance as a subjective right, whose substance is linked with the rights to political or citizen participation, as it relates to the functioning of the Union-*polis* in the administration of the "common matter" and how this may affect individuals, including their entitlement to appeal against instances of maladministration. At the same time, and not least, by enshrining this right of complaint in Article 43 CFREU, the European Ombudsman institution itself is strengthened: inclusion in the Charter stresses the comprehension of the European Ombudsman, in its characteristic feature, as a mechanism for the protection of fundamental rights. Before the CFREU was adopted, the European Ombudsman already provided a link between the people and the administration of the Union and used a fundamental rights approach. The inclusion of the European Ombudsman in the Charter undoubtedly reinforces this status of defender of fundamental rights within the Union. Finally, from the point of view of the European Ombudsman's activity, the CFREU itself contributed to a "more cogent definition" (Vital Moreira) of the applicable rights within the Union and, therefore, to a more explicit list of the fundamental control parameters on which the European Ombudsman's activities are based in detecting instances of maladministration.

4. In accordance with Article 52 CFREU, rights recognised by the Charter for which provision is made in the Treaties – as in the case of the right to complain to the European Ombudsman – are exercised under the conditions and within the limits defined by the Treaties. In this sense, in addition to the provisions of Articles 20(2d) and 24 TFEU (whose terms are essentially constitutive of the right to complain to the European Ombudsman), the conditions for the exercise of the right enshrined in Article 43 CFREU are mainly established under Article 228 TFEU. The latter provision delimits the mission, the scope of action, and the powers of intervention of the European Ombudsman. Furthermore, this legal framework details the essential functional guarantees with which the European Ombudsman is equipped. One should also mention the measures adopted under those Treaty provisions [Article 20(2) *in fine* TFEU].

Within this framework, the legal basis for the activity of the European Ombudsman further encompasses the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties (hereinafter "Statute").[4] In addition, there are the implementing provisions for this Statute (hereinafter "Implementing Provisions").[5] The Rules of Procedure of the European Parliament [7th parliamentary term (July 2010)] contain rules on the

[4] Decision 94/262/ECSC, EC, Euratom, adopted on 9 March 1994 and amended by Decisions of the European Parliament of 14 March 2002 and 18 June 2008. Following the Treaty of Lisbon, the statutory framework of the European Ombudsman is laid down by regulation of the European Parliament (Article 228(4) of the TFEU). This was achieved by Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom.

[5] Adopted on 8 July 2002 and amended by Decisions of the European Ombudsman of 5 April 2004 and 3 December 2008. These Decisions were repealed by Decision of the European Ombudsman of 20 July 2016 adopting new Implementing Provisions, which in turn have been under revision to take account of the new Statute of the European Ombudsman (see Article 18 of the latter).

election, activities, and dismissal of the European Ombudsman as well (Rules 204 to 206).[6]

5. Independence is a *sine qua non* condition of an Ombudsman institution. This matter is dealt with in Article 228(3) TFEU, according to which "*the Ombudsman shall be completely independent in the performance of his duties*" and "*in the performance of those duties he shall neither seek nor take instructions from any Government, institution, body, office or entity.*" When taking office, the European Ombudsman gives a solemn undertaking to that effect before the CJEU (Article 9 of the Statute).[7] Accordingly, besides being a Union citizen in full possession of civil and political rights, every candidate for the office must meet, among other eligibility criteria, a high profile of independence, impartiality and integrity [Articles 6(2) and 9(2) of the Statute],[8] inherent to an "authority of persuasiveness" as a distinctive attribute of the Ombudsman and its *modus operandi*.

This mark of independence of the European Ombudsman is also strengthened by other crucial institutional and functional guarantees. Foremost the establishment of the European Ombudsman at the level of Union primary law, whose norms guarantee the essence of the fundamental characteristics of the Ombudsman institution. These characteristics include the election of the European Ombudsman by the Union's parliamentary institution (the mainstay of its basis of democratic legitimacy) and the legal provisions for the election procedure (including eligibility criteria, candidacies and majority of votes required), in addition to the determination of the duration of the mandate and possibility of reappointment [Articles 228(1) and (2) TFEU, 6 of the Statute and Rule 204 of the Rules of Procedure of the European Parliament].[9] The definition of strict conditions for the cessation of duties should also be mentioned since that the European Ombudsman enjoys no status of absolute irremovability. Apart from voluntary early cessation of duties, or reaching the end of the term of office, the European Ombudsman may be dismissed only "*if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct*", by decision of the CJEU sitting as a full Court and in accordance with the foreseen procedure [Articles 228(2) TFEU, 7 and 8 of the Statute, Rule 206 of the Rules of Procedure of the European Parliament and Article 16 of the Protocol on the Statute of the CJEU].[10] A system of incompatibilities is also established, in keeping with which the European Ombudsman may not, during the term of office, engage in any political or administrative duties, or any other occupation, whether gainful or not [Articles 228(3) *in fine* of the TFEU and 10(1) of the Statute].[11]

6. The European Ombudsman's essential task is to examine complaints concerning cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the CJEU acting in its

[6] As for the 9th parliamentary term (January 2023), these rules are contained in Rules 231 to 233 of the Rules of Procedure of the European Parliament.

[7] This matter is covered by Article 14 of the new Statute of the European Ombudsman.

[8] This matter is covered by Articles 11(2) and 14(2) of the new Statute of the European Ombudsman, which establishes a new two years cooling-off period for eligibility for the office.

[9] As for the new Statute of the European Ombudsman, see Article 11, and also Rule 231 of the Rules of Procedure of the European Parliament (January 2023).

[10] As for the new Statute of the European Ombudsman, see Articles 12 and 13, and also Rule 233 of the Rules of Procedure of the European Parliament (January 2023).

[11] As for the new Statute of the European Ombudsman, see Article 14(3).

judicial role. This is the core of the European Ombudsman's actions as in evidence in Article 43 CFREU and in line with the mandate outlined in the TFEU. The focus of Article 43 is on the fundamental right of access to the European Ombudsman. The institutionalisation of the European Ombudsman correlates decisively with the enjoyment and exercise by individuals of a fundamental subjective legal position, *i.e.*, the right to complain to the Ombudsman, a particular expression of the right to petition. Whether referring, as in the Portuguese version of the CFREU, to "petitions" or, as in the TFEU (Article 228) and the provisions for its application, to "complaints" submitted to the European Ombudsman, we are in any case in the field of citizen participation rights, with no requirement for those applying to the Ombudsman to have been directly or personally affected by the alleged case of maladministration.

As already mentioned, despite the systematic placement of Article 43 CFREU (consistent with the matrix conception of the right to complain to the European Ombudsman as part of the status of Union citizenship), not only nationals of Member States, but also any natural or legal person residing or having its registered office in a Member State, are entitled to exercise the right. In addition to this openness to non-nationals of Member States, the extension of the right to complain to the European Ombudsman to encompass legal persons (such as associations or companies) ties in with the view that the latter are entitled to all fundamental rights that are compatible with their specific nature.

Complaints may be submitted to the European Ombudsman directly or through a Member of the European Parliament [Articles 228(1) TFEU and 2(2) of the Statute],[12] in any of the official languages of the Union (Article 15 of the Implementing Provisions).[13] In addition to the admissibility criteria directly related to the European Ombudsman's scope of action (*i.e.*, to the competences *ratione personae* and *ratione materiae*, explained in more detail below), the following conditions must be met for a complaint to be considered admissible:[14] identification of the complainant and the object of the complaint; lodging of the complaint within two years of the date on which the facts came to the attention of the complainant, otherwise the complaint is extemporaneous; prior appropriate administrative approaches to the entity concerned, hence preventing a premature complaint;[15] and the absence of ongoing or completed legal proceedings concerning the facts set out.[16]

---

[12] As for the new Statute of the European Ombudsman, see Article 2(1).

[13] Corresponding to Article 13 of the 2016 Implementing Provisions.

[14] Articles 228(1) TFEU, 1(3) and 2(3)(4)(7) of the Statute [the latter correspond to Articles 1(5) and 2(2)(3)(9) of the new Statute of the European Ombudsman]; The European Ombudsman, *Annual Report 2009*, 28.

[15] As for complaints concerning employment relations between the institutions, bodies, offices or agencies of the Union and their officials and other servants, the complainant must first exhaust all internal administrative proceedings available and wait for the time limits for reply by the entity concerned to expire [Article 2(8) of the Statute; this Article corresponds to Article 2(6) of the new Statute of the European Ombudsman, which includes a provision for the protection of alleged victims of harassment].

[16] Thus, a clear separation is kept between mechanisms for judicial control and the European Ombudsman. Accordingly, and given that lodging a complaint does not affect time-limits for appeals in administrative or judicial proceedings, whenever legal action on the same facts is taken, the complaint file is closed [Article 2(6)(7) of the Statute; these provisions correspond to those contained in Article 2(8)(9) of the new Statute of the European Ombudsman]. As for the impossibility of pursuing the two remedies – Ombudsman inquiry and judicial proceedings – at the same time, see

The European Ombudsman is a mechanism that essentially deals with complaints. Nevertheless, the Ombudsman's intervention is not necessarily prompted by natural or legal persons, but also may occur on the Ombudsman's own initiative. The exercise of this power enables the extension of the European Ombudsman's protection to those situations where the aggrieved person is not entitled to lodge a complaint with the institution (for instance, because of the lack of the citizenship of the Union or residence therein). The practice of the European Ombudsman confirms this approach, based on a case-by-case assessment and with identical procedural safeguards for the interested person, as an inquiry initiated following a complaint. In this very sense, from the point of view of entitlement, one may say that the right of access to the European Ombudsman is potentially a universal right. The European Ombudsman's practice further reveals that the Ombudsman initiates its own inquiries, namely, to solve systemic problems in the performance of the administration in the Union. Moreover, this latter approach may reflect a movement away from the individual complaint and, therefore, from a reactive action to the exercise of proactive action in the defence of the general interest and of citizens' rights as a whole.[17]

7. The entities covered by the European Ombudsman's actions are the institutions, bodies, offices and agencies of the Union, with the exception of the CJEU acting in its judicial role. The institutions of the Union are exhaustively listed in Article 13 of the TEU (former Article 7 of the EC Treaty). In contrast, the Treaties do not define or list the Union bodies, offices and agencies, but it is accepted that the term includes other entities established by the Treaties or by legislation under the latter, including specialised agencies.[18]

The Treaty of Lisbon had the effect of expanding the competence *ratione personae* of the European Ombudsman, mostly due to the consequences of the absorption of the European Community in the Union. Thus, where it before read that the European Ombudsman's action concerned the "Community institutions or bodies" [ex-Article 195(1) of the EC Treaty], the term "Union institutions, bodies, offices or agencies" is now enshrined in Article 228(1) TFEU, and also mirrored in Article 43 CFREU. This, right away, means that the European Council, which now integrates the formal list of the Union's institutions, also became subject to the actions of the European Ombudsman.[19]

With specific reference to the exclusion of the judicial activities of the CJEU and the GC from the scope of action of the European Ombudsman, this approach is consistent with the full independence of the courts and prevalence of judicial decisions. Only when acting in their judicial role do those Courts fall outside the mandate of the European Ombudsman, who is however empowered to conduct inquiries regarding their administrative functions.

8. The European Ombudsman has a broad mandate, the material scope of its intervention being set by reference to the concept of maladministration in the conduct (by way of action or inaction) of institutions, bodies, offices or agencies of

---

Judgments CJEU *Lamberts*, 10 April 2002, Case T-209/00, ECLI:EU:T:2002:94, paragraphs 65-66, and *C-Content*, 28 September 2010, Case T-247/08, ECLI:EU:T:2010:409, paragraph 90.

[17] Article 3(3) of the new Statute of the European Ombudsman validates this power of the Ombudsman to launch proactive inquiries.

[18] The European Ombudsman, *Annual Report 2009*, 25.

[19] The European Ombudsman, *Annual Report 2009*, 23.

the Union. Called upon by the European Parliament to establish a clear definition of the term of maladministration at an early stage, the European Ombudsman provided the following definition: "*maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.*"[20] Both the European Parliament and the Commission expressed their agreement with this definition. In more practical terms examples of maladministration include, among others, lack of transparency (comprising refusal to release information), misapplication of substantive or procedural rules, undue delay, lack of reasoning, unfairness, discrimination and abuse of power.

The definition of maladministration referred to above enshrines the basic requirement for the institutions, bodies, offices and agencies of the Union to comply with the law, including respect for fundamental rights as provided for in Article 6 TEU (in other words, an infringement of fundamental rights constitutes maladministration). Accordingly, the guiding reference or control parameter of the European Ombudsman includes the "block" of Union law.

As regards the protection of fundamental rights more particularly – and whilst the absence of legal binding effect of the Charter, when proclaimed in Nice, did not present an obstacle to its invocation –, the raising of the status of the CFREU to that of primary law enhances the role of the European Ombudsman in guaranteeing the maximum possible alignment of the activities of the Union and the rights, freedoms and principles set out in the CFREU. In the framework of the European Ombudsman's action, this is particularly so, in terms of the protection of the right to good administration as well as the right of access to documents enshrined therein (Articles 41 and 42, respectively).[21]

The above definition of maladministration was followed by a proposal, resulting from an own initiative inquiry by the European Ombudsman into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour.[22] On 6 September 2001, the European Parliament adopted a resolution approving, with some modifications, the Code as drafted by the European Ombudsman.[23] The Code of Good Administrative Behaviour aimed at spelling out, in a single document and in plain language, the meaning of the fundamental right to good administration in practice. By approving it, the European Parliament also encouraged the European Ombudsman to apply the Code when dealing with complaints and conducting own initiative inquiries as well, within the framework of the relations of the Union's administration and their officials with the public. The Code of Good Administrative Behaviour also supports the view that maladministration is a broad concept: not only confined to the infringement of legally binding rules or principles (hard law), but also embracing non-legal dimensions (in this case, as revealed by non-observance of

[20] See The European Ombudsman, *Annual Report 1997*, 23. See also the first report on the activities of the European Ombudsman, in which the notion of maladministration was already dealt with (The European Ombudsman, *Annual Report 1995*, 8-9).

[21] Article 1(3) of the new Statute of the European Ombudsman makes express mention to Article 41 CFREU on the right to good administration as a reference for the discharge of the Ombudsman's mandate.

[22] Case OI/1/98/OV, Special Report from the European Ombudsman to the European Parliament, 11 April 2000.

[23] Mentioning the non-legally binding nature of this Code, see Judgment CJEU *PC-Ware Information Technologies*, 11 May 2010, Case T-121/08, ECLI:EU:T:2010:183, paragraph 90.

good administrative practice or of a public service culture, both expected from the Union's administration). This breadth of the ambit upon which the activities of the European Ombudsman are based, while differentiating the institution from a judge, is consistent with the typical Ombudsman's profile: operating in possibly non-justiciable realms, and likewise fostering solutions other than jurisdictional ones for cases of maladministration. As a result, whenever the European Ombudsman identifies an instance of maladministration this is not necessarily synonymous with "*illegal behaviour that could be sanctioned by a court.*"[24]

Finally, complaints about the Union's political action, as well as targeting the merits of EU legislation[25] fall outside the sphere of competence of the European Ombudsman. Nevertheless, the Ombudsman may formulate normative recommendations, as exemplified by the proposal for a Code of Good Administrative Behaviour.

9. Whenever a complaint is received, a multilevel analysis is carried out, in order to assess whether the complaint: *(i)* falls within the mandate of the European Ombudsman, *(ii)* meets the admissibility criteria, and *(iii)* has sufficient grounds to justify making inquiries. If so, the European Ombudsman acts with a view to determining whether an instance of maladministration occurred and, that being the case, seeks its elimination through a procedure that also involves the institution, body, office or agency concerned, so as to find appropriate solutions. The European Ombudsman enjoys very wide discretion when examining the merits of and dealing with the complaints, with "*no obligation as to the result to be achieved.*"[26]

Both statutory and implementing provisions relating to the European Ombudsman's inquiries are embedded in the concept of fair procedure, ensuring the adversarial principle. Accordingly, both the complainant and the entity concerned have the opportunity to be informed regarding the other's position and present their views on the matter. Likewise, it is a transparent procedure, which ensures the right of the complainant to see the complaint file as well as public access to documents of the European Ombudsman, in accordance with the applicable rules.[27] The procedural rules apply to all European Ombudsman inquiries, either prompted by a complaint or, *mutatis mutandis*, own initiative inquiries (Article 9 of the Implementing Provisions).[28] In addition, and within this context, the deadlines set by the Ombudsman are not peremptory.[29]

The European Ombudsman has significant powers of investigation. He or she may request information from the entities concerned and access the relevant documentation. The Statute provides, in particular, for the rules on access to classified information or documents, as well as treatment of such classified information or documents and other information covered by the obligation of professional secrecy

[24] See The European Ombudsman, *Annual Report 2009*, 27. In this very same Annual Report, the following judgments are mentioned: *Lutz Herrera*, 28 October 2004, joined cases T-219/02 and T-337/02, ECLI:EU:T:2004:318, paragraph 101; *Tillack*, 4 October 2006, Case T-193/04 R, ECLI:EU:T:2006:292, paragraph 128. See also Judgment CJEU *Komninou and Others*, 25 October 2007, Case C-167/06 P, ECLI:EU:C:2007:633, paragraph 44.

[25] The European Ombudsman, *Annual Report 2005*, 40.

[26] Judgment *Lamberts*, paragraph 57.

[27] Under Article 5(8) of the new Statute of the European Ombudsman limits apply to EU classified information and other information which is not accessible to the public. As for requests for public access to documents, see also Article 6 of the new Statute of the European Ombudsman.

[28] Corresponding to Article 8(2) of the 2016 Implementing Provisions.

[29] Judgment *Lamberts*, paragraph 71.

[Article 3(2)].[30] In this context and under the conditions also laid down in the Statute, the European Ombudsman may access documents originating in a Member State as well. Member States' cooperation with the European Ombudsman may be rooted in the former Article 10 of the EC Treaty [replaced by Article 4(3) TEU, following the Treaty of Lisbon] and is enhanced by the legally binding force of the CFREU, as the latter is also addressed to the Member States when they are implementing Union law [Article 51(1)].[31] In addition, the European Ombudsman may hear officials and other servants of the Union. Whenever the assistance requested is not forthcoming, the Ombudsman informs the European Parliament, which then takes such steps as are deemed appropriate [Article 3(4) of the Statute].[32]

10. Whenever an inquiry leads to the conclusion that there has been an instance of maladministration, the European Ombudsman is empowered to seek a solution with the institution concerned or otherwise to make any appropriate recommendation(s) to that entity.[33] In the latter case, the entity concerned is then allowed a period of three months to send to the European Ombudsman a detailed opinion that can mean the acceptance of the Ombudsman's recommendation(s). Besides recommendations and proposals for solutions, the European Ombudsman may also make suggestions for improvement. In every case, the person complaining to the European Ombudsman has the right to be informed of the outcome of the inquiries [Articles 228(1) TFEU and 3(6-7) of the Statute].[34]

The European Ombudsman investigates the complaints without any decision-making power. Therefore, no legally binding rights or obligations for the complainant, the entity concerned or third parties arise from his or her intervention. The debate on the recommendatory nature of the Ombudsman institution's actions – an aspect that differentiates it from a court – is common to this kind of complaints mechanism in general. In this respect, it should be noted that the Ombudsman's persuasiveness and authority represent the strength rather than weakness of the institution. Although not legally binding, the acceptance of its recommendations reflects the careful consideration, common sense, and reasonableness underpinning the Ombudsman's arguments. Moreover, those features are driven by a "DNA" of independence, genetically present in the Ombudsman institution – and this is also the case of the European Ombudsman – and substantiated by both subjective and objective organisational and functional safeguards.

As for the latter, they include functional immunity from any disciplinary, administrative, or criminal proceedings or penalties relating to the discharge of official responsibilities. At the EU level, the Community judicature has already had the opportunity to rule on the issue of a judicial review of the activity of the European Ombudsman: unlike actions brought against the European Ombudsman for annulment or for failure to act, which were rejected,[35] it may be possible to

[30] This matter is covered by Articles 5 and 9(1) of the new Statute of the European Ombudsman, which specify the conditions for access to documents.

[31] The provisions of Article 10(1)(3) of the new Statute of the European Ombudsman clarify the conditions for cooperation with the authorities of the Member States.

[32] The corresponding provision is contained in Article 5(11) of the new Statute of the European Ombudsman.

[33] See Articles 5 and 6 of the 2016 Implementing Provisions.

[34] This matter is covered by Articles 1(4) and 4(1-3) of the new Statute of the European Ombudsman.

[35] Orders CJEU *Associazione delle cantine sociali venete*, 22 May 2000, Case T-103/99, ECLI:EU:T:2000:135; *O'Loughlin*, 5 September 2006, Case T-144/06, ECLI:EU:T:2006:237; *Srinivasan*, 3 November 2008, Case

sue for compensation for damage, namely "in very exceptional circumstances", due to a "manifest error" in dealing with the complaint, likely to cause damage to the complainant.[36]

11. There is no institutional or functional interdependence relationship between the European Ombudsman and the Ombuds institutions at the Member States' level, nor do the respective mandates conflict. In the scope of Union law, they are distinguished essentially by the different addressees of their action: the European Ombudsman's mandate is limited to the activities of the institutions, bodies, offices or agencies of the EU; in turn, the Ombuds institutions at the Member States' level act exclusively within the scope of their respective national public administrations (central, regional and/or local authorities). Consequently, in no circumstances can the European Ombudsman act *vis-à-vis* the national authorities of the Member States, even though the conduct complained about may fall within the field of application of Union law.

Accordingly, as for national authorities subject to their control, the Ombuds institutions at the Member States' level also remain as "guardians" of Union law and particularly of fundamental rights thereby guaranteed and recognised. At this level, and notwithstanding the differences in the institutional shaping of ombuds within the Member States, the CFREU can provide guidance, as it is also addressed to the Member States pursuant to Article 51(1). And this is not irrelevant, given that a significant part of the implementation of Union law lies with national authorities, and it is at the domestic level that citizens may face major obstacles to full compliance by Member States with Union legal provisions. Aware of this reality, the European Ombudsman soon promoted the establishment of a flexible and informal cooperation mechanism, on equal terms, between counterpart institutions across the Union.[37] Besides the sharing of knowledge, experience, and good practice, this form of cooperation or network is important from the point of view of safeguarding citizens' rights under Union law (with highlight to the practice built on more recently of parallel investigations). In addition, as for the European Ombudsman's activity and effectively dealing with complaints that fall outside its mandate, cooperation facilitates the possibility of the European Ombudsman transferring the complaint directly to the Ombudsman institution established at the Member State level[38] or otherwise advising the complainant to contact the latter. This practice is intended to safeguard that every complaint is taken up by the body best placed to defend citizens' rights.

Catarina Sampaio Ventura

T-196/08, ECLI:EU:T:2008:470 and *Srinivasan*, 25 June 2009, Case C-580/08 P, ECLI:EU:C:2009:402.

[36] Judgments CJEU *Lamberts*, 23 March 2004, Case C-234/02 P, ECLI:EU:C:2004:174, para. 57, and *M v Ombudsman*, 24 September 2008, Case T-412/05, ECLI:EU:T:2008:397.

[37] The European Ombudsman, *Annual Report 1995*, 15-16, and *Annual Report 1996*, 92-93.

[38] As mentioned in The European Ombudsman, *Annual Report 2009*, 68, "*[a] complaint is transferred only with the prior consent of the complainant and provided there appear to be grounds for the complaint.*" See also Article 2(4) of the 2016 Implementing Provisions.

ARTICLE 44

Right to Petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

1. *Definition of the right to petition*. In a broad sense, the right to petition is exercised through a *request, in written form, directed to the bodies of a public authority, of non-judicial nature, with a view to ensure their intervention in defence of personal rights and interests or in defence of general interest causes*.[1]

With historical manifestations prior to the advent of constitutionalism, the right of petition pursues a dual function: on the one hand, the ancillary defence of individual or group rights and, on the other hand, as a right to representation and political participation.

The international dimension of the protection of human rights, related to the legal subjectivation of the individual, as well as the growing institutionalisation of international relations, have taken the right of petition from a purely state level to an international level, under different names (claim, complaint, communication, petition) – *e.g.*, Articles 24 and 25 of the Constitution of the ILO; First Optional Protocol to the ICCPR; Additional Protocol to the European Social Charter Providing for a System of Collective Complaints; and Article 71 of the Rules of Procedure of the Parliamentary Assembly of the Council of Europe.

2. *Genesis in Community law*. The original versions of the founding Treaties left out the right to petition; this omission is understandable given that the texts, which were approved in the 1950's, did not address the protection of fundamental rights, taking, at the time, economic integration as the key axis of the neophyte European project. While absent from the texts, the right to petition was, nevertheless, present from the beginning, in parliamentary practice. Indeed, the Rules of Procedure of the ECSC Assembly, adopted in March 1953, already provided for the possibility to petition this body (Article 39). This provision was later renewed and updated in subsequent versions of the Rules of Procedure of the Assembly – since 1958, common to the three Communities and, since 1962, self-designated as European Parliament, title which would be later made official by the Single European Act.

3. Since its establishment in 1953, the right to petition underwent a continuous development and for a long time was the only mechanism allowing for a direct relationship between citizens and the institution representing them within the institutional framework of the European Communities. After the creation of the European Ombudsman in 1994, as well as of other forms of administrative complaint, the number of petitions declined in relative terms.

4. Not only was the European Parliament the starting point of the Community *praxis* on the right to petition, but it has also been responsible for the most vigorous

[1] Maria Luísa Duarte, *O direito de petição. Cidadania, participação e decisão* (Coimbra: Coimbra Editora, 2008), 29.

political initiatives towards the formal codification of the right to petition in the Treaties: 1) in 1977, the Resolution on the granting of special rights to be citizens of the European Community requested the Commission "*to consider (...) among the rights to be granted to Community citizens (...) the right to submit petitions*"; 2) the draft treaty establishing the EU, adopted by the Parliament by resolution of 14 February 1984 (the so-called Spinelli project), referred to the right to petition and to conduct inquiries; 3) on 12 April 1989, the European Parliament adopted two texts of enormous political significance, the Declaration of Fundamental Rights and Freedoms and the Interinstitutional Declaration, the latter jointly adopted by the European Parliament, the Council and the Commission; the first text stated that everyone shall have the right to address written requests or complaints to the European Parliament; in the second text, the Council and the Commission undertook the obligation to provide the European Parliament with all the necessary cooperation for the processing of petitions and complaints.

5. In the Maastricht Treaty, under the new concept of Union citizenship, a right to petition the European Parliament and a right of complaint to the European Ombudsman were established and granted to the citizens of the Union and to any other natural or legal person with residence or a registered office in a Member State. This provision – currently enshrined in Article 24, paragraph 2, of the TFEU – was thus the origin point for the subsequent provision of the right to petition set out in Article 44 of the CFREU.

6. *The right to petition within the plural framework defined by the Treaty of Lisbon*. With the entry into force of the Treaty of Lisbon, the CFREU, until that point held in a sort of legal limbo, became a legal instrument capable of granting rights "*which shall have the same legal value as the Treaties*" [Article 6(1) TEU]. It happens that the right to petition established in Article 44, within the chapter related to Citizenship, is, likewise, enshrined in Article 24(2) of the TFEU ("*Every citizen of the Union shall have the right to petition the European Parliament...*"). The conditions and limits to the exercise of this right are, instead, described in Article 227 TFEU: "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.*"

Article 44 CFREU establishes the right to petition in an open and unconditional way, in contrast to the restrictive formula of the final part of Article 227 TFEU. Regarding the rights explicitly provided by the Treaties and the Charter, such as the right to petition, Article 52, paragraph 2, CFREU, clarifies that such rights "*shall be exercised under the conditions and within the limits defined by those Treaties.*" When referring to the scope of the regime established by Article 52(2), the commentary versions of the CFREU clarify the following limit: the Charter does not alter the system of rights conferred by the EC Treaty and embraced by the current Treaties. Let us now address briefly the conditions for exercising the right to petition.

7. The Rules of Procedure of the European Parliament establishe, in Articles 226 to 230, the rules regarding the right holders, the object of the petition and the procedure for processing petitions declared admissible by the Committee on Petitions (Annex VI, title XX, to the Rules of Procedure).

The list of right holders includes, in addition to citizens of the Union, any legal person, be a natural or legal person, residing in a Member State or (in the

case of legal person) having its registered office in a Member State. The petition may be individual or collective.

The Rules of Procedure allow, nonetheless, for the consideration, where appropriate, of petitions submitted by natural or legal persons who are neither citizens of the EU nor reside in a Member State nor have their registered office in a Member State (Article 226, paragraph 15).

By requiring that the issue addressed by the petition directly affects the petitioner, the formula implied in the final part of Article 227 TFEU is excessively limiting and contrary to the very nature of the right to petition in its possible dimension as a right to political participation in matters of general interest. In effect, the European Parliament ignores the letter of this provision. According to the interpretation provided by the Committee on Petitions: "*The clause, according to which the subject of petitions must directly affect the petitioners, should be applied in the sense of requiring from the petitioner a real and effective concern for the subject of the petition, but without requiring an individual and personal interest, so that petitions continue to play their role as an instrument for defending collective interests.*" (Position of the Committee on Petitions on the results of the Intergovernmental Conference and the Treaty of Maastricht – Doc A3 – 0123/92 en PE 156.133/def).

Considering the (well taken) position of the European Parliament, it is incomprehensible how the revision of Treaties, tested in the Treaty Establishing a Constitution for Europe and materialised in the Treaty of Lisbon, was not used as an opportunity to remove from Article 227 TFEU the incoherent and useless reference to a requirement of individual or direct interest of the petitioner. Such an amendment to the letter of the article which establishes the exercise of a right to petition would be underline the known political expression of this right, in accordance with the intent to further value the proper mechanisms of participatory democracy (cf. Article 11, paragraph 1, TEU). In fact, the Treaty of Lisbon strengthens the catalogue of political participation rights attributed to citizens, with special focus on the new European Citizens' Initiative (ECI) instrument provided for in Articles 11, paragraph 4, of the TEU and 24, paragraph 1, TFEU, applicable since 1 April 2012 [Regulation (EU) no. 211/2011 of 16 February 2011].

8. Strictly speaking, the right to petition is an historic right, inherent to the status of citizenship and, more broadly, to the status of addressee of decisions taken by public authorities. In this sense, the right to petition exists even in the absence of an explicit reference. Its formal establishment, as in the case of Article 44 of the CFREU, should not be interpreted as prohibitive or restrictive of the exercise of the right to petition with regard to other institutions, bodies and agencies of the Union. The Charter itself, in Article 41, paragraph 4, recognises that "*Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.*" (see also Article 24, paragraph 4, TFEU). Embedded into the article devoted to administrative guarantees, it should not be confused with the fundamental right to petition.

9. In the period between 2018-2020, there was an increasing use of the right to petition the European Parliament: 1220 petitions in 2018, 1357 petitions in 2019 and 1573 petitions in 2020 [REPORT on the deliberations of the Committee on Petitions in 2020 - 2021/2019(INI), of 16 November 2021].

10. With regard to concrete measures which the European Parliament may adopt to effectively respond to a petition addressed to it, we should consider as

most relevant: 1) the establishment of a commission of enquiry, in accordance with Article 226 TFEU; 2) to request the European Commission to submit, within the exercise of its exclusive power of legislative initiative, appropriate proposals to the Parliament (see Article 225 TFEU); 3) to address the lack of legal standing of the individual or legal person and, in order to defend the rights of the petitioner (s) or to defend the general interest, to bring an action for annulment [see Article 263(2) TFEU] or for failure to act [see Article 265(1) TFEU]; 4) to trigger the procedure of application of political sanctions against a Member State, in accordance with Article 7(1) TEU, for a serious violation of democratic values and fundamental rights.

Maria Luísa Duarte & Joana Gama Gomes

ARTICLE 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

1. In Article 45, the Charter incorporates a right that has acknowledged historical weight: freedom of movement and residence.

The passage from "fundamental freedom" to "fundamental right" is not, however, inconsequential. It raises three types of issues, pertaining to: *a)* the statement of the right; *b)* the right's connections to the economic freedom of movement for workers established in the Treaties; and *c)* the right's meaning and evolution in the new context of European citizenship.

2. *The statement of the right.* The free movement of persons appears in most of international instruments. The UDHR, adopted on 10 December 1948, proclaims it in Article 13.[1] The 1966 ICCPR does the same in a more detailed way.[2] The Council of Europe granted this right in the European Convention on Establishment (13 December 1955) and in the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe (13 December 1957, Article 1). Protocol no. 4 to the ECHR, adopted on 16 September 1963, establishes this right in its Article 2.[3]

A rich body of literature has emerged that discusses the theme of free movement for foreigners in the Council of Europe's member countries.[4]

---

[1] § 1: "*Everyone has the right to freedom of movement and residence within the borders of each State; § 2: Everyone has the right to leave any country, including his own, and to return to his country.*"

[2] Article 12, § 1: "*Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*" Article 12, § 2: "*Everyone shall be free to leave any country, including his own.*" Article 12, § 3: "*The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant.*" Article 12, § 4: "*No one shall be arbitrarily deprived of the right to enter his own country.*"

[3] § 1: "*Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*" § 2: "*Everyone shall be free to leave any country, including his own.*" § 3: "*No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*" § 4: "*The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*"

[4] In particular, Resolution 7 (1969) regarding the return of migrant workers to their countries of origin; Resolution 35 (1970) regarding schooling for the children of migrant workers; Resolution 11 (1976) regarding equal treatment between local and migrant workers; Resolution 33 (1978) regarding family reunion; and Resolution 44 (1978) regarding illegal migration and illegal employment of foreign workers. Cf. also the Recommendation Rec (1979) 10 regarding women migrants; Rec (1984)

3. *The right's connections to the economic freedom of movement for workers established in the Treaties.* The Treaties defined the freedom of movement as a necessary function of the carrying out of an economic activity. The first holders of this right were salaried workers (Articles 32 and 42 TEC), the self-employed (Articles 43 and 48 TEC) and members of their families.

Secondary legislation regulated diverse categories of beneficiaries, always maintaining the economic conditions that underpin this freedom.

Among the most relevant regulations that govern the condition of salaried workers, one finds Regulation (EEC) no. 1612/68, of 15 October 1968, regarding the free movement of workers within the Community;[5] Regulation (EEC) no. 1251/70, of 29 June 1970, regarding the right of workers to reside in the territory of a Member State after having taken up employment there; and Directive 68/360/CEE, of 15 October 1968, regarding the limits on restrictions on the movement and residence of workers of Member States and their families within the Community. In more general terms, Regulation (EC) no. 1030/2002, of 13 June 2002, establishes a uniform model for residence permits for the nations of third countries, modified by Regulation (CE) no. 380/2008, of 18 April 2008, and Regulation (EU) no. 492/2011, of 5 April 2011, regarding the free movement of workers within the Union.

Regarding self-employed workers, Directive 75/34/EEC, of 17 December 1974, pertains to the right of Member State nationals to reside in the territory of another Member State after being self-employed there.

Directive 73/148/EEC, of 21 May 1973, regulated the abolition of restrictions on the movement and residence of Member State nationals within the Community, in terms of establishment and the provision of services.

Other directives cover the limits imposed on the right of free movement for these economic actors, grounded in reservations stemming from reasons of public order, security and health: Council Directive 64/221/EEC, of 25 February 1964, for the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, security or health; 72/194/CEE, of 18 May 1972, broadening the scope of application of Directive 64/221/EEC to workers who exercise the right of residence in the territory of a Member State after having taken up employment there; and 75/35/EEC, of 17 December 1974, broadening the scope of Directive 64/221/EEC to include nationals of a Member State who exercise their right to reside in another Member State after having been self-employed there.

Among the most recent Council Directives regarding the right of residence, one finds 90/364/EEC and 90/365/EEC, of 28 June 1990; 93/96/EEC, of 29 October 1993, regarding the right of residence for students; 2001/40/EC, of 28

---

regarding second-generation migrants; Rec (2000) regarding residence guarantees for long-term immigrants; Rec (2002) regarding the legal status of persons who enter for family reunification purposes; Rec (2006) 9F regarding the admission, rights and obligations of migrant students and cooperation with their countries of origin; Rec (2007) 9F regarding life projects in favor of unaccompanied minor migrants; Rec (2007) 1OF regarding co-development and migrants in view of the development of their home countries; Rec (2008) 4F regarding the integration of the children of migrants; Rec (2008) 1OF regarding the improvement of access to employment for migrants and persons of immigrant origins; Rec (2011) 1F regarding relations between migrants and host societies; Rec (2011) 2F regarding validating migrants' qualifications; and Rec (2011) 5F regarding preventing the risk of vulnerability and improving the well-being of elderly migrants.

[5] Modified by Regulation (EEC) 2434/92, of 26 August 1992.

May 2001, regarding the mutual recognition of decisions on the expulsion of third-country nationals; 2003/86/EC, of 22 September 2003, regarding the right to family reunification; 2003/109/EC, of 25 November 2002, concerning the status of long-term residents who are nationals of a third country; 2004/81/CE, of 29 April 2004, regarding the residence permit given to third-country nationals who are victims of human trafficking or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; and 2004/114/EC, of 13 December 2004, on the conditions of admission of third-country nationals for the purposes of study, student exchange, unremunerated training or voluntary service. Also of special interest, due to its codifying ambition, is Directive 2004/38/EC, of 29 April 2004, regarding the right of free movement and residence of Union citizens and the members of their family within Member States. And lastly, worth noting here are Directive 2008/115/EC, of 16 December 2008, regarding the common standards and procedures in Member States for returning illegally present third-country nationals, and 2009/50/EC, of 25 May 2009, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

In addition to the same employment and labour conditions, persons enjoying these rights are also guaranteed the same social and tax benefits that local citizens enjoy.

Family members of these workers are not subject to any nationality requirement.

In some cases, depending on cooperation and association agreements, third-country workers can enjoy these rights.

The CJEU has produced a vast body of case-law on this topic, namely about notions of "worker" and "family", the prohibition of discrimination and the exceptions that the Treaty stipulates. As far as the exception granted for "employment in the public service" [Article 39(4) TEC], the citizenship requirement for employment that implies participation, whether direct or indirect, in the exercise of public authority, was loosened on account of Member States' tendencies towards the reorganization and privatization of important swathes of public administration.

Over the years, a progressive broadening of the scope of personal free movement has occurred.

At present, the overall right of movement and of residence for nationals of Member States is practically unconditional for those who carry out an economic activity in another Member State. The residence of nationals who seek employment in another Member State is subject to reasonable deadlines that the Member States are supposed to set. Those who are "non-active" are required to demonstrate that they possess sufficient economic resources and health insurance. Students benefit from similar rules.

One might say that, regardless of citizenship status, the CJEU's case-law has caused the free movement for persons to undergo the first effect of accommodation to the classic fundamental rights of the ECHR.

This effect led, in some cases, to the broadening of several notions of EU law (such as the restriction) and, in other cases, to the recognition of rights of movement and residence for citizens of third countries.

The *Carpenter* ruling, of 11 July 2002, case C-60/00, is an example of the expansion of Community law concepts through the application of fundamental

rights. The case dealt with a national of a Member State, established in this State, who provided services in other Member States; at stake was the expulsion of his wife, the citizen of a third country.

Another judgment[6] targeted the freedom to circulate and reside for third-country nationals. In this decision, the CJEU ruled that, as far as third-country nationals and spouses of Member State nationals are concerned, the denial of entry at the border, based on the absence of an identity document, valid passport or visa, when said spouse can prove his or her identity as well as the marriage bond and there is no evidence that he or she represents a danger to the public order, security or health as laid out by Article 10 of Directive 68/360/EEC and Article 8 of Directive 73/148/EEC, is disproportionate and therefore prohibited, given the importance that Community lawmakers have attributed to the protection of family life.

Article 18 of the Treaty Establishing the European Community provided that "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.*"

The enshrinement, by way of the Treaty of Maastricht, of a European citizenship and its attendant proclamation of a right to free movement and residence, regardless of socio-economic circumstances, possesses symbolic value in itself, albeit relative. In effect, the right was recognized subject to the limitations and conditions laid out in the Treaty and the provisions adopted for its execution. In this respect, it was structured according to the conditions and the limits of the previous legal framework. The question of whether Article 18 could be considered as a specific legal basis, in conformity with the acquis of secondary law which governs the right to movement and residence in this domain, was a legitimate one.

The CJEU responded to this question, recognising a direct effect for Article 18, in the *Baumbast and R* ruling, of 17 September 2002, case C-413/99. Invoking the logic of *Grzelczyk*,[7] the Court reasoned that the status of citizen of the Union is destined to be the fundamental status of Member State nationals and added that, especially as concerns the right to reside in Member State territory laid out in Article 18(1) of the TEC, this is directly recognised for any Union citizen by a clear and precise Treaty provision, simply on the basis of status as a Member State national, and thereby citizen of the Union. The CJEU specified further that the right of Union citizens to reside in the territory of another Member State is recognized subject to the limitations and conditions established in the EC Treaty and the provisions adopted for purposes of application. Nonetheless, the application of limitations and conditions permissible under Article 18(1) of the EC Treaty for the exercise of that right of residence is subject to judicial review. Consequently, contingent limitations and conditions on that right do not impede the provisions of Article 18, paragraph 1 from conferring on private individual's rights which can be invoked in court and which national courts or tribunals should protect.

4. *The right's meaning and evolution in the new context of European citizenship.* European citizenship lent itself to controversy from the very beginning. A diverse range of reservations has been expressed.[8]

---

[6] Judgment *MRAX*, 25 July 2002, Case C-459/99, ECLI:EU:C:2002:461.

[7] Judgment *Grzelczyk*, 20 September 2001, Case C-184/99, ECLI:EU:C:2001:458.

[8] Cunha Rodrigues, "Entre a Europa das liberdades e a Europa da cidadania", in *Estudos Jurídicos e Económicos*

Some saw citizenship as something without substance or potential; an "ambivalence" towards the *market citizen* inherited by the EU as an *acquis* of the European Economic Communities.

Others spoke of "confusion", of a "cynical exercise" of "polysemy" with a "non-identified political object" or pointed to the methods that elaborated a concept of citizenship: inverted in terms of the mode of formation, subordinated in terms of status and incomplete in terms of content.

Still others predicted that the power of legitimation for decisions of the EU would continue to reside with nationality and not with citizenship.

The criticisms also targeted the wording of the Treaty of Maastricht, categorized as "intricate and precipitous" and more oriented toward citizenship as a sense of belonging than as a *status juris* with rights and obligations: "a sort of inflated 'pathos' in citizens too interested in not cutting the umbilical cord that ties them to their countries of origin."

It is clear that citizenship is genetically a citizenship of overlap, which has endured a long period as an asymmetric, unbalanced notion for the benefit of economic ends.

HABERMAS identified three approaches to understanding citizenship: in terms of the market, in ethnocultural terms (oriented towards common cultural bonds) and in civic terms (seeking shared norms and values).

The process of constructing a European citizenship faced difficulties on each count.

In any case, one can legitimately say that early on the case-law forged promising paths and the accumulation of acquis produced, at short notice, qualitatively different solutions.

Historical legacies determined the normative context and explain the reason for which economic concerns prevailed for a long period over "socio-political" status. They also account for the reasons why an almost economic "superstition" gradually disappeared in contact with new realities tied to changes in the world of work and in migratory fluxes.

This occurred in various domains, including that which governs the notion of "worker". The CJEU adopted, in this respect, a broad method of interpretation and prohibited not only discrimination on account of nationality but also limitations of the principle of free movement, extending rights to those who do not exercise any active economic activity.

Encouraged by this doctrine, Community lawmakers wrote secondary legislation that evolved in a parallel way.[9]

One cannot fail to observe, also, that many interpretations had in common the recognition of constitutional characteristics in Article 18 of the TEC. These characteristics would be in keeping with the Treaty's economy and adequate for the European project.

Such a constitutional dimension, based on a juridical-political reality that is new and oriented toward the recognition of "special rights", characterized the transition of the status of the individual from a simple object of policies to a

---

*em Homenagem ao Prof. Doutor António de Sousa Franco (*University of Lisbon, School of Law, 2006).

[9] Directive 2004/38/CE illustrates this tendency. In various sections of the preamble (9, 16 and 27), the Community legislature refers explicitly to the case law of the Court of Justice. The directive figures as a sort of certificate of "progress" that to a great extent agglutinates the Court's legal precedents.

central reference point in the advancement of the European project. The Treaty of Maastricht has taken this path, inserting in Article 8 an evolutionary or progressive clause (Article 8 E),[10] in accordance with the "plastic" or "dynamic" character of the status of citizenship. The perception of this evolution is essential to any interpretation of the moment in which we find ourselves, and in particular for comprehension of the instruments that have been used to consolidate the concept of a European citizenship.

Two of the most relevant aspects of this methodological *continuum* are the space implied by the right of free movement and the almost-exclusive use of the principle of non-discrimination as the force behind an expansion of rights.

The CJEU's case-law supports this view.

As we have seen, in *Baumbast and R*, the CJEU stabilised an important aspect of the notion of citizenship, accepting the direct effect of Article 18.

Garcia Avello,[11] *Collins,*[12] *Trojani,*[13] *Zhu and Chen,*[14] *Bidar*[15] and *Grunkin and Paul*[16] are rulings that underscore the above-mentioned tendency towards expansion.

The Charter, proclaimed in 2000, entered into force alongside the Treaty of Lisbon, on 1 December 2009.

The absence of any reference, in paragraph 1 of Article 45, to the conditions and limits established in the Treaties or in secondary legislation, confers to the proclamation of the right of free movement and residence a nature that approximates to the classic civil and political rights. As is fitting for these rights, any limitation should be established by the law and respect the law's essential content.[17] Nonetheless, even without appearing in the declaration, the problem of conditions and limits returns by way of paragraph 2 of Article 52.

In this context, the Charter does not significantly alter what was already acquired, except in the axiological plane stimulated by the inter-systematization of norms.

The Charter acts within the new context created by the Treaty of Lisbon, where different sorts of dynamics interact: greater integration produced by the abolition of pillars and by the reinforcement of the human rights framework (*e.g.*, by possibility of accession by the Union's to the ECHR), and greater participation from Member States, particularly in the framework of the principle of subsidiarity.

The CJEU's case-law seems to reflect these dynamics as far as the right of movement and residence is concerned.

We are here referring to the *Rottman*, *Zambrano* and *McCarthy* rulings.

The *Rottman* judgment[18] confirmed the principle according to which the definition of the conditions leading to the loss of nationality is the responsibility of the Member States, which should respect EU law. The contribution of the judgment to the evolution of the concept of citizenship was to delineate the scale of jurisdictional control when the combined laws of two Member States lead to a person having the nationality of both States losing both nationalities and, as a consequence, EU citizenship.

[10] See Article 25 of the TFEU.
[11] Judgment of 2 October 2003, Case C-148/02, ECLI:EU:C:2003:539.
[12] Judgment of 23 March 2004, Case C-138/02, ECLI:EU:C:2004:172.
[13] Judgment of 7 September 2004, Case C-456/02, ECLI:EU:C:2004:488.
[14] Judgment of 19 October 2004, Case C-200/02, ECLI:EU:C:2004:639.
[15] Judgment of 15 March 2005, Case C-209/03, ECLI:EU:C:2005:169.
[16] Judgment of 14 October 2008, Case C-353/06, ECLI:EU:C:2008:559.
[17] No. 1 of Article 52 confirms as much.
[18] Judgment of 2 March 2010, Case C-135/08, ECLI:EU:C:2010:104.

Of the issues raised, one referred to the purely internal character of the situation whilst the other referred to the competences of Member States in the domain of nationality.

The Court considered both issues and opined that the situation is a matter of EU law, concluded that, given the fraudulent conduct of the interested party, EU law is not in conflict with a Member State withdrawing naturalization; nor does it prevent the reinstatement of nationality in the other Member State. Nonetheless, the assignment of national jurisdiction should "*take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalization decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.*"

The Court's scrutiny seems to have been calibrated to the circumstances, in a case in which the right of nationality threatened European citizenship, which was enough to remove this situation from the ambit of purely internal consideration.

In the *Zambrano* ruling,[19] the CJEU judged that Article 20 of the TFEU must be interpreted as precluding a Member State from depriving a third-country national, upon whom his or her children (who are minors and EU citizens) are dependent, of the right of residence in the Member State where the children have nationality and are resident. The same article also precludes the Member State from declining to issue a work permit to that third-country national, insofar as such decisions prevent those children from enjoying the substance of the rights attached to the condition of EU citizen.

The Brussels Employment Tribunal sought answers to the following questions regarding the right of movement and residence:

> *"1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?*
>
> *2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognize, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognized by Community case-law [Zhu and Chen], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?*"

[19] Judgment of 8 March 2011, Case C-34/09, ECLI:EU:C:2011:124.

After another reminder that the status of EU citizen is intended to be the fundamental status of Member State nationals, the CJEU cited *Rottman* to reason that Article 20 forbids national measures that have the effect of preventing EU citizens from enjoying the substance of rights conferred by their Union citizenship.

Preventing a third-country national from residing in a Member State where his or her minor children, who are nationals of that Member State and then resident, when those children are dependent upon the third-country national, has that effect; so too does the refusal to issue a work permit.

The Court stressed that Union citizenship confers a fundamental and individual right to move and reside freely within the territory of Member States whose exercise is independent of the provisions of secondary legislation.

It is implicit in the ruling that the subject matter at hand is not a purely internal situation and thus dispels any potential misunderstandings regarding the requirement of a previous exercise of the right of movement for recognition of a right of residence in light of citizenship status.

The CJEU did not take a stand on the question of knowing whether the right of residence of *Zambrano*'s children resulted from the internal right or directly from citizenship status. Another loose end was the question of knowing whether there would be space to ponder the prior requirement for free movement, given that the Treaty of Lisbon represented a new stage in citizenship status (now present in the TFEU as in the TEU) and given the inclusion in Title II of the TEU, under the heading "Provisions on democratic principles".

Another problem to resolve in the future is that of the relation between *complementarity* [Article 9 TEU and 20(1) TFEU] and *subsidiarity* (Article 5, paragraph 3 TEU and Protocol no. 2].

The *Sayn-Wittgenstein* ruling, of 2 December 2010, case C-208/09, represents an interesting practical application of citizenship status, which addresses the question of national identity.

The *McCarthy* ruling, of 5 May 2011, case C-434/09, deals with the interpretation of Article 3(1), and Article 16 of Directive 2004/38/EC, regarding the right of free movement and residence for Union citizens and members of their families within Member State territory.

The Court held that Article 3, paragraph 1 of Directive 2004/38/EC must be interpreted as meaning that the directive is not applicable to a Union citizen who has never exercised his right of free movement, has always resided in a Member State of which he is a national and is also a national of another Member State. The Court then took up the question of applicability under Article 21 TFEU, making the preliminary observation that the situation of a Union citizen who, like S. McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be equated to a purely internal situation. As a citizen of at least one Member State, an individual like McCarthy enjoyed the status of Union citizenship as specified by Article 20, paragraph 1 TFEU and could invoke the rights tied to that status, even in regard to the Member State of origin, and in particular, the right of free movement and residence within the Member States' territories. Nonetheless, the factual account of McCarthy's situation, as described by the referring court, did not evidence that the national measure at stake in the main proceedings had the effect of depriving her of the effective enjoyment of the

substance of rights related to her status as a Union citizen or hindering the exercise of her right to free movement and residence within the Member States' territories.

To justify this decision in relation to the existing case-law, the CJEU explained that in the cases that had led to the *Zambrano* and *Garcia Avello* rulings, the national measure at stake had had the effect of depriving citizens of the Union of the effective enjoyment of the substance of rights conferred by that status or hindering the exercise of their right to free movement and residence in Member State territories. The situation of an individual like S. McCarthy did not present any connection with one of the situations that EU law contemplated. The pertinent elements of the situation were limited to the internal confines of a single Member State.

It is clear from the above that the question of subordination of the exercise of citizenship to a requirement of previous movement between Member States, if it ever arose, is resolved.

The judgment *Zambrano* (pronounced by the Grand Chamber) gave place to an extensive debate in the scientific mainstream, sometimes welcomed as timely and fair, sometimes criticised for being the product of a certain activism.

McCartthy (issued by a Chamber of five judges) was regarded by some as having the objective of limiting the effects of *Zambrano*; by others, as a manner of substantiating the essential content of the rights derived from the European citizenship, in a case that did not refer to parental's protection but to spouses' protection.[20]

A few judgments followed the restrictive approach of *McCarthy*.[21]

However, the Grand Chamber of the CJEU did not take long to confirm and expand *Zambrano*'s case-law.[22] This clarification was particularly welcomed in a situation "where *Zambrano*'s and *Rottmann*'s potential seemed hopelessly gagged".[23]

The right of movement and residence continues to reveal itself to be privileged ground for the evolution of the status of citizenship.

In this respect it is foreseeable, by way of the expansion of this status, that particularities of regulation with respect to third-country nationals may impose, in certain cases, a reconfiguration of the notion of what counts as a purely internal situation.

J. Cunha Rodrigues

[20] The Court underlined that no element of McCarthy's situation, as described by the national court, revealed that the national measure at issue in the main proceedings had the effect of depriving the wife of the genuine enjoyment of the rights associated with the status as a Union citizen.

[21] See Maria Haag, "Case C-133/15 Chávez-Vílchez and Others – Taking EU children's rights seriously", *European Law Blog*, May 30, 2017, https://europeanlawblog.eu/2017/05/30/case-c-13315-chavez-vilchez-and-others-taking-eu-childrens-rights-seriously/ (last access in January 2023). The author considered that "the Court swiftly backtracked and curtailed *Ruiz Zambrano.*"

[22] *Inter alia*, see judgments *Rendón Marin,* 13 September 2016, Case C-165/14, EU:C:2016:675 and *Chavez-Vilchez,* 10 May 2017, Case C-133/15, ECLI:EU:C:2017:354.

[23] See Alessandra Silveira, "Da jurisprudência do TJUE pós-Brexit sobre cidadania europeia. A recuperação do fio de Ariadne identitário?", *UNIO – EU Law Journal*, vol. 3, no. 1 (2017): 48-62, https://doi.org/10.21814/unio.3.1.8.

ARTICLE 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

1. The right to diplomatic and consular protection is based upon Article 46 of the CFREU, and Articles 20 (2)(c) and 23 of the Treaty on the Functioning of the TFEU. It constitutes one of the citizenship rights included in the Maastricht Treaty, alongside the right to free movement and residence in Member States [Articles 20(2) (a) and 21 TFEU], the right to vote and be elected in the European Parliament elections and in the local elections of the Member States of residence [Article 20(2)(b) and 22 TFEU], and the right to *(i)* address petitions to the European Parliament, *(ii)* make a complaint to the European Ombudsman, and *(iii)* write to the institutions of the Union in one of the languages of the Treaties and receive an answer in the same language [Articles 20(2)(d), 24 TFEU, 11 TEU and 41(4) CFREU].

The inclusion of an external dimension to EU citizenship serves a triple purpose: *(i)* to foster the worldwide free movement of EU citizens by securing consular support in situations of political and humanitarian crisis in third States; *(ii)* to enhance consular cooperation between Member States and the EU delegations outside the EU; *(iii)* to strengthen the identity of the Union as perceived by third States.

The diplomatic and consular protection provided to unrepresented EU citizens includes support provided in situations of need, such as when they are arrested or detained, suffer serious accidents, serious illnesses or die, need relief and repatriation or the issuance of documents. Since it is virtually impossible to exhaust local legal remedies in a short time span, the EU citizenship right does not include diplomatic protection in a strict sense, that is, the "*invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for an injury caused by an international wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.*"[1]

2. The right to diplomatic and consular protection does not entitle the unrepresented EU citizens to the assistance that would be given in a similar situation by the diplomatic or consular missions of their Member State of origin. They are solely entitled to the support available to nationals of the Member State from whom they seek protection in the third State.

Under international law, States have the sovereign right to grant diplomatic and consular protection to their own citizens. This is not, however, an obligation, but merely a discretionary power that may be exercised "*by considerations of a political or other nature, unrelated to the particular case.*"[2]

---

[1] Article 6 of the draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006 (UN doc. A/CN.4/L 684).

[2] Judgment International Court of Justice (ICJ) *Barcelona Traction, Light and Power Company, Limited*

In the absence of harmonised EU rules, diplomatic and consular protection provided to unrepresented EU citizens varies according to the laws and practices adopted in each Member State. The phenomenon of "consular shopping" or "protection shopping" by which unrepresented EU citizens pick and choose Member States' diplomatic and consular missions that offer a more generous treatment to their nationals may emerge and put a strain on the capacity of those missions to deliver adequate relief in times of crisis.

Diplomatic and consular missions of Member States enjoy a wide degree of discretion in deciding whether to provide assistance to unrepresented EU citizens on a given case.[3] EU citizens without representation that seek support in these missions may well find their request for diplomatic and consular protection denied. Since such a denial restricts a citizenship right protected by the Charter, it must meet objectives of general interest recognised by the Union, be necessary to attain a legitimate objective, respect the essence of the right to diplomatic and consular protection, as well as the principle of proportionality (Article 52 CFREU). When examining such requests, Member States' missions must take into account the consequences that the denial of diplomatic and consular protection entails for the person(s) concerned.[4] Those consequences relate to the protection of other fundamental rights enshrined in the Charter, such as the rights to life, physical integrity, property, liberty and human dignity.[5]

The right to diplomatic and consular protection enjoys direct effect and is subjected to judicial review. Unrepresented EU citizens may seek compensation for any harm caused by the decision of the diplomatic or consular mission of the represented Member State.[6]

3. The reciprocal diplomatic and consular protection between Member States established in the Charter is also limited by the fact that in international law, "*in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.*"[7] Article 3(1) of the draft Articles on Diplomatic Protection (2006) is also clear in this respect: "*The State entitled to exercise diplomatic protection is the State of nationality.*"

(Belgium v. Spain), 24 July 1964, *I.C.J. Reports 1970 3*, para. 79.

[3] Eva-Maria Poptcheva, *Multilevel Citizenship: the right to consular protection of EU citizens abroad* (Peter Lang, 2014), 192, found ten Member States that provide diplomatic and consular protection as a matter of policy: Austria, Belgium, Cyprus, the Czech Republic, France, Ireland, Luxembourg, Malta, the Netherlands, and the United Kingdom. Based on the national responses contained in the CARE Project Report Consular and Diplomatic Protection legal framework in the Member States, Eileen Denza, "Article 46", in *The EU Charter of Fundamental Rights: a commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Hart Publishing, 2014), 1186, also includes in this list Germany, Greece, and Spain.

[4] Judgment CJEU *Rottman*, 2 March 2010, Case C-135/08, ECLI:EU:C:2010:104, para. 56. This case concerned a situation in which national law granted national administrative authorities the discretionary power to withdraw the nationality of a naturalised citizen.

[5] Eva-Maria Poptcheva, *Multilevel Citizenship: the right to consular protection of EU citizens abroad*, 199, considers that "*the obligation imposed on the Member States as counterpart to the subjective right to claim consular protection is thus the obligation to secure those underlying fundamental rights.*" Poptcheva identifies the right to consular protection as an "umbrella right" that secures the effectiveness of other fundamental rights (199-200).

[6] Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, COM(2011)149/2, 4.

[7] Judgment Permanent Court of International Justice *Panevezys-Saldutiskis Railway (Estonia v. Lithuania),* 1938 P.C.I.J. (ser. A/B) no. 75 (Order of June 30), 16.

States have no right to protect nationals from other States against the will of the receiving State.[8] Article 8 of the Vienna Convention on Consular Relations (1963) authorises the extension of consular protection to nationals from other Member States, but at least tacit consent is required from the receiving State. Consent may follow the unilateral notification of the Member State whose protection was sought, or, alternatively, result from the application of "consent clauses" included in bilateral agreements that foresee the possibility of the third country accepting that the authorities of a Member State may provide protection to nationals of other Member States not represented on the same conditions offered to its own citizens.[9]

Article 23(1) TFEU mandates Member States to initiate international negotiations required to secure the effectiveness of the right to diplomatic and consular protection of unrepresented EU citizens. Although this obligation is not being complied with by Member States, in the absence of any reported denial from third states to protective functions exercised by Member States under Article 23 TFEU, the case could be made "*for asserting that there has developed a customary law exception to the restricted right to protection deriving from the special nature of the relations between Member States of the Union.*"[10]

4. Article 23(2) TFEU states that the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

On 20 April 2015 the Council adopted Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries.[11]

The directive establishes that citizens of the Union enjoy protection from the diplomatic and consular missions of other Member States on the same terms as the nationals of those Member States, if in the territory of the third country where the EU citizen's Member State of origin has no embassy or consulate established on a permanent basis, or if it has no embassy, consulate or honorary consul which is effectively in a position to provide him with consular protection (Articles 1 and 6). Protection for unrepresented citizens may include assistance in a number of typical situations in which Member States provides consular support to their own nationals, such as in cases of arrest or detention, serious accident or serious illness and death, as well as with regard to providing relief and repatriation in cases of distress, or the issuance of emergency documents (Article 9). The consular protection includes third-country family members accompanying the applicant to the same extent and on the same conditions as it would be provided to third-country family members of the citizens of the assisting Member State, in accordance with its national law or practice

[8] Eileen Denza, "Article 46", 1182.

[9] The European Commission has also encouraged the inclusion of "consent clauses" in "mixed agreements". These are international agreements adopted between the EU and its Member-States with third countries that focus on matters partially included within the sphere of competences of the EU and the Member-States. See Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, 8.

[10] Eileen Denza, "Article 46", 1191.

[11] This Directive establishes a transposition deadline until 1 May 2018 (Article 17). On this date the intergovernmental legal framework that governed the implementation of the right to diplomatic and consular protection (Decision 95/553/EC) was repealed.

(Article 5).[12] Unrepresented citizens can only be required to undertake to repay costs of consular protection that would have had to be borne by nationals of the assisting Member State in the same circumstances [Article 14(1)].

In the event of a crisis, the coordination of the support provided for unrepresented citizens is performed by the "Lead State". This role is given to one Member State represented in the third country. Member States not represented are obliged to provide the Lead State with all relevant information regarding their citizens [Article 13(2)].

5. The EU was granted legal personality by the Treaty of Lisbon (Article 47 TFEU) but that was not enough to overcome the "functional" limitation of its right as a federal Union of States to deliver diplomatic and consular protection solely to its staff.[13]

The possibility that the EU could provide diplomatic and consular protection directly to EU citizens was probably eschewed because it would invade areas of sovereignty that the Treaties still reserve almost exclusively to the Member States. However, that would be the best solution to reinforce the EU's identity as perceived by third countries and, above all, to solve the limitations of a diplomatic and consular protection of unrepresented EU citizens based on a reciprocal cooperation between Member States.[14]

The need to strengthen the Union's efforts in the field of diplomatic and consular protection was not ignored by the Treaty of Lisbon: *(i)* Article 3(5) TEU declares that "*in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens*"; *(ii)* Article 35(3) states that the diplomatic and consular missions of the Member States and the Union delegations in third countries "*shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries.*"

The Union's delegations, upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis [Article 5 (10) of the Council Decision 2010/427/EU].

In the event of crisis in third countries, the EU's civil protection mechanism can also be called upon to provide consular support to EU citizens when requested

---

[12] The Directive does not preclude that during the consultations which should take place before assistance is provided to third-country nationals, the assisting Member State and the unrepresented citizen's Member State of nationality, whenever appropriate, agree on the possibility to extend assistance to third-country family members of the unrepresented Union citizen beyond what is required by the law of the assisting Member State or what is dictated by its practice, taking into account as much as possible requests from the unrepresented citizen's Member State of nationality, and in so far as what is agreed does not fall short of what is required by Union law (Recital 9).

[13] In the opinion *Reparation for Injuries Suffered in the service of the United Nations*, Advisory Opinion: I.C.J. *Reports* 1949, 184, the International Court of Justice stated the following regarding the case of the United Nations: "*upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.*"

[14] Marta Cartabia, "Art. 46 Tutela diplomática e consolare", *in L'Europa Dei Diritti, Commento alla Carta dei diritti fondamentali dell'Unione Europea*, ed. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: il Mulino, 2001), 317, and "Article 46 – Diplomatic and Consular Protection", in *Human Rights in Europe*, ed. William B. T. Mock and Gianmario Demuro (Durham: Carolina Academic Press, 2010), 286, which adds that this proposal was presented by the Commission and by the Spanish government at a European Council held in Rome.

by the consular authorities of the Member States.[15] The operational centre for this mechanism – the European Commission's Monitoring and Information Centre – facilitates a rapid mobilisation of financial and logistical resources in crises, as well as the exchange of information of great importance to the consular authorities of the Member States.

Francisco Pereira Coutinho

[15] Article 2(10) of the Council Decision 2007/779/EC. The EU Civil Protection Mechanism was used to provide evacuation of Europeans after the terrorist attacks in Mumbai in 2008 and the beginning of the civil war in Libya in 2011. See Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, 8.

ARTICLE 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

1. *Sources.* The direct material sources of the three paragraphs of Article 47, inserted in the Charter's Title VI on "Justice", are respectively Article 13 of the ECHR (Right to an effective remedy), Article 6(1) ECHR (Right to a fair trial) – as expressly foreseen in the explanatory annotations on Article 47 included in the Explanations relating to the CFREU prepared under the authority of the *Praesidium* on the Convention, which drafted the Charter – and the legal aid systems foreseen within the framework of the guarantee system of the ECHR and of the judicial system of the EU. However, the contents of Article 47 of the Charter, especially its first paragraph and second paragraph, first sentence, are inspired in other sources of International Law on Human Rights, in particular in Article 8 (right to an effective remedy by the competent national courts) and Article 10 (fair and public hearing by an independent and impartial tribunal) of the UDHR (1946) and in Articles 2, 3(a) and 14(1) of the ICCPR (1966).

The three paragraphs of Article 47 of the Charter therefore foresee the "right to an effective remedy before a tribunal" (first paragraph), the "right to an impartial tribunal" – right to a fair and public hearing within a reasonable time (second paragraph, first sentence) – as well as the right to defence (second paragraph, second sentence), including the right to legal aid (third paragraph).

The comparison between the wording of Article 47 of the Charter and the Articles of the ECHR that provided inspiration reveals that the wording of the former does not match exactly the wording of the latter – Article 47, second paragraph, first part, is more restricted, because it only contains part of Article 6(1), first paragraph of the ECHR; and Article 47, first paragraph, on one hand, is more restricted and precise due to the fact that it does not consider the final part of Article 13 of the ECHR and, on the other hand, makes clear that it is an effective remedy before a *tribunal* – which does not imply a narrow scope of protection offered by the rights set in the Charter since the General provisions governing the interpretation and application of the Charter, precisely its Articles 52(3) and 53, foresee that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said ECHR and that the rights recognised by the Charter and nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and

fundamental freedoms as recognised, among other sources, by the ECHR. In its case-law, the CJEU even underlined that Article 47 "*secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary therefore to refer only to Article 47.*"[1]

Similarly, whilst the comparison between the wording of Article 47 of the Charter and the wording of the relevant provisions on the UDHR and the ICCPR shows that they do not fully match, Article 53 of the Charter is equally applicable so that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by International agreements to which the European Union or all the Members States are party.

Moreover, the rights recognised by Article 47 of the Charter also correspond to rights recognised by the legal orders of the Member States of the European Union – and Portugal[2] is no exception –, so that Article 52(4) of the Charter fully applies when it foresees that in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions and Article 53 also applies regarding the level of protection of the rights recognised by the Charter.

2. *The right to an effective remedy* (before a tribunal). The right to an effective remedy recognised in the first paragraph of Article 47 is based on the wording of Article 13 of the ECHR and moreover reflects the case-law of the CJEU regarding the right to an effective remedy in the case of violation of EC law – today European Union law.

The right to an effective remedy, or right to action, in the sense that the physical and legal persons can defend before a tribunal the rights deriving from EU law and the correspondent judicial control, was recognised in the *Johnston* case. The CJEU considered that the requirement of judicial control (right to an effective remedy before a tribunal) "*reflects a general principle of law which underlies the constitutional traditions common to the Member States*" and "*is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*", which was at that time the (substantive) source of the Legal Order of the European Communities – and Member States must ensure such effective judicial control as regards compliance with the applicable provisions of Community Law and of national legislation intended to give effect to such rules.[3] The CJEU further affirmed the principle in the cases *Heylens* and *Borelli*: in the first case, stating that the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of a right conferred by community law reflects "*a general principle of Community law*" in the terms recognised by the *Johnston* case-law, connecting such remedy to the guarantee of the effective protection of a fundamental right conferred by the Treaty on Community workers and to the duty to state reasons for the national definitive decision in refusing such right;[4] in the second case stating again that "*the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the (...)*" ECHR.[5]

Within the judgment on the liability of Member States for infringement of European Union law the CJEU underlines that "*It follows from the requirements inherent*

[1] Judgment *Berlioz*, 16 May 2017, Case C-682/15, EU:C:2017:373, para. 54.
[2] See Article 20 of the Portuguese Constitution, especially 1 and 3.
[3] Judgment *Johnston*, 15 May 1986, Case 222/84, ECLI:EU:C:1986:206, paras. 18 and 19.
[4] Judgment *Heylens*, 15 October 1987, Case 222/86, ECLI:EU:C:1987:442, paras. 14, 15 and 16.
[5] Judgment *Borelli*, 3 December 1992, Case C-97/91, ECLI:EU:C:1992:491, para. 14.

in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance."[6]

Therefore, although previously recognised by the Community legal order, through the general principles of law (and Community law), the "right to an effective remedy" before a tribunal, after the entering into force of the Treaty of Lisbon, is undoubtedly, as established in Article 47(1) of the Charter and Article 6(1) of the TEU, a fundamental right protected by those articles in accordance with the principle of the rule of law and the principle of effective judicial control recognised, respectively, by Articles 2 and 19(1), second paragraph, of the TEU – and any limitation on the exercise of that right must respect the requirements set out in Article 52(1) of the Charter.[7] As recalled by the GC in *Adib Mayaleh*, and referring to the previous *Kadi* case-law, "*according to settled case-law, the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to Member States, which has been enshrined in Articles 6 and 13*" of the ECHR, "*the principle having moreover been reaffirmed by Article 47 of the Charter of Fundamental Rights.*"[8]

The right to a remedy before a court to safeguard rights conferred by EU law [nevertheless in accordance with the limits set by the Court of First Instance (at present the GC) in the case *ITT Promedia*][9] must be effective: the effective judicial review must be able to cover the legality of the reasons for the contested decision and presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons, but also when it is a question of securing the effective protection of a fundamental right conferred by the (then Community) Treaty the beneficiary of the right must be able to defend that right under the best possible conditions and have the possibility of deciding, based on full knowledge of the relevant facts, whether there is any point in their applying to the courts.[10]

When, in the light of the principle of *autonomy* in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing such actions for safeguarding rights which individuals derive from Community law, that principle is limited by both the principle of *equivalence* and the principle of *effectiveness*: the first imposing that such rules are not less favourable than those governing similar domestic actions; the second that such rules do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law[11] – principles that were applied by the CJEU to the effectiveness of the right to obtain compensation for damages caused by infringement of EU law by Member States.[12] Each case that raises the question of whether a national procedural provision renders the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a

[6] See, for all, Judgment *Köbler*, 30 September 2003, Case C-224/01, ECLI:EU:C:2003:513, para. 36.
[7] Judgment *SC Star Storage*, 15 September 2016, joined cases C-439/14 and C-488/14, ECLI:EU:C:2016:688, para. 49.
[8] Judgment *Mayaleh v. Council*, 5 November 2014, joined cases T-307/12 and T-408/13, ECLI:EU:T:2014:926, para. 103.
[9] Judgment *ITT Promedia*, 17 July 1998, Case T-111/96, ECLI:EU:T:1998:183, para. 60.
[10] Judgment *Heylens*, para. 15.
[11] Judgment CJEU *Upjohn*, 21 January 1999, Case C-120/97, ECLI:EU:C:1999:14, para. 32.
[12] See *Köbler*, para. 58.

whole, before the various national instances – and the court must, where appropriate, take into consideration the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.[13]

(a) Scope of application. The right to an effective remedy (before a tribunal) is foreseen by the Charter as a right related to the violation of "*rights and freedoms guaranteed by the law of the Union*" which means that such right is not limited to the safeguarding of rights established by the Charter itself that lays down such right: on the contrary, it allows the individual beneficiaries of such right to invoke it in the case of violations of rights – and all rights, namely civil, economic or social rights – conferred by the EU law – and all EU law, especially by primary law and the Charter, but also secondary law adopted in the execution of the treaties.

As results from the case-law of the CJEU, EU law not only imposes obligations on individuals but is also intended to confer upon them rights, which become part of their legal heritage. Such rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Union.[14]

Regarding the subjective scope of application of the right to an effective remedy before a tribunal, this right is conferred to "everyone" whose rights and freedoms guaranteed by the law of the Union are infringed. Therefore, this right is conferred to those who are subject to the jurisdiction of a Member State of the Union and not only to "citizens" of the Union with the meaning set out in Article 20(1) of the TFEU.

In terms of the subjective scope of application in the passive dimension, although the above-mentioned case-law of the CJEU foresaw the right to an effective remedy before a court, in the EU legal order, as a general principle of law related to the judicial control of Member States actions, such subjective scope is not limited to these actors of the EU legal order when they apply the law of the Union, but also applies to the European Union institutions – as confirmed by Article 51(1) of the Charter on its "Field of application". According to Article 51(1) of the Charter its subjective field of application, in the passive dimension – meaning those to whom the Charter is addressed whose actions may violate the law of the Union – includes not only Member States when they are implementing Union law but also "the institutions, bodies, offices and agencies of the Union" – the institutions mentioned in Article 13(1) TEU, other bodies and offices of the Union foreseen in the treaties (see especially Articles 13(4) and 38 TEU, 300 and following and 288 TFEU) and the agencies foreseen in primary law (see Article 45 TEU) or created by act of secondary law and expressly considered within the legal remedies in the EU laid down in the TFEU [see Articles 263, 265 and 267(b)] and with the limits foreseen in such rules.

(b) National courts and EU courts. Considering the above-mentioned dual subjective scope of application, in the passive dimension – EU and Member States – the reference to an "effective remedy" before a "tribunal" implies that the last element does not refer only to a "national authority" (see Article 13 ECHR) or to "competent national tribunals" (see Article 8 UDHR). In fact, the definition of a

[13] Judgment *Evans*, 4 December 2003, Case C-63/01, ECLI:EU:C:2003:650, para. 46 or Judgments CJEU, 26 June 2019, *Addiko Bank*, Case C-407/18, ECLI:EU:C:2019:537, para. 48 and 16 July 2020, *Caixabank*, Case C-224/19, ECLI:EU:C:2020:578, para. 85.

[14] In this regard, see Judgment *Van Gend & Loos*, 5 February 1963, Case 26/62, ECLI:EU:C:1963:1.

"court" includes not only the courts or tribunals of a Member State but also the CJEU of the EU, which includes today the CJEU and the GC, especially those who rule in the first instance on the actions and recourses enshrined in primary law.

The access to justice is a fundamental element of the rule of law and of a Union based on the rule of law: as the CJEU ruled in the *Les Verts* case, neither the Member States of the Community (the Union, as of today) nor its institutions can avoid reviewing whether the measures they adopt are in conformity with the "basic constitutional charter, the Treaty"[15] – through the CJEU and the complete system of legal remedies and procedures foreseen in the treaties or through national courts when the implementation of the Community law is a matter for national authorities (*idem*).

The "right to an effective remedy before a tribunal" must be exercised in the framework of the *ratione materiae* jurisdiction of the CJEU as set out in the Treaties in the light of the principle of conferral, as well as of the legal remedies foreseen in the TEU and in the TFEU [see Articles 19(3) and 226 *et seq.*, respectively]. Consequently, the right in question can only be exercised, on one hand, within the competences conferred to the EU by its Member States and that the Treaties expressly include in the *ratione materiae* jurisdiction of the CJEU; and, on the other hand, through the main or incidental legal remedies that allow the beneficiaries of "rights or freedoms guaranteed by the law of the Union" that have been violated to bring an action before the courts of the EU – meaning that the right to an effective remedy before a tribunal of the Union is exercised, in the first or second instance, through the legal remedies aimed at the control of the legality of EU 'institutions, offices and bodies' acts or omissions (namely action of annulment, action for failure to act and preliminary ruling on the validity of EU secondary law) as well as through the pertinent legal remedies involving *pleine jurisdiction* (action to obtain compensation for damages and legal remedies to settle disputes between the Union and its servants). This also means that the right to an effective remedy before a tribunal of the EU is, in practice, restricted by the requirements of each type of legal remedy foreseen in the treaties, especially requirements on legitimacy to bring an action before a court of the Union, as interpreted by the CJEU.

Moreover, the right to an effective remedy before a court (in the meaning guaranteed by the ECHR and foreseen in the UDHR) includes the safeguarding of the right or freedom conferred by the Charter either through a main procedure or an incidental procedure aiming at obtaining provisional measures, including before national courts.[16]

3. The '*Right to a fair trial*' (or '*Droit à un tribunal impartial*' in the French version of the Charter) established in the second paragraph, first part, of Article 47, on one hand, is based on Article 6(1) ECHR and, on the other hand, reflects the case-law of the CJEU according to which the right to a fair trial as a fundamental principle of the law of the Union must be respected in all procedures, including in administrative procedures. The right to a for trial includes, namely, the right to a fair and public hearing, including the principle of equality of arms, the rights of defence, including the adversarial principle, as well as the duty to give reasons.[17]

---

[15] Judgment CJEU *Les Verts*, 23 April 1986, Case 294/83, ECLI:EU:C:1986:166, para. 23.
[16] Judgment *Factortame*, 19 June 1990, Case C-213/89, ECLI:EU:C:1990:257, paras. 19-22.
[17] Judgment *ZZ*, 6 June 2013, Case C-300/11, ECLI:EU:C:2013:383, para. 53-55 and *Euro Box*, 21 December 2021, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 205.

The CJEU case-law regarding the right of a fair trial as a general principle of EU law, including within a reasonable period of time, considers that such principle (and the respective right) applies to the procedures within the legal order of the EU. In the case *Sumitomo and Nippon*[18] – and underlining previous case-law of the Court[19] –, the CJEU considers that such principle is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law as well as that the reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities. Moreover, the Court considers that such list of criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceeding appears justified in the light of one of them.

According to the CJEU the right to be heard must be upheld in all proceeding in which sanctions, in particular fines or penalty payments, may be imposed. This is a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings,[20] requiring that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of a pertinent rule of the Treaty.[21] According to settled case-law of the CJEU, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question;[22] since the observance of rights of the defence is considered a general principle of law that the CJEU ensures, it applies to any procedure that may "*end with a decision of an institution of the Union towards a person whose interests are perceptibly affected*" by such decision.[23]

Although the Commission is not considered a "tribunal" in the sense of Article 6 ECHR, it should ensure, within administrative proceedings, procedural rights foreseen by the Community law.[24]

The right to a fair trial does not only safeguard civil rights and obligations (see Article 6(1) ECHR) but is envisaged as a right conferred upon "everyone" – that

[18] Judgment *Sumitomo and Nippon*, 25 January 2007, joined cases C-403/04 P and C-405/04 P, ECLI:EU:C:2007:52, paras. 115-117.

[19] See the following judgments: *Baustahlgewebe*, 17 December 1998, Case C-185/95 P, ECLI:EU:C:1998:608, paras. 20, 21 and 29; *Limburgse*, 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-252/99 P and C-254/99 P, ECLI:EU:C:2002:582, paras. 179 and 188; *Thyssen Stahl*, 2 October 2003, Case C-194/99 P, ECLI:EU:C:2003:527, paras. 154-156.

[20] Judgment *Hoffmann-La Roche*, 13 February 1979, Case 85/76, ECLI:EU:C:1979:36, para. 9.

[21] On competition, see Judgment *Hoffmann-La Roche*, para. 11.

[22] See, for all, Judgment *Germany v. Commission*, 5 October 2000, Case C-288/96, ECLI:EU:C:2000:537, para. 99.

[23] See the following judgments: *Transocean Marine Paint v. Commission*, 23 October 1974, Case 17/74, ECLI:EU:C:1974:106, para. 15; *Ismeri*, 10 July 2001, Case C-315/99 P, ECLI:EU:C:2001:391, para. 28.

[24] Judgment *Musique Diffusion Française*, 7 June 1983, joined cases 100 to 103/80, ECLI:EU:C:1983:158, paras. 7 and 8.

has a right to bring an action or is a part in proceedings – and therefore is not only conferred upon citizens of the EU.[25]

In its recent case-law the CJEU has further developed the requirement of the independence of the courts (internal and external independence) which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial which is of cardinal importance to safeguard the EU values, especially the value of the rule of law.[26]

The above-mentioned right is not limited to proceedings in national courts but also applies to procedures before the courts of the EU – especially within appeals against decisions of the GC regarding pleas of law.[27]

4. *The right to defence and to legal aid.* The right to defence established in the second paragraph, second sentence, of Article 47 of the Charter includes the right to be advised, defended and represented. The right to legal aid foreseen in the third paragraph is conferred to the extent that such legal aid may be "necessary" to ensure effective access to justice – since the latter shall not be denied due to lack of sufficient (economic) resources.

Legal aid within the legal order of the EU is foreseen both in the Rules of Procedure of the CJEU (2020) and the Rules of Procedure of the GC (2023) – respectively Articles 115 to 118 and Articles 146 to 150 ("Legal Aid") – and the application for legal aid shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent authority attesting to his financial situation [Article 115(2) of the Rules of Procedure of the CJEU and Article 147(3) of the Rules of Procedure of the GC) and in the case of the CJEU decided by the competent formation of the Court by way of order (Article 116) and in the case of the GC by the President also by way of an order [Article 148(2)].

With respect to the provision of legal aid within national legal orders, the CJEU ruled that in conformity with the principles of equivalence and effectiveness it is incumbent on the national courts to verify whether it appears reasonable, or indeed necessary, for the individuals (invoking rights conferred by the law of the Union) to be given "legal assistance" within proceedings, as foreseen in a directive aimed at the protection of the victims of motorcar accidents.[28]

The case-law of the CJEU has further developed the requirements of the right to legal aid, namely underlining that legal aid may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings and that the assessment of the need to grant that aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the_basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid; as well as enouncing the criteria for national courts to ascertain whether the conditions for granting legal aid – also to legal persons – constitute a limitation on the right of access to the courts which undermines the very core of that right, whether

[25] Judgment *Germany v. Commission*, para. 99.

[26] Judgment *Euro Box*, para. 219-229 (and case-law cited) and previously Judgment *ASJP*, 27 February 2018, Case C-64/16, ECLI:EU:C:2018:117, paras. 42-45.

[27] Regarding the duration of the first instance procedure, see Judgment *Baustahlgewebe*, paras. 28 and 29.

[28] Judgment *Evans*, para. 77.

they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.[29]

Maria José Rangel de Mesquita

[29] Judgment *DEB*, 22 December 2010, Case C-279/09, ECLI:EU:C:2010:811, paras. 48, 42 and 59-62, respectively.

ARTICLE 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proven guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

This article addresses two essential principles of individual guarantees in the face of certain repressive powers: the presumption of innocence and the respect for the rights of defence.

The provision of this Article closely, although not exactly, corresponds to the most significant instruments of international law. Article 11, paragraph 1, of the UDHR states that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he/she has had all the guarantees necessary for his/her defence.

Article 14, paragraph 2, of the ICCPR states that everyone charged with a criminal offence is entitled to be presumed innocent until their guilt has been legally established. The rights of defence are provided in paragraph 3 of the same Article, according to a minimum catalogue – every person accused of a crime is entitled in full equality to the following minimum guarantees: to be informed promptly in a language which he/she understands and in detail of the nature and cause of the charge; to have the necessary time and means for the preparation of a defence and to communicate with the counsel of his/her own choosing; to be tried without undue delay; to be tried in his/her presence, and to defend himself/herself in person or through legal assistance of his/her own choosing; to be informed, if he/she does not have legal assistance, of this right; and to have legal assistance assigned to him/her, in any case where the interests of justice so require, and without payment if he/she does not have sufficient means to pay for it; to examine, or have examined, the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her; to have the free assistance of an interpreter if she/she cannot understand or speak the language used in court; and not to be compelled to testify against himself/herself or to confess guilt.

The RSICC dedicates a rule – Article 55 – to the rights of persons under criminal investigation, clarifying that in the course of an investigation under that Statute, no person may be compelled to incriminate himself/herself or to confess guilt; no person shall be subjected to any form of coercion, duress or threat, to torture or other forms of cruel, inhuman or degrading treatment or punishment; any person shall have, if questioned in a language other than a language the person fully understands and speaks, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; no person shall be arrested or detained arbitrarily, nor be deprived of liberty except on the grounds of the Statute and in conformity with the established procedures. The Rome Statue extends its range of warranties by adding in paragraph 2 of the same article that, where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court

and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights, of which he or she shall be informed prior to being questioned: to be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; to remain silent, without such silence being a consideration in the determination of guilt or innocence; to have legal assistance of the person's choosing or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without any payment if the person does not have sufficient means to pay; and to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 48 of the CFREU is, however, directly inspired by paragraphs 2 and 3 of Article 6 of the ECHR. Paragraph 2 states that any person accused of an infraction is presumed innocent until their guilt is legally proven, while paragraph 3 tells us that the accused has at least the following rights: to be informed as soon as possible, in a language he or she understands and in detail, of the nature and cause of the accusation against him or her; to have adequate time and facilities for the preparation of his or her defence; to defend himself or herself or to have legal assistance of their choosing or to have legal assistance assigned to him or her without any payment if the person does not have sufficient means to pay for it, where the interests of justice so require; to interrogate or to have interrogated the prosecution witnesses and obtain the summons and questioning of defence witnesses under the same conditions as witnesses for the prosecution; to be assisted by an interpreter, free of charge, if he or she does not understand or speak the language being used in the process.

According to Article 52(3) of the CFREU, the rights set out therein have the same meaning and scope as those set out in the ECHR. In that sense, even though the precept in question refers only to the rights of the defence without densifying them, we must understand them in exactly the same terms as those laid down in the ECHR. Accordingly, the minimum catalogue of rights of defence provided for in Article 6(3) of this instrument serves as a hermeneutical element for the reading of Article 48(2) of the CFREU and should be considered as if it were actually listed.

The presumption of innocence, first affirmed in France in the Declaration of the Rights of Man and of the Citizen, originally played a role of reaction against the abuses hitherto committed, having a political dimension as strong as or stronger than the legal one. In this context, it required the non-presumption of guilt, containing, above all, a negative legal meaning.

This principle rests structurally in the conception of a free society, which recognises the intrinsic ethical value of each human being. This axiological understanding of the principle results in consequences in all criminal proceedings (and also in other cases of repressive proceedings). Enforcement of the principle will always respect the suspect or accused, embedded in the awareness that he or she is innocent until proven otherwise and therefore equal to all other citizens.

This principle is procedurally important in relation to coercive measures and in the field of evidence. In the first case, by requiring such measures to be limited only to that which is strictly necessary for in terms of precautionary requirements and, second, by removing the burden of proof from the defendant and leaving the prosecution with the task of proving the facts (the defendant does not need to prove his or her innocence).

The principle *in dubio pro reo* is, therefore, for many authors, a consequence of the presumption of innocence. In fact, since a *non liquet* verdict may not be declared, any doubts about the evidence will favour the accused, since otherwise there would be an assumption of guilt based on the facts imputed to the accused, who would bear the burden of proof. The primacy of the defendant's innocence may only be overturned by evidence presented at a trial, resulting from an independent and impartial procedure, which will demonstrate his guilt.

One of the most frequently discussed questions in the context of the presumption of innocence is: when does it cease? In fact, abstractly, several moments could be considered as the procedural moment from which the accused would no longer be considered innocent. All of them are dependent on a judicial decision that assesses the guilt of the accused, but that could be the case either with the first judicial decision (in the first instance), or with only the final decision, or possibly with a decision in a second instance confirming the previous verdict. To ensure respect for the fundamental value of the dignity of the human person, which grounds and justifies the principle of the presumption of innocence, it has been understood that the presumption of innocence must be maintained until the final judgment has been passed.

The presumption of innocence, although commonly accepted in international law and in various domestic laws, does not appear in most European constitutional texts. The CPR is one of the texts that expressly provides for it, establishing, in paragraph 2 of Article 32, that all defendants are presumed innocent until the final conviction and must be tried in the shortest possible time compatible with the guarantees of defence. Similarly, the Spanish Constitution of 1978, in its Article 24(2), lists a set of rights of defence among which explicit reference is made to the presumption of innocence. Although it does not refer to the presumption of innocence verbatim, the Italian Constitution provides, since 1948, in Article 27(3) that no one can be considered guilty until after the final conviction.

The concern of the EU with the presumption of innocence (as well as with the other procedural guarantees of the defendant) is not a recent one, and efforts have been made to harmonise this principle within the Member States as much as possible. The most significant instrument in this area is the Commission's Green Paper on the Presumption of Innocence of 26 April 2006, which was presented to the Member States for the formulation of replies and comments.[1]

With regard to the guarantees of defence provided for in paragraph 2 of Article 48 CFREU, we should note the EU's option of promoting a criminal procedural model with an accusatory basis, in the hope of fostering equal powers of prosecution and defence. The State, through the Public Prosecutor's Office or another representative, shall bear the burden of proof to demonstrate the guilt of the accused. Whilst the defendant or accused does not have the duty to defend himself, since he is presumed innocent, he has that right, which must be ensured in its essential minimum.

The Green Paper on the Presumption of Innocence, however, has identified three exceptions, on the basis of the case-law of the ECtHR, in which the burden of proof is

[1] After this Green Paper, several other instruments have been developed within the framework of the presumption of innocence. In particular, we should highlight the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, adopted by the Council on 30 November 2009 (OJ C 295, 4.12.2009) and integrated into the Stockholm Programme in December of that year, and the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on reinforcing certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (OJ L 65, 11.03.16).

not to be confined exclusively to prosecution: strict liability offences, offences in which the burden of proof is reversed and cases in which a confiscation order is issued.

As regards the first of these situations, the ECtHR has already recognised that Member States' criminal legislation establishes strict liability offences [ECtHR, *Salabiak v. France*, A 141-A (1988), paragraph 28]. In these cases, the prosecution needs only to provide evidence that the accused has committed the *actus reus* of the offence but does not have to prove the defendant's *mens rea*, *i.e.,* that he intended to act in that way or to bring about that result. As far as these infringements are concerned, it is only necessary to prove that the accused has committed the offence and, if proven, there is a presumption that it may operate against the accused. The ECtHR pointed out that these presumptions should be subject to "*reasonable limits which take into account the seriousness of the matter in question while respecting the rights of the defence.*"[2]

The ECtHR recognises, in the same decision, the possibility of reversing the burden of proof, albeit only in the context of "minor infringements" (of an exceptional nature, above all we refer to document or regulatory offences). In this hypothesis, the prosecution must prove that the accused acted in a certain way and the accused must provide a justification for his actions to prove his innocence. The burden of proof on the accused here will be heavier than in the previous situation.

The third hypothesis relates to situations of asset recovery. When a confiscation order is issued, the recovery of assets from the defendant or third parties may lead to a reversal of the burden of proof, where the assets are the proceeds of a criminal activity, which the owner of those assets must rebut, or a reduction in the level of requirement of proof, where the prosecution is authorised to prove culpability on the basis of probabilities, rather than proving culpability beyond reasonable doubt, as is usually the case.[3]

Regarding the specific rights of defence, which as we have noted the CFREU seeks to safeguard, we must understand them with reference to the provision in paragraph 3, Article 6 of the ECHR. The first of these rights is the right to be notified of the accusation, in detail, in the language the accused understands or with the intervention of interpreter that assists the accused in any clarification he or she may deem necessary, in the shortest possible time. It is, of course, a fundamental guarantee, without which the entire defence would be compromised. The right to know and understand thoroughly the facts being imputed, as well as any subsequent procedural process, may require, in the case where the accused does not understand the language in question, the right to an interpreter and/or translation of procedural documents. This is of particular importance for the EU given the increasing mobility of citizens and the need to ensure an adequate area of freedom, security and justice. The Commission Green Paper on procedural safeguards for suspects and defendants in criminal proceedings in the EU of 19 February 2003 identifies, however, certain difficulties related to the exercise of this right: the availability of qualified translators and interpreters, the length of the documents to be translated, the cost problem and whether the costs are charged to the defendant or not.[4]

---

[2] See ECtHR *Salabiak v. France*, 7 October 1988, no. 10519/83.

[3] See Judgments ECtHR *Welt v. United Kingdom*, 9 February 1995, no. 17440/90; *Philips v. United Kingdom*, 5 July 2001, no. 41087/98.

[4] In this regard, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010) has since been adopted.

The right to have the necessary time and resources to prepare the defence is also established. It should be noted that the time for the preparation of the defence is not specifically defined and will be the appropriate time for each concrete case and can therefore be variable. The necessary means will be those that allow the accused to bring to the attention of the judge all the arguments relevant to his defence.

On the other hand, there is also a right to be assisted by counsel of the defendant's choice and, if he does not have the means, to be provided with legal aid or, if he so wishes, to defend himself. The right to be assisted by counsel, chosen by the defendant on his own initiative or officially appointed, will be a natural condition for the proper exercise of the defendant's other rights of defence, as his opportunities for information in this respect increase greatly with qualified legal assistance. This right exists at all procedural stages and must always be brought to the attention of the accused. He/she may, if he/she so desires and only in some cases, renounce the assistance of the defender and/or defend himself/herself. It should be noted that the right to free legal aid is not unconditional. Both the ECHR and the ICCPR and the Rome Statute provide that this right should be granted "where the interests of justice so require." In the case of *Quaranta v. Switzerland*, 24 May 1991, no. 12744/87, the ECtHR indicated three factors to be taken into account: the gravity of the offense and the severity of the sentence, the complexity of the case and the personal situation of the accused.[5]

The accused also has the right to question or have the prosecution witnesses questioned and to have the defence witnesses summoned and interrogated under the same conditions as the prosecution witnesses. As an embodiment of the right to present their own means of defence, the possibility of cross-examining and registering witnesses ensures an effective equality of arms between the prosecution and the defence.

The right to be assisted by an interpreter free of charge, if the defendant does not understand or speak the language used in the proceedings, is a development of the one we first enunciated and obviously aims to ensure that the accused is aware of the prosecution's case and can convey to the court their version of the facts.

The right to silence is one of the rights usually recognised for the accused, but it is a right that raises serious questions and is not expressly set out in the CFREU. In fact, the right to silence is generally recognised in international standards, applying to police interrogations and the courts. Member States recognise the right to remain silent during the investigation phase in which the police or the investigating judge interrogate the accused. However, given the different ways in which States act, and guarantee the right to silence, it is essential that the accused be informed of this right. This right, however, is not absolute. There are cases where the ECtHR has recognised the possibility of deriving unfavourable inferences from the silence of the accused, when such inferences can only be drawn after the prosecution has proved the facts. In the case of *Murray v. United Kingdom*, 8 February 1996, no. 18731/91, the ECtHR accepts that requiring the accused to testify is not incompatible with the ECHR (and therefore with the CFREU) but does not accept as compatible a conviction based exclusively or principally on a refusal to testify. The Court has held that legal persons

[5] There have also been developments in this regard in the meantime, namely with the adoption of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to inform a third party upon deprivation of liberty and to communicate, in a situation of deprivation of liberty, with third persons and with consular authorities (OJ L 294, 6.11.2013).

do not have an absolute right to be silent and must answer questions on the facts but cannot be required to admit that they have committed an offence.[6]

On the same grounds as the right to silence, the accused has the right not to present self-incriminating evidence. In defining the scope of this right, the ECtHR distinguished between the evidence obtained by coercive means and the evidence that exists independently of the will of the accused. The right not to self-incriminate is intrinsically linked to the right of the accused to remain silent. However, common sense demands that this right does not extend to the gathering of evidence in criminal proceedings that can be obtained from the accused by coercive means, but that exist independently of his will, referring to evidence obtained by court order, biological samples, including for the purpose of DNA analysis.[7]

Finally, one last question can be raised regarding this precept (as well as the following two): that of its material scope. Are "criminal matters" the only issue here, or rather "repressive matters, in a generic sense"? In fact, the ECHR speaks specifically about criminal matters, even though the ECtHR has held that such expression may include some non-criminal repressive procedures. The CFREU, in turn, does not make such a reference to parameters, thus it has been argued that the broader interpretation, in accordance with the legal text, is the most favourable to the protection of rights. In view of the importance of repressive administrative measures within the Union (such as, for instance, concerning financial markets or competition) it would be strange if all such regimes, with very serious consequences for citizens and carried out not by courts but by administrative authorities, offered fewer procedural warranties to individuals presenting a challenge to the principles of the CFREU.

Flávia Noversa Loureiro & André Paulino Piton

[6] See Judgment *Orkem v. Commission*, 18 October 1989, Case 344/87, ECLI:EU:C:1989:387, paragraphs 34 and 35.

[7] See Judgment *Saunders v. United Kingdom*, 17 December 1996, no. 19187/91.

ARTICLE 49

Principles of legality and proportionality of criminal offences and penalties

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

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

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

1. Paragraph 1 of Article 49 sets out one of the most important principles for criminal law: the principle of legality, also known by the Latin maxim *nullum crimen, nulla poena sine lege.*

2. At the national level, the principle of legality is constitutionally acknowledged in almost all the Member States of the European Union (EU): in Germany (Article 103, §2), in Belgium (Article 14), in Bulgaria [Article 5 (3)], in Cyprus [Article 12 (1)], in Slovakia [Article 49 and 50 (6)], in Slovenia (Article 28), in Spain [Article 9 (3) and 25], in Estonia (Article 23), in Finland (Article 8), in France (Article 5 and 8 of the Declaration of the Rights of Man and of the Citizen), in Greece [Article 7 (1)], in The Netherlands (Article 16), in Hungary [Article 57 (4)], in Italy [Article 25 (2)], in Lithuania (Article 31), in Luxembourg (Article 14), in Malta [Article 39 (8)], in Poland [Article 42 (1)], in Portugal (Article 29), in the United Kingdom [Article 7 (1) of the Schedule 1 of the Human Rights Act 1998], in the Czech Republic [Article 39 and 40 (1 and 6)], in Romania [Article 23 (12)], and in Sweden (Article 10).

3. At the international level, this principle can be found in the UDHR, specifically in Article 11(2), stating that "*no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*"

4. Similarly, the ACHR, also known as the "Pact of San José", establishes the principle of legality and retroactivity in its Article 9.

5. Furthermore, Article 15(1) of the ICCPR establishes, on the one hand, that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed, and, on the other hand, establishes that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed. If a subsequent law imposes the application of a lighter penalty, the offender shall benefit from it.

6. Chapter III of the Statute from the International Criminal Court, on the general principles of criminal law, welcomes the principle *nullum crimen, nulla*

poena sine lege. It begins by stating, in Article 22, that, under the Statute, no one shall be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court, thus implementing the principle *nullum crimen sine lege*, under which there is no crime, or criminal liability, that does not result from a previous law. Subsequently, the following article, under the heading *nullum poena sine lege*, establishes the idea that there is no penalty without law, since any person sentenced by the Court shall only be punished in accordance with the Statute.

7. The ECHR adopts the same principle in its Article 7(1), closely following the formula employed in Article 11(2) of the UDHR.

8. Article 7(1) of the ECHR, does not foresee, at least expressly, the retroactive application of the most favourable law (*lex mellior*), in contrast to Article 49(1) of the CFREU – as well as the UNICCPR and the ACHR –, in which there is a duty to apply a lighter penalty, in case the law, after the infraction occurs, provides for more lenience. However, the duty to apply the most favourable penal regime must be considered implicit, which will happen in case of decriminalisation as well as the mitigation of the legal consequence.[1]

9. The principle of legality occupies a prominent place in the catalogue of rights enshrined in the ECHR, exemplified by the fact that Member States, even in the event of war or other public danger that threatens the life of the Nation (Article 15), may not refrain from the obligation to respect this principle, which is explained by the pivotal role of the principle in establishing limits against possible arbitrary or excessive state intervention.[2]

10. The principle of legality, foreseen in Article 49(1) of the CFREU, therefore assumes the nature of a fundamental human right within the EU.

11. However, it is necessary to densify the approach to the principle through the decomposition of the elements which materialise it; prima facie, to analyse the notion of law or rule. As far as this question is concerned, it has been the dominant view of the ECtHR that the principle of legality does not imply, at the source level, the existence of a formal law, and an offence may be punished as a crime by unwritten law. The concept of law must therefore be viewed from a material or substantive point of view, thus legitimising the interpretation under which custom and case-law can be regarded as sources of criminal law, as in common law countries.[3]

12. The law should be sufficiently clear, accessible, accurate and predictable.[4]

13. In order to comply with the principle of legality, in the first place, the law must be sufficiently clear. This implies that the agent must be able to identify the acts or omissive behaviours which are legally prohibited, even if he has to make use of the judicial interpretation given to the relevant rule.[5]

---

[1] See Judgments *Mihai Toma v. Romania*, 24 January 2012, no. 1051/06 and *Scoppola v. Italy* (no. 2), 17 September 2009, no. 10249/03.

[2] See Judgments *Scoppola v. Italy* (no. 2); *Kafkaris v. Cyprus*, 12 February 2008, no. 21906/04 and *S.W. v. United Kingdom*, 22 November 1995, no. 20166/92.

[3] See Judgments *Sanoma Uitgevers BV v. The Netherlands*, 14 September 2010, no. 38224/03 and *The Sunday Times v. United Kingdom*, 26 April 1979, no. 6538/74.

[4] See *Mihai Toma v. Romania*; *Sanoma Uitgevers B. V. v. The Netherlands*; *Scoppola v. Italy* (no. 2); *Kokkinakis v. Greece*, 25 May 1993, no. 14307/88, and *The Sunday Times v. United Kingdom*.

[5] See Judgments *Scoppola v. Italy* (no. 2); *Sud Fondi Srl et al. v. Italy*, 20 January 2009, no. 75909/01; *Achour v. France*, 29 March 2006, no. 67335/01; and *Kokkinakis v. Greece*.

14. Although the requirements of accessibility and accuracy are acknowledged as being essential, the ECtHR has not analysed these criteria in much depth. Still, we can find in *Margareta and Roger Andersson v. Sweden*, 25 February 1992, no. 12963/87, the following passage: "*The Court recalls that the expression "in accordance with the law" (...) requires (...) that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*" In *The Sunday Times v. United Kingdom*, one can also read that "*the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.*"

15. In *Cantoni v. France*, 15 November 1996, no. 17862/91, the ECtHR upheld the idea that the correct fulfilment of the requirement of predictability depends on several factors, such as the textual content of the rule, its scope and the quality and quantity of individuals affected by it.[6] Compliance with this requirement will not be ruled out even in the event that the individual must seek adequate legal advice in order to discern the consequences that may arise from a particular case.[7] Neither will compliance be ruled out by jurisprudential efforts to clarify the meaning of the rule, provided that by its efforts the essential elements of the offence are not altered[8] thereby undermining predictability. Hence, this means that absolute certainty of the legal consequences of a particular behaviour is not required because, apart from being out of reach for the human interpreter, it would be a sign of an undesirable crystallisation and inflexibility of the law.[9]

16. Regarding the concept of "infringement", it should be recalled that, in *Lauko v. Slovakia*, 2 September 1998, no. 26138/95, the ECtHR held that, in order to determine whether an offence qualifies as a criminal offence under the Convention, three criteria must be used alternately or cumulatively when necessary: the legal framework of the text that defines the offence within the legal system of the State concerned; the nature of the offence; and the nature and degree of severity of the sanction which the person concerned incurs.

17. In order to assess the existence of a "penalty" in a specific case, it must firstly be borne in mind that, for the purposes of the Convention, it is autonomous in nature and scope in relation to the qualification offered by the national legal systems.[10] It is therefore necessary to examine its nature beyond mere appearance.[11] Criteria such as whether a provision under analysis is the consequence of a crime, the nature and purpose of the provision, its characterisation in the national legal order, the type of process involved in its application and its severity are relevant hermeneutical elements to determine if a certain provision is a penalty.[12]

---

[6] In the same sense, see Judgments *Scoppola v. Italy* (no. 2) and *Groppera Radio AG and others v. Switzerland*, 28 March 1990, no. 10890/84.

[7] See Judgments *Scoppola v. Italy* (no. 2); *Kafkaris v. Cyprus*; *Achour v. France*; *Cantoni v. France* and *The Sunday Times v. United Kingdom*.

[8] Judgment *Scoppola v. Italy* (no. 2).

[9] Judgment *The Sunday Times v. United Kingdom*.

[10] Judgments *Scoppola v. Italy* (no. 2); *Kafkaris v. Cyprus*; *Demicoli v. Malta*, 27 August 1991, no. 13057/87.

[11] Judgments *Kafkaris v. Cyprus* and *Welch v. United Kingdom*, 9 February 1995, no. 17440/90.

[12] Judgments *Scoppola v. Italy* (no. 2); *Kafkaris v. Cyprus and Welch v. United Kingdom.*

Accordingly, these criteria must also be used in the context of Article 49 CFREU, pursuant to Article 52(3) of the same legal instrument.

18. The sources of Paragraph 2 of Article 49 may be found in Article 7(2) ECHR and Article 15(2) UNICCPR.

19. In the English version, the wording used in the afore-mentioned legal provisions is practically identical, albeit with some variations: the CFREU ends with the expression "general principles recognised by the community of nations", and in UNICCPR with "*general principles of law recognised by the Community of Nations*" – different in terms of the characterisation of the principles as being legal principles –, whilst Article 7(2) ECHR ends with "general principles of law recognised by civilized nations."

There will, however, be an even greater disparity if we compare the Portuguese version of the various texts: *"princípios gerais reconhecidos por todas as nações" (CFREU), "princípios gerais de direito reconhecidos pela comunidade das nações" (UNICCPR) and "princípios gerais de direito reconhecidos pelas nações civilizadas" (ECHR).*

20. According to the Explanations to Article 49 drawn up under the responsibility of the *Praesidium* of the Convention, who drafted the CFREU, and published in OJEU, C 303, 14 December 2007, the elimination of the term "civilised", which could be found in the wording of Article 7(2) of the ECHR, does not compromise the meaning of the text. Notwithstanding this assertion, which we accept with reservations, it seems to us that the Portuguese translation should not have innovated by eliminating the word "community" in addition to the term "civilised", in order to avoid any future hermeneutic problems stemming from the lack of at least formal normative correspondence with the remaining translations of the CFREU.

21. It is clear from the reading the preparatory work of the ECHR, the study of which seems appropriate to elucidate the function and material meaning of the provision under examination, that the basis of Article 7(2) lies in the need to emphasise the exceptional nature, in view of the provisions of paragraph 1 (principle of legality and principle of non-retroactivity *in malam partem*), of the laws created at the end of World War II to punish war crimes, treason and collaboration with the enemy.[13] Such an argument is also extended to crimes against humanity.[14]

22. The expression "general principles of law recognised by civilised nations" of Article 7(2) ECHR derives directly from Article 38(1)(e) of the Statute of the International Court of Justice. Therefore, as the doctrine emphasises, it means that we are under principles of law that find refraction in most national legal systems, although it is said they may also arise from emerging international law, *rectius*, international law in the process of sedimentation. Moreover, in using the term "civilised nations", there was deliberate intent to extend the axiological-referential spectrum of the general principles of law to the ethical-social conscience assumed by the international community, and not only to the Contracting States of the ECHR. The general principles of law do not originate only from the Contracting States. The same reasoning applies to the provisions of the CFREU.

23. Examples of crimes against international law – known as *delicta juris gentium* or *crimina juris gentium* – are genocide, war crimes, crimes against peace and human rights and crimes against humanity, *e.g.*, extermination, slavery, torture, apartheid, among others.

---

[13] See Judgment ECtHR *Kononov v. Latvia*, 17 May 2010, no. 36376/04.

[14] See Judgment ECtHR *Touvier v. France*, 13 January 1997, no. 29420/95.

24. Although the etymology of these crimes lies in customary international criminal law, we have witnessed, since the end of World War II, their inclusion in international legal instruments (and consequently in national legal systems). The RSICC, open for signature by the participating States on July 17, 1998 warrants special emphasis because of the importance now justifiably attributed to it, notably for having materialised an international court in criminal matters of permanent, voluntary and subsidiary jurisdiction.

In addition to the Rome Statute, examples of this crystallising tendency include: the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, the Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the Statute for the International Criminal Tribunal for Rwanda, the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism.

25. Apart from the Polish Constitution [Article 42(1)], the only other national constitution in the European area which incorporates the principle proclaimed in paragraph 2 is the Portuguese one. In its Article 29(2), the CPR provides that the principle of the legality of criminal intervention does not "*preclude punishment, within the limits of domestic law, for an action or omission which, at the time it was committed, was considered criminal according to the general principles of commonly recognised international law.*"

26. The Portuguese legislator thus considered that the principle of legality of legal intervention, as provided for in Article 29(1) of the CPR, should not be an obstacle to the Portuguese courts being aware of a conduct classified as a crime under the general principles of international law. Or, in other words, punishment may occur for a conduct that, according to Portuguese domestic law, is not of a criminal nature, provided that the conduct may be considered a crime against international law.

27. Under the heading "*Principles of legality and proportionality of criminal offences and penalties*", Article 49(3) reaffirms a general principle of EU law, which follows from the constitutional traditions common to the Member States.

28. There is no provision like Article 49(3) in any other fundamental rights text in force, in particular the ECHR. It should be noted, however, that Article 8 of the Declaration of the Rights of Man and the Citizen established that "*the law shall provide for such punishments only as are strictly and obviously necessary....*"

29. According to the Explanations relating to the CFREU, Article 49(3) encompasses the general principle of proportionality of penalties and criminal offences, recognised by the constitutional traditions common to the Member States and by the case-law of the CJEU. In addition, the ECtHR also accepts and applies the principle of proportionality, in the broad sense, as an evaluation criterion to determine whether the restriction of a given freedom appears necessary.

30. It should be noted that the wording of Article 49(3) of the CFREU, in reaffirming a general principle of European Union law deriving from the Member States' common constitutional traditions, is of particular interest, insomuch as the constitutional principles are generally expressed in terms of "gross disproportionality", thus promoting a more demanding *standard*, which may raise questions about its impact and interpretation.

31. Article 49(3) CFREU does not, in its simple wording, give rise to the concept of proportionality for the purposes of implementing the CFREU, or EU law in general, as it does not densify when a certain punitive penalty is proportionate and when it is not.

32. With reference to the principle of legality in Union law,[15] the principle of proportionality applies to any punitive sanction, whether it derives from civil, disciplinary, administrative or criminal law. In addition, the term "criminal offence" has an independent meaning in EU law, independent of the meaning within the Member States' domestic law.

33. In a broad sense, the principle of proportionality "*advocates a fair balance between conflicting interests*", imposing on both the legislator and the judicial operators, the balancing of conflicting interests in order to achieve the appropriate measure.

34. The realisation of this concept of proportionality must therefore be derived from a combined reading of the notion under analysis with the related provisions of the CFREU and of the development of the principle by the EU, national legislators [Article 51(1) CFREU] and the CJEU, in particular in accordance with Member States' common constitutional traditions with regard to Article 52(4) CFREU.

35. The CJEU has referred to the principle of proportionality of penalties in several judgments on sanctions, stating that the penalty must correspond to the parameters of reasonableness and must be proportional to the infringement. In accordance with that principle, inherent in the concept of the rule of law, the penalty must therefore be appropriate to the seriousness of the facts as a whole.

36. According to settled case-law of the CJEU,[16] in order to establish whether a provision of EU law complies with the principle of proportionality, it must be determined whether the penalty goes beyond what is necessary and appropriate to achieve the objective sought by the rules infringed. In fact "*it is necessary to ascertain whether the penalty laid down by the provision in question to achieve the aim in view corresponds with the importance of that aim and whether the disadvantages caused are not disproportionate to the aims pursued.*"

37. Regarding a breach of the principle of proportionality, it is appropriate to recall the case-law[17] whereby "*when determining the amount of each fine, the Commission has a discretion and is not required to apply any particular arithmetical formula.*"

38. As regards the gravity of the criminal offence, the CJEU held that a series of elements should be considered, the nature and importance of which depend on the substance of the offence and the specific circumstances of the case. There is no binding or exhaustive list of criteria that must be taken into account. As is the case in *Groupe Danone v. Commission*,[18] the initial amount of the fine is established based

[15] See above note on the Explanations relating to the CFREU.

[16] See Judgments *Zardi*, 26 June 1990, Case C-8/89, ECLI:EU:C:1990:260; *Pressler,* 21 January 1992, Case C-319/90, ECLI:EU:C:1992:28 and *Crispoltoni*, 11 July 1991, Case C-368/89, ECLI:EU:C:1991:307.

[17] See Judgment *Hoek Loos*, 4 July 2006, Case T-304/02, ECLI:EU:T:2006:184.

[18] Judgment *Groupe Danone v. Commission,* 25 October 2005, Case T-38/02, ECLI:EU:T:2005:367.

on the infringement and its relative seriousness is determined on the basis of several factors; in this particular case, the amount and value of the goods which are the subject of the infringement, the size and economic power of the undertaking and, therefore, its influence on the market.

39. As the GC emphasised in *Areva and Others v. Commission*,[19] the principle of proportionality as well as the principle of equal treatment "*require that the companies which (...) played the role of "leader in the infringement" should have a different increase in the basic amount of their fine where the period during which the undertakings under their management played that role is substantially different.*"

40. As far as the principle of proportionality with regard to sanctions is concerned, in *Skanavi and Chryssanthakopoulos*[20] the Court found that "*treating a person who has failed to have a licence exchanged as if he were a person driving without a licence, thereby causing criminal penalties, even if only financial in nature, such as those provided for in the national legislation in question in this case, to be applied, would also be disproportionate to the gravity of that infringement in view of the ensuing consequences.*" In this context, the Court decided that "*the answer to the second part of the question submitted by the national court must therefore be that, in view of the resultant consequences, such as may arise under the national legal system in question, Article 52 of the Treaty precludes the driving of a motor vehicle by a person who could have obtained a licence from the host State in exchange for the licence issued by another Member State but who did not make that exchange within the prescribed period from being treated as driving without a licence and thus rendered punishable by imprisonment or a fine.*"

41. In this sense, the judgment (CJEU) *El Dridi*[21] deserves to be mentioned. In the main proceedings, a third-country national (Mr El Dridi) was sentenced to one-year's imprisonment for the crime of unlawfully remaining in Italian territory without justification, in breach of a removal order which was issued against him by the Questore di Udine (Police chief of Udine). In order to decide the Court described that "*regarding, more specifically, Directive 2008/115, it must be remembered that, according to recital 13 in the preamble thereto, it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.*" As far as the principle of proportionality is concerned, the Court pointed out that "*it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible.*" In this regard, "*the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.*"

42. With great relevance for the implementation of the principle of proportionality we ought to pay attention to *Molkereigenossenschaft Wiedergeltingen*,[22] a case where the CJEU ruled that "*it must be held that the second subparagraph of Article 3(2) of Regulation No 536/93 is invalid in so far as it does not allow the amount of the*

[19] Judgment *Areva and Others v. Commission*, 3 March 2011, joined cases T-117/07 and T-121/07, ECLI:EU:T:2011:69.
[20] Judgment *Skanavi and Chryssanthakopoulos*, 29 February 1996, Case C-193/94, ECLI:EU:C:1996:70.
[21] Judgment *El Dridi*, 28 April 2011, Case C-61/11 PPU, ECLI:EU:C:2011:268.
[22] Judgment *Molkereigenossenschaft Wiedergeltingen*, 6 July 2000, Case C-356/97, ECLI:EU:C:2000:364.

penalty to be adjusted according to the length of time by which the deadline for communication is exceeded and according to the resulting impact on the purchaser's obligation to pay, before 1 September each year, the sums payable by way of the additional levy on milk."

43. Reference should also be made to the Opinion of Advocate General Mazák in the case *Commission v. Council of the European Union*,[23] which, notwithstanding the findings of the case-law of the CJEU, stated that "*in accordance with the principle of subsidiarity, the Member States are as a rule better placed than the Community to "translate" the concept of "effective, proportionate and dissuasive criminal penalties" into their respective legal systems and societal context.*" In fact, "*different ideas as to the role and purpose of criminal law as an instrument of enforcement. On a more concrete level, those diverging ideas are reflected by differences in the national penal systems as regards the overall level of penalties, the balance struck between the various forms of sentences and, obviously, the type and level of penalties provided for in respect of particular offences.*"

Mário Monte & Pedro Miguel Freitas & Margarida Santos

[23] Opinion of Mr Advocate General Mazák delivered on 28 June 2007, Case C-440/05, ECLI:EU:C:2007:393.

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.

1. This Article enshrines the *ne bis in idem* principle, which prevents the duplication of criminal proceedings for the same acts against the same person (double jeopardy). Although widely accepted by the international community, the scope of this principle varies from country to country and is naturally dependent on national legislation.

2. Being a principle of clear national effects, its implementation at a supranational level is as important as it is difficult. The question of the horizontal effects of the *ne bis in idem* is therefore a particularly problematic solution and of particular concern to the EU.

3. At national level, the prohibition of *ne bis in idem* is constitutionally established in only one third of the countries of the EU and, when established, is applicable only in the domestic sphere: Germany (Article 103, § 3), Estonia (§ 23), Lithuania (Article 31), Malta (Article 39, § 9), Portugal (Article 29, § 5), Slovakia (Article 50, § 5), Slovenia (Article 31), Spain (Article 25, § 1), Czech Republic (Article 40, § 5 of the GR-Declaration) and Cyprus (Article 12, § 2).

4. This principle was first recognised internationally through Article 14(7) of the ICCPR, which provides that no one may be tried or punished again for an offense for which he has already been acquitted or for which he has finally been convicted in accordance with the law and penal procedure of each country.

5. Although there was an interpretation according to which this *ne bis in idem* principle was universal, valid between all the signatory States, the UN Human Rights Committee clarified that this provision only prohibits *ne bis in idem* in respect of offenses prosecuted in a particular State.[1]

6. The Statute of the International Criminal Court, adopted in Rome on 17 July 1998, provides in its Article 20 for the *ne bis in idem* principle. The scope of this Article is to prevent double judgment for acts for which the International Criminal Court already convicted or acquitted. In addition, it is recognized that the International Criminal Court is barred from re-judging an individual who has already been tried by another court, unless this judgment has had the sole purpose of subtracting the accused from his criminal responsibility or has been carried out without respect for the principles of independence and impartiality, which should guide the judicial activity, or if it is shown that it was not intended to subject the person to justice.

7. The ACHR, also known as the "Pact of San José of Costa Rica", establishes in Article 8(4) as a judicial guarantee the right not to be tried again in the case of acquittal.

[1] U.N. Doc. CCPR/C/31/D/204/1986.

8. The ECHR did not accept this principle at its inception. Article 6, equivalent to Article 14 of the ICCPR, does not enshrine the *ne bis in idem*, and its tacit inclusion in the Article was not successfully sustained. Only with the adoption of Protocol no. 7, which entered into force in 1988, did it become part of the list of rights provided for in the Convention, and Article 4(1) provides that no one may be liable to be tried or punished again under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

9. The spatial validity of the principle is restricted to judgments carried out within the same State and has no effect on relations between the various countries. Although the case-law on this provision is limited and even contradictory, it seems safe to believe that the *ne bis in idem* principle laid down in Article 4 of Protocol no. 7 has only internal application.

10. The European Convention on Extradition of 1957, the European Convention on the International Validity of Criminal Judgments of 1970, and the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, all of the Council of Europe, provide for the *ne bis in* principle in its international dimension. However, this principle appears here in a context of judicial cooperation and can only be invoked if there is a process of cooperation between States and not as a human right, applicable *erga omnes*.

11. In 1987, an attempt was made to enshrine the principle of *ne bis in idem* between States, with the Convention between the Member States of the European Communities on Double Jeopardy. Article 1 states that a person whose trial has finally been disposed of in a Member State may not be prosecuted in another Member State for the same acts, provided that, if a sanction was imposed, it has been enforced and is actually in the process of being enforced or can no longer be enforced under the law of the sentencing State. This instrument, however, ended up having very few ratifications.

12. In the meantime, Article 54 of the Convention implementing the Schengen Agreement provides that anyone whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts, provided that, if a penalty has been imposed, it has been enforced and is actually in the process of being enforced or can no longer be enforced under the law of the sentencing contracting Party.

13. The introduction of a *ne bis in idem* provision in an instrument whose purpose is the abolition of internal borders and the creation of a common external border is significant, since it demonstrates the relevance of the principle both for cooperation in criminal matters and for the deepening of European integration.

14. Although the Schengen Agreements were concluded outside the institutional framework of the Union, they were integrated into the Treaty of Amsterdam, which transposed the *ne bis in idem* principle into the third pillar. From this point on, cooperation in criminal matters is well developed and an area of freedom, security and justice is enshrined as an objective of the EU.

15. The Action Plan of the Council and the Commission of 1998, designed to leverage the construction of such a space, expressly states as one of the priorities to "*establish measures for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking into account of better use of the ne bis in idem principle.*"

16. The CFREU clearly establishes the *ne bis in idem* principle as a fundamental human right within the EU, whose scope of application operates at two levels: within the jurisdiction of each Member State; and in the relationship between the jurisdictions of the Member States, either in the context of their normal cooperation, or as a matter of the Treaties and other European legislation.

17. However, it is necessary to determine the material scope of the provision in question, which requires that we begin by analyzing the scope of the offenses to which the Article is directed. Although both the epigraph and the body of the Article refer to a right not to be tried or punished by a criminal offense, it is important to analyze these notions. In fact, some legal systems of European Member States regulate "minor offenses" separately, which then have their own procedure and are often not considered criminal offenses. In case of *Lauko v. Slovakia*,[2] the ECtHR addressed this issue. It wanted to know whether in the case *sub judice* a sanction for an administrative offense would be subject to the guarantees provided for in criminal proceedings. The Court held that, in determining whether an offense qualifies as a criminal offense under the Convention, it must first be ascertained whether the text defining the offense belongs to the national criminal law of the State concerned, then consider the nature of the offense and, finally, the nature and degree of severity of the sanction in which the person incurs. Accordingly, under Article 52(3) of the CFREU, in order to decide on the application of the *ne bis in idem* principle provided for in Article 50, these three criteria should also be used, alone or in combination, to qualify the offense and the procedure as criminal.

18. More recently, in the case of *Sergey Zolotukhin v. Russia*,[3] the Court once again had the opportunity to address this issue by offering interpretative criteria of the *ne bis in idem* principle, in particular as regards the question of knowing what should be understood as criminal procedure and what is the material scope of the principle. Concerning the first question, the Court considered that the legal concept of procedure cannot be based solely on the parameters offered by domestic law, otherwise there would be a margin of discretion which might be incompatible with the spirit of the Convention. The general principles applicable to the concepts of "criminal charge" and "penalty", notions foreseen in Articles 6 and 7 of the Convention, should also serve as a hermeneutic standard for the meaning of the term "criminal procedure". In addition, it was established in *Engel and Others v. The Netherlands*,[4] the Engel test that makes the existence of a "criminal accusation" dependent on the analysis of three criteria, which were described above in the case of *Lauko v. Slovakia*. Regarding the material scope of the *ne bis in idem* principle, the case-law has oscillated between completely different lines of reasoning, and it cannot be said that there is unanimity as to the definition of what is meant by the same offense. Prior to the case of *Sergey Zolotukhin v. Russia*, there were three divergent positions in the case-law. According to the first one, when Article 4 of Protocol no. 7 refers to the prohibition of double-trial or punishment on the ground of an offense, it may be understood that what is at stake here is the prohibition of a new trial or punishment again under the jurisdiction of the same State for a conduct for which someone has already been finally acquitted or convicted,[5] even in cases where the

[2] Judgment *Lauko v. Slovakia*, 2 September 1998, 4/1998/907/1119.
[3] Judgment *Sergey Zolotukhin v. Russia*, 10 February 2009, no. 14939/03.
[4] Judgment *Engel and Others v. The Netherlands*, 8 June 1976, nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.
[5] See Judgment *Gradinger v. Austria*, 23 October 1995, no. 15963/90.

behavior originates several offenses. For others, however, there is no breach of the *ne bis in idem* principle in cases where the same conduct is judged more than once when it leads to different offenses. According to this view, having different judgments and punishments for various offenses, even if they stem from the same conduct, does not imply a violation of Article 4 of Protocol no. 7.[6] A third position emphasizes the notion of "essential elements" of the two offenses.[7] Although it could be argued that Article 4 of Protocol no. 7 allows for criminal prosecution of different offenses that arise from the same set of facts, those who adopt the latter reasoning claim that criminal charges or trials for offences that do not differ in their essential elements are incompatible with the Convention. Hence it becomes necessary to know whether or not there is an overlap between its "essential elements." The position taken in the case of *Sergey Zolotukhin v. Russia* is that Article 4 of Protocol no. 7 is to be understood as prohibiting the investigation or prosecution of a second offense where it arises from the same facts or substantially identical facts.

19. Equally relevant is the meaning of final acquittal or conviction. The moment at which the judgment is final (*res judicata*) is defined in the criminal procedure law of the different Member States. However, in spite of the final decision, there are circumstances in which criminal cases can be reopened, in particular when new facts or serious procedural flaws are discovered. Reading Article 4(2) of Protocol no. 7 in light of the ECHR, we share the view that the *ne bis in idem* principle does not prevent the reopening of a case in such situations, for example, if there are new facts or newly discovered facts or procedural flaws that could have affected the outcome of the trial.[8] Given the fact that the CFREU should be read taking into account the meaning and scope of rights in the Convention, this is a problem which may arise in the light of this Article 50.

20. The CJEU addressed for the first time *the ne bis in idem* principle in criminal matters in *Gözütok and Brügge*.[9] The question herein posed was to know whether the *ne bis in idem* principle, defined in accordance with Article 54 of the Convention implementing the Schengen Agreement, "*also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor*", which received a positive answer by the Court. Taking the opportunity to develop a position on the *ne bis in idem* principle, the European judges argued that this principle, on the one hand, implies "*mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied*", and, secondly, if the EU's mission is to promote an area of freedom, security and justice in which the free movement of persons is ensured, the *ne bis in idem* serves as a protection for the individual, since it guarantees "*that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement.*"[10]

---

[6] See Judgment *Oliveira v. Switzerland*, 30 July 1998, no. 25711/94.
[7] See Judgment *Franz Fischer v. Austria*, 29 May 2001, no. 37950/97.
[8] See Judgment *Nikitin v. Russia*, 20 July 2004, no. 50178/99.
[9] Judgment *Gözütok and Brügge*, 11 February 2003, joined cases C-187/01 and C-385/01, ECLI:EU:C:2003:87.
[10] See Judgments *Filomeno Mario Miraglia*, 10 March 2005, Case C-469/03, ECLI:EU:C:2005:156, and *Leopold Henri Van Esbroeck*, 9 March 2006, Case C-436/04, ECLI:EU:C:2006:165.

21. For the purposes of applying Article 54 of the Convention implementing the Schengen Agreement, the criterion to be used should be that of "*the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.*"[11] It is up to the competent national authorities to determine whether the material facts of the two criminal proceedings constitute a set of facts inextricably linked in time, space and by their subject-matter.[12]

22. Under Article 3(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, the concept of "*same facts*" is an independent and specific concept of EU law, removed from the discretion of the judicial authorities of each Member State.[13]

23. The *ne bis in idem* principle is recognized as a fundamental principle of the Community *acquis*[14] and can be found in various legal instruments, namely: Article 7 of the Convention drawn up on the basis of Article K.3 of the TEU on the protection of the European Communities' financial interests; Article 10 of the Convention drawn up on the basis of Article K.3(2)(c) of the TEU on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union; Regulation (EC) no. 2157/1999 of 23 September 1999 on the powers of the European Central Bank to impose sanctions; Article 7(1) (c) of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Articles 3(2) and 4(2) and (3) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; Article 8(2)(a) of Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Article 13 (1) (a) of Framework Decision 2008/978 / JHA of 18 December 2008 on a European Evidence Warrant for the procurement of objects, documents and data for use in criminal proceedings; Article 15(1)(c) Council Framework Decision 2009/829/JHA of 23 October 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; and Article 1(2)(a) of Council Framework Decision 2009/948/ JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

24. Additionally, in December 2005, the Commission presented a Green Paper on conflicts of jurisdiction and the *ne bis in idem* principle, where it "*outlines the possibilities for the creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction in criminal proceedings, and also for a possible revision of the rules on ne bis in idem.*"

Flávia Noversa Loureiro & Pedro Miguel Freitas

---

[11] See Judgments *Leopold Henri Van Esbroeck*; *Gasparini and Others*, 28 September 2006, Case C-467/04, ECLI:EU:C:2006:610; *Jean Leon Van Straaten v. Staat der Nederlanden and Republiek Italië*, 28 September 2006, Case C-150/05, ECLI:EU:C:2006:614; *Norma Kraaijenbrink*, 18 July 2007, Case C-367/05, ECLI:EU:C:2007:444; *Jürgen Kretzinger*, 18 July 2007, Case C-288/05, ECLI:EU:C:2007:441.

[12] Because they are also relevant in this regard, see Judgments *Klaus Bourquain*, 11 December 2008, Case C-297/07, ECLI:EU:C:2008:708; *Vladimir Turanský*, 22 December 2008, Case C-491/07, ECLI:EU:C:2008:768; *Gaetano Mantello*, 16 November 2010, Case C-261/09, ECLI:EU:C:2010:683.

[13] See Judgment *Gaetano Mantello.*

[14] See Judgment *Limburgse Vinyl Maatschappij NV (LVM) and Others v. Commission of the European Communities*, 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ECLI:EU:C:2002:582.

ARTICLE 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

1. With the entry into force of the Treaty of Lisbon, the Treaties were finally provided with a catalogue of fundamental rights. But in the absence of a catalogue with legal binding force – for almost forty long years –, and while political power did not decisively steer in this direction, the CJEU built the protection of fundamental rights into the EU legal order through its case-law. It did so on the basis of the recognition of fundamental rights as "general principles" of EU law, the respect of which it was incumbent upon it to ensure. Therefore, the role of general principles in protecting fundamental rights in the EU "*is unique and is unparalleled in any of the Member States*",[1] since it historically stems from the original absence of codification of fundamental rights in the founding Treaties.

It follows from Article 6 TEU that the framework for the protection of fundamental rights of the EU (which serves as a parameter for decisions of European courts, either organic or functional, *i.e.*, the CJEU and national courts) includes standards proceeding from different legal sources: i) standards of international origin relating to the protection of human rights (in particular the ECHR); ii) standards of European origin (enshrined in the Treaties, and in particular the CFREU); and iii) standards of national origin (enshrined in the constitutions of the Member States, and corresponding to their common constitutional traditions). To that extent, in a context of coexistence of various instruments protecting fundamental rights, the entry into force of the CFREU does not disregard the EU *acquis* in the field of the protection of fundamental rights, from which their recognition as general principles evolved – it only provides continuity therewith.[2]

However, the actual application of provisions of fundamental rights protection proceeding from different legal sources is not always simple and unambiguous,

[1] See Leonard Besselink, "General Report", in *Reports of the XXV FIDE Congress – Tallinn 2012*, vol. 1, ed. Julia Laffranque (Tallinn: Tartu University Press, 2012), 87 and 102.
[2] Under Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. This provision makes it possible for EU law to assimilate the constitutional developments of the Member States with regard to fundamental rights – which is characteristic of a system of constitutional rules in network. Regarding the function of Article 6(3) TEU after the entry into force of CFREU, see Leonard Besselink, "General Report", *cit*., 82 and following.

since even if the essential core of normative provisions (or the "*the core of the rules*")[3] might seem to be identical in the different legal systems (international, European and national), systemic differences may give rise to different standards, that is, different levels of protection with respect to the same fundamental right. That is why provisions of fundamental rights protection of international (ECHR) and national origin (Constitutions of the Member States) must be made compatible with the structure and objectives of the EU legal order.[4]

The particular features of the EU model of protection of fundamental rights – based on provision of fundamental rights protection proceeding from legal different sources and their recognition as general principles – led to the establishment of the principle of the highest level of protection (Article 53 CFREU). According to this principle, if provisions of fundamental rights protection proceeding from legal different sources are to be mobilised for the solution of a specific situation (with regard to the same fundamental right), the provision of the legal order that grants the highest level of protection to the holder of the right in question will be applied.[5] Despite the difficulties that this entails, the EU model of fundamental rights protection is more sophisticated than any other model currently in existence, because it demands the application of the highest level of protection among the various standards that may be mobilised for the solution of a given case.

In any event, the problem national courts confront, in the application of fundamental rights of the EU to specific cases, is precisely to identify the standard of fundamental rights protection applicable – which may even be that of their national Constitution, but nevertheless according to EU law must be the highest level of protection available.[6] Therefore, the reference for a preliminary ruling procedure (Article 267 TFEU) is indispensable for the determination of the standard applicable in a context of "*internormativity*" in the field of fundamental rights protection (or "*interjusfundamentalidade*", in Portuguese language).[7]

---

[3] See Alexander Egger, "EU-fundamental rights in the national legal order: the obligations of the Member States revisited", *Yearbook of European Law*, 25 (2006).

[4] See Judgment (CJEU) *Hauer*, 13 December 1979, Case 44/79, ECLI:EU:C:1979:290, in the summary of which it is stated that any infringement of fundamental rights by a legal act of the EU (at the time, the Communities) can only be assessed under EU law, otherwise the effectiveness and unity of the EU legal order would be jeopardised.

[5] See Leonard Besselink, "Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union", *Common Market Law Review*, no. 35 (1998); Joseph Weiler, "Fundamental rights and fundamental boundaries", in *The Constitution of Europe* (Cambridge University Press, 1999); Paul Craig and Gráinne de Búrca, "National constitutional traditions and the 'maximum standard' problem", in *EU Law. Text, cases and materials* (Oxford: Oxford University Press, 2008), 4th edition, 388 and following; Bruno de Witte, "Tensions in the multilevel protection of fundamental rights: the meaning of Article 53 EU Charter", in *Citizenship and solidarity in the European Union – from the Charter of Fundamental Rights to the crisis, the state of the art*, ed. Alessandra Silveira/ Pedro Madeira Froufe/Mariana Canotilho (Brussels, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien: Peter Lang, 2013), 205 and following; Leonard Besselink, "Multiple political identities: revisiting the 'maximum standard' problem", in *Citizenship and solidarity in the European Union, cit.*, 235 and following.

[6] See Judgment CJEU *Melloni*, 26 February 2013, Case C-399/11, ECLI:EU:C:2013:107, para. 60: "*It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*"

[7] The expression "*interjusfundamentalidade*" owes its inspiration to the wisdom of J. J. Gomes Canotilho, and derives from "*interconstitutionality*" (*i.e.*, constitutional norms in network-style). On

The entry into force of the CFREU provides a catalogue of fundamental rights for all those within the jurisdiction of the EU. But this catalogue does not change the essence of the *praetorian* construction of fundamental rights protection in the EU, resulting from a dialogue between jurisdictions, because fundamental rights continue to be applied according to criteria specific to EU law – or filtered by the legal model of European integration. In a context of "*interconstitutionality*" is not enough to solve fundamental rights problems in the light of the national Constitution, because the problem concerns all EU citizens who may benefit, by way of the precedent of the CJEU, from a highest level of protection. The effectiveness of EU law would be jeopardised if national courts were to deal with questions falling within the scope of EU law solely in the light of their national constitutional order.[8]

2. In what concrete situations will an EU standard of fundamental rights protection apply? This is the major issue behind Article 51 CFREU – which enshrines the first of the so-called "horizontal clauses", *i.e.*, general provisions governing the interpretation and application of CFREU. It follows from settled case-law of the CJEU, now enshrined in Article 51 CFREU, that fundamental rights as protected by the EU law may be invoked by litigants when the (European or national) contested measure falls within the material scope of application of EU law.[9]

The scope of EU law derives, in the first place, from its competences – as referred to in Article 2 TFEU. Therefore, where the EU has exercised its competence in a given area, imposing a specific obligation on Member States with regard to the situation at issue, the standard of protection of fundamental rights applicable to concrete situations is that of the EU. However, as the CJEU has clarified, the concept of "implementing Union law", as referred to in this Article 51, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other. In order to determine whether national legislation involves the implementation of EU law for the purposes of this Article 51, some of the points to be determined are: i) whether that legislation is intended to implement a provision of EU law; ii) whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also iii) whether there are specific rules of EU law on the matter or capable of affecting it.[10] Consequently, the mere fact that a national measure falls within an area in which the EU has powers cannot bring it within the scope of EU law, and, therefore, cannot render the CFREU applicable.[11]

This problem was not posed (so evidently) in the EU because the Treaties had never defined the criteria governing the division of competences between Member States and the EU – something currently embodied in Articles 5 TEU and 2 to 6 TFEU. To that extent, Article 51(1) CFREU (explicitly) relates the protection of

---

the subject, see J. J. Gomes Canotilho, "*Brancosos*" *e interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional* (Coimbra: Almedina, 2006).

[8] See Judgment CJEU *Melki*, 22 June 2010, joined cases C-188/10 and C-189/10, ECLI:EU:C:2010:363, paras. 43-46 and 53-57, and *Mecanarte*, 27 June 1991, Case C-348/89, ECLI:EU:C:1991:278, paras. 39, 45 and 46.

[9] For example, see Judgments CJEU *Klensch*, 25 November 1986, joined cases 201/85 and 202/85, ECLI:EU:C:1986:439, paras. 10-11; *Wachauf*, 13 July 1989, Case 5/88, ECLI:EU:C:1989:321, para. 22; *Bostock*, 24 March 1994, Case C-2/92, ECLI:EU:C:1994:116, para. 16; and *Booker Aquaculture*, 10 July 2003, joined cases C-20/00 and C-64/00, ECLI:EU:C:2003:397, para. 68.

[10] See Judgment CJEU *Siragusa*, 6 March 2014, Case C-206/13, ECLI:EU:C:2014:126, paras. 24-26.

[11] See Judgment CJEU *Julian Hernández*, 10 July 2014, Case C-198/13, ECLI:EU:C:2014:2055, para. 36.

fundamental rights of the EU with the scope of EU law defined by its powers. In other words: the scope of the CFREU derives from the competences of the EU, regardless of whether the measure in question is attributable to European or national authorities. In her Opinion in the *Zambrano* case, Advocate General Eleanor Sharpston even suggested the dispensability of the exercise of EU competence – that is to say, EU fundamental rights protection should depend on the existence of material EU competence (especially exclusive or shared competence) in a given area, even if such competence has not yet been exercised by the EU.[12] As the Advocate General argued, the EU should have a responsibility to ensure the protection of fundamental rights within its sphere of competence, without depending on the timings of the legislative initiative of the institutions and the political process.

It follows that EU fundamental rights protection is drawn into the sphere of action of the Member States when they apply EU law – and that such level of protection resulting from the CFREU will coexist with standards of protection resulting from national Constitutions and the ECHR. This phenomenon shows the various overlapping levels of protection of fundamental rights in the EU, which produces a *multilevel protection of fundamental rights* – as Marta Cartabia suggests, paraphrasing Ingolf Pernice and his *multilevel constitutionalism.* This allows the protection of fundamental rights pursued by the EU to penetrate national legal systems – where national authorities are acting within the scope of application of EU law –, overcoming the dualistic view that the standard of protection of fundamental rights applicable by national authorities would be that resulting from the national Constitution, while the standard of fundamental rights protection applicable by European authorities would be that resulting from the CFREU.[13]

It follows from the above that the scope of application of EU fundamental rights is closely related to its sphere of competences, for no other reason was the entry into force of the "catalogue of EU fundamental rights" accompanied by the definition of the "catalogue of EU competences" in the Treaties.[14] This also explains why Article 51(1) CFREU emphasises "due regard for the principle of subsidiarity", and why paragraph 2 of Article 51 CFREU insists that the CFREU does not extend the scope of application of EU law, nor does it establish new competences or modify competences for the EU. That is to say, Article 51 CFREU attempts to introduce antidotes against the "fearful" enlargement of EU competences through fundamental rights protection – in other words, the provision attempts to prevent the fundamental rights enshrined in the CFREU from being interpreted as an implicit recognition of new powers for the EU in all matters on which such fundamental rights are to be protected. This is particularly true for the so-called economic, social and cultural rights, the recognition of which in the CFREU was not viewed favourably by some Member States – one of the reasons for the late legal binding force recognised to the CFREU.

---

[12] See Opinion of Advocate General Sharpston in *Zambrano*, 30 September 2010, case C-34/09, ECLI:EU:C:2010:560, paras. 163-165.

[13] See Marta Cartabia, in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, ed. Raffaele Bifulco/Marta Cartabia/Alfonso Celotto (Bologna: Il Mulino, 2001), 348; Ingolf Pernice, "Multilevel constitutionalism in the European Union", *European Law Review*, 27 (2002).

[14] See José Luís da Cruz Vilaça and Alessandra Silveira, "The European federalisation process and the dynamics of fundamental rights", in *EU citizenship and federalism – the role of rights*, ed. Dimitry Kochenov (Cambridge University Press, 2017).

The relevance of the Article 51(2) (according to which the entry into force of the CFREU does not extend the scope of EU law) was already questioned, even before its entry into force,[15] since the theory of federative systems' legal organisation explains that there is no way to prevent the impact of the enshrinement of fundamental rights in determining the scope of EU law. Trying to ignore it amounts to accepting an intolerable "absurdity" in a Union based on the rule of law: those who were in a position to benefit from EU law would have access to the EU standard of protection of fundamental rights (and the highest level of protection that arises from it), while those who were not in a position to do so would have access only to domestic standards of protection of fundamental rights. Ultimately, such a result would compromise the trend towards the equalisation of the fundamental legal positions indispensable for the survival of a Union based on the rule of law. The Authors of the CFREU were not incognizant of such developments (proper to the legal-political tradition of federative systems), hence the (largely innocuous) attempt to reduce the impact of fundamental rights in determining the scope of EU law.

The fact is that "Bills of Rights" acquire a "life of their own" due to the litigation inherent in the exercise of citizenship rights.[16] Inevitably, as litigants are committed to promoting the application of EU law in the different Member States and optimising the effective judicial protection that can be derived. This is evidenced by the phenomenon of the horizontal effect of fundamental rights protected by the EU legal order irrespective of any specific reference in this regard – under Article 51 CFREU, the provisions of the CFREU are not addressed to individuals. As the CJEU has clarified, Article 51(1) does not address the question of whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility. The fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals.[17]

That "own dynamic" is also evidenced by the impact of fundamental rights on the densification of the scope of European citizenship (Article 20 TFEU) and on the solution of the constraints of so-called "reverse discrimination" between "mobile" and "non-mobile" citizens, as we shall see below. Such developments are only understandable in specific concrete cases, especially where national courts have difficulties in finding the link with EU law that allows the application of EU standards of protection of fundamental rights. It is worth considering whether national courts may apply the provisions of the CFREU autonomously, that is to say, without any further connection with EU law beyond European citizenship itself. Two emblematic rulings of the CJEU, to which we will return later, indicate that this is indeed the case.

3. The first problem that Article 51 seeks to solve concerns the addressees of the provisions of the CFREU: EU institutions, bodies, offices and agencies, on the one hand, and the Member States when they are implementing EU law, on

[15] See Paloma Biglino Campos, "Derechos fundamentales y competencias de la Unión: el argumento de Hamilton", *Revista de Derecho Comunitario Europeu*, no. 14 (2003).

[16] See Francisco Balaguer Callejón (ed.), *Manual de derecho constitucional*, vol. I, 5th edition (Madrid: Tecnos, 2010), 240-241.

[17] See Judgment CJEU *Bauer*, 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871, paras. 87-88.

the other. Regarding EU public power (Institutions, Bodies, Offices and Agencies), Article 51 wanted to clarify that all EU officials are subject to the provisions of the CFREU, and not only the institutions listed in Article 13 TEU (European Parliament, European Council, Council, European Commission, CJEU, European Central Bank and Court of Auditors). The expression is intended to cover the diverse range of entities, some of which are consultative in nature, such as the Economic and Social Committee or the Committee of the Regions (Articles 301 and 305 TFEU respectively), and the European Investment Bank (Article 308 TFEU), but also those bodies set up by secondary legislation, in particular EU agencies.[18]

In any case, the reference to the principle of subsidiarity exposes the Member States' mistrust and the attempt to introduce a limit on EU action through the CFREU. In our view, the reference to subsidiarity in this Article would be unnecessary, taking into account the content of Article 5(4) TEU, according to which the action of the EU shall not exceed what is necessary to achieve the objectives of the Treaties.[19] Moreover, subsidiarity is intrinsic to the constitutional commitment of cooperation that is a feature of any federative system (or multilevel system, as the EU has been recognised).

With regard to Member States' respect for the CFREU, it should be noted that, according to the CJEU's settled case-law, the notion of "Member State" must be interpreted broadly, irrespective of the territorial distribution of powers and competences deriving from the corresponding national constitution, or of the quality in which the State is acting – whether as an employer or as an authority –, in order to prevent Member States from taking advantage of their non-compliance with EU law. The notion of "application" has also been interpreted in a broad sense; not limited to legislative and administrative activities for the implementation of EU obligations.

This means that the provisions of the CFREU are binding on all bodies or entities that exercise public authority or control, or which have special (exorbitant) powers beyond those resulting from the rules applicable to relations between individuals. That is to say, the CFREU is binding on any body, whatever the respective legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.[20]

Moreover, Article 51 reveals some insistence in highlighting the strictly vertical effect of the provisions of the CFREU – that is, their relevance only to relations between the authorities exercising public power and individuals or legal persons –, excluding their applicability to relations between individuals or legal persons. Nevertheless, many fundamental rights enshrined in the CFREU do have

[18] For further developments, see Fabrice Picod, in *Traité établissant une Constitution pour l'Europe*, Part II, ed. Laurence Burgorgue-Larsen, Anne Levade and Fabrice Picod (Bruyland, 2005), 648.

[19] On the principle of subsidiarity see Opinion of Advocate General Juliane Kokott in *Commission v Italian Republic*, 3 March 2005, C174/04, ECLI:EU:C:2005:138, para. 41; and Opinion of Advocate General Verica Trstenjak in *Commission v Portuguese Republic*, 14 April 2011, Case C-255/09, ECLI:EU:C:2011:246, paras. 59-64.

[20] See Judgments CJEU *Foster*, 18 July 1990, Case C-188/89, ECLI:EU:C:1990:313, paras. 18-20; and also *Konle*, 1 June 1999, case C-302/97, ECLI:EU:C:1999:271, and *Haim*, 4 July 2000, Case C-424/97, ECLI:EU:C:2000:357.

horizontal effect. Title IV of the CFREU (Solidarity) provides for workers' rights *vis-à-vis* the employer, which only makes sense if such provisions create obligations for individuals and may be relied on in cases where EU law applies – even though Article 51(1) CFREU only identifies the authorities that exercise public power within the EU as addressees of the provisions of the CFREU. The contrary would weaken the horizontal effect of fundamental rights, stemming from the common constitutional traditions to the Member States, otherwise safeguarded by Article 6(3) TEU. It is true that the horizontal effect of constitutionally enshrined fundamental rights is not accepted in the vast majority of the Constitutions of the Member States – even though, through the infra-constitutional regulation of private relations between individuals, fundamental rights eventually have a horizontal effect in some areas.[21] In any case, this would not prevent certain constitutional traditions (expressly recognising such horizontal effect, at least in respect of certain fundamental rights) from being invoked to achieve that result, such is the case regarding the Portuguese, Greek, Irish and Cypriot Constitutions.

However, considering the settled case-law of the CJEU in this field, such an effort is not necessary. It follows from this case-law that economic freedoms, now formally recognised as fundamental rights [Article 15(2) CFREU], have horizontal direct effect.[22] Insofar as the protection of fundamental rights in the EU rests on them and has evolved from them – including with regard to the recognition of social rights by individuals who are exercising them –, the "jusfundamental" nature of economic freedoms and their horizontal effect are reflected in the fundamental rights recognised to give them concrete expression. It should be recalled that the recognition of European citizenship met the (original) objective of granting a set of civil, political and social rights to nationals of one Member State exercising economic freedoms in another Member State – in order to place them on the same footing as nationals of the host Member State.

In any case, since the fundamental rights protected by the EU legal order are usually fulfilled through directives, their correct transposition (or lack thereof) ends up producing an "indirect" horizontal effect of those rights, in accordance with Article 51(1) ("when they apply Union law").[23] Moreover, the application of the CFREU tends to introduce, over time, relevant consequences for disputes between individuals in which EU law is invoked, since the absence of a direct horizontal effect of provisions of EU directives, which implement fundamental rights, might be reconsidered in the light of the legal binding force of the CFREU. In his Opinion in *Seda Kücükdeveci*,[24] Advocate General Yves Bot confronted the CJEU with this problem. The Advocate General suggested that the CJEU should consider whether the identification of rights guaranteed by directives as fundamental rights allows (or not) reinforcement of the invocation of directives in the context of litigation between individuals – thus overcoming the constraints arising from the absence of horizontal direct effect of the directives. The Advocate General considered that if national courts cannot interpret national law in accordance with a directive, they

[21] See Leonard Besselink, "General Report", *cit*., 91-92.
[22] See Harm Schepel, "Constitutionalising the market, marketising the Constitution, and to tell the difference: on the horizontal application of the free movement provisions in the EU Law", *European Law Journal*, vol. 18, no. 2 (2012).
[23] See Leonard Besselink, "General Report", *cit*., 93-95.
[24] See Opinion in *Seda Kücükdeveci*, 7 July 2009, case C-555/07, ECLI:EU:C:2009:429.

have, in the light of the general principles of EU law which the directive embodies, the power to disregard national law inconsistent with the directive, even in the context of a dispute between individuals. That is to say, the general principle of EU law/fundamental right on which the directive is based would ultimately reflect in the provisions which give specific expression to it.

In *Seda Kücükdeveci*, the CJEU held that EU law – more particularly the principle of non-discrimination on grounds of age as set out by Directive 2000/78, of 27 November 2000 (establishing a general framework for equal treatment in employment and occupation) – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provided that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal. In the judgment, the CJEU appears to recognize some impact of the CFREU on the absence of a direct horizontal effect of provisions of EU directives.[25]

Such a situation of horizontal "indirect" effect (as it is related to the implementation of the fundamental right invoked) can also be detected in *Maribel Dominguez*. The question was whether and to what extent the applicant's employer was obliged to pay compensation for annual leave not taken due to absence from work after an accident *in itinere*. In particular, the question was whether Article 7(1) of Directive 2003/88, of 4 November 2003 (concerning certain aspects of the organisation of working time) was to be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the period of reference. The CJEU considered EU law to preclude such national provisions or practices as "*according to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC of 23 November 1993*" (codified by Directive 2003/88).[26] However, the CJEU does not take an explicit position on the question of the horizontal effect of Article 31(2) CFREU, nor does it specify whether that principle of EU social law should be identified as a general principle of EU law within the meaning of Article 6(3) TEU.[27]

The horizontal effect of fundamental rights has been maintained by CJEU, for example, in Judgment *Egenberger*, according to which, as regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds,

[25] Judgment CJEU *Seda Kücükdeveci*, 19 January 2010, Case C/555/07, ECLI:EU:C:2010:21, paras. 22 and 53.

[26] Judgment CJEU *Maribel Dominguez*, 24 January 2012, Case C-282/10, ECLI:EU:C:2012:33, para. 16 (italics added).

[27] The legal doctrine points out that the notion of "general principles of EU law" has not been defined by the CJEU, perhaps in order to safeguard the flexibility it needs in order to jurisprudentially shape an integration in motion. These are certainly principles deriving from the spirit and the scheme of the Treaties, and which constitute a normative reference presupposed by the very idea of a Union based on the rule of law. By way of example, the CJEU has already identified as general principles: proportionality, effective judicial protection, legitimate expectations, good administration, *ne bis in* idem, non-discrimination, etc.

even where the discrimination derives from contracts between individuals.[28] Like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.[29] Moreover, in Judgment *Cresco*, the CJEU decided that the prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right, which they may rely on as such in disputes between them in a field covered by EU law.[30]

4. Other judgments, such as *Zambrano*[31] and *Dereci*,[32] provide valuable clues as to the scope of EU fundamental rights, in particular as regards the fight against the so-called "reverse discrimination", *i.e.*, the differentiation of treatment resulting from the exercise of economic freedoms by some (dynamic or mobile citizens) in contrast to others (static or non-mobile citizens). Such judgments allow the invocation of the EU standard of fundamental rights protection by way of the European citizenship status in order to ensure the full and secure exercise of the rights recognised by the EU. Until those judgments, the invocation of fundamental rights protected by the EU legal order was conditional on the fact that a European provision was applied (especially an economic freedom, by reference to which the connection with the EU standard of fundamental rights was established) or a national provision falling within the material scope of EU law (for when implementing EU law the Member States are bound by fundamental rights as protected under the EU legal order). However, in those judgments the CJEU seems to reconsider the issue in order to accommodate situations in which the connection with EU law is not so obvious, and so in order to make it possible to invoke the EU standard of fundamental rights solely through European citizenship (Article 20 TFEU), regardless of whether other provisions of EU law apply.

The *Zambrano* and *Dereci* cases appear in the wake of a number of CJEU judgments aimed at ensuring the protection of the fundamental rights of third-country nationals who are family members of European citizens – essentially because if EU citizens were prevented from having a normal family life in their host Member State, they would be dissuaded from moving and exercising the rights guaranteed to them by European citizenship.[33] However, one detail makes all the difference: in both cases, the families were static, that is, they had never circulated within the territory of the EU.[34] Thus, such cases confronted the EU legal order

[28] Judgment CJEU *Egenberger*, 17 April 2018, Case C-414/16, ECLI:EU:C:2018:257, para. 77.
[29] *Idem*, para. 78.
[30] Judgment CJEU *Cresco*, 22 January 2019, Case C-193/17, ECLI:EU:C:2019:43, para. 76.
[31] Judgment CJEU *Zambrano*, 8 March 2011, Case C-34/09, ECLI:EU:C:2011:124.
[32] Judgment CJEU *Dereci*, 15 November 2011, Case C-256/11, ECLI:EU:C:2011:734.
[33] There is extensive case law in which the CJEU has linked economic freedoms with the protection of family life (now enshrined in Article 7 CFREU), obliging Member States to protect third-country nationals, members of the family of EU citizens, at a higher level than would have resulted from national law.
[34] In *Zambrano*, the CJEU interpreted Article 20 TFEU as meaning that it precludes a Member State from refusing a third-country national upon whom his minor children, who are EU citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third-country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen. In *Dereci*, the factual situations did not involve minor citizens and the third-country

with the meaning and scope of citizenship: does it only serve to support the freedom of movement of economically active individuals, or does it correspond to a uniform set of rights and duties proper to a Union based on the rule of law where fundamental rights play an essential role? What was really at stake was the need to densify the scope of EU fundamental rights and the consequent access of citizens to that standard of protection of fundamental rights, in order to avoid an inadmissible differentiation of treatment between dynamic citizens (who exercise their classical European rights/economic freedoms and thus benefit from the EU standard of protection of fundamental rights) and, on the other hand, the so-called static citizens (who do not exercise any economic freedom and thus do not enjoy the EU standard of protection of fundamental rights). Would it be reasonable to suggest that only economically active citizens have the right to the protection of family life in the EU?

The current state of fundamental rights protection in the EU no longer allows the continuation of the reverse discrimination phenomenon,[35] which is inconsistent with Articles 9 TUE (principle of the equality of EU citizens) and 18 TFEU (prohibition of any discrimination based on nationality). Such a result is no longer compatible with a "citizenship of rights", and with the tendency to equate legal positions with the EU standard of protection of fundamental rights. It was foreseeable that the entry into force of the CFREU would lead to such demands, insofar as both the EU and the Member States are formally subject to the same standard of legality (Union based on the rule of law) and fundamental rights protection (highest level of protection). It follows from the CJEU case-law (in particular *Zambrano* and *Dereci*) that i) EU citizenship (Article 20 TFEU) is not subject to the prior exercise of economic freedoms and that ii) one may have access to the EU standard of protection of fundamental rights through EU citizenship.

Perhaps the CJEU has found in EU citizenship the ultimate link to safeguarding the protection of fundamental rights in the EU. If EU citizenship (and the rights it entails) falls within the substantive scope of EU law, this allows for the EU standard of protection of fundamental rights to be invoked autonomously by EU citizens, without any other link with EU law beyond his or her own citizenship. The rationale underlying those decisions is as follows: i) the situation of the EU

---

nationals were not economically dependent on their EU citizen relatives. The CJEU interpreted EU law, in particular its provisions on EU citizenship, as meaning that it does not preclude a Member State from refusing to allow a third-country national to reside on its territory, where that third-country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

[35] As Advocate General Poiares Maduro explained in his Opinion in *Carbonati Apuani*, 6 May 2004, Case C-72/03, ECLI:EU:C:2004:296, para. 55, "reverse discrimination" refers to situations where nationals of a Member State who have not exercised the freedoms of movement laid down by the Treaty find themselves in a less favourable legal position than nationals who have exercised the rights derived from those freedoms. See also Henry Schermers and Denis Waelbroeck, *Judicial protection in the European Union* (The Hague/London/New York: Kluwer Law International, 2001), 92: "*whenever a Member State gives a preferential treatment to the nationals of other Member States as opposed to its own national, this should also amount to a discrimination prohibited by the Treaty*"; and also: "*the Court may be prepared, under certain circumstances, to prohibit reverse discrimination if there is a sufficient relationship with Community law.*"

citizen who has not exercised any of the economic freedom cannot be considered as unrelated to EU law;[36] ii) the status of a EU citizen "*is intended to be the fundamental status of nationals of the Member States*" – thus allowing him or her to invoke, even towards the Member State of which he or she is a national, the rights relating to that status;[37] iii) if a national court considers that the situation at hand falls within the scope of EU law through EU citizenship, it must examine whether fundamental rights as guaranteed by the EU legal order are being respected.[38]

This case-law emancipated EU citizenship from the constraints inherent to the freedoms of movement,[39] although such decisions were reluctant to define the essential content of EU citizenship.[40] However, what is relevant to this comment is that in *Zambrano* and *Dereci* the CJEU was finally confronted with the impact of fundamental rights in determining the meaning and scope of EU citizenship formally established by Articles 9 TEU and Article 20 TFEU: after all, what is EU citizenship for? That is to say, the CJEU was challenged, to imbue EU citizenship with a practical utility essentially related to the protection of fundamental rights in the EU – or, in other words, to consider EU citizenship as a platform that allows nationals of the Member States to access the EU standard of protection of fundamental rights where there is no more obvious connection with EU law, thus preventing EU citizens from seeking fictitious or hypothetical links with economic freedoms in order to benefit from that standard.[41]

Alessandra Silveira

[36] See *Dereci*, *cit.*, para. 61.

[37] See *Dereci*, *cit.*, paras. 62 and 63.

[38] See *Dereci*, *cit.*, para. 72. In this paragraph, the CJEU alerts the national court (regarding the right to protection of family life): "*On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.*" This denotes the interactivity between legal orders evident in the "*European area of fundamental rights*". In this sense, see Leonard Besselink, "General Report", *cit*., 139.

[39] See Koen Lenaerts, «'Civis europaeus sum': from the cross-border link to the status of citizen of the Union», *Online Journal on free movement of workers within the European Union*, no. 3 (2011): 7.

[40] See Dimity Kochenov, "The right to have *what* rights? EU citizenship in need of clarification", in *Citizenship and solidarity in the European Union*, *cit.* Article 20(2) TFEU states that EU citizens shall enjoy the rights and be subject to the duties provided for in the Treaties. A non-restrictive interpretation of that provision suggests that EU citizenship does not only include the rights traditionally associated with it [points (a), (b), (c) and (d) of that provision] but also relates to the protection of fundamental rights.

[41] See Opinion of Advocate General Eleanor Sharpston in *Zambrano*, para. 167; see also Armin von Bogdandy *et al.*, "Reverse Solange – protecting the essence of fundamental rights against Member States", *Common Market Law Review* 49, no. 2 (2012).

ARTICLE 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect theessence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

1. The EU model of fundamental rights protection is founded on the recognition of fundamental rights as "general principles" of EU law and includes standards proceeding from different legal sources: (i) provisions of European origin (enshrined in the Treaties, and in particular the CFREU); (ii) provisions of national origin (enshrined in the constitutions of the Member States, and corresponding to their common constitutional traditions); and (iii) provisions of international origin relating to the protection of human rights (in particular the ECHR, which has been a framework of reference for the protection of fundamental rights in the EU since the 1970s). None of this is altered by the entry into force of the CFREU – which adds, as EU primary law, to the existing protection. In this sense, Article 6(3) TEU expressly states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.[1] That is why Article 52 CFREU sets

[1] The fact that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are an integral part of EU law as general principles of EU law does not entail the recognition of limits to the observance of those rights under EU law. The recognition of such rights as general principles only gives continuity to the development of an inter-normative model of fundamental rights protection by the application of the principle of highest level of protection (see comments on Articles 51 and 53 CFREU).

out the parameters for interpreting the provisions of the CFREU – which will be linked to the corresponding provisions of fundamental rights protection enshrined in the Treaties, the ECHR and the Constitutions of the Member States.

The provisions contained in Article 52 CFREU establish the conditions for harmonious coexistence between legal provisions proceeding from different sources (in an inter-normative context in the field of fundamental rights protection). The provisions do so by preserving the level of protection currently conferred, within their respective spheres of application, by EU law, by the ECHR and by the law of the Member States, so that none of the thresholds reached by such systems can be reversed. However, in a situation of competition between different levels of protection, if none of them can be set aside, the highest level of protection must be applied, moving away from a rigid approach of the "*lowest common denominator*".[2] This principle is strengthened by Article 53 CFREU, from which it follows that, in its respective scope of application, EU law must confer the highest level of protection among the various sources in order to solve a specific case relating to fundamental rights. Indeed, such highest level of protection, guaranteed by EU law, may be that resulting from the CFREU, the ECHR or the national Constitutions – as there might be legally relevant differences in the level of protection resulting from both the wording of the normative provisions and their interpretation/application by the different courts of the various levels of the system.[3] More difficult is the task of defining the level of protection of fundamental rights applicable to the specific case, since the sophistication of the model does not allow for simplicity: what is the highest level of protection? and, highest for whom, if there is a conflict of rights? These issues will be addressed in the commentary to Article 53 of the CFREU, to which we refer.

Let us try, then, to decode the meaning of this Article 52 CFREU. Paragraph 1 provides for a general clause on limitations to the exercise of fundamental rights recognised in the CFREU. The subsequent three paragraphs adapt that general clause to the restrictions on the exercise of rights set out in the Treaties, the ECHR, and resulting from the constitutional traditions common to the Member States. The need to ensure consistency between the different regimes of restriction on the exercise of fundamental rights stems from the fact that the CFREU has not adopted the model provided for in the ECHR and in several national Constitutions – which provide for specific restrictions on each right. This is the case in the Portuguese Constitution: although Article 18 CPR provides for a set of substantive conditions regarding the restrictions on the exercise of fundamental rights and freedoms, the first refers precisely to the requirement of express constitutional provision of the respective restriction, that is, "*the whole restriction must be expressly provided for in the constitutional text.*"[4] In certain cases, the CPR itself directly provides for certain restrictions, then referring to the law for their implementation [*e.g.* Articles 27(3) and 34(2)(4)]; in other cases, the CPR merely admits unspecified restrictions [*e.g.*, Articles 35(4) and 47(1)].

---

[2] See J. J. Gomes Canotilho and Mariana Canotilho, "Comentário ao artigo 6.º do TUE", in *Tratado de Lisboa Anotado e Comentado*, ed. Manuel Lopes Porto/Gonçalo Anastácio (Coimbra: Almedina, 2012), 42.

[3] See J. J. Gomes Canotilho, "Estado de direito e internormatividade", in *Direito da União Europeia e transnacionalidade*, ed. Alessandra Silveira (Lisbon: Quid juris, 2010), 182.

[4] See J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. I (Coimbra: Coimbra Editora, 2007), 391.

Unlike the CPR, the general restriction clause in Article 52(1) CFREU applies to all fundamental rights and freedoms set out therein. The provision does not list the fundamental rights and freedoms the exercise of which cannot be restricted. In any case, the wording of some of the provisions of the CFREU – namely the use of the expression "no one" – suggests that some restrictions are excluded, as would be the case of Article 2(2) ("*No one shall be condemned to the death penalty, or executed*"), Article 4 ("*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*"), Article 5(1) ("*No one shall be held in slavery or servitude*") and Article 5(2) ("*No one shall be required to perform forced or compulsory labour*"). In addition, the Explanations relating to Article 1 CFREU stress that the dignity of the human person must be respected "*even where a right is restricted*".

Thus, except for the situations referred to above, any limitation/restriction on the exercise of the rights and freedoms recognised by the CFREU must (i) be provided for by law; (ii) respect the essence of those rights and freedoms; (iii) respect the principle of proportionality; and (iv) be necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. Accordingly, the provision takes account of the settled case-law of the CJEU with regard to the restriction of the exercise of rights and freedoms and the principle of proportionality which guides it: the restriction is admissible in so far as it corresponds to objectives of general interest pursued by the EU and does not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights. In light of the Explanations relating to Article 52 CFREU, the reference to general interests recognised by the EU covers both the objectives mentioned in Article 3 TEU (promote peace, its values and the well-being of its peoples; offer its citizens an area of freedom, security and justice without internal frontiers; establish an internal market; work for the sustainable development of Europe based on a highly competitive social market economy; combat social exclusion and discrimination; promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child; etc.) and other interests protected by specific provisions of the Treaties.

Thus, it follows from the CJEU settled case-law that, irrespective of the existence of a legitimate objective under EU law, it is necessary to assess whether a measure is appropriate to ensure the attainment of the objective in question and does not overreach, going beyond what is necessary to attain that objective. That would be the case where the measure (i) genuinely reflects a concern to attain the objective in a consistent and systematic manner (optimisation of factual possibilities)[5] and (ii) is the least onerous measure to the legal interest in question (minimisation of sacrifices).[6] Moreover, the measure must be reasonable, that is, it should not be disproportionate to the objective pursued, in terms of the balancing of means and ends. The case-law on proportionality was developed by the CJEU in the context of restrictions on economic freedoms – which are legitimate if they are justified in the light of overriding reasons, if they do not exceed what is objectively necessary for that purpose, and if the same result cannot be achieved by less restrictive rules.[7]

[5] See Judgments CJEU *Attanasio Group*, 11 March 2010, Case C-384/08, ECLI:EU:C:2010:133, para. 51, and *Presidente del Consiglio dei Ministri*, 17 November 2009, Case C-169/08, ECLI:EU:C:2009:709, para. 42.
[6] See Judgment CJEU *Schräder*, 11 July 1989, Case C-265/87, ECLI:EU:C:1989:303, para. 21.
[7] See Judgment CJEU *Commission v. Portuguese Republic*, 27 October 2011, Case C-255/09, ECLI:EU:C:2011:695, para. 72.

It is not difficult to understand the need for rules on the compatibility of the different regimes of restriction deriving from the CFREU, the Treaties, the ECHR and the national Constitutions. Article 52 CFREU clarifies that the restriction regimes provided for by each of those levels of protection does not allow fall backs – that is, the level of protection conferred by the CFREU should not be lower than the level guaranteed by the Treaties, the ECHR and by constitutional traditions common to the Member States – and that it is expressly permitted for EU law to provide more extensive protection. In a situation of competition between different levels of protection, consistency implies that the level that guarantees the highest protection should be applied. The formula used to convey this idea was to ensure that the level of protection conferred by the CFREU in respect of admissible restrictions would never be inferior to that guaranteed by the others – this is the spirit of Article 52 CFREU. It then follows that the legal regime allowing the least admissible restriction on the fundamental right in question will be applicable – provided that this is acceptable to the EU legal order and does not jeopardise the effectiveness of EU law, which requires a dialogue between the national courts and the CJEU, by way of preliminary ruling, in order to reach such a conclusion.

The CFREU does not provide for the possibility of derogation from the rights and freedoms it recognises – either by means of states of emergency or of necessity –, unlike some Constitutions of the Member States (this is the case of Article 19 CPR, for example) and the ECHR (Article 15, which allows derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation). According to the Explanations relating to Article 52 CFREU, that does not affect the possibilities of Member States availing themselves of Article 15 ECHR, when they take action in the areas of national defence in the event of war and the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(2) TEU and Articles 72 and 347 TFEU. In any case, in the absence of an express provision concerning the derogation, the question remains as to the legitimacy and conditions for derogation from CFREU rights.

2. The existence of a general restriction clause in the CFREU and of restrictive clauses in the ECHR reveals that, among other differences separating the two instruments, coexistence between the two may not be as fruitful as it would be desirable. In the absence of a catalogue of fundamental rights specific to the EU, the CJEU has considered, since the 1970s, the ECHR as a framework of reference for the protection of fundamental rights in the EU legal order. Even after the entry into force of the CFREU, Article 6(3) TEU expressly states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. The EU has not yet acceded to the ECHR – only the Member States are signatories to the ECHR. This is why individuals do not have access to the ECtHR if there is a failure of the EU system of protection for a violation of the rights enshrined in the ECHR – not even to pursue a complaint against a Member State of the EU when there is a violation of the ECHR as a result of the implementation of a European provision.

This might change as Article 6(2) TEU authorises the accession of the EU to the ECHR – although the accession process has been handled with circumspection, bearing in mind the technical and procedural difficulties which it necessarily entails.[8] Notwithstanding, as regards the current relationship between the ECtHR

[8] Article 218(8) TFEU specifies that the agreement on accession of the EU to the ECHR must be

and the CJEU, it must be said that the former has developed a case-law of deference towards the latter, on the basis of the presumption of equivalent protection of fundamental rights. In *Bosphorus*,[9] a case in which Ireland was accused of infringing its obligations under the ECHR when applying a EU regulation, the ECtHR clarified that a signatory State complies with the requirements of the ECHR when it merely implements the legal obligations resulting from its accession to the EU. In addition, it is important to point out that the case-law of the CJEU has been influencing the ECtHR – as may be witnessed in decisions involving discrimination that affects transsexuals.[10]

However, if (and when) the accession takes place, the ECtHR will theoretically have the final say on the protection of fundamental rights in the EU, as individuals will be able to gain access to the ECtHR in cases of failure of the EU system to protect rights enshrined in the ECHR. Such failures may (mainly) result from (i) the absence of judicial mechanisms/remedies in the EU legal order specifically for the protection of fundamental rights; (ii) the difficulties of direct access of individuals to the CJEU; and (iii) the resistance of some national courts to engage with the CJEU by way of preliminary ruling. All this may prevent the CJEU from addressing fundamental rights issues – and for this reason the EU accession to the ECHR has long been eagerly desired. In any case, it is not possible to predict whether the ECtHR's deference towards the CJEU will survive the EU accession to the ECHR. If this deference is maintained, the very usefulness of accession may be questioned; but if it is not maintained, the highest level of protection of fundamental rights under EU law may be brought into question.

Here lies the key question: whether and how accession to the ECHR is compatible with the pursuit of the highest level of protection under EU law. That is, accession stumbles on the question of compatibility between Article 53 of the CFREU and Article 53 of the ECHR. According to Articles 52 and 53 of the CFREU, EU law provides the highest level of protection among the various protections available to solve a case relating to fundamental rights. However, the highest level

---

approved by all the Member States, in accordance with their respective constitutional requirements. In addition, Protocol (no. 8) relating to the EU accession to the ECHR was added to the Treaty of Lisbon and the Declaration *ad* 2 on Article 6(2) TEU was annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, a declaration which calls for regular dialogue between the CJEU and the ECtHR and suggests that the accession should be arranged in such a way as to preserve the specific features of the EU legal order.

[9] See Judgment ECtHR *Bosphorus*, 30 June 2005, no. 45036/98.

[10] See Judgment CJEU *P v. S*, 30 April 1996, Case C-13/94, ECLI:EU:C:1996:170. In this case, the CJEU had to decide whether the dismissal of a worker who underwent gender reassignment constituted discrimination based on sex. At the time, the ECtHR had not yet given a ruling on the question – which would eventually occur in the Judgment *Christine Goodwin*, 11 July 2002, no. 28957/95. The issue was to determine the scope of protection of the principle of equal treatment for men and women in the workplace – which prohibits a woman or a man from being treated arbitrarily based on the fact that a person is of one or other sex. There is discrimination on grounds of sex when one is subjected to arbitrary treatment (without material justification or reasoning) in relation to someone belonging to another sex – and this was not exactly the case in the case in question. However, the CJEU decided that where a person is dismissed on the grounds that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. In 2002, in *Christine Goodwin*, the ECtHR followed the reasoning of the CJEU and ruled that no factor of public interest was opposed to the legal recognition of the applicant's gender reassignment, thus censuring the signatory States refusing such recognition.

of protection must be assimilated by EU law and cannot be instrumentalised to subvert it. Furthermore, it must give way when other rights or legitimate interests are imposed, especially when the effectiveness of EU law is at stake. Furthermore, as the CJEU pointed out in Opinion 2/13, insofar as Article 53 the ECHR reserves to the Contracting Parties the power to lay down national standards for the protection of fundamental rights that are higher than those guaranteed by the Convention, it is necessary to ensure that this provision is compatible with Article 53 the CFREU so that the power granted to the Contracting Parties of the ECHR remains limited to what is necessary, so as not to undermine the level of protection provided for the CFREU and the primacy, unity and effectiveness of EU law.[11] In any event, given the particularities of accession to the ECHR and the difficulties of ECtHR in responding in a timely manner, the improvement of the "multilevel" system of the EU[12] depends less on accession to the ECHR and more on the creation of a specific remedy for the protection of fundamental rights within the EU legal framework – which would guarantee more protection than that resulting from the subsidiary intervention of the ECtHR.

3. In light of the Explanations relating to Article 52(5) CFREU, the Charter sets out a distinction between 'rights' and 'principles' according to which "*subjective rights shall be respected, whereas principles shall be observed.*" The provisions of the CFREU which contain principles would become significant for the courts only for the interpretation and judicial review of legislative or executive acts taken by EU institutions, bodies, offices and agencies, and by acts of Member States when they are implementing EU law. However, unlike rights, they do not give rise to direct claims for positive action by the EU institutions or Member States' authorities. Some say that the distinction seems to reintroduce through the "window" of the Explanations the traditional dichotomy between civil/political rights and social rights that the wording of the CFREU sought to set aside. Unlike the traditional distinction between fundamental rights (adopted by several constitutions of the Member States, including the CPR), the CFREU opted for the organisational unit of fundamental rights, avoiding any supposed distinction between "judicially enforceable rights" and "rights to public benefits". Moreover, the originality of the CFREU was largely based on the cataloguing of fundamental rights in five major thematic titles – dignity, freedom, equality, citizenship and justice – regardless of the "generation" of the rights in question.

Many Authors underline the difficulty – or even question the possibility – of identifying, provision by provision, a distinction in abstract between rights and principles under the CFREU.[13] The provision of Article 52(5) CFREU – which

[11] Opinion 2/13 of the CJEU, on the compatibility of the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with the TEU and TFEU, 18 December 2014, ECLI:EU:C:2014:2454.

[12] Preferring the Portuguese expression "*interconstitucionalidade*" (interconstitutionality) to the expression "multilevel constitutionalism", see Leonard Besselink, "Multiple political identities: revisiting the 'maximum standard'", in *Citizenship and solidarity in the European Union – from the Charter of Fundamental Rights to the crisis, the state of the art*, ed. Alessandra Silveira/Pedro Madeira Froufe/Mariana Canotilho (Brussels, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien: Peter Lang, 2013), 236: "*I strongly prefer this over the expression 'multilevel constitutionalism'. The metaphor 'multilevel' presupposes the existence of levels. And in turn, levels presuppose hierarchy: one level is by definition higher than the other. In the day and age of globalization, hierarchy has become a contested concept. It may no longer adequately explain the relationship between constitutional orders.*"

[13] See Clemens Ladenburger, "European Union Institutional Report", in *Reports of the XXV FIDE*

did not exist in the original version – was inspired by Article 53(3) of the Spanish Constitution and attempts to solve the problem of the justiciability of the so-called social and economic principles.[14] Article 53(3) of the Spanish Constitution concerns the recognition, respect and protection of the principles enshrined in Chapter III of Title I of the Constitution and specifies that "*the substantive legislation, judicial practice and actions of the public authorities shall be based on the recognition, respect and protection of*" such principles. It further states that such principles "*may only be invoked in the ordinary courts in the context of the legal provisions by which they are developed.*"[15] In any case, if the problem to be solved relates to the judicial enforceability of the principles, it is worth noting that the second part of Article 52(5) CFREU does not exclude their justiciability – it merely provides that principles may be relied on in court for interpretative purposes and for judicial review of legislative and executive acts (but not only those specifically adopted for their implementation, which would correspond to a narrow interpretation of the provision).

Thus, our interpretation of Article 51(1) CFREU, reflected in Article 52(5) CFREU, according to which the addressees of the CFREU shall "*respect the rights, observe the principles and promote the application thereof*", does not entail any distinction between rights and principles beyond that arising from the theory of fundamental rights itself. It merely translates the idea that fundamental rights act as a limit to the exercise of public power, as well as principles that guide the action of these same powers – which should promote their application. The expression suggests the indispensability of a plurality of instruments of action, not only of a judicial nature, to enforce the rights proclaimed in Bills of Rights[16] because, as Norberto Bobbio wisely taught, the main problem of fundamental rights is their guarantee. In any event, and by virtue of Articles 6(1)(3) TEU and 52(7) CFREU – in accordance with which the Explanations relating to the CFREU shall be given due regard by the courts of the Union and of the Member States in the interpretation of the provisions of the CFREU –, a possible distinction would be the one suggested by Vital Moreira: rights would be "*immediately preceptive and directly justiciable*" while principles would lack "*legislative and administrative implementation.*"[17]

In any case, the doubt remains – which principles? – since the CFREU does not identify them. Would the principle of equality between women and men, one of the principles referred to as such in Article 23 CFREU, undermine the existence of a fundamental right to equality under the CFREU? The Explanations relating to the CFREU themselves admit that some provisions may contain both elements of a right and of a principle – notably Articles 23, 33 and 34 – which suggests some relativisation of that distinction. Actually, protection of fundamental rights in the EU has evolved from their recognition as general principles of EU law – which have direct effect and can be relied on by individuals before European and national authorities – and that did not prevent the development of such protection in a legal order based essentially on principles. Thus, with the entry into force of the CFREU, the principle of equality and non-discrimination, particularly in the workplace, has

Congress – Tallinn 2012, vol. 1, ed. Julia Laffranque (Tallinn: Tartu University Press, 2012), 183.

[14] *Idem*, 184.

[15] See Jorge Bacelar Gouveia, *As Constituições dos Estados da União Europeia* (Lisbon: Vislis, 2000), 249.

[16] See Marta Cartabia, in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, ed. Raffaele Bifulco/Marta Cartabia/Alfonso Celotto (Bologna: Il Mulino, 2001), 350.

[17] See Vital Moreira, "Anotação Geral à CDFUE", in *Tratado de Lisboa Anotado e Comentado*, *op. cit*., 1399.

led to interesting developments in the CJEU case-law.[18] It follows that in the context of a case-law based on principles – which decides on concrete cases through the application of principles – the distinction proposed by the Explanations relating to the CFREU would be less important than it appears. As suggested by Maria Luísa Duarte, the Explanations, drafted in a certain institutional and temporal context, cannot in the future limit the freedom of application of the courts of the Union and of the Member States, nor hold back the dynamics of an evolutionary and contextual interpretation of the provisions of the CFREU.[19]

4. According to Article 52(6) CFREU, full account shall be taken of national laws and practices as specified in the CFREU – in particular in Articles 9, 10, 2, 14, 3, 16, 27, 28, 30, 34(1)(3) and 35. As explained by Clemens Ladenburger, in the Convention which drafted the CFREU, such references to national laws and practices had originally been proposed in relation to the right to marry and to found a family (Article 9) and for the right of collective bargaining and action (Article 28) – two very contested provisions for (allegedly) covering areas where the EU would lack legislative powers and where the differing views of the Member States would be more divergent. However, this original logic was lost along the way when, in subsequent negotiations, other similar references were introduced in the CFREU – that would explain why it is not currently possible to clarify, in a coherent way, the reason why some provisions of the CFREU refer to national legislation while others do not. Moreover, such variable geometry, proper to the nature of international conventions, is not in accordance with EU primary law, taking into account its characteristics of autonomy and uniform application; especially since the scope of protection of the CFREU would ultimately depend on how a Member State implements EU law in a given area – which would be altogether inadvisable.[20]

If the concern that led to such a provision was to prevent the construction of a "European area of fundamental rights" from ignoring the constitutional traditions of the Member States (and thenceforth, the legislation and practices adopted), the normative solution found was not entirely successful. Moreover, this concern is already covered by Articles 4(2) and 6(3) TEU – as well as Articles 52(4) and 53 CFREU. In addition, the CJEU discursive case-law has over the years always taken into account national laws and practices in order to assess the legitimacy for a given restriction to the exercise of rights by the Member States, especially where there are different levels of protection concerned – but it does so independently and in addition to the situations now referred to in the CFREU. It should be noted that respect for the constitutional identities of the Member States [Article 4(2) TEU] and their common constitutional traditions [Article 6(3) TEU] are laid down in EU law – such provisions being interpreted in the light of the EU legal order. That is, there is no "yielding" of the principle of the primacy of EU law, as it is EU law itself that recognises and authorises respect for constitutional identities. As explained by Advocate General Juliane Kokott, recourse to constitutional traditions (or common legal principles) is not subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support: "*It depends rather on an evaluative comparison of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special*

[18] Judgment CJEU *Seda Kücükdeveci*, 19 January 2010, Case C-555/07, ECLI:EU:C:2010:21.
[19] See Maria Luísa Duarte, *Estudos sobre o Tratado de Lisboa* (Coimbra: Almedina, 2010), 95.
[20] See Clemens Ladenburger, "European Union Institutional Report", *cit.*, 177-179.

nature of European integration and of EU law."[21] This careful "filtering" prevents the risk of a "narrow" individual tradition being mechanically incorporated into the EU legal order.

It must therefore be pointed out that the unlimited claim of the highest level of protection, based on constitutional identities or common constitutional traditions, is likely to disrupt the effectiveness of EU law.[22] For this reason, it is for the CJEU to avoid the instrumentalisation of the principle of the highest level of protection, that is to say, to prevent Member States from shielding themselves with this principle in order not to fulfil their obligations under EU law and unilaterally decide on the provisions to be adopted. To this extent, some directives – especially in the areas of health, consumption and environment – assume that the risk in question has already been taken into account and that the highest level of protection is guaranteed therein.[23] By way of example, in *Commission v. Republic of Poland*, that Member State, in order to justify a unilateral measure prohibiting the commercial sale of seeds of genetically modified organisms, put forward a "*Christian conception of life which is opposed to the manipulation and transformation of living organisms created by God into material objects which are the subject of intellectual property rights" that was "likely, inter alia, to undermine the foundations of society*."[24] Such arguments were rejected by the CJEU, which indicated that there are limits to invoking (supposedly) the highest level of protection, in particular where effectiveness of EU law is at issue.

It should also be noted that the construction according to which "purely internal" situations may fall within the EU fundamental rights protection by virtue of European citizenship begins to take shape. As explained by Armin Von Bogdandy (*et al.*), the CJEU held in *Zambrano* that "*Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*."[25] It follows that the substance of European citizenship must be defined by reference to the essence of the fundamental rights recognised in Article 2 TEU.[26] If the standard of protection of fundamental rights that follows is applicable to all public authority under the jurisdiction of the EU, then the failure by a Member State to acknowledge those rights, even in relation to a purely internal matter, can be considered a violation of the substance of the European citizenship. Thus, in order

---

[21] Opinion of Advocate General Kokott in *Akzo Nobel Chemicals*, 29 April 2010, C-550/07 P, ECLI:EU:C:2010:229, para. 94.

[22] On this topic see Judgment CJEU *M.A.S. and M.B* (Taricco II), 5 December 2017, Case C-42/17, ECLI:EU:C:2017:936; Alessandra Silveira and Sophie Perez Fernandes, "E pur si muove! After all, we do have a highest level of protection of fundamental rights... (about the Taricco saga)", *Thinking & Debating Europe (The Official Blog of UNIO - EU Law Journal),* case note, December 14, 2017, available at: https://officialblogofunio.com/2017/12/14/e-pur-si-muove-after-all-we-do-have-a-highest-level-of-protection-of-fundamental-rights-about-the-taricco-saga/.

[23] See Judgments CJEU *Commission v. Republic of Poland*, 16 July 2009, Case C-165/08, ECLI:EU:C:2009:473; *Plus*, 14 January 2010, Case C-304/08, ECLI:EU:C:2010:12; and *DEB*, 22 December 2010, Case C-279/09, ECLI:EU:C:2010:811.

[24] See Judgment CJEU *Commission v. Republic of Poland*, *cit*., para. 31.

[25] See Judgment CJEU *Zambrano*, 8 March 2011, Case C-34/09, ECLI:EU:C:2011:124, para. 42.

[26] As Eleanor Sharpston explains, it would be unthinkable for the Court to interpret the scope and content of the citizenship provisions of the Treaty without recourse to fundamental rights. See Eleanor Sharpston, "Citizenship and fundamental rights – Pandora's box or a natural step towards maturity?", in *Constitutionalising the EU judicial system: essays in honour of Pernilla Lindh*, ed. Parcal Cordonnel/Allan Rosas/Nils Wahl (Oxford and Portland, Oregon: Hart Publishing, 2012), 267.

to preserve the constitutional pluralism protected by Article 4(2) TEU, Armin Von Bogdandy (*et al.*) suggests the "reverse" of the *Solange* doctrine, now applied to Member States from the EU legal order. To this extent, according to the Author and his research group of the *Max Planck Institute*, in addition to the scope of the CFREU as defined in Article 51(1), Member States would apply their own standard of protection of fundamental rights, provided that they ensure the substance of the fundamental rights corresponding to European citizenship. Otherwise, an individual could invoke his or her status as a European citizen (and the rights it entails) before national courts.[27]

Alessandra Silveira

[27] See Armin Von Bogdandy, *et al.*, "Reverse Solange – protecting the essence of fundamental rights against EU Member States", *Common Market Law Review*, vol. 49, no. 2 (2012).

ARTICLE 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

1. The wording of Article 53 is the result of lengthy discussion and numerous amendments, which took place between 2000 and 2004, prior to the approval of the final text of the CFREU. The initial aim in enshrining a norm concerning the level of protection of fundamental rights in the EU was not to solve any problems that might result from the necessary – and inevitable – interconnection between the Union's legal system and the legal systems of the Member States, but only to clarify the relationship between the provisions of the Charter and the ECHR. The concern was then to ensure that, in accordance with Article 6 of the TEU, the level of protection of fundamental rights within the Union framework would never be lower than the protection established by the ECHR.[1]

The proposals concerning this rule in the Convention that drafted the CFREU were quite different. In fact, a wide variety of suggestions were put forward at the time, including the following: pure and simple deletion of the norm; amendment of the list of references to include common constitutional traditions (in place of Member States' constitutions), Member States' legislation, UN and ILO conventions and the European Social Charter; express mention of the case-law of the ECtHR, the CJEU, or national courts; addition of a paragraph expressly authorising the establishment or maintenance of enhanced protection measures at national level; finally, addition of an article concerning the interpretation of economic, social and cultural rights in the light of international treaties and agreements. The final draft sought to strike the possible balance between the various positions.

2. This provision was intended to respond to the criticisms, both legal and political, of some of those opposed to the establishment of a EU catalogue of fundamental rights, by safeguarding the *standards of protection* enshrined in other legal instruments. This is, at least, the argument made, in an almost unanimous way, in the political discourse, regarding the provisions of Article 53 of the Charter.

At the legal level, however, everything is much more complicated. The norm enshrined in Article 53 must be interpreted in accordance with the other provisions of the Charter, in particular the other so-called *horizontal clauses*. It is also obviously necessary to consider EU law as a whole, in particular the principles whose compatibility with this rule appears to be more puzzling, such as the principle of the

[1] See Jonas Bering Liisberg, "Does the EU Charter of Fundamental Rights threaten the supremacy of Community law? Article 53 of the Charter: a fountain of law or just an ink blot?", *Common Law Market Review*, 38(5) (2001). DOI: 10.1023/A:1012907030538.

primacy and uniform application of EU law. From a systematic point of view, this provision must be rendered compatible – in an especially careful way – with Article 52 CFREU. As such, all relevant legal aspects regarding each specific fundamental right should be taken into account when assessing its *standards of protection*, namely the possibility and the validity requirements for possible restrictions (Article 52, paragraph 1, CFREU), as well as interpretative principles of special importance in the field of EU law, such as the interpretation in conformity with the common constitutional traditions of the Member States and with the ECHR (Article 52, paragraphs 3 and 4).

3. Article 53 of the ECHR can actually provide us with several useful clues for the interpretation of the Charter. According to this norm, no provision of the Convention may be interpreted as "*limiting or prejudicing the human rights and fundamental freedoms recognised by law*", whether these are international norms, enshrined in other conventions, or the internal norms of States. It has been affirmed,[2] without much room for doubt, that the rule is intended to clarify that, in matters of fundamental rights, the ECHR establishes a *minimum standard*, which may be exceeded, but not violated. Thus, whenever the national norms prove to be more protective of a certain right of individuals, they may prevail over the international ones.

This definition of *minimum standards* can be useful in the interpretation of provisions in the domestic law of states by making it clear that the *most demanding* meaning in terms of the protection of rights should usually be chosen. Furthermore, if the ECHR provides for additional safeguards, which are not provided for in the law of a particular country, they must also be observed at national level.[3]

To this extent, Article 53 of the ECHR contains a rule quite similar to Article 53 of the CFREU. Both the state bodies (especially the courts) and the ECtHR have been applying it without any major problems arising as to the definition and comparison of the *standards of* protection of a certain right. In fact, we can draw a conclusion from the reading of the commentaries to that provision, which seems to be equally valid for the interpretation of the rule of the CFREU: the *highest – in the sense of 'the most extensive' – protection* is always assessed from the point of view of the citizens in relation to the public authority; the most extensive level of protection is, therefore, the one which is more favourable to the individual, extending his sphere of autonomy in relation to the State, or giving him more guarantees in certain situations (criminal proceedings, for example).

4. Although not often discussed in case-law, the principle of *the highest/most extensive level of protection* has seemed appropriate to govern the relationship between domestic catalogues of fundamental rights and the ECHR, while embodying a useful tool for enhancing the level of protection. The ECtHR has accepted arguments based on the principle, invoked as an exception to the normal application of the ECHR, although it has emphasised that national measures implementing a higher standard of national constitutional rights still need to comply with the restriction clauses of the Convention and respect proportionality.[4] Notwithstanding, when

[2] See Gérard Cohen-Johnathan, *Aspects européens des droits fondamentaux* (Paris: Montchrestien, 1996).

[3] In this regard, reference can be made to the case-law of the ECtHR on the balancing of family protection and the right to family reunification with the public policy grounds which may justify the expulsion of aliens. See, for example, Judgment ECtHR *Moustaquim v. Belgium*, 18 February 1991, no. 12313/86.

[4] See Judgment ECtHR *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, no. 14235/88, and no. 14234/88.

called to examine a specific violation of Article 53 ECHR, the Court argued that it had already considered the legality of the measure under review, thus making it unnecessary to turn to Article 53.[5]

Still, no major problems have been identified in the application, at this level, of the principle of the most extensive level of protection, as the scope of the ECHR and of the national catalogues of rights usually overlaps. Therefore, the ECHR is not violated if a Member State grants a more extensive protection to an individual right protected by the Convention. At the EU level, however, the use of the principle of application of the most extensive standard of protection discipline the relationship between EU and national catalogues of rights has proved more problematic. Namely because national fundamental rights provisions granting a more extensive protection to a certain right than the one ensured by the CFREU in situations governed by EU law are deemed as an obstacle to its uniform application, as they create further – and different – limits to the exercise of EU competences and to the observance of the Union's law.

5. Having this framework in mind, the need to establish rules concerning the relationship between the CFREU and the ECHR is undoubtedly justified; on the one hand by the interest in clarifying the scope of action of the CFREU and, on the other, by the possibility that, although the EU has not acceded to the ECHR, an individual may bring an action before the ECtHR against a national measure implementing EU law. In this case, the ECtHR could find an EU law provision to be contrary to the ECHR, thus leading to divergent case-law between the ECtHR and the CJEU, which is of course considered undesirable.[6]

The accession of the EU to the ECHR has been considered and is still under negotiations. However, the CJEU has expressed serious reservations regarding the

---

[5] See Judgment ECtHR in *Cine Revue v. Belgique Affaire Leempoel & S.A.*, 9 November 2006, no. 64772/01.

[6] A good example of this possibility is the Judgment ECtHR in the case of *Matthews v. The United Kingdom*, 18 February 1999, no. 24833/94. In this judgment, the Strasbourg Court found, by fifteen votes to two, that there had been a violation by the United Kingdom of Article 3 of Additional Protocol no. 1, which states that: "*the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*" That breach was due to the absence of legal provisions enabling the inhabitants of Gibraltar to vote in the elections of British Members of the European Parliament. While recognising that States enjoy a wide margin of discretion in matters of electoral law, the ECtHR held that, in view of the fact that Community law forms an integral part of the law in force in the territory of Gibraltar, thus affecting the lives of its citizens, it is necessary, in the light of Article 3 of Protocol no. 1, for the United Kingdom to guarantee those citizens the effective exercise of their right to participate in the election of their representatives. The ECtHR thus states that, since EU law forms part of the domestic law of the States under its jurisdiction, it will not fail to assess the conformity of the rules of that system with the ECHR.
Another example of the possibility of divergence between the ECtHR and CJEU is the latter's Judgment in *Christine Goodwin v. The United Kingdom*, 11 July 2002, no. 28957/95. In its judgment the ECtHR makes a reference to Article 9 of the CFREU, noting that this rule, referring to the right to marry, departing from the wording of Article 12 of the ECHR, deliberately omits, according to the Court, the reference to "man and woman". This observation constitutes, for the ECtHR, one of the grounds for concluding that there are major changes in social conceptions concerning the institution of marriage, which are beginning to be accepted by the law, and must be taken into account in the jurisprudential densification of the norms that guarantee this fundamental right. The curious thing is that, by making such a statement, the ECHR is, in essence, interpreting a norm of another catalogue of rights, other than the one it has the mission to guarantee, having gone further than the CJEU itself had gone, until that date.

first agreement concluded with such goal, deeming it contrary to specific provisions of EU treaties. In Opinion 2/13,[7] the Luxembourg Court argued that the accession was liable to adversely affect the specific characteristics and the autonomy of EU law in so far as the proposed adhesion agreement did not ensure coordination between Article 53 of the ECHR and Article 53 of the CFREU, not averting the risk that the principle of Member States' mutual trust under EU law may be undermined.

The CJEU accepted that the rule of more extensive protection applies to the relationship between the ECHR and the CFREU, as well as to the relationship between the ECHR and the fundamental rights of the Member States, but it pointed out that such provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

6. The CFREU is only binding for the Union's institutions and bodies *in all their actions*;[8] it does not impose obligations on Member States when they are acting outside the scope of EU law, so it is only applicable to them when their actions aim at implementing or derogating from EU law. Furthermore, in order to correctly understand the provision of Article 53 CFREU, it is also necessary to recall the distinction between the *obligation to respect* fundamental rights and *the competence to legislate* on fundamental rights. The Charter is intended to operate only within the framework of competences defined in the Treaties and it does not imply an extension of the Union's competences.

Nonetheless there has been a broad doctrinal discussion on the content, scope and meaning of the rule we are now analysing, whose content is a source of dissent and misunderstanding.

First of all, the implications of the reference to the *"constitutions of the Member States"* were discussed. Several authors and political representatives have expressed their concern that the principles of the primacy of Union law and uniformity of application would be at serious risk. Those in favour of the provision of Article 53 argued, however, that the Charter only sets *minimum standards for the* protection of fundamental rights, without which there would be a regression in relation to the level of protection already achieved in each of the Member States.

Concerning the reference to the *scope of application of* each relevant legal system, it might be thought that this is intended to clear up any doubts which might arise about the primacy of Union law over the law of the Member States (including constitutional law), thus reaffirming that national constitutions may take precedence only in matters of exclusive national competence. However, if this was in fact the intention, it would contradict the Charter itself (see Article 51), which provides for Member States to be bound only when they apply Union law (which will certainly

[7] Opinion 2/13 of the CJEU, on the compatibility of the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with the TEU and TFEU, 18 December 2014, ECLI:EU:C:2014:2454.

[8] See Draft Charter of Fundamental Rights of the European Union, document CHARTE 4111/00, BODY 3, Brussels, 20 January 2000. Available at https://www.europarl.europa.eu/charter/activities/docs/pdf/body3en_en.pdf. This is a preparatory document for the general debate on the Charter of 2 February 2000, which the Chairman asked the Secretariat to draft, and the purpose of which is to list certain "horizontal questions" for discussion by members of the Convention.

not happen in matters of exclusive national competence). Within the framework of a systematic analysis of the rule, the reference to scopes of application thus appears to be a mere statement of fact, namely that the rights provided for in other catalogues or legal instruments, national or international, can only be mobilised when the specific case presents a connection with the legal system in question.

7. This provision of Article 53 of the CFREU has two essential dimensions. First of all, it must be regarded as an important *principle for the interpretation of* fundamental rights rules. This principle is, of course, binding on both the Union and the Member States and has several consequences. First of all, it implies the assumption by the various *guardians of fundamental rights* in the European area – with particular emphasis on the role of the judicial bodies, especially the CJEU and national (constitutional) courts – of the need to effect a real *integration through rights*. The CJEU and national courts should then take into account, in the process of interpreting the rules of the Charter, *other* EU rules on fundamental rights, as well as the relevant internal rules, *other rights* (*i.e. the rights of other* legal systems that can be mobilised) or, in most cases, the *different* existing *formulations of the same right.* Basically, in this sense, there is an *obligation of interpretation in conformity with fundamental rights*, which implies that, among the various possible meanings of a norm, the interpreter chooses the one which confers the most extensive level of protection of the right and/or is more compatible with the analogous normative provisions of other legal systems.

Secondly, the principle analysed here also constitutes a *rule of conflict*, which should allow resolution of possible problems of *collision of norms*. As such, the rule contained in Article 53 of the Charter requires, in any case of interaction or concurrence of different rules of fundamental rights, their coordination by way of interpretation in order to ensure the greatest possible protection of the right(s) in question; should this solution not appear feasible, one should opt for the preferential application of the rules which ensure a more intense effective guarantee of the same right, or which allow, in the event of a collision of rights, to achieve each of them with the least possible sacrifice.

8. A large part of the legal doctrine expresses major reservations, both regarding the *merits of* the provision, from a dogmatic point of view, and its *applicability*, from an eminently practical point of view. Critics generally argue that this rule is contrary to the principle of the primacy of EU law, calling into question the functioning of the system of production and application of Union law; also, some consider the provision of Article 53 as a norm of impossible application, given the difficulties of verifying the criterion of competence ("*in their respective fields of application*") and of determining the most favourable *standard of* protection.

The positions of the authors who have analysed the rule of Article 53 can be divided into three main groups. On the one hand, there are those who are sceptical (sometimes very sceptical) about the effective possibility of applying the rule. On the other, the more optimistic ones, who see in it a new criterion for conflict resolution that will contribute to the construction of the EU as a true community of rights. Between the two there are some *intermediate positions* that point to the consideration of the norm as enshrining, in conjunction with the other horizontal clauses, a new *interpretative principle*, under the terms of which the Charter's rules should be read in accordance with the fundamental rights guaranteed by other legal instruments, in particular by state constitutions.

One of the most critical voices is that of Ingolf Pernice,[9] who states that *the rule in question has little practical significance* and therefore does not even constitute a credible threat to the principle of the primacy of EU law. In fact, he maintains, the reference to the *respective fields of application* makes it possible to rule out the interpretation according to which, in view of this normative provision, the fundamental rights recognised by the constitutions of the Member States could be considered a parameter for controlling the validity of EU acts. Thus, the provision of Article 53 should be read as a *proposed armistice in the struggle between the constitutional practices of the Union and the Member States*.

In turn, the analysis of M. Cartabia[10] seems to point to an understanding of the rule in question as a *simple interpretative principle*, intended to ensure that the provision of a Union catalogue of fundamental rights is not intended to replace the various forms of protection of these rights provided for in the legal systems of the Member States and in EU and international law. The provision of Article 53 seeks, according to the author, to affirm the Charter as an additional protection of fundamental rights (*un valore aggiunto alla protezione dei diritti fondamentali*) in the European Union, without prejudice to the forms of protection already existing at the various levels. This argument also reinforces the idea that the ECHR constitutes, in all cases, the minimum standard of protection for fundamental rights.

Finally, the most optimistic and open positions regarding the rule contained in Article 53 of the Charter are those of the authors who see in it the consecration of a true *principle of the most extensive level of protection, a* principle which constitutes, in their opinion, an expression of the European commitment in relation to fundamental rights and a guarantee of an effective protection of these rights in the EU area. Representative of this thesis is Alonso Garcia,[11] who finds the *consecration of a true principle of the most extensive level of protection in the* matter of fundamental rights, in the wording of Article 53.[12] However, the author admits

---

[9] See Ingolf Pernice, "The Charter of Fundamental Rights in the Constitution of the European Union", *Walter-Hallstein Institut*, Paper 14/02.

[10] Marta Cartabia, "Article 53: Livello di protezione", in *L'Europa Dei Diritti, Commento alla Carta dei diritti fondamentali dell'Unione Europea*, ed. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: il Mulino, 2001).

[11] See R. Alonso Garcia, "The General Provisions of the Charter of Fundamental Rights of the European Union", *European Law Journal*, vol. 8, no. 4 (2002): 492-514.

[12] On the existence, in Article 53 of the Charter, of a principle of the most extensive level of protection in the matter of fundamental rights, see also, among others, Francesco Saverio Marini, "I Diritti Fondamentali della CEDU e della Carta dell'Unione Europea come Diritti Pubblici Soggetivi", in *Tutela dei Diritti Fondamentali e Costituzionalismo Multilivello – Tra Europa e Stati Nazionali*, ed. Antonio d'Atena and Pierfrancesco Grossi (Milano: Giuffrè, 2004), 51-69. The author detects in Article 53 of the Charter a "principle of prevalence of the most favourable norm", stating that this contributes to delineate a system of protection of fundamental subjective rights based on three different normative levels (international, Community and constitutional), whose possible conflicts will be solved not according to the traditional criterion of formal hierarchy, but taking into account the material content of each norm. In his reflection, Saverio Marini also draws attention to the impracticality of the criterion of prevalence of the most favourable provision whenever we are not in the presence of subjective rights, whose passive subjects are only public entities.
For their part, Koen Lenaerts and Eddy De Smitjer, "A Bill of Rights for the European Union", *Common Market Law Review*, no. 38 (2001): 273-300, argue that Article 53 establishes a rule according to which the level of protection of fundamental rights conferred by Union law, by the constitutions of the Member States (or even by the national legal systems as a whole, as seems to result, the authors affirm, from a combined reading of Article 53 of the CFREU and Article 53 of the ECHR) and also by international legal instruments recognised by the EU or by all Member States, constitutes the

that it raises some difficulties of interpretation due to the fact that, despite being similar to other provisions present in international human rights conventions (namely Article 53 of the ECHR), which have a clear *vocation to complement* national systems for protecting and guaranteeing fundamental rights, the norm is intended to be applied in the context of an *autonomous legal order*, the EU legal order. Indeed, the fundamental rights norms contained in international legal instruments unequivocally function as a statement of a minimum *standard* of protection, which the various national legal systems are obliged to respect, and there is no objection to the establishment of a higher or more intensive protection of a particular right or of fundamental rights as a whole. However, in the context of EU law, and in the name of respect for the principle of the uniform application, any standards of protection of fundamental rights other than those contained in the Charter will tend to be relegated to a secondary level, with their application being refused whenever they differ significantly from those contained in the Charter and even if the level of protection of rights resulting from them may be considered more extensive.

9. As expected, a *restrictive* interpretation of Article 53 of the Charter was adopted by the CJEU. As is widely known, the CJEU was confronted with a case in which Article 53 of the Charter was directly mobilised to determine the resolution of the issue involved. This is the case of *Melloni*,[13] in which the Spanish Constitutional Court invited, through the referral mechanism, the CJEU to interpret and, if necessary, to assess the validity of the Community rules on the European arrest warrant and surrender procedures between Member States, in accordance with a recent amendment reinforcing the procedural rights of individuals and promoting the application of the principle of mutual recognition with regard to decisions rendered *in absentia*. The Spanish court also asked the CJEU to specify, for the first time, the scope of Article 53 of the CFREU.

The case has its origins in case-law of the Spanish Constitutional Court under which the execution of a European arrest warrant issued for the purposes of executing a judgment rendered *in absentia* must always be subject to the condition that the person against whom the warrant has been issued may be retried in the issuing Member State. Now, as a result of changes at that time, European Union law provided that, where a person was aware of the scheduled trial and had given a mandate to a lawyer to represent him at that trial, surrender cannot be made subject to such a condition.

Advocate General Bot took the view that "*Article 53 of the Charter is not to be regarded as a clause designed to regulate a conflict between, on the one hand, a provision of secondary law which, interpreted in the light of the Charter, sets a given level of protection for a fundamental right and, on the other hand, a provision drawn from a national constitution which provides a higher level of protection for the same fundamental right. In such a situation, that article has neither the objective nor the effect of giving priority to the more protective rule deriving from a national constitution. To accept otherwise would*

---

minimum level of protection to be guaranteed in all circumstances. In other words, these authors agree with the thesis that the rule in question enshrines a prohibition on the violation of the standards of protection of fundamental rights enshrined in the constitutions of the Member States (and in the other legal instruments referred to in Article 53).

[13] See Opinion of Advocate General Yves Bot in *Stefano Melloni v. Ministerio Fiscal*, submitted on 2 October 2012, Case C-399/11, ECLI:EU:C:2012:600. See also Judgment CJEU *Stefano Melloni v Ministerio Fiscal*, 26 February 2013, Case C-399/11, ECLI:EU:C:2013:107.

be tantamount to disregarding the settled case-law of the Court concerning the primacy of European Union law." He added that such an "*interpretation of Article 53 of the Charter would also undermine the principle of legal certainty, since a provision of secondary law, which is nevertheless in accordance with the fundamental rights guaranteed by the Charter, could be set aside by a Member State on the ground that it infringed one of its constitutional provisions.*" Indeed, in his Opinion, the Advocate General repeats many of the arguments set out above, in particular the fact that "*it is therefore not possible to reason only in terms of a higher or lower level of protection of human rights without taking into account the requirements linked to the action of the European Union and the specific nature of European Union law*", in particular "*the necessary uniformity of application of European Union law.*"

In that context, the Advocate General suggested differentiating "*between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of an action by the European Union and those in which that level of protection has not been the subject of a common definition. In the first case, the fixing of the level of protection is, as we have seen, closely linked to the objectives of the European Union action concerned. It reflects a balance between the need to ensure the effectiveness of European Union action and the need to provide adequate protection for fundamental rights. In that situation, it is clear that, if a Member State were to invoke,* a posteriori, *the retention of its higher level of protection, the effect would be to upset the balance achieved by the European Union legislature and therefore to jeopardise the application of European Union law. On the other hand, in the second case, the Member States have more room for manoeuvre in applying, within the scope of European Union law, the level of protection for fundamental rights which they wish to guarantee within the national legal order, provided that that level of protection may be reconciled with the proper implementation of European Union law and does not infringe other fundamental rights protected under European Union law.*" He therefore concluded that Article 53 "*makes clear that, within the framework of the coexistence of the various sources of protection for fundamental rights, the Charter cannot, on its own, result in a reduction in the level of protection for those rights in the different legal orders. That article therefore seeks to confirm that the Charter imposes a level of protection for fundamental rights only within the field of application of European Union law. The Charter thus cannot have the effect of requiring Member States to lower the level of protection of fundamental rights guaranteed by their national constitution in cases which fall outside the scope of European Union law.*"

10. In the end, regarding the third question submitted for a preliminary reference in that case, the CJEU ruled that the interpretation of Article 53 as allowing a Member State "*to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law* [...] *cannot be accepted.*" The ground for that, in the reasoning of the Court, was that such reading undermines the principle of primacy. The Court also stated that EU rules which comply with the Charter cannot be open to disapplication by Member States, irrespective of the fundamental rights guaranteed in national constitutions. Recalling case-law, it was highlighted that the effectiveness of EU law in the territory of the State cannot be affected by national provisions, including constitutional ones.

Notwithstanding the norm in Article 53 that permits national authorities and courts to freely apply national standards of protection of fundamental rights, the CJEU sustains that such level of protection must not compromise the primacy, unity

and effectiveness of EU law. As a consequence, Member States are bound to *execute a European arrest warrant when the person concerned is in one of the situations provided for therein*. In conclusion, any risk for the uniformity of the standard of protection of fundamental rights as defined in EU (secondary) law ought to be prevented by national judges, so that mutual trust, recognition and efficacy remain unimpaired. Even if that costs the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State. National judges are, therefore, obliged, at least under EU law, to effect the surrender of a person convicted *in absentia*, despite a potential adverse effect on national fundamental rights' standards. This outcome did not go uncontested and was reconfigured later in the so-called *Taricco* saga.

11. The CJEU's stand on Article 53 was developed in cases *Taricco* I and II (also known as *M.A.S and M.B.*).[14]

The *Taricco* judgment concerned a reference for a preliminary ruling from an Italian court in criminal proceedings, the substance of which concerned the operation of a criminal association to evade value added tax (VAT) on the purchase and sale of bottles of champagne. According to the Italian court, given the complexity and duration of the investigation, the national limitation rules would make it impossible for the Italian financial administration to recover the amount of tax subject to the infringement in question, since the limitation periods would have expired. Since the case affected the financial interests of the EU, the request for a preliminary ruling sought to ascertain whether the Member State was obliged to extend those periods and thereby infringe the principle of criminal legality laid down in Article 25(2) of the Italian Constitution, given that the limitation rules for criminal offences in Italy, as clarified by the *Corte Costituzionale*, are substantive and not adjective in nature, in order to give effect to the obligation that damage to the financial interests of the EU must be punishable by effective criminal penalties.

In its first judgment, the CJEU held that, in particular under Article 325 TFEU, Member States have a duty to impose dissuasive and effective measures to protect the Union's financial interests and that, for that reason, the application of a national system which gives rise to a significant number of cases in which defendants are not criminally punished because the statute of limitations has expired, is contrary to EU law.

The referring court should therefore cease to apply the national (constitutional) provisions.

Using the words of the Court, if "*the national court concludes that the national provisions at issue do not satisfy the requirement of EU law that measures to counter VAT evasion be effective and dissuasive, that court would have to ensure that EU law is given full effect, if need be by disapplying those provisions and thereby neutralising the consequence* [of temporal effect of an event interrupting the limitation period], *without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure.*" In addition, the ruling stated "*the sole effect of the disapplication of the national provisions at issue would be to not shorten the general limitation period in the context of pending criminal proceedings, to allow the effective prosecution of the alleged crimes, and to ensure, if necessary, that penalties intended to protect the financial interests of the European Union and those intended to protect the financial*

[14] See Judgments CJEU *Taricco*, 8 September 2015, Case C-105/14, ECLI:EU:C:2015:555, *and M.A.S and M.B*, 5 December 2017, Case C-42/17, ECLI:EU:C:2017:936.

interests of the Italian Republic are treated in the same way. Such a disapplication of national law would not infringe the rights of the accused, as guaranteed by Article 49 of the Charter" because the acts in question were already a crime at the time. They constituted the same offence for which the same punishment was in place.

Once again, full effectiveness of (a part of) EU law, namely the financial interests of the Union, was deemed to override fundamental rights standards (*e.g.* legality) in a rather narrow stance.

In the light of that judgment, the Italian Constitutional Court was confronted with questions of constitutionality on the matter. Instead of engaging with its *controlimiti* doctrine, a different approach was taken. Indeed, concerned with the correct application of the most extensive level of protection of fundamental rights guaranteed in this respect by the Italian Constitution to defendants, the Constitutional Court decided, in a different case, to stay the proceedings and to refer questions for a preliminary ruling on interpretation as to whether Article 325 TFEU, as interpreted in the *Taricco* judgment, requires the criminal court to refrain from applying a national rule, even if such disapplication "*is at variance with the overriding principles of the constitution of the Member State concerned with the inalienable rights of the individual conferred by the constitution of the Member State.*" This was the starting point of the *M.A.S.* – or *Taricco II* – judgment.

The CJEU pointed out, firstly, that it was necessary to hone the interpretation it had itself given to Article 325, TFEU. Thus, reiterating that it is incumbent on the Member States to ensure the collection of all VAT revenue and, thus, the protection of the Union's financial interests, the Court stated that, within the scope of application of Union law, the obligation to ensure the effective collection of Union resources cannot run counter to the principle of the legality of criminal offences and penalties, which forms part of the common constitutional traditions of the Member States and is also enshrined in Article 49 of the Charter.

Significantly, the Court specified that "*it is for the national court to ascertain whether the finding, required by paragraph 58 of the* Taricco *judgment, that the provisions of the Criminal Code at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise.*"

Furthermore, the Court showed a more nuanced awareness regarding the requirements of foreseeability, precision and non-retroactivity inherent in the principle that offences and penalties must be defined by law, having considered in this judicial analysis that they preclude the national court, in proceedings concerning persons accused of committing VAT infringements before the delivery of the *Taricco* judgment, from disapplying the provisions of the Criminal Code at issue. This was a clear sign of retreat on the practical application of the principle of legality so that the *Corte Costituzionale* was reassured regarding the case at hand.[15]

Thus, the CJEU concluded that if the national court assesses that the non-application of the domestic provision leads to a situation of uncertainty, concerning

[15] As Fabio Giuffrida put it, the earlier order – in *Taricco I* – for disapplication represented "*a retroactive application of a rule of substantive criminal law to the detriment of the defendants*", contrary to the Italian constitution. See Fabio Giuffrida, "The Limitation Period of Crimes: Same Old Italian Story, New Intriguing European Answers: Case Note on C-105/14, Taricco", *New Journal of European Criminal Law*, vol. 7, no. 1 (2016): 112.

the determination of the applicable limitations' regime, which violates the principle of the precision of the applicable law, there is no obligation to disapply the national rule. It is worth transcribing the following extract from the judgment: "*if the national court were thus to come to the view that the obligation to disapply the [national] provisions at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied.*"

Notwithstanding the useful and adequate judicial dialogue arising from the *Tarrico* saga, one point remains: there are undeniable points of tension at the intersections of the idea of the effectiveness of EU law and the protection of fundamental rights' standards, either through national constitutions or the CFREU. Although they are not inimical, this is a constant pressure over the EU legal order that can be handled in different ways, with very different outcomes. The perspective adopted in *Taricco I* leads to a confrontational focus causing losses for all (individuals, Member States, the EU, the entire system of integration), in the name of the fulfilment of a supposed uniformity in the application of EU law that will tend to downgrade the protection of fundamental rights. This consists of an effectiveness deprived of values. Conversely, the approach exemplified by *Tarico II* shows a path towards raising the level of complexity and perception of subjective rights built upon the (still) primary and more immediate source of fundamental rights, *i.e.*, constitutions. Such articulation with EU law is beneficial to all parties, as it is more comprehensive and defensive of individual and collective claims in societies where diversity, combatting inequalities and safeguarding minorities and vulnerable groups are priorities. In the *Taricco* judgments, the object was the confrontation between a certain conception of the principle of (criminal) legality and the protection of financial interests of the Union; but it could have been any other fundamental right as well. Had it been freedom of thought, data protection, health care or environmental protection, it would surely be preferable to rely on the stronger prerogative for the weaker side.

12. As we have seen, the defence of a restrictive interpretation of Article 53 is based on some central arguments. The first is that the enshrinement of such a principle of the most extensive level of protection is incompatible with the primacy of EU law and with CJEU case-law in this area, together with the risks it entails for the uniform application of the Union's law. Secondly, there is the idea that the rule of Article 53 merely seeks to affirm the ECHR as a minimum *standard of* protection for fundamental rights within the European framework, reaffirming what was, after all, already the *status quo*. Thirdly, it is also claimed that a principle of the most extensive level of protection of fundamental rights would be impossible to apply, since it is based on the erroneous assumption that it would be possible to compare the protection guaranteed, in relation to the same right, by different norms under different legal systems.

As to the first argument, the application of a rule stated in an instrument of EU law (the CFREU) cannot *by definition* violate the principle of primacy. Following a consistent systematic interpretation, it should only be considered that it is EU law itself that allows an exception to its preferential application, on the basis of the Union's objectives, which include strengthening the rights of citizens.

Regarding the second argument, it is clear from the preparatory work and the entire discussion about Article 53 CFREU (both legal and political) that if

the initial intention was indeed to affirm the ECHR as a basic *standard* of rights protection in the EU framework, the final result went beyond this intention. The rule in question was intended to ensure that there is no regression in relation to the level of protection of rights enshrined in the legal orders of the Member States, especially at a constitutional level. However, this guarantee of non-retrogression will only be effective if, in cases where there are competing rules of national and EU law, the norm providing the most extensive level of protection is applied.

Finally, concerning the third argument, it can be argued from the outset that law in general often mobilises the idea of *standards*. There is a reference to *standards* of protection in many different areas, from labour law to environmental law. The Charter itself refers to levels of protection, when it states that EU law may provide for more extensive protection of a given right. This concept naturally presupposes the possibility of comparison between rules or legal systems, since it only makes sense to speak of levels of protection if there is a point of reference against which to assess the degree of protection afforded.

Still on the alleged incompatibility of the principle of the most extensive level of protection with the principle of the primacy of EU law, it is important to note that the principle of the most extensive level of protection of fundamental rights will only have effective practical application in situations where a Member State acts in application (or, according to the case-law of the CJEU, in derogation) of EU law, in matters of concurrent competence between the Union and the Member States.[16] In fact, in matters of exclusive competence of the EU, national (constitutional) standards for the guarantee of fundamental rights will naturally not be invokable, precisely because it is beyond their scope of application. The other sources of law mentioned in the rule of Article 53 (international law, ECHR and other international conventions to which the Union or all the Member States are party), when they can be mobilised, should always be considered as *minimum common denominators*, below which protection cannot, under any circumstances, fall.

13. Although conflicts of standards and of competence appear closely linked, it is useful to clarify that the principle of the most extensive level of protection as regards fundamental rights can only resolve possible *conflicts of standards*, *i.e.*, situations of dissent between competing standards. In reality, both in terms of normative interpretation and in terms of application of the law, the division of competences is now reasonably clear. The CJEU is the *guardian of the Treaties* and has exclusive competence to give preliminary rulings on its interpretation. For their part, the national courts, in particular the constitutional courts, are the *guardians of national constitutions and the rights enshrined in them*. There is no hierarchy of any kind between them. Thus, the problem the principle of the most extensive level of protection intends to solve is (once the meaning of each of the conflicting rules in a given case has been established by the competent bodies) to determine which rule should actually be applied.

14. On the other hand, it should be noted that the principle of the most extensive level of protection can only answer questions of *effectiveness*. When resolving problems of fundamental rights in matters of concurrent competence between the EU and the Member States, questions of validity may logically arise. However, it is important that the various players in this process of *interconstitutionality* accept that

[16] The areas of shared competence are already, in the light of Article 4 TFEU, quite relevant; the possibility of conflict thus tends to increase as the matters in which the Union may act also increase.

the parameters for controlling ordinary norms are the respective constitutions/treaties. Thus, it will be up to the competent judicial bodies (of the Union or the Member State) to assess the conformity of the provisions of each legal system to their specific standard. In this field, however, mobilisation of the principle of the most extensive level of protection does not make sense. An EU law rule may be contrary to the fundamental rights provisions of the constitution of a particular Member State and yet not appear to be incompatible with the EU criteria of validity. In such a situation, its possible exclusion can be based only on a principle of *effectiveness* which, on predetermined grounds, gives preference in application to the national rule. On the other hand, a national rule that is contrary to the Union standard may be judged invalid in countries such as Portugal, where EU law is the object of special constitutional provisions [Article 8(4) of the CPR] and the principle of consistent interpretation (that entails the duty to interpret domestic law in accordance with Union's law) is therefore particularly relevant. But in this case, invalidity is based primarily on a direct failure to comply with the national parameter.

15. Finally, for a better understanding of the problem posed by the recognition of the existence of a principle of the most extensive level of protection of fundamental rights in the EU, it seems appropriate to take into account the distinction proposed by Antonio Ruggeri[17] between recognition, at the constitutional level, and multi-level protection of fundamental rights. According to this author, the first concept refers to the protection granted to rights at a normative level; the second refers us to the jurisdictional level, in particular to the guarantee mechanisms ensured by constitutional courts and other courts with competence in the field of fundamental rights, both at a national and supranational level. In this sense, and in line with all of the above, it may be concluded that an effective guarantee of the most extensive level of protection of each of the fundamental rights does not imply an act of recognition, in the sense attributed to it by the author, an act of a materially constitutional nature which can only be carried out by the competent authorities, in each specific legal system, and which must take into account the unity of the legal order in question. Thus, we are dealing here with a principle which guides the task – situated at a hierarchically lower level – of protecting rights, especially at the jurisdictional level. In this operation, the case-by-case application of a standard of guarantee expressed in a norm originating in a different legal system does not imply the automatic incorporation of that level of protection into another legal system. It is, of course, desirable that this incorporation should gradually take place by way of interpretation. However, this will be a longer process, the fruit of the construction of a true constitutional union and of integration through rights, and not a necessary consequence of the punctual application of the principle of the most extensive level of protection.

16. The interpretation advocated here of the principle of the most extensive level of protection regarding fundamental rights is, moreover, fully in line with the stated objectives of the Union. Thus, the very first recitals of the TEU recognise

[17] See Antonio Ruggeri, "Riconoscimento e tutela 'multilivello' dei diritti fondamentali attraverso le esperienze di normazione e dal punto di vista della teoria della Costituzione", Communication to the Congress on *Ordinamenti compositi e tutela dei diritti fondamentali*, Udine, 11 May 2007. Available at: https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/dottrina/libertadiritti/ruggeri.html.

the attachment of the Member States to the principles of liberty, democracy, respect for human rights and fundamental freedoms; they also proclaim a commitment to social rights and a desire to deepen solidarity between peoples, while respecting their culture and traditions; finally, it should be recalled that the Union also states its desire "*to promote economic and social progress* [...] *taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.*"

Already in the body of the Treaty, in the general provisions, Article 3(1) states that "*the Union's aim is to promote peace, its values and the well-being of its peoples.*" In addition, and in accordance with Article 3(3) of the TEU, the EU "*shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.*"

In the light of these rules, an interpretation of Article 53 CFREU that advocates the possibility of setting aside a more favourable norm of fundamental rights in favour of the EU rule, in the event of regulatory conflict, on the basis of the principle of the primacy of EU law and the supposed threat to the effectiveness and uniform application of the latter does not appear sustainable in the long run. In reality, all EU law (including the said principles of primacy and uniform application) aims at the pursuit of the above-mentioned objectives. As such it makes no sense to defend a solution that departs from them, for the sake of their application.

Thus, the principle of the most extensive level of protection in the field of fundamental rights appears to be a principle which is perfectly in keeping with EU law, a genuine instrument for the practical achievement, at various levels, of the Union's objectives. We even believe that, beyond the jurisdictional level, where the question of constitutional conflicts is situated, this principle also imposes on the Union's institutions and on State bodies, when applying such law, the obligation to adopt an *attitude of protection and promotion of fundamental rights*.

17. It should also be noted that the Treaties provide, in various rules, in particular in the provisions concerning the Union's public policies, for an obligation to ensure a *high level of protection*. Thus, we find, for example, a reference to *a high level of protection in the* field of the environment, defined as the objective to be attained by the Union's policy in that area;[18] similarly, the guarantee of a high *level of* consumer protection is mentioned as the scope of Community consumer protection policy;[19] an identical mention can also be found in relation to public health, where a *high level of consumer protection* must be ensured in the definition and implementation of all Union policies and activities.[20]

The EU is thus making an explicit commitment, under the terms of which the protection afforded to its citizens in the areas covered by the Union's policies should always be *high*; we therefore believe that these rules, in addition to being political

[18] See Article 191(2) of the TFEU.
[19] See Article 169(1) of the TFEU.
[20] See Article 168(1) of the TFEU.

statements of intent, may be used as auxiliary provisions for the interpretation of EU law norms on fundamental rights (whether these are subjective rights or programmatic rules). In this context, the densification of these types of norms should be carried out in such a way that the protection provided is *above minimum standards*, which should be defined by reference to existing international legal instruments (UDHR, ECHR, European Social Charter and other international conventions on specific matters to which the Member States or the EU itself are party).

18. If Article 53 of the CFREU is to be interpreted as enshrining a new principle, to be applied by the European institutions and the Member States, according to which preference will be given, in the case of competing rules, to the provision that affords the most extensive protection to fundamental rights, it is necessary to try to establish criteria that make it possible to determine what it actually means to classify a given legal regime as "*the most extensive level of protection*" of a given right. What does it mean, after all, to protect *more*? Is it possible to suggest a *priori* decision-making criteria to support and ground a judicial decision in this matter?

The silence of the majority of the doctrine shows that it is difficult to establish operative criteria for evaluating the *standards* of protection in a matter as sensitive as fundamental rights. It is obvious that, in view of the complexity that is usually present in *practical cases of* constitutional law, and bearing in mind that the understanding that is held, in each legal system, about the material content of the fundamental rights norms is highly dependent on the socio-political context and the specific constitutional commitment of each Member State, a situation will always be imaginable in which the criteria that we will suggest fail or lead to paradoxical solutions. In this field it seems almost impossible to formulate *a priori* judgments and great caution will always be required. This should not, however, prevent us from trying to set out some criteria of a doctrinal nature which may be useful for an effective rationalisation and justification of judicial decisions.

A first methodological and/or interpretative criterion that is pertinent in this matter is that of opting for the rule or legal regime of fundamental rights which confers greater freedom of action of the individual or which enshrines a more intense legal duty of provision for the public entities. This idea may, of course, be challenged on the grounds that it stems from an eminently liberal (and, for many, outdated) conception of fundamental rights. However, if it is necessary to choose, in the evaluation and interpretation of *protection standards*, between individuals and public authorities, we believe that the option cannot be any other. Thus, we think there are good grounds for choosing to apply the fundamental rights' provision which appears to be more favourable to the citizen, *i.e.* the one which allows him/her to act (to speak out, to express him/herself, to defend him/herself in legal proceedings, to form associations, to go on strike, etc.) or which gives him/her the right to benefits from the public authorities (health, education, housing, protection in cases of special vulnerability, etc.). In addition, in principle, preference should also be given to implementing rules which set limits on action by the public authorities in favour of individuals.

An additional criterion is that of protecting the weaker party. Internal constitutional rules and rules of international law have long enshrined legal regimes which establish a special (or more intense) system of protection for categories of people considered to be particularly vulnerable, given the political, sociological or cultural context. Thus, in the event of conflict, the regime which allows a concrete

response to the particularities of certain vulnerable categories of subjects – by granting them a wider sphere of autonomy or, more often, by designating them as holders of rights to special benefits and as the target of anti-discriminatory measures, including, in some legal systems, positive discrimination measures – should be considered more extensive.

The last criterion suggested is closely related to the principle of subsidiarity and also to the idea of effective judicial protection. It is also a subsidiary criterion, only to be applied if it proves impossible to solve the case on the basis of the previous principles. In these terms, since it is not possible to choose between two different systems on the basis of the above criteria, we believe that the one which appears to be closest to the citizen (national rather than EU, regional or local rather than national) may rightly be chosen, for two reasons: firstly, because individuals are generally more familiar with the provisions on rights in *their own* vicinity, including the considerations in cases of conflict, and the interpretation made by the courts, and have legitimate expectations that the public authorities will act accordingly. Furthermore, while it is not possible to say that one or the other rule is clearly more favourable to citizens, it seems sensible to choose to apply the rule which, in principle, reflects a compromise that has considered the particular socio-political framework of the community to which they belong. Finally, the rights enshrined in the system with more proximity will usually ensure that individuals have a greater chance of effective judicial protection to enforce them (see the difficulty of access by individuals to the CJEU). In essence, it can be said that a rule which ensures that citizens' expectations regarding their rights are safeguarded and that public authorities provide effective and timely protection of those rights confers the most extensive level of protection.

Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

This Article corresponds to Article 30 of the UDHR of 1948, Article 17 of the 1950 ECHR, Article 5 of the 1966 ICCPR, Article 5 of the 1966 ICESCR and Article 29 of the ACHR of 1969.

Under Article 30 of the UDHR: "*Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein*."

Article 17 of the ECHR states that: "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*"

Article 5 of the ICCPR establishes that: "*1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*"

In accordance with Article 5 of the ICESCR: "*1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.*"

Article 29 of the ACHR states that: "*Restrictions Regarding Interpretation - No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.*"

Last but not the least is a commonly used expression that will rarely be applied with as much pertinence as when applied to the qualification of Article 54 CFREU.[1]

---

[1] On this Article, see Consultative Assembly of the Council of Europe, "Débat préliminaire devant l' Assemblée", Strasbourg, ECtHR, 1957; H. Cannie and D. Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?", *Netherlands Quarterly of Human Rights*, vol. 29 (2011); European Council, Note from the Præsidium – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, European Council, 2000; and S. Van Drooghenbroeck, "L'article 17 de la Convention européenne des droits de l'homme est-il

These provisions are deeply rooted in the wording of Article 17 of the ECHR, although it is clear that this provision reproduces Article 30 of the UDHR, which preceded the ECHR by two years; the rationale for its existence, and certainly its necessity, but, even more, its function, is to substantiate the ultimate defence (*ultima ratio*) of democracy and freedom against itself. In Goebbels' famous quote on democracy, we read the following: "*Cela restera toujours l'une des meilleures farces de la démocratie d'avoir elle-même fourni à ses ennemis mortels le moyen par lequel elle fut détruite.*" The freedom guaranteed by the international instruments on fundamental rights can, in fact, allow the development of liberticidal initiatives. This risk, which unfortunately has been considerable in recent years, was the main argument used by Mr Maccas, the representative of Greece, when, on 19 August 1949, he appealed to the Consultative Assembly of the Council of Europe for its inclusion in Article 17 of the ECHR.[2] The appeal from Mr Maccas prompted Teitgen, a rapporteur, to submit a proposal to the Committee on Legal and Administrative Matters of the Consultative Assembly, which included a provision whose content corresponded exactly to the current Article 17 of the ECHR. However, this proposal was rejected by the Commission. Resistance to the proposal would only be overcome at the Conference of Senior Officials on Human Rights in Strasbourg that took place between 8 and 17 of June 1950.

The underlying question of the *rationale* of this provision is the defence of freedom and democracy. This protection requires the awareness that fundamental rights, as subjective rights, must have limits. As taught by Castro Mendes,[3] there are extrinsic limits to the exercise of rights – the collision of rights and abuse of rights. In the wake of the various international instruments in this area, the EU's legislator conferred upon Article 54 the epigraph "Prohibition of abuse of rights", therein regulating such matter. The adopted solution leads the interpreter in the direction of the Principle of the Abuse of Rights. This is a general principle of law in the Roman-German legal tradition, arising both at the level of domestic law and at the level of international law. It has its origin in the emulative acts in Roman law and corresponds, generally, to the formulation in private law of the principle of the deviation of the existing power in public law.[4] The *rationale* of the Principle of Abuse of Rights is based on the idea that the exercise of a subjective right may be unlawful if the aim pursued is not consistent with the purpose of the law that protects the subjective right in question.

The drafting of this disposition points to the existence of a certain confluence of concepts; the concept of abuse of right and another extrinsic limit to the subjective rights, pointed out by Castro Mendes, the collision of rights.[5] The solution cannot be dissociated from the fact that the nature of the CFREU in this matter results from the synthesis between different legal traditions. It so happens that, as M. Byers came to demonstrate,[6] the Anglo-Saxon legal tradition constructed the concept of abusive use of the law in the perspective of illegality (*tort*) of the exercise due to the violation of the limits imposed by the rights of others: "*The excessive or abusive exercise of rights as limited by the rights and interests of others.*" Which explains how we arrive

indispensable?'", *Revue trimestrielle des droits de l'homme*, Brussels, Nemesis (2001): 542-543.

[2] M. Maccas, "Débat préliminaire devant l'Assemblée", Strasbourg: ECHR, 1957.

[3] J. Castro Mendes, *Teoria Geral do Direito Civil I* (Lisbon: AAFDL, 1978).

[4] A. Vaz Serra, "Os actos emulativos em Direito Romano", in *Boletim da Faculdade de Direito da Universidade de Coimbra*, Coimbra (1928).

[5] See J. Castro Mendes, *Teoria Geral do Direito Civil I*.

[6] See M. Byers, "Abuse of Rights: an old principle, a new age", *McGill Law Journal*, 47 (2002).

at the co-existence of abuse of rights and collision of rights. In any case, when it comes to Fundamental Rights, the collision of rights seems to be the most evident manifestation of the abuse of rights. In fact, it is inherent in the concept of abuse of rights that the exercise of the right is unlawful. The unlawfulness of the exercise of a right can only result from a breach of a higher-level provision which, in the case of Fundamental Rights, arises from a precept establishing a fundamental right of a higher level.

This seems to have been the solution contemplated by M. Maccas in the proposal submitted to the Consultative Assembly of the Council of Europe in 1949. Indeed, the citation presented in note 55 continued as follows: "*En second lieu, la liberté et la sûreté de la personne humaine, justement parce qu'elles doivent être générales et solidaires, doivent avoir pour corolaires et pour frontières la liberté et la sûreté de son prochain. S'il n'en était pas ainsi, on finirait par ne garantir que la sûreté des malfaiteurs. Et dans ce cas, la seule sûreté dont les innocents bénéficieraient serait la sûreté avec laquelle ils seraient atteints.*"

Article 54 of the Charter covers two broad categories of recipients: the Member States as such (sovereign bodies) and natural and legal persons who, for some reason (personal or territorial jurisdiction), fall within its scope. For this reason, it is possible to state, as regards to this provision, as is the case with Article 17 of the ECHR, that two provisions co-exist: one that clearly addresses the Member States and another the individuals (natural or legal persons). The provision regarding Member States prohibits the use of any of the provisions set forth by the Charter as a means to limit in an unauthorised way any of the rights or freedoms existent therein. The provision that pertains to individuals prohibits the use of the Charter to justify any activity which has as its object or effect the offense of one of the rights or freedoms set forth therein, which is to say that the norm is essentially intended to prevent and ward off any violation of liberty that an inattentive or fundamentalist interpretation of fundamental rights and freedoms might provide.

From the coexistence of two different provisions in a single article, it is conceivable, theoretically, that vertical disputes may arise between Member States and individuals (in a broad sense, between Member States and the Union or even between private individuals) as well as horizontal disputes (between Member States or between private parties). While there is still no case-law application of Article 54 of the Charter, we again refer to Article 17 of the ECHR and, where appropriate, the relevant case-law.

Article 17 of the ECHR has been dealt with in three ways in the case-law of the ECtHR and the European Commission on Human Rights: it has been used in a number of cases as a basis for preventing the use of fundamental rights and freedoms against themselves; in other cases where the use of fundamental rights against the rights themselves might be justified it was simply ignored; and in the third situation it was simply used as an interpretive element and as an aid to the "main" provisions.

José Caramelo Gomes & Noémia Bessa Vilela

***

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

ACADEMIC AND PROFESSIONAL BACKGROUND OF THE CONTRIBUTORS

Alessandra Silveira

Professor (Aggregation in Law), University of Minho. Researcher at JusGov – CEDU. Director of Master's Degree in EU Law. Jean Monnet Chair Holder in EU Law. Academic Coordinator of Jean Monnet Centre of Excellence "Digital citizenship and technological sustainability: achieving CFREU effectiveness in the digital decade" (CitDig), Erasmus+. Project Manager (Portugal) of Jean Monnet Network "European Network on Digitalization and E-governance" (ENDE), Erasmus+. Director of UNIO-EU Law Journal and Editor of UNIO's official blog "Thinking and Debating Europe". Member of "Community of Charter Experts" of EU Agency for Fundamental Rights (FRA).

Alexandra Aragão

Professor with a permanent post at the Faculty of Law of the University of Coimbra, Portugal, where she teaches environmental law, ecoliteracy, risk governance, food safety law and forest law. Vice-editor of the Portuguese "Planning law, urban law and environmental law journal". Member of the European Natura 2000 observatory, of the European water law observatory, of the Advisory Board of the European Environmental Law Forum and trustee of the European group of environmental law experts, Avosetta.org.

Ana Rita Gil

Assistant Professor at the Faculty of Law, University of Lisbon. Researcher at the Lisbon Public Law Research Centre. She has several publications and communications in the area of Immigrants' Human Rights, and has collaborated in several studies by academic networks and the European Commission on Immigration Law.

Anabela Miranda Rodrigues

Full Professor at the Faculty of Law of the University of Coimbra; Adjunct Professor of the Faculty of Law of the University of Macau; Vice President of the International Society of Social Defence; President of the Portuguese Group of the International Association of Penal Law; President of the Institute for Economic and European Criminal Law of the Faculty of Law of Coimbra; Research Associate at the Legal Institute of the Faculty of Law of Coimbra; Member of the Supervisory Board of Legal Medicine. She taught at the Faculty of Law of the Portuguese Catholic University (Porto) and was a guest professor at the Faculty of Law at NOVA University Lisbon. She was Director of the Centre for Judicial Studies (October/2004 to September/2009); member of the Portuguese High Council for the Judiciary (2009-2011); and Director of the Law Faculty of the University of Coimbra (2011-2013). She was Minister of Internal Affairs in the XIX Government of Portugal (2014-2015).

André Paulino Piton

Assistant Professor at the University of Maia. PhD in Law from the University of Minho. Master in Criminal Legal Sciences from the University of Coimbra. Jusgov Integrated Investigator.

António Araújo

Graduated and has a Masters in Legal-Political Sciences from Lisbon Law School, he currently teaches at Nova University, Lisbon. PhD in Contemporary History from the Faculty of Human Sciences of the Portuguese Catholic University. Advisor to the Portuguese Constitutional Court, he was Consultant for Political Affairs at the Civil House of the President of the Portuguese Republic. Member of the Board and Director of Publications at Fundação Francisco Manuel dos Santos. Author of several books and articles on constitutional law, political science and contemporary history.

António Manuel Hespanha*

Distinguished Professor (retired) at the Faculty of Law of NOVA University Lisbon (History and Theory of Law). Doctor honoris causa from the School of Law at the University of Lucerne (Switzerland). Honorary Researcher at the Institute of Social Sciences of the University of Lisbon. Visiting professor or researcher at several Portuguese and foreign university institutions (Belgium, Spain, France, Germany, Italy, Norway, Sweden, Switzerland, Argentina, Brazil, Canada, United States of America, Mexico, China, India). Former President of the Scientific Council of the Foundation for Science and Technology (Social Sciences and Humanities area). Former member of the Comité Scientifique of the Maison des Sciences de l'Homme (2005-2006) and the Réseau des Maisonr des Sciences de l'Homme. Former General Commissioner for the Commemoration of Portuguese Discoveries. Member of the Historical and Geographical Institute of Rio de Janeiro. Grand Officer of the Order of Santiago. University of Coimbra Prize, 2005 (ex-aequo with Luís Miguel Cintra). Founder and former director of the Penélope and Themis magazines.

Carlos Pamplona Corte-Real

PhD in Law (Legal Sciences) from the Lisbon Law School, with teaching especially focused in the areas of family and inheritance law, having in recent years conducted seminars on matters such as access to marriage, same-sex parenting, divorce, de facto partnerships and parental responsibilities. He has published works in the fields of Inheritance Law, Family Law and Tax Law.

Catarina Gouveia Alves

Law Clerk at the Portuguese Constitutional Court since 2018, she was previously a legal adviser in the office of the Portuguese Ombudsman and a guest lecturer at the University of Coimbra Faculty of Law (FDUC). She obtained her master's degree in Administrative and European Law at FDUC and is currently a PhD candidate in Tax Law at the Lisbon School of Law of the Portuguese Catholic University (FD-UCP).

* This academic biography is an unchanged translation of the one published in the 2013 Portuguese Commentary on the Charter of Fundamental Rights of the European Union due to the Author's passing.

Catarina Sampaio Ventura

Graduated from the University of Coimbra Faculty of Law (1995), approved in the academic part of the Master's Degree in Legal-Political Sciences (1998/1999) and postgraduate degree in Medical Law (2003/2004) from the same institution. Coordinator of the Rights, Freedoms and Guarantees Unit within the Office of the Portuguese Ombudsperson (since April 2023). Advisor to the Portuguese Ombudsperson (2006-2023). Assistant at the Ombudspersons' Cabinet (2002-2006). Intern Assistant at the University of Coimbra Faculty of Law, in the subjects of Constitutional Law and Political Science, and Public and European International Law (1996-2001). Consultant for human rights, on request, at the Portuguese Ministry of Foreign Affairs, within the scope of the Portuguese Presidency of the European Union (1999-2000).

Cláudia Viana

PhD, Public Law. Associate Professor of Law at University of Minho, Portugal. Research Member of Jus Gov - Research Centre for Justice and Governance, University of Minho, Portugal.

Emiliano García Coso

Professor at the Facultad de Derecho de la Universidad Pontificia Comillas, Madrid. Honorary International Researh at Regional Studies Institute, Anhui University (Hefei, China). Principal Investigator of the Spanish team on the Observatory of Free Movement of EU Workers project, funded by the European Commission and directed by Nijmegen University. Of Counsel Lawyer at Lopez-Ibor and Associates, Madrid, Spain.

Fernando de Gravato Morais

Full Professor at the University of Minho Law School. Master of Law from the University of Coimbra Faculty of Law. PhD in Law from the University of Minho Law School. Scientific areas of interest: commercial law, civil law and consumer law.

Filipe Guerra

Graduated in Law from the Faculty of Law of the University of Porto (2008). He collaborated with the Portuguese Legislative Policy and Planning Office in the monitoring and evaluation process of the Experimental Civil Procedural Regime in 2007. Lawyer (2011 to 2012). Judge (since 2013).

Flávia Noversa Loureiro

Graduated in Law from the Law School of the University of Minho, she completed her Master's degree in Legal Criminal Sciences at the University of Coimbra in 2008. She has a PhD in Law from the Law School of the University of Minho, where she is an Assistant Professor in the area of criminal law.

Francisco Pereira Coutinho

Associate professor at Nova School of Law (Lisbon, Portugal). Bachelor (2002), PhD (2009), and Habilitation (aggregation) (2021) in law from Nova School of Law. Member of CEDIS - I & D Research Center for Law and Society.

Gonçalo Saraiva Matias

Professor of the Faculty of Law of the Portuguese Catholic University, where he completed his first degree (2002), his Master's degree (2010) and his PhD (2014). He was the Dean of the Catholic Global School of Law. He is Chairman of the Board of Directors and of the Executive Committee of the Francisco Manuel dos Santos Foundation. He carried out research as a Fulbright Visiting Scholar at Georgetown University Law School. He is particularly involved in the areas of Regulatory, Administrative, Constitutional and International Law. He was an invited professor at Washington University in St. Louis. He was an Adviser for Legal and Constitutional Affairs to the President of the Portuguese Republic between 2008 and 2014 and has been a consultant since 2014.

Helena Pereira de Melo

Bachelor's degree, Master's degree and PhD in Public Law. She is an Associate Professor with Aggregation at the Faculty of Law at NOVA University Lisbon and invited Professor at the Faculty of Medicine of the University of Porto. She is the author of four books and fifty articles published in international and national journals. She is Vice-President of the Portuguese Bioethics Association.

J. Cunha Rodrigues

Chairman of the UEFA Club Financial Control Body (2012-2021). Judge of the Court of Justice of the European Union (2000 to 2012). Attorney-General of the Portuguese Republic (1984 to 2000). Representative of the Portuguese Government at the European Commission of Human Rights and the European Court of Human Rights (1980-1984). Expert at the Human Rights Committee of the Council of Europe (1980 to 1984).

Joana Covelo de Abreu

Professor of European Union law at the University of Minho – School of Law, Portugal and an integrated research member of JusGov, where she also integrates its Directive Committee. She acts within the European Union Law, namely devoting her attention to EU Procedure, Data Transfer and Interoperability within European e-Government and e-Justice paradigms. She was the Academic Coordinator of the Jean Monnet Module eUjust – "EU Procedure and credits' claims: approaching electronic solutions under e-Justice paradigm" (until 2022). She is now the key-staff member of the Jean Monnet Centre of Excellence CitDig. Director of the department of public legal sciences at the University of Minho - School of Law. She was an appointed expert to the modernization of judicial cooperation in civil matters (DG Justice and Consumers – European Commission), in 2018, namely concerning discussing Commission's proposals on taking of evidence and service of documents' Regulations. She is Editor of UNIO – EU Law Journal and its official blog "Thinking & Debating Europe."

Joana Gama Gomes

Guest Lecturer and PhD candidate in Public International Law and European Union Law at the University of Lisbon School of Law. Master in Law (International Public Law and European Law) from the University of Coimbra Faculty of Law.

Joana Nunes Vicente

Graduated in Law by the University of Coimbra - Faculty of Law (2004). Master of Legal-Labour Sciences by the University of Coimbra - Faculty of Law (2008). PhD in Law by the Faculty of Law of the University of Coimbra (2017). Assistant Professor at the Faculty of Law University of Coimbra. Member of the University of Coimbra Legal Institute. Board member of APODIT - Portuguese Labour Law Society (Associação Portuguesa de Direito do Trabalho). Member of IDET - Instituto de Direito das Empresas e do Trabalho. Member of Labour Studies Law Society (Associação de Estudos Laborais). Research fields - Labour Law, Labour Law of Public Administration, Anti-discrimination Law, EU Social Law.

João Leal Amado

Professor at the University of Coimbra Faculty of Law. PhD in Law from the University of Coimbra. Member of the Editorial Board of the journals Questões Laborais; Desporto & Direito – Revista Jurídica do Desporto; Revista de Legislação e Jurisprudência. Vice-president of the Board of IDET (Instituto de Direito das Empresas e do Trabalho). Member of the management bodies of JUTRA (Associação Luso-Brasileira de Juristas do Trabalho). Member of the list of arbitrators-president of the CES (Economic and Social Council of Portugal).

João Nuno Calvão da Silva

Vice-Rector of the University of Coimbra for External Relations and Alumni since March 2019. President of the Association of Portuguese Speaking Universities - AULP (since September 2021) and Vice-President of the Executive Committee of the Union of Portuguese Speaking Capital Cities - UCCLA (since October 2022). Assistant Professor at the University of Coimbra Faculty of Law (FDUC) since 2015. PhD in European Union Law at FDUC. Visiting researcher at the European University Institute (2011) and Assistant at the Faculty of Law of the University of Macau from 2002 to 2004. Various participations in national and international conferences and publications, and collaboration with FDUC institutes.

Joaquim Freitas da Rocha

Full professor at the University of Minho (Associated Professor with Habilitation). Researcher at the Research Centre for Justice and Governance (JusGov). Director of the Master's Degree in Tax Law at the Law School of the University of Minho. Head-in-chief (Director) of "Cadernos de Justiça Tributária" (Tax Litigation Issues). Trainer at the Centre for Judicial Studies (CEJ). Author of several books about constitutional law, local financial law, and tax law. Holding various management positions in the university field.

Jorge Leite[*]

Professor (retired) at the University of Coimbra Faculty of Law. Professor at the Faculty of Law of the Universidade Lusófona do Porto. Vice-president of the Instituto de Direito das Empresas e do Trabalho – IDET (2000/2007) and coordinator of its first six postgraduate courses in Labor Law. Director of the magazine Questões Laborais. Founding member and president of the Associação de Estudos Laborais. Founder and member of the board of JUTRA (Associação Luso-Brasileira de Juristas do Trabalho). Arbiter-President of the Arbitration Commissions established within the scope of the Economic and Social Council. European Commission expert in the field of social policy (1994/1999).

José Caramelo Gomes

Aggregate Professor of Law at Lusíada University. PhD in Law from the University of Salford-Manchester. Master in Law from the Portuguese Catholic University. Graduated from the Universidade Livre de Lisboa. He is Chair of European and Comparative Law at UPT and belongs to several Editorial Boards and international research groups, having works and articles published in Portugal, the United Kingdom, Spain, Brazil, China, Slovenia, Germany and the United States of America.

José João Abrantes

President of the Constitutional Court of Portugal. Justice of the Constitutional Court since July 2020, elected its President on April 2023. Full Professor Professor at the Faculty of Law at NOVA University Lisbon. Graduated and Master from the Lisbon Law School, where he was an assistant between 1982 and 1992. Doctor of Law from the University of Bremen. Aggregated Professor in Private Law of the Faculty of Law at NOVA University Lisbon, where he has been a professor since 2000, teaching, among other subjects, Labor Law, Succession Law and Legal Research Methodology. Legal consultant at Caixa Geral de Depósitos between 1985 and 2009. Member of the Editorial Board of the magazines Questões Laborais, European Labor Law Journal and Juridical Tribune, among others. Founding member of ELLN (European Labor Law Network), a network of labour lawyers from 30 European countries, including all European Union countries, whose Constitutive Conference took place in 2005 and which, in December 2007, became the European Network of Experts for advice from the Directorate-General for Employment, Social Affairs and Equal Opportunities of the European Commission.

José Luís da Cruz Vilaça

Judge of the Court of Justice of the European Union (2012-2018). President of the Court of First Instance of the European Communities (1989-1995). Advocate General of the Court of Justice of the European Communities (1986-1988). Professor at the Law Faculties of Coimbra University (1966-1985), NOVA University Lisbon (2001-2012) and at Portuguese Catholic University (2004-2018). Lawyer, founding and managing partner of Cruz Vilaça & Associados). PhD in International Economics from the University of Paris I (1978).

---

[*] This academic biography is an unchanged translation of the one published in the 2013 Portuguese Commentary on the Charter of Fundamental Rights of the European Union due to the Author's passing.

José Silva Pereira

Master in Law (European Community Legal Sciences) from the Faculdade de Direito da Universidade Independente, with teaching in the scope of Environmental Law, Spatial and Community Planning at the Universidade Independente. He has published works in the fields of geological resources and protected areas.

Júlio Manuel Vieira Gomes

Judge at the Portuguese Supreme Court (Social Section). Invited Professor at the Porto Law School of the Portuguese Catholic University; LLM (Columbia University), DPhil (Oxford). Previously member of the Advisory Council on Unjust enrichment and negotiorum gestio in the Study Group on a European Civil Code; Scientific areas of interest: labour law, law of obligations and insurance contracts.

Larissa Araújo Coelho

Master in Human Rights by the School of Law of the University of Minho. PhD Candidate at the School of Law of the University of Minho. Researcher at Center for Justice and Governance. Invited lecturer at the School of Law of the University of Minho.

Luís Couto Gonçalves

Full Professor at the University of Minho School of Law. He was its President between 2002 and 2008. Member of the Scientific Board of the journal Actas de Derecho Industrial, of the Institute of Industrial Law of the University of Santiago de Compostela. Member of the Editorial Board of the journal Revista de Direito Intelectual. Author of approximately 80 publications.

Luís Meneses do Vale

Graduation in Law, Master and Doctorate in Public Law (juridical and political sciences) at the Faculty of Law of the University of Coimbra (FDUC), both under the supervision of J. J. Gomes Canotilho. Former Monitor and Assistant Teacher, he is now Researcher at the UCILeR (University of Coimbra Institute for Legal Research) as well as Auxiliar Professor and Coordinator of the Master Degrees at the Faculty of Law, where he also held positions within the Executive Board, the Pedagogical Council and the Assembly of Representatives. He is a Founding Member of the Portuguese Association of Theory of Law, Philosophy of Law and Social Philosophy, and of the Portuguese Chapter of I-Con, member of the Portuguese and International Associations of Constitutional Law and also of Die Deutsch-Lusitanische Juristenvereinigung. Associate Member of the Centre for Biomedical Law, of the Portuguese Society of Rhetoric, of the Laboratory of Rationality and Applied Ethics (of the Faculty of Arts and Humanities of the University of Coimbra) and of Causa Publica; Founding as well as current Board Member, of Alumni (The Association of Former Students of the Faculty of Law of the University of Coimbra).

Margarida Santos

Professor at the School of Law of University of Minho (from 2009). Integrated member of the Research Centre for Justice and Governance. PhD degree (May 2015) in Juridical Sciences, specifically in Public Juridical Science field, obtained in the Law School of University of Minho. Master degree in Judiciary Law (Procedural Law and Judicial Organization) obtained in the Law School of University of Minho and a Undergraduate degree in Law obtained in the same University. Fields of study and research: Criminal Procedural Law, Criminal Law, Criminology, EU Criminal Law, Juvenile Justice.

Maria Ana Ferraz

PhD in Legal Sciences from the School of Law of the University of Minho (2015). Master in Public Law (International Law variant) from the Faculty of Law of the Portuguese Catholic University (2008). Graduated in Law from the Faculty of Law of the University of Porto (2000). Lawyer (2000-2005). Legal Consultant (2005-2014). Judge (since 2014).

Maria do Rosário Palma Ramalho

PhD and Post PhD in Law. Full Professor of the School of Law of the University of Lisbon. President of APODIT - Portuguese Association of Labor Law and Vice-President of the ISLSSL - International Society for Labor and Social Security Law. Legal expert of the European Commission in the field of equality and non-discrimination. Legal consultant in the areas of Civil Law, Labor Law, Social Security, Public Service and Equality Law. Author of many edited books and papers, in Portugal and abroad and including a 4 volume Treaty on Labor Law. Scientific coordinator of several international projects and of drafts of legal acts in the same areas. Lecturer at numerous scientific events both in Portugal and abroad.

Maria Inês Costa

Master in Human Rights and PhD Candidate at the School of Law of the University of Minho. Researcher with an FCT scholarship. Member of the Editorial Team of UNIO - EU Law Journal and its official blog Thinking and Debating Europe. Ambassador for European Careers at the University of Minho for two consecutive academic years: 2023/2024 and 2024/2025. Member of JusGov and Member of Jean Monnet Centre of Excellence "Digital citizenship and technological sustainability: achieving CFREU effectiveness in the digital decade" (CitDig), Erasmus+. Project Communication Specialist (Portugal) of Jean Monnet Network "European Network on Digitalization and E-governance" (ENDE), Erasmus+.

Maria José Rangel de Mesquita

Associate Professor with Aggregation of the Group of Legal and Political Sciences of the University of Lisbon School of Law. Conducting the areas of European Union Law, Public International Law and Human Rights Law, among others. Coordinator of the European Jean Monnet Modules "Fundamental Rights and Rule of Law as European Values in a Global World after the Conference on the Future of Europe" (2022-2025) and "European Union's External Action Role in a Global World" (2012-2015). Integrated Researcher of the Lisbon Public Law Research Centre. Member of the Project on Principles of European Tort Law – Public Liability (Institute for European Tort Law, 2010-2013). Former Judge of the Constitutional Court of Portugal (2012-2021).

Maria Luísa Duarte

PhD and Aggregate Professor in Public Law. Professor at the Lisbon Law School and Senior Research Fellow at the Lisbon Public Law Research Center. Jurisconsult and agent for the Portuguese Republic in numerous cases before the Court of Justice of the European Union. Author of extensive work, in the form of articles, monographs and manuals, especially in the areas of Public International Law, European Union Law, Justice of European and Fundamental Rights.

Maria Miguel Carvalho

Associate Professor with Habilitation at the University of Minho School of Law. Director of Research Centre for Justice and Governance (JusGov). Member of the board of the Portuguese Intellectual Property Association. Subdirector of Revista de Direito Intelectual (IP law journal). Author of several publications in the field of company law and industrial property law.

Mariana Canotilho

Graduated in Law from the University of Coimbra Faculty of Law (FDUC) in 2003. Master in Legal-Political Sciences, from FDUC, in 2008. Master and PhD (2010 and 2015) in European Constitutional Law from the Faculty of Law of the University of Granada, Spain. Assistant Professor at FDUC since 2003. Advisor to the Office of the President of the Constitutional Court between 2013 and 2019, and between 2003 and 2008. Judge at the Portuguese Constitutional Court since 2019.

Mariana Sousa e Alvim

European and Competition Law Consultant at Sérvulo & Associados and Master in European Legal Sciences from the Lisbon Law School. Received the Jacques Delors award in 2008 for her work "A Tutela Judicial Provisória dos Particulares no âmbito do Direito Comunitário". She is a PhD candidate at the Católica Law School in the area of European Union Law and a researcher at the Católica Research Centre for the Future of Law.

Mário Monte

Postgraduate, Master, Doctor and Aggregate in Law, with specialization in Legal and Criminal Sciences. He has collaborated with several universities, and is currently a Full Professor at the School of Law of the University of Minho. He has also collaborated with institutions such as the Center for Judicial Studies (CEJ), the Bar Association and the Foundation for Science and Technology, particularly within the scope of their respective juries. He is the author of more than a hundred articles and some books, and has participated as a lecturer in several national and international scientific events, especially in the area of criminal sciences. He is Director of the Master's Course in Judicial Law and the Doctorate Course in Law at the School of Law of the University of Minho. He is a member of the Research Center for Justice and Governance (JusGov), being the coordinator of the Justice and Criminology Group (JusCrim). He is President of the School Council of the Law School of the University of Minho.

Milena Silva Rouxinol

Assistant Professor at the Porto School of Law, Universidade Católica Portuguesa. Graduated in Law (1999-2004) in the Faculty of Law, University of Coimbra, where she obtained her master's degree (2005-2008) and her PhD (2009-2014). She has held teaching positions and carried out research work, especially in Labor Law. She is author, either individually or as part of work teams, of several studies in this field and frequently participates in specialized training courses (e.g., postgraduate courses), colloquiums and conferences.

Noémia Bessa Vilela

Head of Research at Institut pravnih znanosti, Maribor. Her PhD thesis focuses on the uniform application of EU Competition law and the analysis of the efficiency and efficacy of the existing legislation. With a remarkable track record or 14 consecutive years of participation in EU funded research Projects, she oversees Cost Actions: IGCOORD and ECO4ALL.

Patrícia Jerónimo

Professor at the University of Minho School of Law. PhD in Law from the European University Institute in Florence. Regional Coordinator for Portuguese-Speaking Countries at the Global Citizenship Observatory (GLOBALCIT) of the Robert Schuman Centre for Advanced Studies. Country correspondent for the project CUREDI – Cultural and Religious Diversity under State Law across Europe at the Max Planck Institute for Social Anthropology in Germany. She regularly publishes works in legal journals and collective works in Portugal and abroad. Her preferred areas of research are human rights and cultural diversity, legal pluralism, migration and citizenship.

Paula Távora Vítor

Professor of Family and Succession Law (Faculty of Law – University of Coimbra). President of the Direction Board of Centro de Direito da Família (Family Law Center – UC). Member of the Executive Council of the International Society of Family Law (ISFL), of the Coordinating Group of Family Law in Europe Academic Network (FL-EUR) and of the International Academy of Comparative Law (IACL). Researcher (Institute for Legal Research - UCILeR). Member of the Editorial Board of Lex Familiae – Revista Portuguesa de Direito da Família and of the Journal Family & Law. Author of several monographs and articles and co-author of law reform projects.

Paulo Rangel

Current Minister of State and Foreign Affairs. Lecturer at the Faculty of Law of the Portuguese Catholic University (Porto) and on the Executive MBA from Porto Business School. Author of monographs and scientific articles in the areas of public law and political science. He is a lawyer and was a Member of the European Parliament, Member of the Assembly of the Portuguese Republic (having been parliamentary leader of PSD) and Secretary of State to the Minister of Justice.

Pedro Madeira Froufe

Professor at the University of Minho School of Law (EDUM), where he teaches mainly European Union Law and Competition Law. PhD in Public Legal Sciences from the University of Minho. Master in Integration Law from the University of Coimbra Faculty of Law and D.E.A. Droit de l'Économie from the Université de Dijon/Bourgogne. Member of the Steering Committee of the Masters in European Union Law (EDUM). He was responsible for a Jean Monnet Module (1996-1998) in Community Law (EDUM). He was Lauréat of the Altiero Spinelli Simulated Process Competition, Brussels (1987). He received a scholarship from the French Ministry of Education. Former member of the Portuguese High Council for (the) Judiciary. Researcher at JusGov – CEDU.

Pedro Miguel Freitas

Professor at the Faculty of Law of the Portuguese Catholic University, where he coordinates a Postgraduate Course in Law and Technology, as well as a course in Law and Technology in the Law Degree. He obtained his Law Degree (2005), Master's degree (2011) and PhD (2016) from the Law School of the University of Minho. He lectures and researches in the area of Criminal Law, Criminal Procedure, Computer Crime and Law and Artificial Intelligence. He is a member of the Católica Research Centre for the Future of the Law, Algoritmi Center, the Latin American Observatory for Criminal Policy Research and Law Reform, the International Federation for Information Processing (WG 9.6 and WG 11.7) and the Secure Platform for Accredited Cybercrime Experts at EUROPOL.

Ricardo Leite Pinto

PhD Contemporary History (School of Arts and Humanities of the University of Lisbon), LL.M, Law Master, Public Law (UL). BA, Law Degree (FDUL). Professor at the Lusíada University (Lisbon). Integrated Researcher at the Centro de Estudos Jurídicos, Económicos, Internacionais e Ambientais (CEJEIA) at Lusíada University. Vice-Chancellor of the same University. Author of more than 80 works in History, Political Science and Constitutional Law (books, books chapters, articles, etc.).

Rita Canas da Silva

Professor at the Faculty of Law of the Catholic University of Portugal (Lisbon School), has a Ph.D. in Private Law from the Faculty of Law of the Nova University of Lisbon, having written her thesis on the suspension of the employment contract. Head Partner of the Labour Department at Sérvulo & Associados SRL. Guest speaker at conferences and seminars on Employment Law and Sports Law, has authored several publications on her areas of specialisation. Founding member of the Portuguese Employment Law Association (APODIT - Associação Portuguesa de Direito do Trabalho) and founding member of the Association of Young Labour Jurists (AJJ - Associação de Jovens Juslaboralistas).

Rosa Cândido Martins

Assistant Professor at the Faculty of Law of the University of Coimbra where she teaches Family and Succession Law as well as Procedural Family and Children Law. She completed her PhD in Law (Family Law) with Distinction and Praise by Unanimity in 2020 and her Master Degree (Civil Law and Family Law) with Very Good (18/20) at the Faculty of Law of the University of Coimbra. She is an integrated researcher of UCILeR (University of Coimbra Institute for Legal Research). She is member of the Board of the Portuguese Family Law Centre, and also member of the editorial board of Lex Familiae – Portuguese Family Law Review.
Her main research areas are Family Law, Children's Rights, Children's legal (in)capacity, Parental Responsibilities, Vulnerability, Relational Autonomy and Care and the legal regulation of family relationships. She is scientific coordinator of and teaches in several Postgraduate Courses. She is author and co-author of two monographs and several articles and book chapters in Portuguese and English published in Portugal and abroad in the areas of Family Law, Parental Responsibilities, Children Rights, Marriage Law and Relational Autonomy.

Sergio Maia Tavares Marques

Master in EU Law by the School of Law of the University of Minho. PhD Candidate at the Faculty of Law of the Universidade Católica Portuguesa, Porto School. Adviser at the Portuguese Constitutional Court.

Sophie Perez Fernandes

Référendaire at the Court of Justice of the European Union. Law Graduate, Master in European Union Law and PhD in Law (Public Legal Sciences) from the University of Minho. Distinguished, among others, by the attribution of the following awards: Honorable Mention - European Prize Professor António Sousa Franco 2011 (University of Lisbon); Jacques Delors Prize 2012 (Jacques Delors European Information Centre); Honourable Mention - Prize Professor Paulo de Pitta e Cunha 2016 (University of Lisbon); Honourable Mention - Jacques Delors Prize 2017 (Jacques Delors European Information Centre).

Teresa Coelho Moreira

Associate Professor with Habilitation at the University of Minho Law School (EDUM). Coordinator of DH (Human Rights) of the Research Group JusGov (Research Centre for Justice and Governance). Regular collaborator in Postgraduate and Master's Degrees in Labour Law in Portugal and abroad. Author of many national and international monographs and articles. Speaker at several National and International Congresses and in training activities at the Center for Judicial Studies (CEJ). Scientific co-coordination of the Congresso Nacional de Direito do Trabalho.

Teresa Freixes

Professor of Constitutional Law. Holder of the Jean Monnet Chair since 2003 (ad personam since 2008) with the Success Stories distinction. Received the Narcís Monturiol medal awarded by the Government of Catalonia. Member and Vice President of the Royal European Academy of Doctors. Legal expert for the European Commission and the Council of Europe. She participated in the drafting of the Treaty of Lisbon, the Constitutional Treaty, the Treaty of Amsterdam and the Charter of Fundamental Rights of the European Union. She was a Senior Expert and Director of National Focal Point at the European Union Agency for Fundamental Rights and the European Institute for Gender Equality. She has a National Prix Muñoz Torrero on the constitutional values and the Otto of Habsburg Prix on the European values. Author of more than one hundred specialized publications, and director of European and national research projects.

Tiago Sérgio Cabral

Master in EU Law by the School of Law of the University of Minho. PhD Candidate at the School of Law of the University of Minho. Project Expert (digital transformation) at the European Network on Digitalization and E-governance (ENDE). Researcher at JusGov. Data Protection, Cybersecurity, Technology and AI lawyer.

Vital Moreira

PhD in Law, University of Coimbra. Retired professor of the University of Coimbra; currently, professor at Lusíada University (Porto). Former director of Ius Gentium Conimbrigae - Centre for Human Rights, and National Director of the European Master's Degree on Human Rights and Democratization. Former member of the European Parliament (2009-2014) and chairman of the Committee on International Trade (INTA). Major research and teaching interests: national and EU constitutional law, history of constitutionalism, human rights, international trade law.

TABLE OF CONTENTS

LIST OF CONTRIBUTORS 4

FOREWORD 5
Alessandra Silveira & Larissa Araújo Coelho & Maria Inês Costa & Tiago Sérgio Cabral

LIST OF ABBREVIATIONS 7

COMMENTARY TO THE PREAMBLE TO THE CHARTER OF FUNDAMENTAL RIGHTS 8
Teresa Freixes

ARTICLE 1
Human dignity 25
José Luís da Cruz Vilaça

ARTICLE 2
Right to life 36
Anabela Miranda Rodrigues

ARTICLE 3
Right to the integrity of the person 46
Helena Pereira de Melo

ARTICLE 4
Prohibition of torture and inhuman or degrading treatment or punishment 60
Maria Inês Costa

ARTICLE 5
Prohibition of slavery and forced labour 66
Flávia Noversa Loureiro & Margarida Santos

ARTICLE 6
Right to liberty and security 71
Larissa Araújo Coelho

ARTICLE 7
Respect for private and family life 82
Sophie Perez Fernandes

ARTICLE 8
Protection of personal data 93
Alessandra Silveira & Tiago Sérgio Cabral

ARTICLE 9
Right to marry and right to found a family 105
Carlos Pamplona Corte-Real & José Silva Pereira

ARTICLE 10
Freedom of thought, conscience and religion 112
Vital Moreira

ARTICLE 11
Freedom of expression and information 126
Maria Ana Ferraz & Filipe Guerra

ARTICLE 12
Freedom of assembly and of association 136
Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 13
Freedom of the arts and sciences 146
Alessandra Silveira & Joana Covelo de Abreu

ARTICLE 14
Right to education 161
António Manuel Hespanha

ARTICLE 15
Freedom to choose an occupation and right to engage in work 167
Emiliano García Coso

ARTICLE 16
Freedom to conduct a business 176
Pedro Madeira Froufe

ARTICLE 17
Right to property 181
Luís Couto Gonçalves & Maria Miguel Carvalho

ARTICLE 18
Right to Asylum 190
Ana Rita Gil

ARTICLE 19
Protection in the event of removal, expulsion or extradition 200
Ana Rita Gil

ARTICLE 20
Equality before the law 208
Ricardo Leite Pinto

ARTICLE 21
Non-discrimination 212
Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 22
Cultural, religious and linguistic diversity.....220
Patrícia Jerónimo

ARTICLE 23
Equality between women and men.....241
Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 24
The rights of the child.....249
Rosa Cândido Martins

ARTICLE 25
The rights of the elderly.....260
Paula Távora Vítor

ARTICLE 26
Integration of persons with disabilities.....268
António Araújo & Gonçalo Saraiva Matias

ARTICLE 27
Workers' right to information and consultation within the undertaking.....275
Júlio Manuel Vieira Gomes

ARTICLE 28
Right of collective bargaining and action.....285
Jorge Leite

ARTICLE 29
Right of access to placement services.....301
Teresa Coelho Moreira

ARTICLE 30
Protection in the event of unjustified dismissal.....305
João Leal Amado

ARTICLE 31
Fair and just working conditions.....311
Maria do Rosário Palma Ramalho

ARTICLE 32
Prohibition of child labour and protection of young people at work.....318
Joana Nunes Vicente & Milena Silva Rouxino

ARTICLE 33
Family and professional life.....323
Sophie Perez Fernandes

ARTICLE 34
Social security and social assistance.....330
José João Abrantes & Rita Canas da Silva & Mariana Sousa e Alvim

Article 35
Health care.....339
Luís Meneses do Vale

ARTICLE 36
Access to services of general economic interest.....359
João Nuno Calvão da Silva

ARTICLE 37
Environmental protection.....368
Alexandra Aragão

ARTICLE 38
Consumer protection.....377
Fernando de Gravato Morais

Article 39
Right to vote and to stand as a candidate at elections to the European Parliament.....383
Paulo Rangel

ARTICLE 40
Right to vote and to stand as a candidate at municipal elections.....392
Pedro Madeira Froufe & Joaquim Freitas da Rocha

ARTICLE 41
Right to good administration.....396
Cláudia Viana

ARTICLE 42
Right of access to documents.....402
Catarina Gouveia Alves

Article 43
European Ombudsman.....410
Catarina Sampaio Ventura

ARTICLE 44
Right to Petition.....421
Maria Luísa Duarte & Joana Gama Gomes

ARTICLE 45
Freedom of movement and of residence.....425
J. Cunha Rodrigues

ARTICLE 46
Diplomatic and consular protection 434
Francisco Pereira Coutinho

ARTICLE 47
Right to an effective remedy and to a fair trial 439
Maria José Rangel de Mesquita

ARTICLE 48
Presumption of innocence and right of defence 447
Flávia Noversa Loureiro & André Paulino Piton

ARTICLE 49
Principles of legality and proportionality of criminal offences and penalties 453
Mário Monte & Pedro Miguel Freitas & Margarida Santos

ARTICLE 50
Right not to be tried or punished twice in criminal proceedings for the same criminal offence 461
Flávia Loureiro & Pedro Miguel Freitas

ARTICLE 51
Field of application 466
Alessandra Silveira

ARTICLE 52
Scope and interpretation of rights and principles 477
Alessandra Silveira

ARTICLE 53
Level of protection 487
Mariana Canotilho & Sergio Maia Tavares Marques

ARTICLE 54
Prohibition of abuse of rights 503
José Caramelo Gomes & Noémia Bessa Vilela

ACADEMIC AND PROFESSIONAL BACKGROUND OF THE CONTRIBUTORS 506

Universidade do Minho
Escola de Direito