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RESEARCH ARTICLE

From Copper-Fastening Competence to Workable Structural Rule: What Might a Modernized Article 51 of the Charter Look Like?

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Abstract
This article critiques the case-law of the CJEU on when Member States are 'implementing' EU law under Article 51 of the Charter, and tables a proposal for amending Article 51 to enhance the effectiveness of EU fundamental rights protection. It also suggests modifying and updating the explanations. Given that Member State judges have alternative routes available to them to resolve fundamental rights disputes, namely via Member State rules and the ECHR, and which do not require consideration of a complex threshold question before the pertinent substantive laws can apply, it suggests that review of Article 51 of the Charter might be timely.

keywords: Article 51(1); Charter of Fundamental Rights; EU law

I. Introduction

The explanations to Article 51 of the EU Charter of Fundamental Rights (CFR) assert, at the outset, that this provision 'seeks to establish clearly that the Charter applies *primarily* to the institutions and bodies of the Union' (my emphasis). This is unsurprising given that the foundational *Internationale Handelsgesellschaft* ruling[1] aimed, in order to protect the primacy of EU law, at ensuring that EU legislation, and not national measures, complied with fundamental rights, in keeping with the constitutional traditions common to the Member States.[2]

However, sight of this objective may, over time, have been obscured, partly in consequence of the volume of case-law generated by the first paragraph of Article 51(1). It delimits the circumstances in

Co-founding editor, *Cambridge Yearbook of European Legal Studies*, and author of the chapter on Article 51 in S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, 2nd ed (Hart, 2021). I would like to thank anonymous reviewers for their remarks, and the participants of a conference in memory of Professor Ulf Bernitz which took place in Stockholm on 16 and 17 November 2023, where the ideas expressed in this article were first shared and discussed. An extended version of this article will be published by Hart Publishing in 2026 in a book entitled The European Union as a Transformative Legal and Economic Order: Essays in Memory of Ulf Bernitz.

[1] *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114. In this regard, paragraph 3 of the judgment is worth recalling. It begins: 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law…'. Article 6 (3) TEU provides that fundamental rights, 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

[2] *Internationale Handelsgesellschaft* EU:C:1970:114, para 4.

which Member States are, exceptionally, bound by the Charter, because they are 'implementing' EU law.[3] Article 51(2) has a different function. It expressly protects Member State competence by stating that 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'.[4] However, the meaning of Article 51(2), unlike Article 51(1), has never been the topic of sustained conjecture either in the jurisprudence of the Court of Justice of the European Union (CJEU)[5] or in academic commentary. The function of Article 51(2) is to reinforce preclusion of recourse to the Charter to disturb, in any way, the division of authority set in the Treaties between EU and Member State entities.[6]

The structural rules underpinning the pillars of the EU constitution, such as primacy, direct effect, and the establishment of the four freedoms, were crafted in foundational case-law which was relatively easy for Member State judges to apply. For example, the conditions for 'direct effect' were satisfied when an EU measure was sufficiently clear, unconditional, and precise as to vest individuals with rights.[7] Pursuant to the foundation treaties, the benefit of free movement extended to goods, persons, services, and capital, and the applicability of these provisions was never burdened by a complex threshold question on whether they could be relied upon at all in domestic legal proceedings. This was, perhaps, central to the acceptance of the jurisprudence at Member State level.

The same is not the case, however, with respect to the substantive rules of the Charter, as set down in the 50 articles of the Charter's first six titles. Before any assessment can be made as to whether these provisions have been breached by a Member State, the threshold question has to be resolved on whether that Member State was 'implementing' EU law under Article 51(1).[8] This, supposedly, subsidiary element of Article 51 has been the subject of lengthy discussion in academic analyses with respect to the meaning of 'implementing',[9] since that meaning has remained subject to evolution in

[3] *Wachauf*, C-5/88, EU:C:1989:321 and *Akerberg Fransson*, C-617/10, EU:C:2013:105 might be viewed as the foundational rulings on this issue.

[4] For accounts of the difficulties in the drafting process of Article 51 in the pursuit of achievement of this end, see eg H Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in P Cardonnel, A Rosas, and N Wahl (eds) *Constitutionalizing the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart, 2012); T von Danwitz and K Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2017) 35 *Fordham International Law Review* 1396. The draft Charter of Fundamental Rights was adopted in October of 2000 by the Convention entrusted with this task by the Cologne European Council of 3 and 4 June 1999. The conventional wisdom of the day pre-ordained an unwelcome drift toward federalism. See eg I Gambardella, 'L'application de la Charte des droits fondamentaux de l'Union européenne aux Etats members: le critère de mis en oeuvre du droit de l'Union comme obstacle à son effectivité' (2021) 1 *Cahiers de droit européen* 241 at 273 and sources referred to therein. On 'implementing' EU law, see more recently by the same author I Gambardella, 'EU Governance through Funding: What Consequences for the Scope of Application of EU Fundamental Rights?' (2024) 31 (2) *Maastricht Journal of European and Comparative Law* 215.

[5] The notable cases are few in number. See eg *Thomas Pringle v Government of Ireland*, C-370/12, EU:C:2012:756; *Yoshikazu Iida v Stadt Ulm*, C-40/11, EU:C:2012:691, para 78; *J McB v LE*, C-400/10 PPU, EU:C:2010:582, para 59. It is to be noted that, irrespective of competence issues, the European Commission is liable for damages under Article 340 TFEU whenever it acts inconsistently with its role as guardian of the Treaties. See *Council v K Chrysostomides and Co and Others*, C-597/18 P, EU:C:2020:1028, para 96.

[6] See also Article 6(1) TEU.

[7] See eg C-152/84 *Marshall* EU:C:1986:84, paras 46–49.

[8] See note 3.

[9] Among many, see A Rosas, 'When Is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 (4) *Jurisprudence* 1269; F Fontanelli, 'The Implementation of European Union Law by Member States under Article 51 (1) of the Charter of Fundamental Rights' (2014) 20 *Columbia Journal of European Law* 194; C Matusescu, 'The Scope of Application of Fundamental Rights Guaranteed by European Union Law on Member States' Action: Some Jurisprudential Landmarks' (2017) *Union of Jurists of Romanian Law Review* 22; M Tecqmenne, 'Minimum Harmonisation and Fundamental Rights: A Test Case for the Identification of the Scope of EU Law in Situations Involving National Discretion' (2020) 16 *European Constitutional Law Review* 493; I Gambardella, 'L'application de la Charte'; H Král and P Mádr, 'On the (In)applicability of the EU Charter of Fundamental Rights to National Measures Exceeding the Requirements of Minimum Harmonisation Directives' (2021) 1 *European Law Review* 81.

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the case-law of the CJEU, and many years after the Charter obtained the force of law in 2009. Thus, even though there are many instances in which 'implementing' will be self-evident, such as cases in which the Member State law that was challenged for breaching the Charter was passed with the aim of transposing a Directive,[10] new fissures are prone to appearing in the jurisprudence as soon as a fresh case emerges attempting to clarifying what 'implementing' means.

For example, in 2019 the Grand Chamber of the CJEU confirmed what had become evident in a series of separate judgments of its individual chambers.[11] In *TSN and AKT*, the Grand Chamber held that the test of a situation having to be 'governed' by EU law, and therefore susceptible to fundamental rights review, included the requirement that 'the provisions of EU law in the area concerned' had to impose a 'specific obligation' on a Member State. If not, the latter could not be said to be 'implementing' EU law.[12]

However, this ruling fell short of transforming Article 51(1) CFR into a structural provision affording predictable outcomes. This is evidenced by the fact that, soon after *TSN and AKT* was issued, divergence in views emerged between an Advocate General and the ruling of the CJEU on whether the Charter applied to the matter at hand.[13] Indeed, such divergence has occurred in almost all the leading cases concerning Article 51(1) CFR.[14] This is an unfortunate state of affairs given that structural rules of EU law should, ideally, facilitate predictable outcomes and be easy for Member State judges to apply.

Further, it is to be recalled that fundamental rights do not cease to be relevant, and justiciable, if the Charter is found to be inapplicable to a given dispute. Pursuant to Article 53 CFR, such disputes fall to be governed by the ECHR and national human rights rules. The application of Member State fundamental rights standards is only precluded in situations entirely governed by EU law and when the application of such standards compromises the level of protection provided by the Charter or the primacy, unity, and effectiveness of EU law.[15]

Therefore, the following question might be posed. When time-pressured Member State judges are confronted with the choice among being required to consider (i) the 'no threshold' question on whether Member State fundamental rights protection applies to a dispute to hand, as is the case with respect to fundamental rights protection provided by Member State laws; (ii) the settled and relatively straightforward threshold question of determining whether the applicant is within the 'jurisdiction' of a state party to the ECHR, as required by Article 1 ECHR;[16] or (iii) the vast body of case-law on whether a Member State is 'implementing' EU law under Article 51(1) of Charter,[17] on which they are bound to form a view before commencing assessment of whether the Member State concerned has complied with the Charter, is not the natural inclination going to be favouring the first two of

[10] See Opinion of Advocate General Rantos, *Engie Romania*, C-205/23 EU:C:2024:611, para 20.

[11] See eg *Maurin*, C-144/95, EU:C:1996:235, paras 11–12; *Siragusa*, C-206/13, EU:C:2014:126, paras 26–27; *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, para 35; *Miravitlles Ciurana and Others*, C-243/16, EU:C:2017:969, para 34; *Consorzio Italian Management and Catania Multiservizi*, C-152/17, EU:C:2018:264, paras 34–35; *YS v NK*, C-223/19, EU:C:2020:753, paras 79–81.

[12] *TSN and AKT*, C-609 and 610/17, EU:C:2019:981, para 53.

[13] *Sātiņi-S*, C-238/20, EU:C:2022:57. Cf the Opinion of Advocate General Rantos in *Sātiņi-S* EU:C:2021:735, paras 28–32. For an example of a relatively recent ruling in which the CJEU held that no EU rule imposed a specific obligation, so that the Member State was not 'implementing' Union law, see *Land Oberösterreich (Aide au logement)*, C-94/20, EU:C:2021:477, para 61.

[14] See further Part V.

[15] Advocate General Medina, *Imagens Médicas Integradas*, C-258/23, EU:C:2024 537, paras 50–54. See notably in this regard *Melloni*, C-399/11, EU:C:2013:107, para 60.

[16] The exception is the relatively complex body of case-law on the extraterritorial reach of the ECHR. Factual disputes concerning the extraterritorial jurisdiction of the ECHR and other international human rights instruments arise only rarely. For a discussion see generally eg M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law Principles and Policy* (Oxford University Press, 2011).

[17] There are 98 cases and Advocate General's Opinions which address, in some shape or form, the term Member States 'only when they are implementing EU law'.

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these three available routes, so that the substantive fundamental rights issue is resolved by reference to Member State law in combination with the ECHR?

Arguments are beginning to emerge in academic literature to the effect that the difficulty of determining when the Charter is actually operative in a given case is the most pressing challenge to its effectiveness,[18] with lament being expressed that an opportunity to amend Article 51 CFR was not opened up in the 2021–22 Conference on the Future of Europe, since the Council set out a stall early that the conference would entail no amendment to the Treaties.[19]

The present contribution will therefore make suggestions for doing exactly that, if only to help spark further debate and encourage the production of alternative proposals. How might the text of Article 51 be amended so as to foster more predictable outcomes,[20] and what might new explanations to the redrafted provisions say in order to facilitate this end? Indeed, it could well be argued that the need for new explanations is just as pressing as updating the text of Article 51(1) itself, since the case-law has undergone extensive elaboration since the explanations were written. It is fair to say that the explanations concerning Article 51(1), as they presently stand, furnish scant assistance to a Member State judge attempting to decide on whether the Charter applies to a legal dispute in 2025 because they are simply out of date.

What will be here proposed is paring down, and significantly, the text of Article 51(1), and splitting 51(1) and 51(2) so that the former, as recast, would appear at the beginning of the Charter, thereby bringing the Charter into step with the standard approach in international human rights treaties, and under which the provision on jurisdiction appears at their beginning.[21] In order to avoid renumbering the whole of the Charter, the revised text of Article 51(1) would be placed under a new heading 'Part II Jurisdiction' which would appear just before the Charter itself (entitled 'Part III The European Union Charter of Fundamental Rights') and after the preamble (entitled 'Part I Preamble'). As for Article 51(2), it would remain where it is and simply become Article 51.

The new text for ex-Article 51(1), when read in combination with revised explanations, would address when the Charter applies before Member State courts, to the exclusion of all concerns connected with protecting the division of competence between the EU and the Member States. For reasons that will be explained, designation in ex-Article 51(1) of which court has jurisdiction over the dispute, the General Court of the EU or a Member State court is, perhaps, the first matter to be addressed if the new text is to be optimally user-friendly to Member State judges. What matters to them, as a starting point, is not so much whether the Charter can be enforced against Member States and their agencies, since, as will be further explained, the Charter is also invokable before Member State courts when it is alleged that the EU itself or a private legal entity has failed to meet its obligations. It will be here argued, therefore, that the new text of Article 51(1) should both reflect this broad jurisdiction and address the prior essential question of which court should be hearing the claim.

[18] Gambardella, 'L'application de la Charte', 242. See further on amending Article 51, A Jakab and L Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2022) 24 *Cambridge Yearbook of European Legal Studies* 239, especially at 248 and 249.

[19] Gambardella, 'L'application de la Charte', 284–85. The Conference ran from 9 May 2021 for a year. The Council excluded amending the treaties in its position on the Conference on the Future of Europe, 24 June 2020, www.consilium.europa.eu/media/44679/st09102-en20.pdf. This is referred to at footnote 269 of Gambardella, 'L'application de la Charte', who underscores the regrettable absence of debate in the process on the text of Article 51. See *European Commission 2022: Conference on the Future of Europe: Putting Vision into Concrete Action*, COM/2022/404 final, Brussels, 17 June 2022.

[20] The, admittedly, formidable political difficulty entailed in amending the Treaties will here be put to one side in the interests of sparking a discussion on what the new text of Article 51 might be. For a recent analysis of the law and practice of amending treaties see eg C Binder, 'Change and the Law of Treaties' (2024) 13 *ESIL (European Society of International Law) Reflections*. It might be tentatively suggested that altering the text of Article 51(1) and moving it to the beginning of the Charter is a mere technical rather than substantive change to the Treaties.

[21] Article 1 ECHR, Article 1 American Convention of Human Rights, and Article 2 International Covenant on Civil and Political Rights.

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After that, identification by a Member State court seized of a dispute over the substance of EU fundamental rights law, of a provision of EU law, aside from the Charter, that is pertinent to the dispute's resolution, has long been mooted as the touchstone for determining when a Member State is implementing EU law.[22] Indeed, isolating the precise provisions of EU law in issue is central to establishing the jurisdiction of the CJEU in all litigation, whether it concerns fundamental rights or not.[23] Appropriately modified and expanded explanations accompanying the new text of Article 51(1) might render such an 'identification' exercise the guiding light for Member State judges on the Charter's applicability. As will be here illustrated, the cornerstone of the leading cases on Article 51(1) in which the CJEU has searched for certain 'connecting factors' between a Member State law challenged for breach of the Charter and EU law has, in any event, been identification of a provision of EU law that is relevant to resolving the dispute. Such an approach might expedite the task of Member State judges ruling on whether a Member State has been 'implementing' EU law, so that they are then freed to judge the core task of deciding if the Charter has been breached.[24]

Further, the Charter is an instrument that is woven through the established constitutional fabric of the European Union,[25] as opposed to one that is imposed on it externally and from the domain of public international law: the legal paradigm of contemporary human rights protection. In the light of this, it will be here suggested that the new text of ex-Article 51(1) should refer to questions of 'interpretation or validity' of EU law in the same way as Article 267 Treaty on the Functioning of the European Union (TFEU), so as to better reflect the established constitutional matrix and ensure consistency with Article 267, a provision to which Article 51(1) is closely bound, even though this is not self-evident from the text as presently crafted.[26]

Once this approach were adopted, a Member State judge could then proceed to ruling on the fate of any Member State law that is obstructing the application of the EU rule identified as pertinent to the resolution of the dispute, interpreted in conformity with the Charter, by reference to established rules of EU constitutional law. If the relevant EU rule is a directly effective measure, and the defendant is an 'emanation of the state', the Member State judge will be required to disapply the inconsistent Member State law.[27] If it is not directly effective, less onerous obligations to interpret Member State law in conformity with the pertinent measure, as interpreted in conformity with the Charter, will come into play,[28] unless the Charter right in issue is one of the very few which the CJEU has ruled create rights in and of themselves on which individuals can rely in Member State courts.[29]

Part II will explain why the court to be petitioned, whether Member State or European Union, should be part of the text of ex-Article 51(1), and the first question to be considered when breach

[22] Rosas, 'When Is the EU Charter of Fundamental Rights Applicable at National Level?'.

[23] See recently eg *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19, EU:C:2021:1034, para 132.

[24] The scale of the jurisprudential effort that can be necessary in determining the threshold question of whether a Member State is implementing EU law, under the current rules applicable to this question, is demonstrated by the recent Opinion of Advocate General de la Tour in *Protectus*, C-185/23, EU:C:2024:409. There, paragraphs 36–98 (thus 62 paragraphs) of the Opinion addressed whether the Member State was 'implementing' EU law under Article 51(1). The dispute concerned a complex piece of EU legislation, with the substance of the fundamental rights dispute being addressed in the remaining 48 paragraphs of the Opinion.

[25] See eg K Lenaerts and JA Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014). As the CJEU recently observed in Joined *Euro Box Promotion and Others* EU:C:2021:1034, para 245, 'unlike standard international treaties, the Community Treaties establish a new legal order, which is integrated into the legal systems of the Member States on the entry into force of the Treaties and which are binding on their courts'.

[26] See further Part V.

[27] See Part V.

[28] Ibid.

[29] See Part IV.

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of Charter rights are alleged before a Member State court, and how this feeds in to the end point, namely, the identification of EU law provisions relevant to the dispute.

Part III will identify the central elements of the case-law on the phrase 'Member States only when they are implementing Union law' and demonstrate that the dominant feature of this case-law lies, in any event, in identification of the provisions of EU law, other than the Charter, that are pertinent to the resolution of the dispute, even when the primary challenge brought by an applicant has been to Member State law and not EU law. Why, then, retain the complex jurisprudential exercise of determining when a situation is 'governed' by EU law,[30] when what really matters is the relevance of a provision of EU law to resolve the dispute to hand?

Part IV will briefly detail an area of CJEU jurisprudence that, at present, does not, in formal terms, fall squarely within the parameters of Article 51(1) but which amounts to an important instance of when the Charter has legal force at Member State level. That is the case-law of the CJEU on horizontal application of that Charter, which leaves private parties bound, in certain circumstances, by some of the Charter's terms, and liable to be called to account for their breach before Member State courts. The proposed redraft of ex-Article 51(1) would be broad enough, however, to encapsulate this development. Arguably, the present text is not.[31]

Part V will table a tentative proposed text for a new version of ex-Article 51(1), albeit one moved to the beginning of the Charter, and new accompanying explanations. Part VI will contain concluding remarks.

II. Which court to petition: the starting point and the identification exercise as the end point in securing coherency

As mentioned in the introduction to this article, the institutions, bodies, offices, and agencies of the Union are the primary targets of the Charter. It is they that are bound by its terms,[32] and Member States enter the frame only when they are 'implementing' EU law. Thus, it is important to underscore that, unlike the situation with respect to Member States, the Charter applies to institutions, bodies, offices, and agencies of the EU with respect to *everything they do*,[33] so that any court, whether it be EU or Member State, seized of a complaint concerning non-observance of the Charter by one of these entities need make no investigation as to whether, on the basis of the pertinent factual circumstances, any Member State authority has entered the frame by implementing EU law.

The judicial architecture for challenging the institutions, bodies, offices, and agencies of the Union for failure to comply with fundamental rights is split between the EU courts and those of the Member States. Provided that a litigant did not 'unquestionably' have the right under Article 263 TFEU to bring an action before the General Court of the European Union seeking annulment of an EU measure for breach of fundamental rights guaranteed by the Charter,[34] and failed to exercise that right within

[30] See further Part III.

[31] For example, Advocate General Trstenjak in *Dominguez*, C- 282/10, EU:C:2011: 559, paras 80–83, argued against the horizontal application of the Charter in disputes between private parties, inter alia because the text of Article 51(1) was directed exclusively to Member States.

[32] The Institutions of the Union are designated in Article 13 TEU as the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. The CJEU has further held, however, that the term 'institution' within the meaning of Article 340 TFEU (on non-contractual liability for damages) encompasses not only the EU institutions listed in Article 13 TEU but also all the EU bodies, offices, and agencies that have been established by or under the Treaties and are intended to contribute to the achievement of the European Union's objectives, see *Council v K Chrysostomides*, C-597/18 P, EU:C:2020:1028, para 80.

[33] *Défense Active des Amateurs d'Armes and Others*, C-234/21 EU:C:2023:644, para 27 of the Opinion of Advocate General Sanchez Bordona. The Advocate General here mentions that the Charter applies to institutions, bodies, offices, and agencies of the EU 'in any circumstances'.

[34] For guidance on when an entity amounts to an institution, body, office, or agency of the Union and is therefore susceptible to an action for annulment under Article 263 TFEU see eg *Parliament v Council*, C-743/19, EU:C:2022:569.

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the time period prescribed by Article 263 TFEU,[35] they remain entitled to bring an action before a Member State court questioning the validity of the pertinent EU rules, and request a reference for a preliminary ruling to the CJEU.[36] It is to be recalled, however, that the doctrine of *acte clair* does not apply to validity proceedings, so that only the CJEU, and not a Member State court, can declare an EU measure invalid for failing to comply with the Charter's substantive obligations.[37]

But in such disputes there is no 'threshold' question requiring the Member State court concerned to consider whether the Member State is 'implementing' EU law, because the challenge is to whether EU law, and not Member State law, conforms with the Charter.[38] Similarly, and importantly, when no rule of Member State law is identified as being the subject of the challenge, but the dispute instead concerns interpretation of a provision of EU law in conformity with fundamental rights, the threshold question of whether a Member State is 'implementing' EU law is equally irrelevant, even though the dispute arises before a Member State court and even if the defendant is a Member State authority.[39]

That being so, it would then appear that the authority of Member State judges to rule is sometimes dependent on the accident as to whether a litigant's legal team has elected to aim their challenge directly on an EU rule which is pertinent to the resolution of the dispute (and whether it can be interpreted in conformity with the Charter, and failing that declared invalid), rather than the Member State rule purportedly implementing it. If so, is such a system of judicial remedies coherent?[40]

The first step in shoring up coherency lies in addressing the first issue likely to arise in the mind of a Member State judge, particularly in the light of the above judicial architecture, when a litigant raises breach of the Charter. Particularly in disputes in which the alleged fundamental rights wrong has arisen in the context of decisions made jointly between EU and Member State bodies, the Member State judge needs to be sure that their own court, rather than the CJEU, has jurisdiction to rule on the fundamental rights issues raised.

The ruling in *Liivimaa Lihaveis*[41] teased out the complexities that can arise in determining the appropriate court to which a fundamental rights claim should be brought, but also the importance of identification of the relevant provisions of EU law requiring interpretation as the touchstone for determining whether a Member State is 'implementing' EU law under Article 51(1). In February 2010,

[35] See recently *Friends of the Irish Environment*, C-330/22, EU:C:2024:19, para 50, restating the rule in *TWD*, C-188/92, EU:C:1994:90, itself restated in *Rosneft*, C-72/15, EU:C:2017:236, paras 66–67. The terminology of the CJEU has not been entirely consistent. It has also held that an action for validity can be brought before a Member State court when 'it is not obvious that an action for annulment brought by the defendant in the main proceedings would have been admissible', see *Compagnie des pêches de Saint Malo*, C-212/19, EU:C:2020:726, para 35.

[36] This study does not address the jurisdiction of the CJEU under the combined effects of Articles 2 and 19(1) TEU, along with Article 47 CFR, to guarantee effective judicial protection with respect to all 'courts and tribunals', within the meaning of EU law, called upon to rule upon the application and interpretation of EU law, and thus which come within the judicial system of the EU, given that this jurisdiction is operative 'irrespective of the circumstancesin which the Member States are implementing EU law', see *Euro Box Promotion and Others* Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para 220.

[37] See recently eg *RS*, C-430/21, EU:C:2022:99, para 71.

[38] See notably eg *J McB v LE*, C-400/10 PPU, EU:C:2010:582; *Digital Rights Ireland and Seitlinger and Others*, Joined Cases C-293/12 and C-594/12, EU:C:2014:238; *Schrems*, C-362/14, EU:C:2015:650; *N*, C-601/15 PPU, EU:C:2016:84; *Pillbox 38*, C-477/14, EU:C:2016:324; *Ordre des barreaux francophones and Germanophones and Others*, C-543/14, EU:C:2016:605; *Liga van Moskeen en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335; *cdVet Naturprodukte*, C-13/23, EU:C:2024:175; *Préfet du Gers and Institut national de la statistique and des études économiques II*, C-716/22, EU:C:2024:339.

[39] See eg *Ligue des droits humains (vérification du traitement des données par l'autorité de contrôle)*, C-333/22, EU:C:2023:874, para 57; and *J McB v LE* EU:C:2010:582.

[40] On the coherence necessary and inherent in any system of effective judicial protection, see the Opinion of Advocate General Hogan in *Bank Refah Kargaran*, C-134/19 P, EU:C:2020:396, para 61, referring to the ruling of the Court in *Rosneft*, C-72/15, EU:C:2017:236, para 78.

[41] *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229. See also eg *Berlusconi (Fininvest)*, C-219/17, EU:C:2018:1023. Among the many commentaries on this problem, see eg M Safjan and D Dusterhaus, 'A Union of Effective Judicial Protection; Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 *Yearbook of European Law* 3.

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Liivimaa Lihaveis submitted an application under the Estonia-Latvia operational programme for financing of an agricultural project, but was rejected in July of 2010 by a body called the Seirekomitee. The Seirekomitee was established by agreement between the Republic of Estonia and the Republic of Latvia on the basis of, inter alia, Article 63(1) of Regulation No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund, and the Cohesion Fund.[42] Article 63(1) provided for the establishment of a monitoring committee and, importantly, Article 63(2) additionally obliged the monitoring committee to establish rules of procedure. The Seirekomitee was that monitoring committee.

Liivimaa Lihaveis brought legal proceedings before the Tartu Halduskohus (Administrative Court, Tartu) seeking, inter alia, the annulment of the Seirekomitee's decision rejecting its application for aid. They alleged breach of Article 47 CFR, since the decision of the Seirekomitee was not appealable. The prohibition on appeal was set out in Article 6.6.4 of a document called a 'Programme Manual' which had been adopted by the Monitoring Committee pursuant to its obligations to adopt procedural rules, as provided in Article 63(2) of Regulation No 1083/2006. The Court of Appeal, Tartu, sent the following questions to the CJEU under Article 267 TFEU which neatly mapped out the problem of navigating the judicial architecture:

> 1. Are the rules of procedure of a monitoring committee jointly set up by two Member States, such as the programme manual adopted by the [Seirekomitee], which provide that 'The decisions of the Monitoring Committee are not appealable at any place of jurisdiction' (Chapter 6.6.4 of the programme manual) compatible with Article 63(2) of Council Regulation No 1083/2006 in conjunction with Article 47 of the [Charter]?
>
> 2. If Question 1 is to be answered in the negative, must point (b) of the first paragraph of Article 267 [TFEU] be interpreted as meaning that Chapter 6.6.4 of [that programme manual] is an act of an institution, body, office or agency of the European Union which must be declared invalid?
>
> 3. If Question 1 is to be answered in the negative, must the second sentence of the first paragraph of Article 263 [TFEU] in conjunction with Article 256(1) [TFEU] and Article 274 [TFEU] be interpreted as meaning that the General Court of the European Union or the competent court under national law has jurisdiction to hear and determine actions against decisions of the [Seirekomitee]?

The CJEU noted that, under the second sentence of the first paragraph of Article 263 TFEU, it had authority to review the legality of acts of bodies, offices, or agencies of the Union intended to produce legal effects vis-à-vis third parties.[43] It was further established in the case-law that the judicial review mechanisms laid down in Article 263 TFEU apply to the bodies, offices, and agencies established by the EU legislature which were given powers to adopt measures that are legally binding on natural or legal persons in specific areas, such as the European Aviation Safety Agency (EASA), the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), the Community Plant Variety Office (CPVO), and the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).[44] However, a monitoring committee instituted as part of an operational programme to promote European territorial cooperation was not an institution or a body, office, or agency of the European Union[45] because, in an action brought under Article 263 TFEU, the European Union Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority.[46]

[42] OJ 2006 L 210, p 25.

[43] EU:C:2014:2229, para 45.

[44] Ibid, para 46.

[45] EU:C:2014:2229, para 47.

[46] Ibid, para 48. The CJEU referred to *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491, para 9, and *Sweden v Commission*, C-64/05 P, EU:C:2007:802, para 91. To this could be added other rulings, such as *GAEC Jeanningros*, C-785/18,

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But this did not mean that Article 47 CFR did not apply to the dispute. The CJEU provided chapter and verse, as at the date of the judgment, on the meaning of Member States 'only when they are implementing EU law' by ruling as follows:

> 62 In accordance with the settled case-law of the Court, the concept of 'implementing Union law', as referred to in that provision of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other (see, inter alia, judgment in *Kremzow*, C-299/95 EU:C:1997:254, paragraph 16).
>
> 63 In the present case, it is sufficient to note that EU law required the two Member States involved in the Estonia-Latvia operational programme to implement that programme.
>
> 64 In particular, firstly, those Member States were required to institute a monitoring committee, pursuant to Article 63(1) and (2) of Regulation No 1083/2006. Secondly, all the measures intended to apply that operational programme, which include the programme manual, had to comply with the provisions of Regulations Nos 1083/2006 and 1080/2006.
>
> 65 Accordingly, it must be held that the adoption of the programme manual by the monitoring committee implements EU law within the meaning of Article 51(1) of the Charter.

On the substantive question as to whether Article 47 of the Charter had been breached, the CJEU held at paragraph 71 that the lack of any remedy against such a rejection decision deprives the applicant of its right to an effective remedy, in breach of Article 47 of the Charter.

Aside, therefore, from illuminating the importance of determining the court to which a fundamental rights claim should be made, *Liivimaa Livhaeis* clarifies what is entailed in the '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' necessary before a Member State can be held to be implementing Union law. It actually entails identification of EU measures, other than the Charter, binding that Member State, and which themselves, by definition, require interpretation in the resolution of the dispute. As noted earlier, the first question sent by the referring court asked about interpretation of Article 63(2) of Regulation No 1083/2006 to test its conformity with Article 47 CFR.

In *Liivimaa Lihaveis*, the CJEU also identified Article 63(1) and (2) of Regulation No 1083/2006, along with Regulations Nos 1083/2006 and 1080/2006, as the provisions of EU law relevant to the resolution of the dispute. Indeed, these were the only connecting factors mentioned by the CJEU in its ruling.

What impediment is there, therefore, to reducing the legal test for 'implementing' EU law to legal disputes in which the interpretation or validity of a provision of EU law is in question or, in other words, is pertinent to the resolution of the dispute?[47] After all, the CJEU routinely observes in disputes concerning fundamental rights that 'under Article 94 of the Rules of Procedure of the Court of Justice, the referring court is called on to explain the relationship between the provisions of EU law of which it seeks interpretation and the national legislation applicable to the dispute brought before it'. Orders for reference must therefore contain an element permitting a finding that the dispute in issue concerns the interpretation or the application of provisions of EU law other than the Charter. Otherwise, they are declared inadmissible.[48]

EU:C:2020:46, para 27, and *Parliament v Council*, C-743/19, EU:C:2022:569. For further reasoning on this point, see *Liivimaa Lihaveis MTÜ* EU:C:2014:2229, see paras 49–56.

[47] Identification of a rule of EU law other than the Charter has long since been advocated by Rosas (see 'When Is the EU Charter of Fundamental Rights Applicable at National Level?') as central to determining when the Charter applies at Member State level.

[48] See eg *TSN v AKT* EU:C:2019:981, para 44. See recently eg *Swiftair*, C-701/23, EU:C:2025:237, paras 29–33.

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In the section that follows, it will be demonstrated that all lines of case-law interpreting the phrase 'Member States only when they are implementing Union law' seem to feature the identification exercise as central to establishing the requisite 'connection' under Article 51(1), between EU law and Member State law. Thus, could the whole, increasingly confusing, concept of Member States 'implementing' Union law simply be left out in the (new) text of Article 51(1) CFR, with the explanations accompanying that provision addressing why?

III. Member States only when they are implementing Union law

A. Introduction

Prior to *TSN and AKT*,[49] broadly speaking, the circumstances in which Member States had been held to be implementing EU law fell into four categories. The Charter was applicable (i) in all situations 'governed' by European Union law;[50] (ii) whenever Member States exercised discretionary powers, the authority for which was sourced in an EU measure;[51] (iii) when Member States derogated from the four freedoms,[52] or relied on exceptions contained in EU legislation;[53] and (iv) in the context of remedies provided by Member State law to enforce Charter rights. This is so particularly, although not exclusively,[54] with respect to Article 47 CFR.[55]

It is submitted that the first category remains the most problematic in terms of legal certainty. Part of the problem lies in the fact that the requirement for EU law to impose an 'obligation' before it can be viewed as 'implementing' EU law has not been applied in all cases post *TSN v AKT*, and more specifically not even in all Grand Chamber cases.[56] Further, the assent of the 'obligation' requirement has additionally called into doubt the scope of category (ii), and the imposition of the Charter on Member State bodies when they exercise discretionary authority sourced in an EU measure, along with the rule that Member States are bound by the Charter when they exercise their, discretionary, authority over remedies (category [iv] above). It is to the details of these categories to which I will now turn.

B. Situations 'governed' by EU law

As mentioned in the explanations to the Charter, one of the foundational rulings underpinning the text of Article 51, and the rule that 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law', lies in the judgment of the CJEU in *Wachauf*.[57] Mr Wachauf requested compensation for the definitive

[49] EU:C:2019:981.

[50] *Akerberg Fransson* EU:C:2013:105, para 19.

[51] *NS*, C-411/10 and C-493/10, EU:C:2011:865.

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

[53] See eg *NS* EU:C:2011:865, paras 67 and 68.

[54] See the Opinion of Advocate General Tanchev in *MIUR and Ufficio Scolastico Regionale per la Campania*, C-282/19, EU:C:2021:217, para 76 and the interesting discussion on the extent to which rights protected in the Charter, such as the Article 21 prohibition of discrimination based on religion, apply to the context of remedies. The Article 17 right to property is applicable to compensation schemes set up to implement EU law, see *Sātiņi-S* EU:C:2022:57.

[55] As established in *DEB*, C-279/09, EU:C:2010:811. Of the many subsequent rulings see eg *AK (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18, and C-625/18, EU:C:2019:982, paras 80 and 81.

[56] See *Etat Luxembourgeois*, Joined Cases C-245/19 and C-246/19, EU:C:2020:795, at para 46: 'The adoption, by a Member State, of legislation specifying the details of the procedure for exchange of information on request established by Directive 2011/16 constitutes such an implementation (see, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15 EU:C:2017:373, paras 34–37), in particular where that legislation provides for the *possibility*, for the competent authority, of taking a decision that obliges a person holding information to provide it with that information' (my emphasis).

[57] *Wachauf*, C-5/88, EU:C:1989:321.

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discontinuance of milk production pursuant to a German law. That legislation was based on a power contained in Article 4(1)(a) of Regulation No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector.[58] The German authorities refused compensation since the landlord of the farm had withdrawn his consent to the tenancy.The CJEU held at paragraph 22 that

> [the] Community regulations in question … leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively.

The CJEU further held at paragraph 19 that

> Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.

In other words, the *Wachauf* case itself can be read as being about whether specific provisions of an EU Regulation could be interpreted in conformity with fundamental rights, rather than being concerned with the text of a Member State measure. It was not a judgment which, in fact, elaborated upon the meaning of 'implementing' at all. The trigger for the application of fundamental rights in that case was the identification of EU legislative measures, namely Article 4(1)(a) of Regulation No 857/84, read in combination with Article 4(2).

Thus, as was the case in *Liivimaa Lihaveis*, the *Wachauf* ruling itself boiled down to identification of an EU rule that was pertinent to the resolution of the dispute and which required interpretation in conformity with fundamental rights. Article 4(1)(a) of Regulation 857/84 provided that 'in order to complete the restructuring of milk production Member States may grant compensation to producers who undertake to discontinue milk production definitively',[59] but to be read subject to fundamental rights. It is in this context that the seminal finding of the CJEU in *Wachauf* at paragraph 19 needs to be read.

The same applies to the core jurisprudential guidance on the meaning of 'implementing' provided in the ruling of the CJEU in *Akerberg Fransson*,[60] perhaps best known in the literature for confirming that there would be no rupture with pre-Charter case-law, in the sense that a Member State measure need not have been passed for the express purpose of implementing an EU measure in order to be considered as 'implementing' EU law for the purposes of Article 51(1) CFR.[61]

In *Akerberg Fransson*, the applicant sought to rely on the principle of ne bis in idem, enshrined in Article 50 CFR, to combat what he argued to be double punishment for VAT fraud. But in determining whether Sweden was 'implementing' EU law at all, the CJEU relied, as it did in *Liivimaa Lihaveis*, exclusively on an identification exercise, pointing to Articles 2, 250(1), and 273 of Council Directive

[58] Official Journal 1984 L90, p 13.

[59] *Wachauf*, C-5/88, EU:C:1989:321, para 20.

[60] *Akerberg Fransson*, C-617/10, EU:C:2013:105, para 28.

[61] See eg Gambardella, 'L'application de la Charte', 246. See also on this point *Berlioz*, C-682/15, EU:C:2017:373, para 40. It of course remains the case that Member State measures actively taken to implement EU law fall within 'implementing Union law' under Article 51(1). See eg *Parchetul de pelângă Curtea de Apel Craiova*, C-58/22, EU:C:2024:70, paras 41 and 42. Interestingly, at paragraph 27 of the Opinion of Advocate General Emilou, EU;C:2023:464, while not disagreeing that the matter concerned was an incidence of Member State implementation of EU law, the Advocate General observed that he had 'some sympathy for certain arguments put forward by the Romanian Government' to the contrary.

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2006/112/EC of 28 November 2006 on the common system of value added tax,[62] and Article 325 TFEU.[63]

That said, and somewhat oddly, the CJEU in *Akerberg Fransson* made no reference to the rule referred to, in the year preceding, in *Iida*[64] and which had been established in pre-Charter case-law,[65] to the effect that, in order to determine whether a Member State is implementing EU law

> it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.[66]

The CJEU in *Akerberg Fransson* confined its observations to the need for a dispute to fall within the 'scope' of EU law, without developing further on how, in jurisprudential terms, this is to be determined.[67]

Moreover, the factors listed in *Iida* were described in *Siragusa*,[68] a judgment issued only a little over a year after *Akerberg Fransson*, as being reflective of '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'.[69] That 'certain degree of connection', which was referred to equally in *Liivimaa Lihaveis*,[70] has been viewed by some commentators as the foundation stone on which to test whether a Member State is 'implementing' EU law.[71] However, the CJEU in *Akerberg Fransson* was, in practical terms, more concerned with establishing whether the legal framework underpinning the punishment afforded to the applicant for allegedly defrauding the VAT system was grounded in EU law, rather than looking for any other 'connections' between any challenged national law and EU law.[72]

So, put simply, is the existence of a 'certain degree of connection' between Member State and EU law established, in and of itself, by identifying a provision of EU law, other than the Charter, that is relevant to the resolution of the dispute? If that is so, is the rest of the legal principle developed under the umbrella of Member States 'implementing' EU law, in practical terms, redundant? When viewed against the growing corpus of cases in which the CJEU was asked to rule only in the interpretation

[62] OJ 2006 L 347, p 1. See *Akerberg Fransson* EU:C:2013:105, para 25.

[63] *Akerberg Fransson* EU:C:2013:105, para 26. See subsequently, however, the ruling in *MARCAS MC*, C-363/20, EU:C:2022:21, paras 32–39, where the CJEU distinguished *Akerberg Fransson* and concluded, particularly at para 38, that since Member State tax penalties and procedures related to corporation tax are not part of the European Union's own resources system, there had been no implementation of EU law for the purposes of Article 51 CFR. No Advocate General's Opinion was issued in this ruling, the importance nuance on *Akerberg Fransson* which the case presented notwithstanding.

[64] Iida, C-40/11, EU:C:2012:691, para 79.

[65] *Annibaldi* EU:C:1997:631, paras 21–23. See also, among other rulings, *Ymeraga and Others*, Case C-87/12, EU:C:2013:291, para 41.

[66] *Iida* EU:C:2012:691, para 79.

[67] EU:C:2013:105, paras 19–22.

[68] *Siragusa* EU:C:2014:126.

[69] Ibid, para 24. A 'degree of connection' between the legal problem to hand and EU law is required more broadly in the jurisprudence, and is not confined to the Charter'. See, among others, the judgment in *Kremzow*, C-299/95, EU:C:1997:254, para 16.

[70] Above note 41. *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229. See also eg *Berlusconi (Fininvest)*, C-219/17, EU:C:2018:1023. Among the many commentaries on this problem, see eg M Safjan and D Dusterhaus, 'A Union of Effective Judicial Protection; Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 *Yearbook of European Law* 3, para 62.

[71] See eg Gambardella, 'L'application de la Charte', 246–47.

[72] For a recent example of the identification of pertinent EU measures, other than the Charter, as being central to determining the existence of the required 'degree of connection between an act of EU law and the national measure at issue', see the Opinion of Advocate General de la Tour in *BAJI Trans*, C-544/23, EU:C:2025:53, paras 40 and 42.

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or validity of an EU measure,[73] rather than fundamental rights challenge to a Member State measure, the answer to this question would appear to be in the affirmative.

Indeed, an affirmative answer to this question is also suggested by the leading rulings in which the CJEU held that a Member State was *not* implementing EU law.

Thus, in *Annibaldi*,[74] the CJEU referred to 'the absence of specific Community rules on expropriation' and ruled that a dispute in which the applicant was refused under Member State law a licence to plant an orchard in a regional park fell within the exclusive competence of the Member State. In *Siragusa*,[75] the CJEU held that 'no specific obligations to protect the landscape, akin to those laid down by Italian law, are imposed on the Member States by the TEU and TFEU provisions referred to by the referring court; nor are such obligations imposed by the legislation relating to the Aarhus Convention, nor by Directives 2003/4 and 2011/92'.

In *Dano*,[76] the CJEU, while still focusing on the pertinence of EU law rather than Member State law to the resolution of the dispute, honed in on the scale of the discretion left by the pertinent EU measure to Member States to flesh out conditions. For this reason, there was no instance of Member State implementation of EU law.[77]

In *X and X v Etat Belge*,[78] the CJEU equally set about seeking to identify a provision of EU law that was pertinent to the resolution of the dispute, and ruled at paragraph 44, and contrary to the Opinion of the Advocate General, that because 'no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law'.

Finally, in *TSN and AKT*,[79] the findings of the CJEU were also predicated on identification of a pertinent EU measure, with the addition, in this ruling, that such a measure had to impose an obligation on a Member State, rather than analysing the 'connection' between Member State law and EU law. When such a provision could not be identified, because the Member State had merely exceeded the minimum standards imposed by an EU Directive, the Charter did not apply.[80] So here too the CJEU solved the question of whether Charter rights could be relied on, not by reference to a search for 'connecting factors' between Member State law and EU law but by identifying and interpreting the provisions of EU law in issue, and considering whether they were *pertinent* to the resolution of the dispute.

More specifically, the CJEU held, inter alia, that Article 15 of Directive 2003/88 concerning certain aspects of the organization of working time[81] was not a measure granting the Member States an option to legislate by virtue of EU law. Article 15 merely recognized the power which they have to provide for such more favourable provisions in national law, outside of the framework for the regime established by that directive.[82] Further, Finland was not acting out of any specific 'obligation' imposed by EU law, when providing for more than four weeks of annual leave, the minimum required under the Directive, and adjusting their 'carry-over' rule in consequence of this.[83]

Nonetheless, as already foreshadowed, the ruling in *TSN and AKT* is problematic for several reasons, not least of which is the fact that the notion of 'obligation' has not been imposed, in determining

[73] See notes 38 and 39.

[74] *Annibaldi* EU:C:1997:631, para 23.

[75] EU:C:2014:126, para 27.

[76] *Dano*, C-333/13, EU:C:2014:2358.

[77] *Dano* EU:C:2014:2358, paras 89–91.

[78] *X and X v Etat Belge*, C-638/16 PPU, EU:C:2017:173.

[79] *TSN and AKT* EU:C:2019:981. See similarly *Coca-Cola European Partners Deutschland*, C-257/21, EU:C:2022 529, para 49. See also eg *Adusbef*, C-686/18, EU:C:2020:567, para 54.

[80] *TSN and AKT* EU:C:2019:981, paras 36–49.

[81] [2003] OJ L 299/9.

[82] *TSN and AKT* EU:C:2019:981, para 49.

[83] *TSN and AKT* EU:C:2019:981, paras 53 and 54.

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whether a Member State is 'implementing' Union law, in all subsequent Grand Chamber CJEU cases concerning this issue. Notably, *Etat Luxembourgeois*[84] concerned a Member State law which fleshed out the details of a procedure established under a Directive, and a challenge to that Member State law, namely a Luxembourgish law, for compliance with Article 47 CFR. The CJEU gave scant consideration as to whether Luxembourg was 'implementing' EU law. The CJEU ruled that the 'adoption, by a Member State, of legislation specifying the details of the procedure for exchange of information on request established by Directive 2011/16 [on administrative cooperation in the field of taxation] constitutes such an implementation, meaning that the Charter is applicable'.[85]

This, in and of itself, casts a shadow over whether the 'obligation' rule applies in all circumstances. Similarly, what precisely 'obligation' means, and where that obligation is to be sourced, will inevitably be subject to evolution in the case-law. In *Akerberg Fransson*, the CJEU held that the 'obligation' imposed on the Member State was not found in the VAT directive in issue, the interpretation of which was required in order to resolve the dispute, but rather in the primary treaties, namely in Article 325 TFEU.[86] If *TSN and AKT* is to be squared with the established case-law, a broad view will need to be taken of where the 'obligation' imposed on the Member State is identifiable. It need not necessarily be in the provision of EU (secondary) law which falls for interpretation.

Similarly, the established case-law also suggests a broad view of what amounts to an 'obligation' imposed by EU law on a Member State. For example, in *YS v NK*[87] the CJEU concluded that the 'specific requirements' of EU law were enough to amount to an instance of Member State implementation of EU law under Article 51(1) CFR, the 'requirement' of EU law in that case being the principle of equal treatment under a directive. Yet *TSN v AKT* suggests that an indirect connection is no longer enough but falls short of expressly overruling the case-law on this point. But what seems inevitable, and here is contended as undesirable, is even more orders for reference, and further paper-thin distinctions, in the exercise of determining when a Member State is 'implementing' EU law under Article 51(1) CFR.

C. Exercise by Member States of discretionary powers

Further, it is difficult to square the *TSN and AKT* requirement of identification of a provision of the EU imposing a specific obligation on a Member State with rulings concerning areas of EU law in which a Member State has exercised discretion. The case of *Wachauf*, as can be seen from its discussion earlier (Section III.B), concerned an *option* in the hands of Member States to provide compensation in the event of cancellation of mill quotas. On what view could *Wachauf* be viewed as imposing on Member States an obligation?

It is true that *NS*[88] established that exercise by Member States of discretionary powers vested in them by EU legislation constituted an incidence of 'implementation' of EU law. It is difficult to

[84] *Etat Luxembourgeois*, Joined Cases C-245/19 and C-246/19, EU:C:2020:795.

[85] *Etat Luxembourgeois* EU:C:2020:795, para 46. In so doing the CJEU referred to *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paras 34–37. For a further example of a ruling in which there is scant consideration as to whether EU law imposed a 'specific obligation' but the Member State was considered to be 'implementing' EU law, see eg *Spika and Others*, C-540/16, EU:C:2018:565, para 23: the exercise of an EU competence by a Member State was held to be enough to satisfy the requirement of implementation of EU law.

[86] *Akerberg Fransson* EU:C:2013:105, para 26. See subsequently, however, the ruling in *MARCAS MC*, C-363/20, EU:C:2022:21, paras 32–39, where the CJEU distinguished *Akerberg Fransson* and concluded, particularly at para 38, that since Member State tax penalties and procedures related to corporation tax are not part of the European Union's own resources system, there had been no implementation of EU law for the purposes of Article 51 CFR. No Advocate General's Opinion was issued in this ruling, the importance nuance on *Akerberg Fransson* which the case presented notwithstanding. See more recently on the obligations imposed by this provision *Euro Box Promotion and Others* EU:C:2021:1034, paras 181 and 182, and *Lin* EU:C:2023:606, paras 82–86.

[87] *YS v NK*, C-223/19, EU:C:2020:753, paras 79–81.

[88] *NS*, C-411/10 and C-493/10, EU:C:2011:865.

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discern, however, how exercise of such powers could be viewed as resulting from imposition of a precise obligation under EU law. The CJEU held as follows in *NS*:

> 68. Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

This ruling has always stood, therefore, for the proposition that, at minimum, a discretionary power which forms an integral part of a common EU policy, and conferred on the Member States by EU measures, must be exercised in conformity with the Charter. Advocate General Bot in his Opinion in *TSN v AKT*, and contrary to the ruling of the CJEU, took the view that Finland *was* implementing EU law under Article 51(1) CFR. In reaching this conclusion, the Advocate General was persuaded by the established CJEU case-law binding the Member States to protect fundamental rights when they exercise discretionary powers.[89]

Granted, the CJEU in *TSN v AKT* expressly held that the dispute in that case did not entail conferral on a Member State of a discretionary power but rather exercise of a residual Member State power that remained untouched by EU law because the Member State was acting outside of the scope of the directive in issue.[90] However, it seems that another fissure has been opened in the case-law that will require clarification through more case-law.

D. Derogation from the four freedoms

The application of the Charter in this context is straightforward. *Pfleger and Others*[91] confirmed that the Charter applies only to derogation from free movement rules, as opposed to the free movement rules themselves. In *Commission v Hungary (Usufruct over Agricultural Land)*,[92] the CJEU declined an invitation to extend the reach of the Charter beyond the derogations and attach them to the interpretation of free movement rules themselves. Advocate General Szpunar has explained the law in this field in the following terms:

> I fully concur with the view of Advocate General Saugmandsgaard Opinion in Joined Cases C-52/16 and C-113/16, *SEGRO and Horváth* EU:C:2017:410, paragraph 142 that 'when the Court examines national legislation by reference to the freedoms of movement, the alleged infringement of a fundamental right guaranteed by the Charter cannot be examined independently of the question of the breach of those freedoms' … Suffice it to add that this is also the way the Court appears to me to have proceeded to date: questions involving fundamental rights in free movement cases are dealt with within the justification of a restriction.[93]

[89] In his Opinion in *TSN and AKT* EU:C:2019:459, footnote 60, Advocate General Bot cited in particular *Milkova*, C-406/15, EU:C:2017:198, see paras 52–54 and the case-law cited in *Milkova*; see also, concerning a 'discretionary clause' when determining the Member State responsible for examining an application for international protection, *CK and Others*, C-578/16 PPU, EU:C:2017:127, paras 53 and 54 and the case-law cited.

[90] EU:C: 2019:981, paras 49 and 50.

[91] *Pfleger and Others* EU:C:2014:281.

[92] *Commission v Hungary (Usufruct over Agricultural Land)*, C-235/17, EU:C:2019:432.

[93] See the Opinion of Advocate General Szpunar in *FIFA*, C-650/22, EU:C:2024:375, para 80 where he referred to *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, para 127 et seq, and *Commission v Hungary (Usufruct over Agricultural Land)* EU:C:2019:432, para 54 et seq; and the Opinion of Advocate General Øe in Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* EU:C:2017:410, para 142.

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In other words, in the context of free movement law, the provisions of the EU law (other than the Charter) that need to be relevant to the resolution of a dispute *before* the Charter is considered applicable are the derogations from free movement. But here too the established legal principles collide with the rule that an EU measure must impose an 'obligation' on a Member State before they can be said to be 'implementing' EU law under Article 51(1) CFR and therefore bound by the Charter, since the derogations are, manifestly, not provisions of law that entail an imposition on Member States of 'obligations'.

E. Member State remedies and procedural rules

Uncertainty might now be viewed as clouding the applicability of the Charter to the Member States with respect to the remedies and procedural rules available to enforce EU law. The relevance of Article 47 CFR in this scenario was established relatively early in the jurisprudence,[94] and subsequently generated a vast corpus of case-law.[95]

One of the new frontiers, however, likely to emerge in future cases is the extent to which other provisions of the Charter can be relied on in challenges to Member State remedies and procedural rules. At least one Advocate General has expressed the view that the answer to this question is in the affirmative.[96]

In all events, given that questions on remedies and procedural rules can by, definition, arise only in the context of disputes concerning the application of substantive rules of EU law, the latter also amount, in effect, to the rule of EU law other than the Charter, the interpretation of which is required. For example, the CJEU held as follows in *LH v Profit Credit Slovakia*,[97] in the context of Article 47 CFR:

> In the present case, the first two questions put by the national court do not, of course, refer to any act of Union law other than the Charter. However, it is clear from the grounds set out in the order for reference that there is a clear and sufficient link between the limitation rules laid down in Article 107(2) of the Civil Code, which are applicable to an action brought by a consumer, such as the applicant in the main proceedings, and the provisions of secondary Union law, which are intended to ensure consumer protection.

But this element of the edifice on the meaning of 'implementing' under Article 51(1) might have been unsteadied by the ruling *TSN and KST*. Prior to *TSN and KST*, it had never been the case that a specific obligation imposed by EU law was relevant to determining whether Member State remedies and procedural rules available to enforce EU law comply with the Charter. Rather, the Member States have always enjoyed discretion in the availability of Member State remedies and procedural rules, subject to the principles of effectiveness and equivalence, and furthermore to Article 47 CFR and perhaps other of the Charter's substantive rules.

The ruling in *Sātiņi-S*[98] demonstrates the impact of the 'obligation' rule on Member State remedies. There, a national law setting up a compensation scheme in the enforcement of EU environmental law was held by the CJEU to be an instance of 'implementing' EU law, thereby triggering the application

[94] C-279/09 *DEB* EU:C:2010:811.

[95] One leading authority is *Etat Luxembourgeois*, Joined Cases C-245/19 and C-246/19, EU:C:2020:795. For a full analysis of Article 47 CFR, see the chapter on this provision: A Ward (ed), 'Article 47 – Right to an Effective Remedy and to a Fair Trial' in S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, 2nd ed (Hart, 2021), 1245–384.

[96] See the Opinion of Advocate General Tanchev, *MIUR and Ufficio Scolastico Regionale per la Campania*, C-282/19, EU:C:2021:217, especially at para 76, and Article 17 CFR as discussed in note 54. See also Article 49(1) CFR, the principle of retroactive application of the more lenient criminal law, the principle of foreseeability, precision, and non-retroactivity of offences of penalties, and *Lin* EU:C:2023:606, para 109; and *Paoletti*, C-218/15, EU:C:2016:748.

[97] *LH v Profit Credit Slovakia*, C-485/19, EU:C:2021:313, para 39.

[98] *Sātiņi-S* EU:C2022:57.

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to that scheme of Article 17 CFR on the right to property, while Advocate General Santos took the view that the national law was not 'implementing' EU law.

The CJEU interpreted Article 5 of the Birds Directive[99] as requiring Member States to establish a general system of protection for all the bird species referred to in Article 1 of that directive,[100] while Member States were also bound, under Article 6(2) of the Habitats Directive,[101] to take 'appropriate steps' to avoid deterioration of special areas of conservation and disturbance of habitats.[102] Special Member State schemes granting payments to the end of enforcing these objectives of the Birds Directive and the Habitats Directive also amounted to 'implementing' EU law, even though those Directives seemed to provide no obligation to establish such schemes.[103] What mattered was the existence of a restriction on the right to property, protected under Article 17 CFR.[104]

The ruling is therefore consistent with the judgment in *Wachauf*, which, as discussed earlier (Section III.B), considers whether specific provisions of an EU Regulation could be interpreted in conformity with fundamental rights, rather than being concerned with the text of a Member State measure.

However, Advocate General Rantos took the view in his Opinion that there was no obligation under either the Birds or the Habitats Directive either to establish a scheme of compensation or to pay compensation.[105] There had therefore been no implementation of EU law, as required by Article 51(1) CFR.[106]

IV. Horizontal application of the Charter

In *Egenberger*,[107] before the German courts, one private party sought to enforce against another private party the prohibition on discrimination on the basis of religious belief, as protected by Article 21(1) CFR, and the right to effective judicial protection, under Article 47 CFR,[108] in a dispute concerning the interpretation of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[109] Building on established case-law concerning discrimination on the basis of age,[110] the CJEU ruled that both the prohibition on discrimination on grounds of religion or belief, and the right to effective judicial protection were sufficient in themselves to confer individuals with rights which they may rely on in disputes between them in a field covered by EU law, there being no need for more specific provisions of EU or national law to implement these rights.[111] Consequently, 'the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 CFR, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law'.[112]

[99] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ 2010 L 20, p 7.

[100] EU:C:2022:57, para 24.

[101] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ 1992 L 206, p 7.

[102] Sātiņi-S EU:C2022:57, para 25.

[103] Ibid, paras 27 and 28.

[104] Ibid, para 26.

[105] EU:C:2021:735, paras 29 and 30.

[106] Ibid, paras 31 and 32.

[107] *Egenberger*, C-414/16, EU:C:2018:257.

[108] Ibid, para 78.

[109] OJ 2000 L 303, p 16.

[110] See notably *Kücükdeveci*, C-555/07, EU:C:2010:21 and *Mangold*, C-144/04, EU:C:2005:709.

[111] *Egenberger*, C-414/16, EU:C:2018:257.

[112] Ibid, para 79. Subsequent rulings concerning the horizontal application of Article 47 CFR include *Profi Credito Polska*, C-582/21, EU:C:2024:282, para 76; *X (Absence de motifs de résilation)*, C-715/20, EU:C:2024:139, paras 68–81; *Braathens Regional*

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Since *Egenberger*, the CJEU has ruled that the right of workers to paid annual leave, as protected by Article 31(2) CFR, is a provision which requires no further elaboration, and is therefore enforceable in and of itself when one private party is in dispute against another over the meaning of a directive,[113] but that neither Article 27 on the right of workers to information and consultation within their undertaking nor the Article 30 guarantee against unjustified dismissal have this quality.[114] Given that the case-law expressly stipulates that these provisions of the Charter require no measure of Member State law in order to be enforceable horizontally, the *Egenberger* principle is self-evidently not an incidence of Member States 'implementing' law. The identification principle, however, equally applies, given that horizontal application of the Charter is operative only within the scope of EU law. Thus, as will be shown in the proposed new explanations, the *Egenberger* rule would be encapsulated by a new text of Article 51(1) which, like Article 267 TFEU, will refer to questions on interpretation and validity of EU law as the trigger for the applicability of the Charter's substantive rules.

It is to be underscored, however, that there are other instances in which the Charter has horizontal effect. First, in keeping with development of the case-law of the CJEU on Member State remedies and procedural rules, Article 47 applies even in the context of challenge to the remedies available at Member State level when one private party is enforcing EU law, including directives, against another,[115] the prohibition on the horizontal direct effect of directives notwithstanding.[116] Second, once a secondary EU measure has been interpreted in conformity with the Charter, Member State measures preventing the enforcement of the EU law, as so interpreted, will be impacted by EU law, even in disputes between private parties. If the EU measure in question is a Regulation, the relevant Member State measure will have to be disapplied.[117] If it is a Directive, the Member State court will be required to do everything in its powers to interpret the Member State law obstructing the enforcement of the Directive, as interpreted in conformity with the Charter, but will not be required to interpret national law *contra legum*. If it were so required, this would offend the subsisting prohibition on the horizontal direct effect of directives.[118] The only exceptions to this rule are, at this stage, horizontal disputes in which Articles 47 and Article 31(2) CFR.

Since the question of the horizontal enforceability of the Charter is an area of sensitivity and complexity, and one prone to rapid evolution, it might be of assistance to Member State judges if the constitutional backdrop here detailed were mentioned in all cases in which the Charter arises for consideration in disputes between private parties, whether this question features in the order for reference or not. Such a practice would render the fresh judgments on this delicate issue easier to place into the pre-existing constitutional matrix, and avoid an unintended expansion of the relevance of the Charter in disputes between private sector actors, in the absence of due consideration of the relevant constitutional rules.[119]

Aviation, C-30/19, EU:C:2021:269, para 57. Subsequent rulings concerning the horizontal applicability of the prohibition on discrimination on the basis of religion include *Veselibas ministrija*, C-243/19, EU:C:2020:872, para 36.

[113] *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871; *Max Planck-Gesellschaft*, C-684/16, EU:C:2018:874.

[114] *Plamaro*, C-196/23, EU:C:2024:596.

[115] See eg *Profi Credit Slovakia*, C-485/19, EU:C:2021:313, paras 39–42 and 78.

[116] This has long since been a feature of CJEU case-law. See classically *von Colson*, C-14/83, EU:C:1984:153. For a more detailed analysis of horizontality of remedies in the context of directives, see A Ward, 'New Frontiers in Private Enforcement of EC Directives' (1998) 23 *European Law Review* 65. On the continued prohibition on horizontal direct effect of directives, see, notably, judgments in *Farrell*, C-413/15, EU:C:2017:745, and *Smith*, C-122/17, EU:C:2018:631.

[117] See eg *Endomol Shine Finland*, C-740/22, EU:C:2024:216, para 42.

[118] See eg C-78/22 *ALD Automotive* EU:C: 2023:379, para 40.

[119] Such concerns might be justified in the recent ruling of the CJEU in C-365/23 *Arce* EU:C:2025:192.

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V. Template for a redraft?

To underscore a point already made, of the six seminal rulings here discussed in detail concerning the applicability of the Charter at Member State level, that is *Liivimaa Lihaveis*,[120] *Akerberg Fransson*,[121] *NS*,[122] *Egenberger*,[123] *TSN v AKT*,[124] and *Sātiņi-S*,[125] there was agreement between the Advocate General and the CJEU on this question in only two of them, namely *Liivimaa Lihaveis* and *NS*. But to the other four might be added the Opinion of Advocate General Mengozzi in *X and X v Etat Belge*[126] and the Opinion of Advocate General Sharpston in *Zambrano*,[127] neither of which was followed by the CJEU and which presented powerful alternatives to the meaning of 'implementing' EU law under Article 51(1) CFR.

While the view might be taken that this is simply an accolade, by way of example, to the independence of the Advocates General, from another perspective it might be indicative of the tenacity of the uncertainty that still prevails with each attempt by the CJEU to settle the meaning, under Article 51(1) CFR, of Member States 'only when they are implementing Union law'. In consequence, delimiting the jurisdictional boundary between Member State and ECHR protection, on the one hand, and Charter guarantees on the other can still be fraught with difficulty, even though the Charter is well into its second decade as a legally binding instrument.

In all events, what is here proposed is an approach consistent with the reflections of Advocate General Cryz Villalon in *Akerberg Fransson*. The Advocate General contended that a common feature of the different formulations 'scope', 'field of application', and 'implementation' was a requirement that Union law have a '*presence* at the origin of the exercise of public authority'. That presence had to be 'as law; that is with the capacity to determine or influence to some extent the subject matter of that exercise of public authority in the Member State'.[128] Would not a 'presence' test, consistent with the application of the identification exercise, have been more in harmony with the established case-law than the gradual emergence of the 'obligation' rule? Therefore, one proposal for reform might be as follows.

Part II

Jurisdiction

1. The General Court shall have jurisdiction to hear annulment proceedings brought by natural or legal persons meeting the conditions provided for under the third paragraph of Article 263 TFEU concerning alleged breach of the fundamental rights guaranteed by Charter by acts of institutions, bodies, offices and agencies of the Union, along with jurisdiction to hear actions for damages under Articles 268 and 340 TFEU entailing breach of the fundamental rights guaranteed by the Charter. The remedies available in Article 263 nullity proceedings are a declaration that an act is void under Article 264 TFEU and interim relief under Article 279 TFEU.
2. The courts and tribunals of the Member States shall have jurisdiction to hear proceedings concerning alleged breach of fundamental rights guaranteed by the Charter with respect to all questions concerning the interpretation and/or validity of acts of the institutions, bodies, offices and agencies of the Union. A preliminary ruling may be made to

[120] EU:C:2014:2229.
[121] EU:C:2013:105.
[122] EU:C:2011:865.
[123] EU:C:2018:257.
[124] EU:C:2019:981.
[125] EU:C:2022:57.
[126] PPU, *X and X v Etat Belge*, C-638/16, EU:C:2017:93.
[127] *Zambrano*, C-34/09, EU:C:2010:56.
[128] EU:C:2012:340, para 33. Emphasis in original.

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the Court of Justice of the European Union pursuant to rules elaborated under Article 267 TFEU.

A 'working draft' of the new explanations might be as follows:

Explanation to Part II: general remark

The text of this provision borrows from the wording of Article 263 TFEU, Article 267 TFEU, and Article 19 TEU, and reflects the Charter's status as an instrument which has the 'same legal value' as the Treaties (Article 6 TEU). Unlike 'standard international treaties, the Community Treaties establish a new legal order, which is integrated into the legal systems of the Member States on the entry into force of the Treaties and which are binding on their courts'. Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, paragraph 245. The Charter is equally so integrated.

Explanation to Article Part II(1)

The institutions of the EU are named in Article 13 TEU. They are the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union ('the CJEU'), the European Central Bank, and the Court of Auditors.

The bodies, offices, and agencies of the EU are established by or under the Treaties and are intended to contribute to the achievement of the Union's objectives (see eg C-597/18 P *Council v K Chrysostomides and Co and Others*, EU:C:2020:1028, paragraph 80). Bodies, offices, and agencies of the Union are generally discernible from the text of the EU legislation establishing them.

The institutions, bodies, offices, and agencies of the Union are the primary addressees of the Charter. They are bound by the Charter with respect to everything they do, whether they are challenged for failing to comply with the Charter in the context of an action for annulment (Article 263 TFEU), damages (Articles 268 and 340 TFEU), in pursuit of interim relief (Article 279 TFEU) before the General Court of the CJEU ('the General Court'), or by way of a claim brought before the Member State courts or tribunals entailing the interpretation of EU law or challenge to its validity (eg C-477/14, *Pillbox 38*, EU:C:2016:324; C-311/18, *Facebook Ireland and Schrems*, EU:C:2020:559; C-333/22, *Ligue des droits humains [verification du traitement des données par l'autorité de contrôle]*, EU:C:2023:874). In other words, the mere identification of an institution, body, office, or agency of the Union as the entity alleged to have acted inconsistently with the Charter triggers the Charter's application.

Nevertheless, in accordance with the rule established in C-188/92, *TWD*, EU:C:1994:90, if a litigant 'without any doubt' had the right under Article 263 TFEU to bring an action before the General Court seeking annulment of an act institution, body, office or agency of the Union for breach of fundamental rights guaranteed by the Charter (or on any other basis) and failed to exercise that right within the time period prescribed by Article 263 TFEU (two months), EU law precludes such a litigant from bringing an action before a Member State court challenging the validity of the EU measure and seeking an order for reference on validity to the CJEU under Article 267 TFEU, even if Member State time limits permit such a challenge (C-330/22 *Friends of the Irish Environment*, EU:C:2024:19, paragraph 50).

Only the CJEU, to the exclusion of Member State courts, can declare an EU measure invalid (C-314/85, *Foto-Frost*, EU:C:1987:452).

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The judgment in C-562/12, *Liivimaa Lihaveis*, EU:C:2014:2229 supplies guiding principles on the application of Part II(1) when both EU bodies, offices, or agencies and Member State authorities are involved in acts alleged to be inconsistent with the Charter. There it was confirmed that the General Court has no jurisdiction under Article 263 TFEU to rule on the lawfulness of an act adopted by a national authority, but the Member State courts do when a national authority 'implements' EU law under the case-law of the CJEU under ex-Article 51(1) CFR. When a Member State is 'implementing' EU law is now subsumed by Part II(2), and its reference to 'interpretation' of acts of EU institutions, bodies, offices, and agencies.

The authority of the General Court to enforce the Charter in the context of the non-contractual liability of the EU under Articles 268 and 340 TFEU and the action for damages is evident from the ruling of the General Court in T-371/22, *Montanari*, EU:7:2024:494.

Explanations to Part II(2)

Part II(2) adopts the language of Article 267(b) TFEU, which provides that the 'Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning … (b) the validity and interpretation of the acts of the institutions, bodies, offices or agencies of the Union'. Under the established case-law of the CJEU, the Charter is applicable only to the acts of national authorities of the Member States when they are 'implementing' EU law. In other words, the Charter is not applicable to everything national authorities do. The primary addressees of the Charter are the institutions, bodies, offices, and agencies of the Union. Member state authorities can become bound by the Charter only by virtue of the operation of EU acts.

The primary route for determining whether a Member State is 'implementing' EU law, a question that only ever arises when acts of national authorities are challenged for compliance with the Charter, as opposed to an EU act itself, is to identify a provision of EU law that is pertinent to the resolution of the dispute, other than the Charter. This is a prerequisite to the admissibility of any order for reference. In this regard, see, for example, the ruling of the CJEU in Case C-206/13, *Siragusa*, EU:C:2014:126, paragraph 19. Once that provision is identified, and interpreted in conformity with the Charter, any act of a national authority impeding the application of the EU measure is subject to the Charter because the Member State is 'implementing' EU law.

This 'identification' exercise runs through all of the seminal rulings of the CJEU on the meaning of 'implementing' EU law (see eg C-5/88 *Wachauf*, EU:C:1989:321, paras 19–22; C-309/96, *Annibaldi*, EU:C:1997:631, see especially para 21; C-617/10, *Akerberg Fransson*, EU:C:2013:105, paras 24–28; C-206/13, *Siragusa*, EU:C:2014:126, para 27; C-333/13, *Dano*, EU:C:2014:2358, paras 89–90; C-638/16 PPU, *X and X v Etat Belge*, EU:C:2017:173, paras 42–50; C-609 and C-610/17, *TSN and AKT*, EU:C:2019:981, para 49; C-411/10 and C-493/10, *NS*, EU:C:2011:865, paras 64–69; C-238/20, *Sātiņi-S*, EU:C:2022:57, paras 24–29; C-265/23, *Volieva*, EU:C:2024:602, paras 46–47).

It has further been held in the case-law of the CJEU that Member States are 'implementing' EU law when they derogate from the rules on free movement (eg Case C-390/12, *Pfleger*, EU:C:2014:281, paras 35 and 36; C-673/16 Coman EU:C:2018:385, para 47) and when they exercise discretionary authority the source of which is grounded in an EU measure (eg C-411/10, *NS*, EU:C:2011:865, paras 64–69), and when they exercise their authority to supply remedies and procedures to enforce rights grounded in EU law, subject to the principles of effectiveness, equivalence, and Article 47 CFR (C-279/09, *DEB*, EU:C:2010(811, paras 30–33) sometimes termed, collectively, the right to 'effective judicial protection' (C-284/23 *Haus Jacobus*, EU:C:2024:558, para 32; C-367/23, *Artemis Security*, EU:C:2024:529, para 31).

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These are all examples of identification of pertinent provisions of EU law which trigger an instance of Member State implementation of EU law.

These rules, however, have be read in the light of the Grand Chamber ruling in C-609 and C-610/17, *TSN and AKT*, EU:C:2019:981, paragraph 53 in which the CJEU confirmed that Member States are only 'implementing' EU law when EU law imposes a precise obligation on them. Although this requirement was absent in the contemporaneous Grand Chamber ruling in Joined Cases C-245/19 and C-246/19, *Etat Luxembourgeois*, EU:C:2020:795, it has been applied in subsequent rulings (eg Joined Cases C-257/21 and C-258/21, *Coca-Cola European Partners Deutschland*, EU:C:2022 529, para 49).

It is to be noted, however, that the 'obligation' has been housed in a primary provision of the Treaty, rather than the provision of EU law secondary law the interpretation of which is sought. One such Treaty provision is 325(1) TFEU on protection of the EU's financial interests (C-617/10, *Akerberg Fransson*, EU:C:2013:105, paras 24–29; see more recently eg Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034 and C-107/23 PPU, *Lin*, EU:C:2023:606).

Further, discretionary compensation schemes established by Member States to enforce obligations imposed by EU law amount to an instance of 'implementing' EU law (C-238/20, *Sātiņi-S*, EU:C:2022:57 and C-5/88, *Wachauf*, EU:C:1989:321).

Liberal interpretation of the 'obligation' requirement affirmed in C-609 and C-610/17, *TSN and AKT*, EU:C:2019:981 is also indicated by the ruling of the CJEU in C-223/19, *YS v NK*, EU:C:2020:753, 753. There the CJEU concluded that the 'specific requirements' of EU law were enough to amount to an instance of Member State implementation of EU law under Article 51(1) CFR, the need to establish an 'obligation' notwithstanding. The 'requirement' of EU law in that case, and which rendered the Member State concerned to be 'implementing' EU law, was the principle of equal treatment, as reflected in a Directive (C-223/19, *YS v NK*, EU:C:2020:753, paras 79–81).

Finally, although not an instance of Member State implementation of EU law, the horizontal application of the Charter between private parties under the circumstances established in C-414/16, *Egenberger*, EU:C:2018:257 falls within the parameters of Part II(2), given that this entails 'interpretation' of EU law.

Once the rules elaborated in the explanations are applied, the only thing left, then, for a national judge to do is to decide, on the basis of established principles of EU constitutional law, the fate of Member State laws that are inconsistent with the pertinent provision of EU law, as interpreted in conformity with the Charter and impeding the EU provision's Charter compliant application at Member State level.

Thus, if a Member State is derogating from a directly effective treaty article of the TEU or TFEU, the Member State measure executing that derogation is to be disapplied if it is inconsistent with the Charter.[129] If the pertinent EU act to be interpreted in conformity with the Charter is an EU Regulation, it is directly applicable and has an immediate effect in the national legal system, so that all acts of Member State authorities inconsistent with the Regulation, as interpreted in conformity with the Charter, are to be disapplied, whether the Regulation is being invoked against an emanation of the state or a private sector actor.[130]

[129] *Pfleger and Others* EU:C:2014:281.

[130] See eg C-740/22 *Endomol Shine Finland* EU:C:2024:216, para 42.

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If the pertinent EU act, as interpreted in conformity with the Charter, is a directly effective provision of a Directive, or a decision for that matter,[131] and it is being enforced against an emanation of the state, a Member State court, in accordance with the principle of primacy, is 'under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means'.[132]

However, if the provision of a Directive to be interpreted in conformity with the Charter is not directly effective, or that provision is being enforced horizontally by one private party against another, there is still scope for acts of Member State authorities to stand, notwithstanding their inconsistency with the Charter. This is so because, under the established case-law of the CJEU, there is no 'disapplication' duty imposed on Member State judges in these circumstances.

Rather, if an act of a Member State authority is inconsistent with the non-directly effective provisions of a Directive, as interpreted in the light of the Charter, the obligation on the Member State judge is limited to interpreting, where possible (which means doing whatever lies within their jurisdiction), Member State law falling within the scope of that Directive or decision in conformity with the relevant provisions of the relevant Directive, ruling inconsistently with established Member State case-law if necessary, but not extended to rendering an interpretation of Member State law that is contra legum its text, or is otherwise inconsistent with general principle of law such as legal certainty and the principle of non-retroactivity.[133] Under settled case-law, a directive cannot of itself create obligations on the part of an individual and cannot therefore be invoked as such against him or her. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognizing a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt Regulations.[134] However, damages against the Member State concerned should be available upon satisfaction of the criteria established in the *Francovich* ruling.[135]

That said, there is one exception. When a natural or legal person seeks, before a Member State Tribunal, interpretation of an act of an EU institution, body, office, or agency, there are some provisions of the Charter that are sufficient in themselves to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.[136] This means that, even in horizontal disputes between private parties, these fundamental rights are to be applied by Member State courts and tribunals over inconsistent Member State measures. To date, the CJEU has ruled that those provisions are the prohibition on discrimination on the basis of religion or belief in Article 21(1) CFR, the right to an effective remedy and to a fair trial in Article 47 CFR,[137] and the right to paid annual leave as protected by Article 31(2) CFR.[138]

[131] See eg *Euro Box Promotion and Others* EU:C:2021:1034, para 253.

[132] *Lin* EU:C:2023:606, para 95.

[133] See eg C-579/15 *Poplawski* EU:C:2017:503, paras 31–36. See also eg C-279/23 *Skarb Państwa (Retard de paiement non significatif ou de créance faible)* EU:C:2024:605, paras 30 and 31, and C-78/22 *ALD Automotive* EU:C: 2023:379, para 40.

[134] C-196/23 *Plamaro* EU:C:2024:596, para 46.

[135] C-282/10 *Dominguez* EU:C:2012:33, para 43.

[136] *Egenberger* EU:C:2018:257, para 76.

[137] *Egenberger* EU:C:2018:257, paras 76–79.

[138] C-569/16 and C-570/16, *Bauer and Willmeroth* EU:C:2018:871; C-684/16 *Max Planck-Gesellschaft* EU:C:2018:874.

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VI. Concluding remarks

One ex-vice president of the European Commission long ago argued for the suppression *in toto* of Article 51 CFR, since the 'Charter should be Europe's very own bill of rights';[139] the suggestion having been endorsed at the time by the European Parliament.[140] What is here advocated is a more nuanced approach, and one consistent with the tripartite nature of fundamental rights protection in Europe, protected as it is by Member State law, the ECHR, and the EU CFR. It is also an approach which weaves the rule on when the Charter is applicable at Member State level into the established constitutional matrix and the extant court structure for the enforcement of EU law across the Union. The task, for a Member State judge, of determining whether the Charter applies in a given dispute is, it has been argued, simplified by bringing focus back on to primacy as the original *raison d'être* of EU fundamental rights, and by being ever mindful of the fact that the application of Member State fundamental rights standards is only precluded in situations governed by EU law and when the application of such standards compromises the level of protection provided by the Charter or the primacy, unity, and effectiveness of EU law.

It has here been contended that the key to that simplification is the identification of a provision of EU law other than the Charter that is relevant to the resolution of the case to hand. Identifying the provision of EU law interpretation of which is required is, in all events, essential for determining whether an order for reference is admissible. Moreover, the analysis of leading cases here presented suggests that the identification exercise is also central to determining whether there are certain 'connecting factors' between a Member State law challenged for breach of the Charter and EU law.

So why not 'cut to the chase' and elevate the identification exercise as the core legal test in determining when Member States are 'implementing' EU law under Article 51(1) CFR? This would be done on the understanding that the provision of EU law will be declared invalid if it cannot be interpreted in conformity with the Charter. If it can be, the fate of any inconsistent Member State laws would be determined by established rules of EU constitutional law, such as direct effect, sympathetic interpretation, and the *Egenberger* rule. At the same time, the approach here suggested entails no danger of the competence creep which was the driving force behind the passage of Article 51(2) CFR.

The support from the Member States' judiciaries in securing effective enforcement of EU law, as it has evolved over the decades, has been paramount to its successful reception at Member State level. If any redrafting programme were to be launched for Article 51 CFR, the group of people whose counsel would be essential to its deliberations would be Member State judges. The present writer has participated, as much as any scholar, in analysing the judgments of the CJEU on the meaning of 'Member State only when they are implementing Union law' under Article 51(1), and postulated on its meaning. But such exercises are of less concern to busy Member State judges, whose fidelity and diligence have always been central to the success of the European project.

[139] Gambardella, 'L'application de la Charte', referring at footnote 6 to https://ec.europa.eu/commission/presscorner/detail/fr/SPEECH_14_327.

[140] Ibid, see footnote 7 of that article.

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