COURT OF JUSTICE
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Fact sheet

FIELD OF APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The scope of the Charter of Fundamental Rights of the European Union (the "Charter") is defined in Article 51 thereof, pursuant to which:

'1. The provisions of [the] Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of EU 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.'

With regard to European Union legal acts, the Court has carried out a review in the light of the fundamental rights in its case-law relating to the validity of certain acts of secondary legislation [1] and it has stated that some acts, such as European EU law regulations and directives, must of necessity be interpreted in the light of the fundamental rights. [2] In addition, the Union cannot conclude an international agreement that is incompatible with such rights. [3]

As regards the Member States, the Court has ruled, in the context of a number of requests for a preliminary ruling, on the notion of the 'implementation of European EU law' , providing, in particular, a list of factors which may be taken into consideration to determine whether a national rule is covered by that notion.

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1 See, in particular, judgments of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12, EU:C:2014:238, paragraph 69), of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84), of 21 December 2016, *Associazione Italia Nostra Onlus* (C-445/15, EU:C:2016:978, paragraphs 63 and 64); of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraph 80); of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, (C-426/16, EU:C:2018:335, paragraphs 80 and 84); of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 112) and of 16 July 2020, *Facebook Ireland and Schrems* (C-311/18, EU:C:2020:559, paragraphs 149 and 199).

2 See, in particular, judgments of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 et C-139/01, EU:C:2003:294, paragraphs 68 et seq.); of 4 March 2010, *Chakroun* (C-578/08, EU:C:2010:117, paragraphs 44 et seq.); of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, paragraphs 68 et seq.); of 11 September 2014, *A* (C-112/13, EU:C:2014:2195, paragraphs 51 et seq.); of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraphs 49 et seq.); of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraphs 38 et seq.) and of 21 December 2016, *Tele2 Sverige and Watson and Others*, (C-203/15 and C-698/15, EU:C:2016:970, paragraphs 91 et seq.).

3 See Opinion 1/15 (EU-Canada PNR Agreement), of 26 July 2017 (EU:C:2017:592).

I. Application of the Charter to the institutions, bodies and agencies of the European Union

Judgment of 20 September 2016 (Grand Chamber), Ledra Advertising v Commission and ECB (C-8/15 P to C-10/15 P, EU:C:2016:701)

The Republic of Cyprus, whose currency is the Euro, had requested financial assistance from the European Stability Mechanism (ESM) [4] following difficulties suffered at the start of 2012 by some banks established in that Member State. That assistance was to be provided under a macroeconomic adjustment programme to be specified in a Protocol of Agreement, negotiated by, inter alia, the European Commission on behalf of the EMS. Such a Protocol was signed on 26 April 2013 by the Republic of Cyprus and the EMS. [5] The appellants in the main proceedings, owners of deposits with some banks established in Cyprus, then brought actions before the General Court seeking, on the one hand, the annulment of some points of the Protocol and, on the other, compensation for the loss which they alleged they had suffered. According to them, that loss arose as a result of both the inclusion of the disputed paragraphs in the Protocol of Agreement and the infringement, by the Commission, of its obligation to ensure that the Protocol complies with European EU law and, more particularly, with paragraph 1 of Article 17 ('Right to property') of the Charter. Since the General Court declared their actions in part inadmissible and in part unfounded, the appellants then brought an appeal before the Court of Justice.

With regard to whether the Charter applied to that case, the Court of Justice pointed out that, although the Member States do not implement European EU law in the context of the Treaty instituting the EMS, so that the Charter does not apply to them in that context, the Charter does, however, apply to the European Union institutions, including when they act outside the legal framework of the European Union.

The Court of Justice added that, in the adoption of a protocol of agreement, such as that of 26 April 2013, the Commission is bound under both Article 17(1) TEU, which confers on it the general responsibility for monitoring the application of European EU law, and Article 13(3) and (4) of the Treaty instituting the EMS, which requires it to monitor the compatibility with European EU law of protocols of agreement concluded by the EMS, to ensure that such a protocol is compatible with the fundamental rights guaranteed by the Charter. The Court therefore held that, in that case, it had to examine whether, as regards the actions in liability, the Commission had contributed to a sufficiently serious infringement of the appellants' property rights, within the meaning of Article 17(1) of the Charter, in the adoption of the Protocol of Agreement of 26 April 2013 (paragraphs 67 and 68). [6]

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[4] The Treaty establishing the European Stability Mechanism was concluded at Brussels (Belgium) on 2 February 2012 between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland. That Treaty entered into force on 27 September 2012.

[5] Memorandum of Understanding on Specific Economic Policy Conditionality, concluded between the Republic of Cyprus and the European Stability Mechanism (ESM) on 26 April 2013 ('the Memorandum of Understanding of 26 April 2013').

[6] That judgment was presented in the 2016 Annual Report, p. 69.

II. Application of the Charter to the Member States: the notion of 'implementation of European EU law'

1. Applicable principles

Judgment of 26 February 2013 (Grand Chamber), Åkerberg Fransson (C-617/10, EU:C:2013:105)

The main proceedings were between the Åklagaren (Swedish public prosecutor) and Mr Åkerberg Fransson, concerning proceedings brought against him for aggravated tax fraud. He was accused of having provided, in his tax declarations for the 2004 and 2005 tax years, inaccurate information which exposed the public Treasury to the loss of revenue in the form of income tax and value added tax (VAT). He was also prosecuted for failing to declare employer's contributions for the reference periods of October 2004 and October 2005, which exposed the social security institutions to the loss of revenue.

In respect of the two tax years at issue, the tax administration had imposed a number of penalties on Mr Åkerberg Fransson, namely penalties as regards the income from his economic activity, as regards VAT and as regards employer contributions. Interest was payable on those penalties and they were not challenged before the administrative court. The reasons for the decision issuing them were the same facts of false declarations as those stated by the public prosecutor in the criminal proceedings.

The referring court was then doubtful as to whether the action brought against Mr Åkerberg Fransson should be dismissed on the ground that, in the other proceedings, he had already been penalised for the same facts, which could be seen as contravening the prohibition on double punishment ('*ne bis in idem*'), set out in Article 4 of Protocol No 7 to the European Convention on Human Rights and Fundamental Freedoms and in Article 50 of the Charter. It therefore referred to the Court the question, in particular, of whether the principle of *ne bis in idem* set out in Article 50 of the Charter precludes criminal proceedings for tax fraud being brought against a defendant when he has already been subject to a tax penalty for the same facts of making false declarations.

Examining the question of its jurisdiction, the Court recalled, first of all, that the field of application of the Charter, as regards the action of Member States, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law. In that regard, the Court stated that the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law, but not outside such situations. The Court pointed out that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. However, if such legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (paragraphs 17 to 23). [7]

7 That judgment was presented in the 2013 Annual Report, p. 16.

In this case, the Court noted that the tax penalties and the criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT. It considered, firstly, that it follows from Article 2, Article 250(1) and Article 273 of the VAT Directive, [8] and from Article 4(3) TEU, that the Member States are required to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory and for preventing evasion. Secondly, it has held that Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures, indicating in that regard that the European Union's own resources include, inter alia, under Article 2(1) of Decision 2007/436 [9], revenue from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules. It deduced therefrom that tax penalties and criminal proceedings, such as those to which Mr Åkerberg Fransson has been or is subject as a result of the inaccuracies in the information provided as regards VAT, constitute an implementation of Article 2, Article 250(1) and Article 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of EU law, within the meaning of Article 51(1) of the Charter. Accordingly, it held that it had jurisdiction to answer the questions referred for a preliminary ruling and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the principle of *ne bis in idem*, set out in Article 50 of the Charter (paragraphs 24 to 27 and 31).

Judgment of 10 July 2014, Julián Hernández and Others (C-198/13, EU:C:2014:2055)

The request for a preliminary ruling was made in proceedings between seven workers and their employers, in insolvency, and the Spanish State, concerning the payment of salaries due to those workers following their dismissal, which the national court had declared invalid.

In accordance with the Spanish legislation applicable to the case, the employer can request from the Spanish State payment of remuneration which has become due during proceedings challenging a dismissal after the 60th working day following the date on which the action was brought. Where the employer has not paid that remuneration and finds itself in a state of provisional insolvency, the employee concerned may, by operation of legal subrogation, claim directly from that Member State the payment of that remuneration.

Thus, the referring court asked whether that legislation fell within the field of application of Directive 2008/94/EC [10] and whether Article 20 ('Equality before the law') of the Charter precluded that legislation since it applies only in cases of unfair dismissal and excludes cases of invalid dismissals.

First of all, the Court recalled that, as is clear from the explanations relating to Article 51 of the Charter, which must be duly taken into account by virtue of Article 52(7) of the Charter, the concept of 'implementation' provided for in Article 51 confirms the case-law of the Court developed prior to the entry into force of the Charter, in accordance with which the obligation to respect the fundamental rights guaranteed in the EU legal order is binding on the Member States only when they are acting within the scope of EU law. Furthermore, the Court noted that

8 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

9 Council Decision 2007/436/EC, Euratom, of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p.17).

10 Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

it had previously found that the fundamental rights of the Union were inapplicable in a situation in which the Union provisions in the area concerned did not impose any specific obligations on the Member States in respect of that situation. The Court has also held the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable. It then stated that, in order to determine whether a national measure involves the implementation of EU law, it is necessary to determine, inter alia, whether the national legislation at issue is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of directly affecting EU law; and whether there are specific rules of EU law on the matter or rules which are capable of affecting it (paragraphs 33 and 35 to 37).In the present case, it examined in particular the criterion of the pursuit, by the national measure at issue, of an objective covered by the directive concerned. In that regard, it stated that it follows from the characteristics of the legislation at issue in the main proceedings that that legislation pursues an objective which differs from that of guaranteeing a minimum protection for employees in the event of the employer's insolvency, as referred to in Directive 2008/94, namely, that of providing for compensation by the Spanish State for the adverse consequences resulting from the fact that judicial proceedings last for more than 60 working days. Furthermore, the Court noted that the mere fact that the legislation at issue in the main proceedings comes within an area in which the European Union has powers under Article 153(2) TFEU cannot render the Charter applicable. Thus, it deduced from all the factors considered that the legislation at issue cannot be regarded as implementing EU law within the meaning of Article 51(1) of the Charter and, therefore, cannot be examined in the light of the guarantees of the Charter and, in particular, of Article 20 thereof (paragraphs 38 to 41, 46, 48, 49 and operative part). [11]

2. Factors enabling a finding of the existence of a national measure of 'implementing EU law'

2.1. EU law places one or several specific obligations on the Member States, or the national situation is covered by a specific rule of EU law

2.1.1. Illustrations from leading case-law

Judgment of 6 March 2014, Siragusa (C-206/13, EU:C:2014:126)

The applicant, the owner of property in a landscape conservation area, had made alterations increasing the size of the property without obtaining prior consent. Since that category of works could not be given retroactive planning consent, the Soprintendenza Beni Culturali e Ambientali di Palermo (Directorate for the Cultural and Environmental Heritage, Palermo, Italy) had then adopted an order requiring restoration of the site to its former state by the dismantling of all work which had been carried out illegally.

Seised of an action against that order, the referring court asked in particular whether the national legislation at issue, in so far as it excludes, on the basis of a presumption, a category of work from being assessed in terms of its compatibility with protection of the landscape and

11 That judgment was presented in the 2014 Annual Report, p. 14.

imposes in that regard the penalty of demolition, constituted an unjustified and disproportionate infringement of the right to property guaranteed under Article 17 of the Charter.

Ruling on its jurisdiction to answer the question referred, the Court stated that the concept of 'implementing EU law', as referred to in Article 51 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. It added that, in order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law, the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and also whether there are specific rules of EU law on the matter or capable of affecting it (paragraphs 24 and 25).In the present case, to find that it did not have jurisdiction, the Court applied several of the criteria which it thus identified. It found that the provisions of EU law raised by the referring court do not impose any obligation on the Member States as regards the situation at issue in the main proceedings. In addition, it noted that the objectives of the EU law rules and those of the national legislation at issue are not the same. Finally, it stated that the provisions of the national legislation at issue do not constitute an implementation of rules of EU law and found that it did not have jurisdiction to answer the question referred by the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily (Italy) (paragraphs 26 to 33 and the operative part).

Judgment of 21 December 2011 (Grand Chamber), N.S. and Others (C-411/10 and C-493/10, EU:C:2011:865)

The dispute in the main proceedings concerned a number of third country nationals who had claimed asylum in the United Kingdom or in Ireland while having previously transited through Greece. They objected to their transfer to Greece, the Member State normally responsible for examining their asylum claims by application of Regulation No 343/2003 [12] ('the Dublin II Regulation'). They argued that such a transfer would infringe their fundamental rights or that the procedures and conditions for asylum seekers in Greece are inadequate and that the Member State in whose territory they were at the time was required to exercise its power under Article 3(2) of the Dublin II Regulation to accept responsibility for examining and deciding on their asylum claims.

That case posed, in particular, two questions concerning the field of application of the Charter.

Thus, initially, the Court had to rule on whether the decision, adopted by a Member State on the basis of Article 3(2) of the Dublin II Regulation to examine or refuse to examine an asylum claim in respect of which it is not responsible in the light of the criteria set out in Chapter III of that regulation, falls within the field of application of EU law, for the purposes of Article 6 TEU and/or Article 51 of the Charter. In that regard, the Court pointed out that Article 3(2) of the Dublin II Regulation grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the Union

12 Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

legislature. That discretion must be exercised in compliance with the other provisions of that regulation. Furthermore, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of the Dublin II Regulation and must, where appropriate, inform the other Member State or Member States concerned by the asylum application. Consequently, in the view of the Court, a Member State which exercises the discretion conferred by Article 3(2) of the Dublin II Regulation must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter (paragraphs 55, 65 to 69, and paragraph 1 of the operative part).

Next, since some questions referred were raised with regard to the United Kingdom's obligations in relation to the protection conferred on a person to whom the Dublin II Regulation applies, the question arose as to whether the taking into account of Protocol No 30 [13] on the application of the Charter of Fundamental Rights of the European Union to the Republic of Poland and the United Kingdom affected in any way the answers given. The Court answered that it did not. To reach that conclusion, it pointed out that it is clear from Article 1 thereof that the protocol does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the third and sixth recitals of that protocol. In those circumstances, the Court held that Article 1(1) of Protocol No 30 explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions (paragraphs 116, 119, 120, 122 and paragraph 4 of the operative part). [14]

Judgment of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court) C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

In the main proceedings, three Polish judges of the Supreme Administrative Court and the Supreme Court complained about their early retirement under new national legislation. In support of their actions before the Labour and Social Insurance Chamber of the Sąd Najwyższy (Supreme Court, Poland), they argued, inter alia, that such early retirement infringed Article 19(1), second subparagraph, TEU and Article 47 of the Charter as well as Directive 2000/78. [15] Although, following a change in that legislation, the applicants were retained or reinstated in their posts, the referring court considered that it was still faced with a problem of a procedural nature. Although such cases would ordinarily fall within the jurisdiction of the Disciplinary Chamber, as newly created within the Supreme Court, the referring court asked whether, on account of concerns relating to the independence of that chamber, it was required to disapply national rules on the distribution of jurisdiction and, if necessary, rule itself on the substance of those cases.

In that context, the referring court asked the Court in particular whether Article 2 and the second subparagraph of Article 19(1) TEU and Article 47 of the Charter must be interpreted as meaning that a chamber of a supreme court of a Member State, such as the disciplinary

13 Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom (OJ 2010 C 83, p.313) ('the Protocol (No 30)').

14 That judgment was presented in the 2011 Annual Report, p. 61.

15 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

chamber concerned, satisfies, having regard to the conditions governing its establishment and the appointment of its members, the requirements of independence and impartiality required under those provisions of EU law.

Before answering that question on its merits, the Court ruled on its jurisdiction and considered whether the national provisions at issue in the main proceedings implemented EU law, thus falling within the scope of the Charter.

As regards the question of the scope of the Charter, the Court stressed that, in this case, the applicants alleged infringements of the prohibition of age discrimination in employment provided for in Directive 2000/78, Article 9 of which reaffirms the right to an effective remedy. It concluded that these cases were situations governed by EU law. The question raised relates to whether the national body normally competent to hear and determine a dispute in which an individual relies on a right which he derives from EU law satisfies the requirements of the right to an effective judicial remedy, as guaranteed by Article 47 of the Charter and Article 9(1) of Directive 2000/78.

Furthermore, with regard to the scope of the second subparagraph of Article 19(1) TEU, the Court recalled that that provision is intended to guarantee effective judicial protection in 'areas covered by EU law', irrespective of the situation in which the Member States implement that law within the meaning of Article 51(1) of the Charter.

Finally, the Court added that the Protocol (No 30) on the application of the Charter to Poland and the United Kingdom also does not call into question the applicability of the Charter in Poland and is not intended to relieve Poland of the obligation to comply with the provisions of the Charter (paragraphs 78-85 and 100).

Judgment of 19 November 2019 (Grand Chamber), TSN and AKT (C-609/17 and C-610/17, EU:C:2019:981)

The workers at issue in these cases were entitled, under the collective agreement applicable to their sector of activity, to a period of paid annual leave exceeding the minimum period of four weeks provided for in Article 7(1) of Directive 2003/88, [16] namely seven weeks (Case TSN, C-609/17) and five weeks (Case AKT, C-610/17). Those workers had been unable to work due to illness during a period of paid annual leave and had asked their respective employers to carry over the part of the annual leave to which they had not been entitled. However, their employers refused to grant those requests in so far as they concerned the part of the right to paid annual leave exceeding the minimum leave period of four weeks laid down by Directive 2003/88.

In these cases, the Työtuomioistuin (Labour Court, Finland) considered, inter alia, whether Article 31(2) of the Charter on the right to paid annual leave precluded national rules and collective agreements which provide for the granting of paid annual leave in excess of the minimum period of four weeks laid down in Directive 2003/88, while excluding carry-over of such leave on grounds of illness.

[16] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

Ruling on the question whether such regulations fall within the scope of the Charter, the Court first recalled that, as regards action by the Member States, the provisions of the Charter are addressed to them only when they are implementing EU law. The Court went on to state that the mere fact that internal measures fall within an area in which the Union has competence cannot bring them within the scope of EU law and render the Charter applicable.

In that regard, the Court pointed out, inter alia, that Directive 2003/88, which was adopted on the basis of Article 137(2) EC, now Article 153(2) TFEU, merely lays down the minimum safety and health requirements for the organisation of working time. Under Article 153(4) TFEU, such minimum requirements are not to prevent any Member State from maintaining or introducing more stringent protective measures that are compatible with the Treaties. Accordingly, Member States remain free, in exercising the powers they have retained in the area of social policy, to adopt such measures, more stringent than those which are the subject matter of action by the EU legislature, provided that those measures do not undermine the coherence of that action.

The Court thus found that, where Member States grant, or permit their social partners to grant, rights to paid annual leave which exceed the minimum period of four weeks laid down by Directive 2003/88, such rights, or the conditions for a possible carrying over of those rights in the event of illness which has occurred during the leave, fall within the exercise of the powers retained by Member States, without being governed by that directive. Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter. Accordingly, the Court concluded that, by adopting such regulations or authorising the negotiation of collective agreements such as those at issue in the main proceedings, a Member State is not implementing that directive within the meaning of Article 51(1) of the Charter, with the result that the latter, in particular Article 31(2) thereof, is not intended to apply (paragraphs 42 to 55).

Judgment of 1 December 2016, Daouidi (C-395/15, EU:C:2016:917)

In this case, in the main proceedings, the appellant disputed his dismissal. While the appellant was temporarily unable to work for an indeterminate period, following a work-related accident, he had been dismissed on disciplinary grounds. Accordingly, he brought an action before the Juzgado de lo Social No 33, Barcelona (Social Court No 33, Barcelona, Spain) seeking, primarily, a declaration that his dismissal was null and void.

That court stated that there was sufficient evidence on which to take the view that the true reason for the dismissal was his temporary inability to work for an indeterminate period as a result of the accident that he had suffered at work. Consequently, it was unsure whether such a dismissal should not be regarded as contrary to EU law, in that it might constitute an infringement of the principle of non-discrimination, of the right to protection against unjustified dismissal, of the right to fair and just working conditions, of the entitlement to social security benefits and social services, and of the right to health protection, enshrined respectively in Articles 21(1), 30, 31, 34(1) and 35 of the Charter.

The Court recalled that, by virtue of settled case-law, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions

of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction. It held, in particular, with regard to Directive 2000/78, [17] that the fact that a person finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate period by reason of an accident at work, does not mean that the limitation suffered by that person may be classified as 'long-term', within the meaning of the notion of 'disability' referred to in that directive. In this case, the Court concluded that it did not have jurisdiction to answer the question referred (paragraphs 63, 64, 65 and 68).

Judgment of 16 May 2017 (Grand Chamber), Berlioz Investment Fund (C-682/15, EU:C:2017:373)

The dispute in the main proceedings was between the company Berlioz Investment Fund and the directeur de l'administration luxembourgeoise des contributions directes, concerning a pecuniary penalty which the latter imposed on Berlioz for its refusal to respond to a request for information in the context of an exchange of information with the French tax administration. The appellant had in fact given a partial response to that request for information, being of the view that the other information requested was irrelevant, within the meaning of Directive 2011/16/EU, [18] to an assessment of whether the issue of dividends by its French subsidiary should be subject to a withholding tax, that being the subject matter of the checks being carried out by the French tax administration. By reason of that partial response, the directeur de l'administration des contributions directes had imposed an administrative fine on it on the basis of a Luxembourg law.

The appellant had then brought an action before the tribunal administratif (Luxembourg) and asked that court to determine whether the information order of 16 March 2015 was well founded. That court upheld in part the main action for variation and reduced the fine as a result, but dismissed the action as to the remainder, holding that there was no need to adjudicate on the action for annulment brought in the alternative. The appellant then lodged an appeal before the Cour administrative (Luxembourg), maintaining that the refusal of the tribunal administratif, based on the Luxembourg Law, to determine whether the information order was well founded constituted a breach of its right to an effective judicial remedy as guaranteed by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

Considering that it might be necessary to take account of Article 47 of the Charter, which mirrors the right referred to in Article 6(1) of the ECHR, the referring court questioned, inter alia, for the purposes of application of the Charter, whether a Member State must be regarded as implementing EU law, within the meaning of Article 51(1) thereof, when it provides in its legislation for a pecuniary penalty to be imposed on a person who refuses to provide information in the context of an exchange of information between tax administrations based inter alia, on the provisions of Directive 2011/16.

In the view of the Court, it is necessary to determine whether a national measure providing for such a penalty can be regarded as an implementation of EU law. To that end, it noted that

[17] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

[18] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

Directive 2011/16 imposes certain obligations on the Member States. In particular, it noted that Article 5 of that directive provides that the requested authority is to communicate certain information to the requesting authority. Furthermore, it stated that under Article 18 of Directive 2011/16, entitled 'Obligations', the requested Member State is to use its measures aimed at gathering information to obtain the requested information. In addition, in the view of the Court, as set out in Article 22(1)(c) of Directive 2011/16, Member States must take all necessary measures to ensure the smooth operation of the administrative cooperation arrangements provided for in the directive. It thus pointed out that, while it refers to the measures aimed at gathering information that exist under national law, Directive 2011/16 thus requires Member States to take the necessary measures to obtain the requested information in a way that is consistent with their obligations in relation to the exchange of information. In that regard, it took the view that the fact that Directive 2011/16 does not make express provision for penalties to be imposed does not mean that penalties cannot be regarded as involving the implementation of that directive and, consequently, falling within the scope of EU law. In consequence, it concluded that Article 51(1) of the Charter must be interpreted as meaning that a Member State implements EU law within the meaning of that provision, and that the Charter is therefore applicable, when that Member State makes provision in its legislation for a pecuniary penalty to be imposed on a relevant person who refuses to supply information in the context of an exchange between tax authorities based, in particular, on the provisions of Directive 2011/16/EU (paragraphs 32 to 42 and paragraph 1 of the operative part).

Judgment of 13 June 2017 (Grand Chamber), Florescu and Others (C-258/14, EU:C:2017:448)

In this case, the appellants in the main proceedings were Romanian judges who also held, in parallel, university teaching positions. After more than 30 years' service as judges, they had claimed their pension entitlements which, in accordance with the national law in force, they were able to combine with the income derived from their university teaching activity. However, against the background of the economic crisis, a new law prohibiting such a combination had then been adopted and declared consistent with the Constitution by the Curtea Constituțională (Constitutional Court, Romania). The appellants therefore brought an action against the suspension of their retirement pensions, claiming that that new law ran counter to EU law, particularly to the provisions of the EU Treaty and of the Charter. Since that action was dismissed at first instance, then on appeal, the appellants then brought an application before the referring court for revision of that judgment. In that context, that court asked the Court of Justice in particular whether Article 6 TEU and Article 17 ('Right to property') of the Charter precluded national legislation which prohibits the combining of the net retirement pension with income from activities carried out in public institutions if the amount of the pension exceeds the amount of the national gross average salary on the basis of which the State social security budget was drawn up.

Before addressing the substance of the referring court's question, the Court first examined whether such national legislation could be regarded as implementing EU law, in order to determine whether the Charter did indeed apply to the dispute in the main proceedings.

In that regard, it noted that, as the referring court explained, the law at issue was adopted to enable Romania to meet the undertakings which it gave to the European Union on an economic programme allowing it to benefit from a facility providing financial assistance for balances of

payments which are set out in a Memorandum of Understanding. [19] Among the conditions laid down in that Memorandum of Understanding are the reduction of the public sector wage bill and, in order to improve the long-term sustainability of public finances, the reform of key parameters of the pension system. Accordingly, the Court held that the purpose of the aggregation measure at issue in the main proceedings, which simultaneously pursues the two objectives referred to above, is to implement the undertakings given by Romania in the Memorandum of Understanding, which is part of EU law. The memorandum is based in law on Article 143 TFEU, which gives the European Union the power to grant mutual assistance to a Member State whose currency is not the euro and which faces difficulties or is seriously threatened with difficulties as regards its balance of payments (paragraphs 31, 45 and 47).

The Court added that it is true that the Memorandum of Understanding leaves Romania some discretion in deciding what measures are most likely to lead to performance of those undertakings. However, on the one hand, where a Member State adopts measures in the exercise of the discretion conferred upon it by an act of EU law, it must be regarded as implementing that law, within the meaning of Article 51(1) of the Charter. On the other hand, the objectives set out in Article 3(5) of Decision 2009/459, [20] as well as those set out in the Memorandum of Understanding, are sufficiently detailed and precise to permit the inference that the purpose of the prohibition on combining a public-sector retirement pension with income from activities carried out in public institutions, stemming from Law No 329/2009, is to implement both the memorandum and that decision, and thus EU law, within the meaning of Article 51(1) of the Charter. Consequently, the latter is applicable to the dispute in the main proceedings (paragraph 48).

Judgment of 7 November 2019, UNESA and Others (C-80/18 to C-83/18, EU:C:2019:934)

The main proceedings concerned the legality of a number of Spanish taxes on nuclear energy, which were challenged by companies producing nuclear energy. The Tribunal Supremo (Supreme Court, Spain), hearing these cases, asked the Court whether the rules providing for those taxes were compatible with EU law. In essence, the referring court sought in particular to ascertain whether the 'polluter pays' principle, referred to in Article 191(2) TFEU, Article 20 ('Equality before the law') and Article 21 ('Non-discrimination') of the Charter as well as Directives 2005/89 [21] and 2009/79, [22] had been complied with by the legislation at issue, given that nuclear power undertakings bore a particularly high share of the taxes concerned compared to other undertakings in the electricity sector.

First of all, as regards the question of the compatibility of the national legislation at issue with Article 191(2) TFEU and Directive 2005/89, the Court stated, in the first place, that the polluter pays principle, as provided for in Article 191(2) TFEU, was not capable of being applied to the situation in the main proceedings, since that provision was not implemented either by Directive 2009/72 or by Directive 2005/89. In the second place, with regard to the applicability of Directive 2005/89, the Court noted that the requests for a preliminary ruling did not contain all the

19 Memorandum of Understanding concluded between the European Community and Romania, in Bucharest and Brussels, on 23 June 2009.

20 Council Decision 2009/459/EC of 6 May 2009 providing Community medium-term financial assistance for Romania (OJ 2009 L 150, p. 8).

21 Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment (OJ 2006 L 33, p. 22).

22 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

information set out in Article 94(c) of its Rules of Procedure and consequently considered that that lack of information did not enable it to rule on the applicability of Articles 20 and 21 of the Charter. In that regard, the Court recalled that Article 51(1) of the Charter confirms the settled case-law of the Court, which states that the fundamental rights guaranteed in the EU legal order are applicable in all situations governed by EU law, but not outside such situations. Where a legal situation does not come within the scope of EU law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction. In this case, the applicability of Articles 20 and 21 of the Charter could have been established only if Article 191(2) TFEU or Directive 2005/89 had been applicable. Since it did not appear that those provisions were capable of being applied to the disputes in the main proceedings, the Court declared inadmissible the question concerning the interpretation of Articles 20 and 21 of the Charter, read in conjunction with those provisions (paragraphs 30 and 35 to 40).

Next, as regards the applicability of Directive 2009/72, the Court recalled that the principle of non-discrimination laid down in Article 3(1) thereof is binding on the Member States only where the national situation at issue falls within the scope of EU law. Noting in this case that the situations at issue were purely internal and that the taxes concerned were measures of a fiscal nature, the Court held that, since Directive 2009/72 did not constitute a measure aimed at the approximation of the tax provisions of the Member States, the principle of non-discrimination laid down in Article 3(1) thereof did not apply to the contested legislation. The Court therefore held that, in the absence of any other specification in the order for reference as to another instrument of EU law which the national legislation would implement, it could not be considered that, by adopting that legislation, the Kingdom of Spain had implemented EU law. Consequently, the Court found that it had no jurisdiction to answer questions concerning that Directive as regards the interpretation of Articles 20 and 21 of the Charter (paragraphs 47, 48, 51 and 53).

Order of 7 September 2017, Demarchi Gino (C-177/17 and C-178/17, EU:C:2017:656)

The main proceedings were between creditors who had participated in two separate bankruptcy proceedings and the Ministero della Giustizia (Ministry of Justice, Italy), concerning the payment of sums due from the latter, as fair compensation, as a result of the duration of the legal proceedings. Since those proceedings had in fact been excessively lengthy, those creditors brought an appeal before the Corte d'appello di Torino (Court of Appeal, Turin, Italy) seeking to obtain compensation for the loss suffered, on the basis of an Italian law. That court upheld their claims. The appellants then lodged an appeal before the referring court seeking enforcement of the obligations which those decisions, having acquired the force of *res judicata*, placed on the public administration concerned. However, the appellants had not satisfied the requirements laid down in Italian law, involving complex administrative formalities, so that the referring court had to declare their appeals inadmissible.

Being doubtful as to the compatibility of the provision of the Italian law on those formalities with the right to a fair hearing laid down in the Charter, the referring court asked the Court of Justice whether the principle affirmed in Article 47(2) ('Right to an effective remedy and to a fair trial') of the Charter, read in conjunction with Articles 67, 81 and 82 TFEU, must be interpreted as precluding national legislation that requires persons having suffered harm as a result of the excessive duration of legal proceedings regarding a matter falling within the sphere of judicial

cooperation to carry out a series of complex administrative operations in order to obtain payment of the fair compensation that the State was ordered to pay them, without being entitled, in the meantime, to take legal action for enforcement and, subsequently, to claim compensation for the harm caused by the delay in that payment being made.

The Court recalled its case-law concerning the fact that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings. In that case, it noted that the provisions of the FEU Treaty referred to by the referring court impose no specific obligations on the Member States as regards the recovery of sums owed by the State by way of fair compensation for the excessive duration of legal proceedings, and that, as it currently stands, EU law includes no specific rules in that field. It deduced from the various factors examined that it did not have jurisdiction to answer the question referred by the referring court (paragraphs 21 to 25, 28, 29 and the operative part).

2.1.2. The question of the invocability between individuals of certain provisions of the Charter

Judgments of 6 November 2018 (Grand Chamber),Bauer and Willmeroth (C-569/16 and C-570/16, EU:C:2018:871) and Max-Planck-Gesellschaft zur Förderung der Wissenschaften (C-684/16, EU:C:2018:874)

In these three cases, as a result of paid annual leave not taken before the end of the employment relationship in question, the dependants of the workers concerned, on the one hand, and the worker concerned, on the other, had been confronted with a refusal by their respective former employers to pay financial compensation for that untaken annual leave. In the first case (Bauer and Willmeroth, C-569/16 and C-570/16), Ms Bauer and Ms Broßonn had applied to the city of Wuppertal and Mr Willmeroth respectively, in their capacity as former employers of their deceased spouses, for financial compensation in respect of paid annual leave not taken by the latter before their deaths. In the second case (Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16), Mr Shimizu, a former employee of the Max-Planck company, claimed compensation from the company for days of holiday not taken before the end of the employment relationship between them. Under the applicable national provisions, a worker's entitlement to paid annual leave was extinguished on the death of the worker and where the worker, during his employment relationship, had not requested to take his paid annual leave during the reference period to which it related. In those circumstances, the right to paid annual leave could not be converted into a right to financial compensation.

Seised of these various cases, the Bundesarbeitsgericht (Federal Labour Court, Germany) considered, inter alia, whether, in each of these cases, if national rules such as those at issue in the cases could not be interpreted in such a way as to ensure compliance with Article 7 of Directive 2003/88 [23] and paragraph 2 of Article 31 ('Right to paid annual leave') of the Charter, direct effect should be given to those provisions of EU law, meaning that the national court

[23] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). In particular, Article 7 of that directive governs the right of every worker to paid annual leave of at least four weeks.

would be obliged to leave those national rules unapplied. The referring court further queried whether such a crowding-out effect of the national rules at issue could also occur in the context of a dispute between two individuals, as in the cases of Willmeroth (C-570/16) and Max-Planck-Gesellschaft zur Förderung der Wissenschaften (C-304/16).

These cases raised two issues relating to the scope of the Charter.

Thus, first, in assessing the existence of a national measure implementing EU law, the Court emphasised the particular importance of the right to paid annual leave not only as a principle of EU social law, but also because it is expressly enshrined in Article 31(2) of the Charter. In that respect, recalling that the fundamental rights guaranteed in the EU legal order are intended to be applied in all situations governed by EU law, the Court held that, since the national legislation at issue in the various cases (partly common to both judgments) constituted an implementation of Directive 2003/88, Article 31(2) of the Charter was intended to apply to those cases.

Second, the Court was called upon to rule on the scope of Article 31(2) of the Charter. More specifically, it was for the Court to determine whether that provision could be relied on directly by individuals, both in relation to a public employer and a private employer, in order to obtain from the national court, first, an order setting aside the contested legislation at issue in each case and, second, where appropriate, an order ensuring that the dependants of the deceased worker or the worker in question are not deprived of financial compensation for leave earned and not taken, that compensation being payable by the former employer concerned.

On that point, the Court stated first of all that, by providing, in mandatory terms, that 'every worker' is 'entitled' 'to a period of paid annual leave', Article 31(2) of the Charter reflects the essential principle of social law from which derogation may be made only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the essential content of the right to paid annual leave. Thus, relying on the judgment in Egenberger, [24] the Court affirmed that the right to a period of paid annual leave, enshrined in Article 31(2) of the Charter, is, as regards its very existence, both imperative and unconditional, since it does not require to be given concrete form by provisions of EU or national law, which are called upon only to specify the exact duration of the annual leave. The Court then deduced that the said provision was sufficient in itself to confer on workers a right that could be relied on as such in a dispute between them and their employer in a situation covered by EU law and therefore falling within the scope of the Charter. Accordingly, the Court stated that the consequence of Article 31(2) of the Charter, as regards situations falling within its scope, is that the national court must disapply national rules such as those at issue in those two judgments (Bauer and Willmeroth, C-569/16 and C-570/16, paragraphs 84 to 86) (Max-Planck-Gesellschaft zur Förderung der Wissenschaften, C-684/16, paragraphs 73 to 75).

Next, as regards the effect of Article 31(2) of the Charter on employers who are private individuals, the Court noted that, while Article 51(1) of the Charter states that its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to Member States only when they are implementing EU law, Article 51(1) does not address the question whether such individuals may, where appropriate, be

[24] Judgment of 17 April 2018, *Egenberger*, (C-414/16, EU:C:2018:257).

directly bound by certain provisions of the Charter and that article cannot therefore be interpreted as systematically excluding such a possibility. The Court concluded that, where it is impossible to interpret national rules such as those at issue in these various cases in such a way as to ensure compliance with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the national court must also ensure that the dependants of the deceased worker or the worker in question are not deprived of the financial compensation for leave earned and not taken, such compensation being payable by the former employer concerned. Such an obligation is imposed on the national court by virtue of Article 7 of Directive 2003/88 and Article 31(2) of the Charter when the dispute is between an individual and an employer who is a public authority, and by virtue of the second of those provisions where the dispute is between the individual and an employer who is a private individual (Case C-569/16 and C-570/16 Bauer and Willmeroth, paragraphs 87-92 and operative part 2) [25] (Case C-684/16 Max-Planck-Gesellschaft zur Förderung der Wissenschaften, paragraphs 76-81 and operative part 2). [26]

2.2. Obstacle to or restriction of an EU right or denial of the genuine enjoyment thereof

Judgment of 30 April 2014, Pfleger and Others (C-390/12, EU:C:2014:281)

This case involved four disputes, in all of which gaming machines operated without authorisation and thus allegedly used to organise prohibited games of chance were provisionally seized following controls carried out in various places in Austria. Those machines had in fact been used without prior authorisation from the administrative authorities, required by the Austrian Federal Law on games of chance (Glücksspielgesetz, BGBl. 620/1989).

The Unabhängiger Verwaltungssenat des Landes Oberösterreich (Independent Administrative Tribunal of the Province of Upper Austria), seised of those disputes, referred a question to the Court of Justice concerning the compatibility of that system with the freedom to provide services guaranteed in Article 56 TFEU and with Articles 15 to 17, 47 and 50 of the Charter. That court considered, in particular, that the Austrian authorities failed to show either that the crime and/or addiction to gambling constituted a significant problem during the period at issue or that fighting crime and protecting gamblers, and not merely increasing State tax revenue, constituted the real objective of the monopoly system of games of chance.

In the proceedings before the Court, a number of national Governments argued that the Charter did not apply to the case, on the ground that the field of games of chance was not harmonised and the national legislations in that field thus did not represent an implementation of EU law for the purpose of Article 51(1) of the Charter.

In that regard, the Court stated that, where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it may benefit from the exceptions provided for by EU law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. In its view, that obligation to comply with fundamental rights manifestly comes within the scope of EU law and, consequently,

[25] That judgment was presented in the 2018 Annual Report, p. 18.
[26] That judgment was presented in the 2018 Annual Report, p. 17 and 18.

within that of the Charter. Consequently, the use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded as 'implementing [EU] law' within the meaning of Article 51(1) of the Charter.

In this case, therefore, the Charter was applicable. Indeed, the system put into place in Austria as regards games of chance constituted a restriction on the freedom to provide services guaranteed in Article 56 TFEU. Moreover, the justifications put forward for that system were the protection of gamblers by restricting the supply of games of chance and the fight against crime connected with those games by channelling them through controlled expansion, which are among those recognised by the Court's case-law as capable of justifying restrictions on fundamental freedoms in the sector of games of chance. The Court held that an examination of the restriction represented by that national legislation from the point of view of Article 56 TFEU also covers possible limitations of the exercise of the rights and freedoms provided for in the Charter, so that a separate examination is not necessary (paragraphs 35, 36, 39, 42 and 60). [27]

Judgments of 13 September 2016 (Grand Chamber), Rendón Marín (C-165/14, EU:C:2016:675) and CS (C-304/14, EU:C:2016:674)

On account of their criminal records, two third-country nationals were refused a residence permit and issued with a deportation order respectively by the authorities of the host Member State, of which their minor children, in their care, were nationals and thus held European Union citizenship. In the first, (the case of *Rendón Marín, C-165/14*), the appellant was the father of two minor children, a son having Spanish nationality and a daughter having Polish nationality, who were in his sole care and who had been resident in Spain since birth. In the second (the case of *CS, C-304/14*), the person concerned was the mother of a child with British nationality who lived with her in the United Kingdom and who was in her sole care.

Seised of those disputes, the referring courts (the Tribunal Supremo (Supreme Court, Spain) and the Upper Tribunal (United Kingdom), respectively, asked the Court whether the existence of a criminal record could alone justify the refusal of a right of residence to or the deportation of a third-country national in whose sole care was a minor EU citizen.

The Court of Justice first explained that Directive 2004/38 on the freedom of movement and residence of Union citizens and their family members [28] applied only to EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them. In the two situations in these cases, only the appellant in the first case and his daughter could therefore benefit from a right of residence under that directive. Although the directive was applicable only to the situation of one of the children, however, the three children concerned by those two cases could rely, by virtue of Article 20 TFEU and of the mere fact of their status as EU citizens, on the rights pertaining to that status (which include, inter alia, the right of free movement and the right of residence in the territory of the Member States).

27 That judgment was presented in the 2014 Annual Report, p. 37.

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

The Court then recalled that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the EU citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the European Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status. In the view of the Court, the situations referred to above have the common feature that, although they are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of an EU citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom. The Court accordingly deduced therefrom that the three children concerned by those two cases, as citizens of the European Union, have the right to move and reside freely throughout the territory of the European Union and any restriction of that right falls within the ambit of EU law. In the view of the Court, since both situations at issue could potentially mean, if the third-country national parents had to leave the territory of the European Union, the consequential departure of their children, those situations could deprive the three children of the genuine enjoyment of the substance of the rights which the status of EU citizen confers upon them. Accordingly, both situations fall within the field of application of EU law.

Finally, in those two judgments, the Court noted that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, it also stated that, in so far as the situation of that third-country national falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter (case of *Rendón Marín* , C-165/14, paragraphs 74 to 81 and 85) (case of *CS* , C-304/14, paragraphs 29 to 33, 36 and 48).

Judgment of 18 June 2020 (Grand Chamber), Commission v Hungary (Transparency of associations) (C-78/18, EU:C:2020:476)

In 2017, Hungary had adopted a law presented as aiming to ensure the transparency of civil organisations receiving donations from abroad (Act No. LXXVI of 2017 on the transparency of organisations receiving aid from abroad). Under that law, those organisations have to register with the Hungarian courts as an 'organisation in receipt of support from abroad' where the amount of the donations sent to them from other Member States or from third countries over the course of a year exceeds a set threshold. When registering, they must also indicate, in particular, the name of the donors whose support reached or exceeded the sum of 500 000 Hungarian forints (HUF) (approximately EUR 1 400) and the exact amount of the support. That information is then published on a freely accessible public electronic platform.

Furthermore, the civil organisations concerned must state, on their homepage and in all their publications, that they are an 'organisation in receipt of support from abroad'.

The Commission alleged that Hungary had failed to fulfil its obligations under Article 63 TFEU (referring to the freedom of movement of capital), Article 7 ('Respect for private and family life'), Article 8 ('Protection of personal data') and Article 12 ('Freedom of assembly and of association') of the Charter by imposing, through the adoption of that law, such registration, declaration and publicity obligations on certain categories of civil society organisations receiving foreign aid above a certain threshold, and by providing for possible sanctions against organisations not complying with those obligations. In support of that regulation, Hungary relied on various objectives intended to increase the transparency of the financing of civil society organisations and protect public order and public security by combating money laundering, terrorist financing and organised crime.

As regards the applicability of the Charter, the Court recalled that, where a Member State claims that a measure of which it is the author, and which restricts a fundamental freedom guaranteed by the TFEU, is justified on the basis of that Treaty or by an overriding reason relating to the public interest recognised by EU law, such a measure must be regarded as implementing EU law, within the meaning of Article 51(1) of the Charter, so that such a measure must comply with the fundamental rights enshrined in the Charter (paragraph 101).

In this case, the Court found that the legislation at issue constituted a restriction on the free movement of capital prohibited by Article 63 TFEU, and that Hungary relied on the existence of an overriding reason relating to the public interest as well as the reasons mentioned in Article 65 TFEU to justify that restriction. Accordingly, the Court held that the provisions of that Act must be in conformity with the Charter, that requirement implying that the provisions of the Act do not impose any limitations on the rights and freedoms enshrined in the Charter or, if they do, that such limitations are justified in the light of the requirements of Article 52(1) of the Charter. The Court then held that it was necessary to examine whether those provisions limited the rights protected by Articles 7, 8 and 12 of the Charter and, if so, whether they were nevertheless justified (paragraphs 102-104).

Judgment of 6 October 2020 (Grand Chamber), Commission v Hungary (Higher Education), (C-66/18, EU:C:2020:792)

The Commission complained that Hungary had failed to fulfil its obligations under, inter alia, Article XVII of the General Agreement on Trade in Services ('GATS'), [29] Articles 49 and 56 TFEU, and Articles 13 ('Freedom of the arts and sciences'), 14(3) ('Freedom to found educational establishments') and 16 ('Freedom to conduct a business') of the Charter, by making the exercise in Hungary of a business activity in the field of education and training subject to the conditions laid down in the Charter, the exercise of degree-granting activity in Hungary by foreign higher education institutions located outside the European Economic Area on the twofold condition that the Hungarian Government and the Government of the State of the seat of the institution

[29] The General Agreement on Trade in Services is an annex to the Agreement establishing the World Trade Organisation (WTO). That WTO Agreement was signed by the Union and approved by the Union on 22 December 1994 by Decision 94/800/EC (OJ 1994 L 336, p. 1). Article XVII of the GATS, entitled 'National Treatment', provides in paragraph 1 that 'in the sectors listed in its Schedule, and subject to the conditions and limitations specified therein, each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers'.

concerned be bound by an international convention and that the said institutions provide higher education in the State of their seat. In order to justify that regulation, which constituted the implementation of Article XVII of the GATS, Hungary relied, inter alia, on overriding reasons relating to the public interest concerning the prevention of deceptive practices by higher education institutions and the need to ensure a high standard of quality in higher education.

As regards the applicability of the provisions of the Charter, the Court recalled that, as regards action by the Member States, the scope of the Charter is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only 'when they are implementing EU law'. In that regard, the Court noted that the GATS is part of EU law. Thus, on the one hand, when Member States implement GATS obligations, they must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter. The Court also recalled that, where a Member State claims that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the TFEU is justified by an overriding reason relating to the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, so that it must comply with the fundamental rights enshrined in that Charter. Consequently, the Court held that the measures at issue must comply with the fundamental rights enshrined in the Charter. Having previously found that Hungary relied on objectives of general interest to justify those limitations, the Court indicated that it was necessary to examine whether those measures limited the fundamental rights relied on by the Commission and, if so, whether they were nevertheless justified by the reasons put forward by Hungary (paragraphs 212 to 216).

III. Cases in which the referring court has failed to establish a degree of connection with EU law

Judgment of 8 May 2014, Pelckmans Turnhout (C-483/12, EU:C:2014:304)

In the dispute in the main proceedings, a Belgian company operating garden centres had applied for an end to be put to the practice of a number of competitor companies of opening their shops seven days a week when Belgian law imposed a weekly rest day. The competitor companies were of the view, for their part, that the legislation ran counter to EU law.

Seised of the case, the rechtbank van koophandel te Antwerpen (Commercial Court, Antwerp, Belgium) referred, firstly, questions to the Court for a preliminary ruling (see, for the Court's answer, the order of 4 October 2012, *Pelckmans Turnhout*, C-559/11, EU:C:2012:615) and, secondly, a question of constitutionality to the Grondwettelijk Hof (Constitutional Court, Belgium). That court decided, in turn, to make a reference to the Court. Since the disputed legislation provided for exceptions and did not apply to all traders, that court was doubtful as to its compatibility with the principles of equal treatment and non-discrimination set out in particular in Articles 20 and 21 of the Charter. It therefore requested the Court to interpret those articles, read in the light of Article 15 ('Freedom to choose an occupation and right to engage in work') and Article 16 ('Freedom to conduct a business') of the Charter, and of Articles 34 to 36 TFEU (concerning the free movement of goods), and Articles 56 and 57 TFEU (concerning the freedom to provide services).

The Court held that it was not established that it had jurisdiction to interpret the provisions cited of the Charter in this case. To reach that conclusion, it first recalled that, in accordance with Article 94(c) of its Rules of Procedure, a request for a preliminary ruling must contain a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the connection between those provisions and the national legislation applicable to the main proceedings. That statement of reasons, like the summary of the relevant findings of fact required under Article 94(a) of those rules, must be of such a kind as to enable the Court to ascertain, not only whether the request for a preliminary ruling is admissible, but also whether it has jurisdiction to answer the question referred. The Court found, in this case, that the order for reference contained nothing specific demonstrating that the legal situation at issue in the main proceedings came within the scope of EU law, which is required for a Member State to be able to request interpretation of the Charter. In the view of the Court, the order for reference contained nothing which established a connection between the facts of those proceedings and one of the situations covered by the Treaty provisions also referred to by the referring court (paragraphs 16, 20, 22, 23, 26, 27 and operative part).

Order of 15 May 2019, Corte dei Conti and Others (C-789/18 and C-790/18, not published, EU:C:2019:417)

The disputes in the main proceedings concerned two judges of the Corte dei Conti (Court of Auditors, Italy) who, in addition to their remuneration as judges, received emoluments in respect of a previous activity carried out in the service of state entities. Their remuneration as judges had been reduced in so far as, when added to those emoluments, that remuneration exceeded the ceiling provided for by the national legislation in question.

The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), before which these cases were brought, questioned the compatibility of such a regulation with several provisions of the EU Treaty and the FEU Treaty, Article 15 ('Freedom to choose an occupation and right to engage in work'), Article 20 ('Equality before the law'), Article 21 ('Non-discrimination') and Article 31 ('Fair and just working conditions') of the Charter, as well as Articles 3, 5 to 7, 10 and 15 of the European Pillar of Social Rights. The referring court noted that it could not be ruled out that nationals of other Member States could be subject to those national rules in the context of employment which did not involve the powers of a public authority.

Recalling the requirements as to the content of requests for a preliminary ruling laid down in Article 94 of its Rules of Procedure, the Court first of all noted that the elements of the dispute in the main proceedings all appeared to be confined to the territory of a Member State. Next, the Court held that Article 45 TFEU was not capable of conferring rights on the applicants in the main proceedings, since that provision was not applicable to employment in the public administration or to activities which do not present any factor connecting them to any of the situations envisaged by EU law and all the elements of which are confined within a single Member State. Noting that the referring court had not indicated in what way, despite their purely domestic nature, the disputes had a connection with the provisions of the TFEU relating to freedom of movement for workers which would make the requested preliminary ruling necessary for the resolution of those disputes, the Court also held that the referring court had

not specified either the reasons which had led it to question the interpretation of the provisions of the EU Treaty, the FEU Treaty and the European Pillar of Social Rights, or the link which it had established between those provisions and the national legislation applicable in the disputes referred to it.

Finally, as regards the provisions of the Charter referred to in the questions referred for a preliminary ruling, the Court recalled its settled case-law to the effect that, where a legal situation does not fall within the scope of EU law, the Court has no jurisdiction to deal with it and the provisions of the Charter which may be relied on cannot, on their own, provide a basis for that jurisdiction. Consequently, since neither Article 45 TFEU nor the other provisions referred to in the questions referred were applicable, the Court concluded that it did not appear that those disputes concerned national legislation implementing EU law within the meaning of Article 51(1) of the Charter and therefore declared the requests for a preliminary ruling inadmissible (paragraphs 17 to 22, 24, 26 to 30 and operative part).

Order of 30 April 2020, Marvik Pastrogor and Rodes - 08 (C-818/19 and C-878/19, not published, EU:C:2020:314)

In the main proceedings, two Bulgarian renewable energy companies brought an action against the Bulgarian State for reimbursement of a tax on the production of energy from renewable sources. The law providing for the said tax had been declared unconstitutional by the Bulgarian Constitutional Court. In support of their actions, the applicants argued that that tax had been levied in breach of EU law, in particular of Directive 2009/28, [30] Article 16 ('Freedom to conduct a business') and Article 17 ('Right to property') of the Charter.

The referring courts, the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria) in the case of *Marvik Pastrogor* (C-818/19) and the Sofiyski Rayonen sad (Sofia District Court, Bulgaria) in the case of *Rodes - 08* (C-878/19), noting that the Bulgarian Constitutional Court had verified only the constitutionality of that tax and not its compatibility with EU law, then asked the Court whether EU law should be interpreted as precluding national legislation establishing a tax on the production of energy from renewable sources.

First, with regard to the interpretation of Directive 2009/28, the Court stated that its provisions do not prohibit Member States from imposing a tax on the production of energy from renewable sources. However, the Court stated that the directive, which does not constitute a measure relating to the approximation of the tax provisions of the Member States, cannot apply to national legislation establishing such a tax.

Next, with regard to the interpretation of the Charter, the Court recalled that its provisions are addressed to the Member States only when they are implementing EU law. In accordance with settled case-law, the fundamental rights guaranteed within the EU legal order are designed to be applied in all situations regulated by EU law, but may not be applied outside those situations. Where a legal situation does not come within the scope of EU law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction. Accordingly, the Court stated that the applicability of Articles 16 and 17 of the

[30] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p.16).

Charter to the main proceedings can be found only if provisions of EU law other than those of the Charter are referred to by the referring courts. In the present case, first, however, the situations at issue are purely internal, since they have no cross-border element. Second, it was found that Directive 2009/28 is not applicable to the legislation at issue. In those circumstances, in the absence of any further specification in the order for reference of another instrument of EU law which that legislation implements, the Court held that the Republic of Bulgaria could not be considered to have implemented EU law within the meaning of Article 51(1) of the Charter. The Court therefore declared that it clearly lacked jurisdiction to answer the questions referred for a preliminary ruling in so far as they concerned the interpretation of Articles 16 and 17 of the Charter (paragraphs 45, 50 to 53, 55 to 58, 60 and operative part 2).