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AREAS OF APPLICATION OF THE CHARTER OF
FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION:
FIELDS OF CONFLICT?

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*Areas of Application of the Charter of Fundamental Rights of the European Union:
Fields of Conflict?*

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Abstract

Although the Charter of Fundamental Rights of the European Union has already become a fully binding act of primary EU law, the controversies concerning the area of Charter's application do not seem to cease. Nevertheless, this phenomenon should not surprise since the core of this discussion rests upon the fundamental rules of the functioning of the European Union.

While the uniform stand concerning the scope of application of the Charter vis-à-vis national legislation has not yet been elaborated upon, an analysis of the trends emerging in the ECJ case-law seems to be useful. The discussion is still open and two approaches - strict (formal) and flexible (liberal) - compete. Recent case-law of the ECJ proves the existence of specific "gear mechanisms" or "legal connectors" which serve the purpose of determination of the field of the Charter's application on the areas traditionally not covered by the EU law. The case-law at hand also determines the framework in which the existing jurisprudence concerning the general principles of EU law can be applied for delineating the field of the Charter's application.

The questions mentioned above are being explored in light of the prospective ratification of the European Convention of Human Rights by the European Union and discussion about the degree of influence of a Member State's constitutional traditions on interpretation and application of the Charter.

Keywords

Fundamental rights - the Charter of Fundamental Rights of the European Union - scope of application of the Charter - general principles of EU law

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AREAS OF APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: FIELDS OF CONFLICT?

Marek Safjan

Preliminary Remarks

The importance of the Charter of Fundamental Rights (the Charter) has long been discussed and extensive legal literature has been devoted to this subject. It seems, however, that the dispute over its significance has not yet diminished, in a sense, it has even intensified. This is partly due to the fact that the Charter became a fully binding element of the legal order in the European Union (the EU) once the Treaty of Lisbon came into force, which also had an impact on the European Court of Justice (the ECJ) decisions referring to the fundamental rights.

We may conclude that the discussion on the Charter – not free from controversy – is broader than a merely formal or dogmatic dispute, because it touches on fundamental questions related to the functioning of the EU.

In this sense, it is not just an argument over the scope of application of a given provision of European law but a dispute about the constitutional nature of the Charter as an EU act of law determining the character and features of the entire legal order of the European Union.

It is not an exaggeration to say that the conclusions of the debate about the scope of application of the Charter will have a significant influence on the answers to many other questions, namely:

- a) How the "identity of the European Union"¹ will be defined in the future,
- b) What the vertical division of competences between EU institutions and the Member States is like and, therefore, how extensive the autonomy of the national systems is,²
- c) Where the dividing line between the EU constitutional order and the national constitutions should be?,
- d) What the relationship between EU regulations concerning fundamental rights and the European Convention of Human Rights should be like? Or, more precisely, where we should draw the line between the field of the Charter's application in which the competences belong to the ECJ, and the systems of Convention guarantees (where the "last word" belongs to the European Court of Human Rights); this issue is particularly significant because of (although not only) the coming ratification of the European Convention on Human Rights by the European Union.

When looking for answers to the questions on application of the Charter, we must not neglect all these fundamental problems.

¹ Cf. an accurate remark by J. Kokott, Ch. Sobotta *The Charter of Fundamental Rights of the European Union after Lisbon*, EUI Working Paper 2010/6, as for the special significance of the Charter, even within the primary law, in promoting the fundamental rights, p.6.

Cf. also A. Rosas, H. Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de Justice : un premier bilan*, Il Diritto dell'Unione Europea, 2011, 1, p.8, who use the term "valeurs identitaires de la Charte."

² Division of competences has caused argument since the very beginning of works on the Charter of Fundamental Rights, cf. e.g. A. Knook, *The Court, The Charter and the vertical division of powers in the European Union*, Common Market Review no 42, 2005, pp.367-398; Eeckhout, *The EU Charter of Fundamental Rights and the federal question*, Common Market Law Review, no 39, 2002, pp.951-977.

The aim of this article is not to discuss the above issues in detail; in fact, it is much more modest. Its intention is to prove – in the context of some recent case law examples presenting a different ways of arguing – that the answer to the question about the scope of application of the Charter of Fundamental Rights vis-à-vis national regulations connected with EU law is still far from definitive. Later on, an attempt will be made to confront current trends in case law with an earlier position taken by the ECJ on the application of the general principles of EU law.

Before discussing individual issues, just to clear the ground, let us look at the problems which we have already agreed on.

What (Seems to) Be Evident?

Firstly, according to widely shared opinion, the Charter – apart from its evident legal significance – is a symbolic act expressing the "European community of values" and thus making the European Union much more than a mere economic community of interests.³ It is believed that its coming into force, regardless of the disputes over its scope of application, will be a factor stimulating the protection of fundamental rights in the EU on the basis of a "split over" mechanism.⁴

Secondly, beyond any doubt the Charter of Fundamental Rights has the importance of primary law and, from this point of view, hierarchically, it stands over all acts of secondary law. We should, therefore, remember that the Charter may form the basis for assessing the validity of secondary acts of law inasmuch as all other Treaty provisions do.⁵

Thirdly, all seem to agree that the Charter can also be used as a basis for assessing the validity of secondary EU provisions of law and as an important interpretative guidelines for all EU regulations, regardless of rank, and – therefore – also for the Treaty provisions.

Fourthly, as we all fully agree, the application of guarantees laid down in the Charter of Fundamental Rights with regard to national law depends on the "connecting points" between national law and EU law. Although no-one questions whether such points are necessary, there are different opinions as to how they should be understood and defined.

Fifthly, undoubtedly, the Charter is not an autonomous source of the EU powers in relation to national systems, and as such it must not be treated as an instrument defining the autonomous field of application of EU law. On the contrary, it is the field outlined by EU law (*ratione materiae*) which defines the scope of the Charter's application. It is therefore worth noting that – at the present stage of case law development – the status of an EU citizen (*ratione personae*) is undoubtedly not an autonomous criterion, sufficient to apply the Charter of Fundamental Rights. However, to some degree, such a position is forecast in the opinion of Advocate General Jacobs who stressed: "In my opinion, a Community national who goes to another Member State as a worker or self-employed person (...) is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights".⁶

³ Which does not exclude opinions – which I disagree with – questioning the practical significance and rationale of introduction of the Charter of Fundamental Rights, cf. e.g. J.H.H. Weiler, *Does the European Union Treaty Need a Charter of Rights?*, European Law Journal vol.6, 2000, pp.95-97.

⁴ Cf. A. Rosas, op.cit, p.9.

⁵ Cf. Judgment on the protection of personal data - case *Volker und Markus Schecke GbR*, (C-92/09 and C-93/09), 9 November 2010.

⁶ Cf. Opinion of Advocate General Jacobs delivered on 9 December 1992 in the case *Christos Konstantinidis v. Stadt Altensteig*, (C-168/91); [Report of Cases 1993, p. I-1191]; par. 46.

Note, however, that we must not forget those ECJ judgments (especially *Rottman*⁷ and *Ruiz Zambrano*⁸ cases) in which the value of protection of EU citizen's rights made the ECJ adopt a stand which significantly extended the boundaries of application of European laws (regulations on national citizenship – *Rottman* case; and regulations on immigration – *Ruiz Zambrano* case).

Two Approaches, Two Philosophies

The dispute over the field of the Charter's application was triggered by the wording of the relevant legal formula, which in itself is not quite clear or transparent, namely art. 51 paragraph 1 of the Charter stating that: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Members States only when they are implementing Union law".

Moreover, there are substantial translation differences with regard to the criterion of the Charter's application defined in art. 51 par. 1, that is, to what is supposed to be the "tangent point" between EU law and national laws. The English expression "when they are implementing" is translated into a French term "*mis en oeuvre*" (lack of exact equivalent in other languages), German "*durchführung*" (Eng. execution), and Polish "*zastosowanie*" (Eng. application).

The real problem, however, does not lie in the different language versions of the Charter but in an essentially different approach (philosophy) to the question of application of the guarantees envisaged in the Charter.

As to the first stance (let us call it "strict and formal"), one can assume that the correct approach identifies the field of the Charter's application with a precisely defined field of EU law operation. Essentially, it overlaps with the scope of normative EU competences. Thus, with regard to national law, it includes regulatory spheres resulting from national lawmaker's activity, which is focused on the implementation of EU law or at least closely and directly connected with its implementation.⁹ The fact that a certain domain of relations has been partially covered by EU regulations is not a sufficient condition to define the sphere of EU law application. The field of application of "general principles of EU law" (see art.6(3) TEU)¹⁰ does not overlap with the field of application of guarantees laid down in the Charter. The interpretative method based on extending the "tangent area" or increasing the number of the "connecting points" between EU law and the national systems, established in present case law with regard to the general principles (especially in the sphere in which national law would restrict application of EU laws - derogation situations)¹¹ cannot automatically be transferred to the application of the Charter of Fundamental Rights.¹²

⁷ Judgment in case *Rottman* (C-135/08), 2 March 2010.

⁸ Judgment in case *Ruiz Zambrano* (C-34/09), 8 March 2011.

⁹ Such an approach is represented e.g. by some representatives of the German constitutional doctrine (cf. J. Kokott, op. cit., 7).

¹⁰ Art. 6(3) of TEU "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional common to the Members States, shall constitute general principle of the Union's law".

¹¹ Cf. e.g. a somewhat radical view of Lord Goldsmith *Charter of Rights, Freedoms and Principles*, Common Market Review no 38, 2001. 1201-1205, who says that, within derogative regulations, the protection of [fundamental] rights is ensured by the constitutional systems and norms of international conventions and not by EU law.

¹² To this approach belongs, in some sense, the opinion expressed recently by the Advocate General Cruz Villalón in the case *Åkerberg Fransson* (C-617/10), 12 June 2012, who stressed that "(...) the competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union. The mere fact that

In most synthetic terms, what arguments support such an approach?

The first and essential formal argument can be found not only in the wording of the said art. 51 par.1, but also in the interpretative rules included in the official explanations to the Charter of Fundamental Rights which, in accordance with art.6(1) par. 3 TEU, stipulates "due regard to the explanations referred to the Charter". The explanations say, among others, that "undoubtedly, reference to the Charter in art. 6 of the Treaty of European Union shall not be understood as extending the scope of Member States' activity regarded as <implementation of EU law>". This interpretative trend is illustrated by the ECJ case law, quoted in the explanations, especially by the judgment issued in cases C-309/96 Annibaldi¹³ and 5/88 Wachauf¹⁴ which - although referring to the period before the Charter entered into force - place the sphere of fundamental rights in these national laws which refer to the execution of Community regulations by means of implementing acts.¹⁵

Secondly, this trend of interpretation goes in line with the assumption, adopted *expressis verbis* in the Treaties and in the Charter, and with the principle of subsidiarity quoted in the explanations, according to which:

"The Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties".

Going beyond these boundaries would be an interference with the division of powers between the EU and Member States.

Thirdly, only this type of interpretation allows us to draw a clear demarcation line between the EU legal order, the competences of the European Court of Justice (ECJ) and the constitutional order of Member States where the Supreme Court instances – constitutional courts in particular – guard fundamental rights. This stance becomes clear if the application of the Charter in the scope of EU law implementation is understood, and explained as the transfer of the original responsibility of Member States to the European Union.¹⁶

An opposite, alternative position turns our attention to a much more flexible approach, which connects the scope of the Charter's application not only with implementation of EU law in its narrow meaning but also with these segments of national law which are located within the "field of operation" of EU law. In this sense the scope of EU law operation would be broader than the normative competences of

(Contd.) _____

such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the implementation of Union law." (par.40).

¹³ Judgment of 18 December 1997.

¹⁴ Judgment of 13 July 1989. For these reasons the third judgment quoted in the explanation in *ERT* case (C-260/89, judgment of 18 June 1991), referring to the 'so-called' "derogation situations" is – as it may seem – a less convincing proof of strict interpretation of application of EU law and in this context we may ask whether it signals a greater interpretative freedom.

¹⁵ With reference to both groups of situations, T. von Danwitz notes that Member States operate on a centralized-administrative EU basis, cf. paper during *Seminaire sur la Charte des droits fondamentaux de l'Union européenne*, La Haye, 24 novembre 2011, p.8. At the same time, the author notes that such a standpoint does not allow adopting a hypothesis that the intention of the Constitutional Convention was restriction of Charter application and excluding the ECJ line represented in its judgments.

Cf. also T. von Danwitz, K. Paraschas *A fresh start for the Charter: fundamental questions on the application of the European Charter of Fundamental rights*, Fordham International Law Journal, vol.35, 2012, pp.1400-1429.

¹⁶ Cf. Opinion of the Advocate General Cruz Villalón in the case *Åkerberg Fransson* (C-617/10), 12 June 2012, according to which "(...) the assumption by the Union of responsibility for guaranteeing fundamental rights when Member States exercise public authority in those cases must be examined in terms of a transfer, in the sense that the original responsibility of the Member States is passed to the Union as far as that guarantee is concerned." (par.37).

EU institutions. "Application" of European law in this context could also be referred to national regulations, which are at least indirectly connected with European law, both in the positive sense (not being an act of strictly understood implementation they are, however, important for the realization and correct application of the European norm¹⁷) and negative sense (they refer to restrictions introduced in the national system with regard to European regulation). One may add that such an approach clearly alludes to a trend – established in the ECJ case law – of application of fundamental principles, based on a broader concept of EU law impact.¹⁸

Arguments supporting this view may be the following.

Firstly, the wording of art. 51 par. 1 of the Charter – in the context of ambiguity of different language versions – does not determine the choice of restrictive approach in the interpretation of the Charter's application. On the contrary, this wording does not allow us to exclude *a priori* – from the "application of EU law" (term used in some language versions, e.g. in the Polish one) – different forms of broader, "reflexive" impact of EU law, including not only strictly understood execution of EU law but also other consequences of EU solutions and of regulatory mechanisms, making part of the internal order e.g. in order to comply with the principles of effectiveness in the national law.¹⁹

Secondly, it is impossible to draw a division between the concept of application of general EU principles, whose inalienable aspect is fundamental rights, and the concept of the Charter's application. It would be an unrealistic and artificial act, leading to an incomprehensible and unclear differentiation within the fundamental rights' area, and, in consequence, to a stratification of axiological order of the EU system (to be discussed later in this article).

Thirdly, a broader "application" of EU law by national systems does not mean challenging the principles of power division between Member States and the European Union since it does not lead to an autonomous application of the Charter as an instrument which independently defines the scope of EU law (which would obviously contradict the Treaties and the Charter itself). The necessary criterion, as in the first approach, is the connection between the national law and EU law, even though it is treated only functionally and not formally. The functional criterion, emphasizing the axiological common basis and the effectiveness of European order, does not mean rejecting the principle of subsidiarity and respect for the autonomy of national systems. The potential collisions with the constitutional order of Member States could be reconciled by respecting two interpretative guidelines expressed in art.52 par. 4 of the Charter (obligation to interpret the Charter in harmony with 'common constitutional traditions of Member States') and in art. 53, according to which 'nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms' guaranteed *inter alia* by the Constitutions of Member States. Co-operation between the ECJ and constitutional courts by means of reference for a preliminary ruling, which has been evolving more and more successfully in recent years, is a procedural mechanism which supports this interpretative trend (see remarks below).

Dispute between these two alternative positions is therefore quite clearly delineated. Let us stress again, it does not refer to the status of the Charter as an autonomous source of EU competence, but,

¹⁷ Cf. Opinion of the Advocate General J. Kokott in the case *Bonda* (C-489/10) who stressed, that the notion of "implementation" relates not only to the national acts which were adopted explicitly when the Member State implements EU law but also to the acts which already existed (see par. 20).

¹⁸ Cf. case *Stauder v. City of Ulm* (29/69) [1969], ECR 419 and case *Internationale Handelsgesellschaft* (11/70) [1970], ECR I 125. These judgments initiated a trend regarding the fundamental rights as part of the general principles of the EU order.

¹⁹ J. Kokott, Ch. Sobotta (op. cit. p. 7) note that the judgments quoted in the explanations to the Charter may act in favor of a broader variant of interpretation than the exact term of "execution".

Cf. also A. Rosas, H. Kalia, op. cit. pp. 15-17. The judgment in case *ERT* (C-260/89), 18 June 1991, (I-2925), seems to be a good example for that approach.

first and foremost, to the question of the nature of the "necessarily" connecting points between EU law and national law, which outline the field of operation of EU law, in which the fundamental rights guaranteed in the Charter are applied. ECJ case law, its present stage, does not allow us to draw clear conclusions in favour of one or other interpretative option. Both seem to co-exist awaiting a definitive breakthrough. At present there are both judgments which seem to apply a flexible and functional approach and those which – on the contrary – keep strictly to the boundaries set by the narrow sense of the notion of implementation.²⁰ Let us now look at a way of arguing differently presented in some recent judgments: in each of the judgments quoted below the ECJ analysed situations in which a Member State executed its own normative competences within the scope of national acts not executing directly European regulations. Does it mean that there exists 'so-called' "third category" of national regulations connected with EU law and subject to the Charter's application – outside the scope of case law in Wachauf and ERT cases?²¹

A Liberal Trend - Fundamental Rights Mounting an Attack?

Let us quote three important judgments passed in the last few years - namely in NS case²² as well as in McB²³ and DEB²⁴ cases, which turn our attention to a functional interpretation of art.51 par.1 of the Charter and to quite a flexible approach to the problem of the scope of application of fundamental rights' guarantees.

²⁰ However, sometimes the qualification of the judgment is not simple - cf. e.g. judgment in case *Dereci* (C-256/11), 15 November 2011, in which par. 71 stipulates as follows: "However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (*McB.*, paragraph 51, see also Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraph 69)";

Nevertheless, in par. 72 of this judgment the ECJ left the problem of the EU law application open, stating in essence that the issue rests upon the decision of the national judge : par. 72 stipulates as follows "Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR."

Cf. also the judgment in case *Guyee and Salmerón Sánchez*, (joined cases C-483/09 and C-1/10) par. 69.

²¹ In this question, the position of T. von Danwitz (op. cit., p.10) is unambiguous: there is no third category of cases in which we could seek "*autres critères de rattachement au droit de l'Union*". The problem depends finally on the definition of the term "implementation";

However, cf. L.M. Díez-Picazo, M. Fraile Ortiz *L'application de la Charte des droits fondamentaux de l'Union européenne pour les tribunaux nationaux : l'expérience des tribunaux contentieux administratifs; Rapport Général*, ACA Europe, Madrid 25.06.2012, in which the authors differentiate three fields of application of the Charter in saying that "Thus, from the case law of the ECJ three types of situations involving the <application of the EU law>, in more or less wide meaning of this term, can be extracted: a) when the Member States apply or develop the law of the Union (implement directives, execute regulations, apply the Treaties' provisions or the general principles of EU law...), b) when for imperative reasons (eg. public order) they adopt measures which may interfere with exercise of Community freedoms, or c) when there is a link with the EU law (a category less defined, but for which there are some cases like the case mentioned above DEB)" [translation from French by the author].

²² Judgment of 21 December 2011, joined cases C-411/10 and C-493/10.

²³ Judgment of 5 October 2010, in C-400/10 PPU case

²⁴ Judgment of 22 December 2010, in C-279/09 case

NS Case – Limited Member State Discretion

In NS case the problem presented by the British jurisdiction referred to asylum procedures defined under Council Regulation (EC) No 343/2003 of 18 February 2003, and, more precisely, art. 3 of this Regulation, which envisages the principle of a single Member State competent to conduct an asylum procedure with reference to third-country immigrants (essentially, it should be the first Member State in which the EU border was crossed). In NS case, the competent state was Greece, in which the asylum procedure took much too long, and immigrants waiting for the decision lived in harsh and humiliating conditions. A question arose as to whether an immigrant who had left Greece and arrived in Great Britain, may effectively seek asylum, if, beyond any doubt, Great Britain was not a competent country. By way of derogation from the principle of "single competent Member State", art. 3(2) of the Regulation authorizes each Member State to examine an application for asylum. In such a situation, the Member State which examined the application becomes responsible for conducting the procedure as required by the Regulation.²⁵ The British authorities did not use the authorization envisaged in art. 3(2) arguing that their national regulations (Asylum and Immigration Treatment of Claimants Act 2004) did not impose such an obligation. What is more, Greece, as a Member State, was obliged to respect the fundamental rights. Therefore, the British authorities decided to expel the immigrant back to Greece. An appeal against this decision resulted in a preliminary reference lodged with the ECJ.

The question - in its essence - could be reduced to the problem as to whether decisions taken on the basis of national regulations, referred to in art. 3(2) of the Regulation, are covered by the scope of application of the Charter of Fundamental Rights in the meaning of art.51 of the Charter and art.6 TEU.²⁶ In the opinion of the court which lodged the question, refusal to initiate the asylum procedure and the decision to expel the immigrant could violate the fundamental rights of the applicant under art. 4 of the Charter (prohibition of torture and inhuman or degrading treatment or punishment) as well as art. 1 (human dignity), art. 18 (rights to asylum) and art. 47 (right to effective remedy and to a fair trial).

An essential argument against acknowledging that the competences executed by a Member State pursuant to art.3(2) of the Regulation "do not implement European law" was the nature of the authorization set out in this provision. According to the British government, it took the form of "sovereignty clause" and "discretionary clause". If a Member State operates within the scope of its own prerogatives, by virtue of express authorization by the European regulation, then the decision to apply or not to apply the asylum procedures is discretionary. It does not mean that other guarantees protecting individuals seeking asylum, which result from the European Convention of Human Rights or Geneva Convention do not have to be respected.²⁷

The ECJ, deliberating in the Grand Chamber, adopted a different stand on this matter, concluding that implementation of a Member State competence under art. 3(2) is part of application of European law.

²⁵ Art.3(2) of the Regulation 343/2003 states as follows: "By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant".

²⁶ The question reads as follows: "Does a decision made by a Member State under Article 3(2) of ... Regulation No. 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter ...?"

²⁷ Cf. par. 61-63 of the judgment. The British position was shared by Belgium, Italy, Czech Republic and partly by Poland.

Par. 68 of the motives of the judgment states among others:

" (...) 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."²⁸

Let us add that the ECJ consequently concluded that the British asylum regulations do not comply with art. 4 of the Charter (inhuman treatment). As for the articles 1, 18, 47 of the Charter the ECJ stated that these regulations do not lead to a different answer.²⁹

The following conclusions arise in this context. Firstly, it appears that the national regulation also within the scope in which it is – purely technically – not an implementation of an European act (regulation enters into force directly and does not require implementation) may be considered as covered by the application of the Charter of Fundamental Rights as long as it is functionally related (in this case, relation with the EU asylum mechanism). Secondly, the freedom of the national lawmaker resulting from an express authorization laid down in Regulation is subject to restrictions resulting from the necessity to respect the fundamental rights' guarantees. Thirdly, legal mechanisms subordinated directly to European regulation and the mechanism subject to the competence of the national lawmaker cannot be analysed in separation – in this sense they form a "single package", within which regulations are complementary. One might wonder to which extent the fact that a similar instance (in Belgian asylum system) had been earlier examined under the European Convention of Human Rights in a Strasbourg procedure,³⁰ had caused a flexible approach to the Charter's application in this case.

DEB Case – Principle of Effectiveness as a Determining Factor?

DEB case concerned national regulation, which prevented a legal person (Deutsche Energiehandel) from getting legal aid before the court, and, in consequence, from effectively claiming damages from the German state on the grounds of breach of European law (directives were not implemented on time). DEB Company was not able to pay the court fee necessary to lodge an action and the cost of obligatory (in such a procedure) representation by a lawyer. The German civil procedure was very restrictive about the conditions of legal aid to a legal person, reducing them practically to a situation in which such a refusal was against public interest.

The question was whether art. 47 of the Charter of Fundamental Rights guaranteeing the right to effective judicial protection may be the basis for the assessment of German procedural regulations applicable under the procedure involving liability of a Member State for breaching European law³¹. In other words, can the "connection" with European law as results from the Treaty principle of indemnity be considered as sufficient to evaluate the national law, falling within the procedural autonomy of a Member State? ECJ case law considered as incompliant with the principle of effectiveness only such national regulations which made it practically impossible or extremely hard to claim compensation against a Member State, leaving to the state the freedom to define concrete procedures. Therefore, could the principle of effectiveness of EU law (e.g. in the context of the state liability) serve as a tool interfering with the national system of legal aid to legal persons if is not excluded a possible

²⁸ It is worth noting that the ECJ shared here the position of Advocate General V. Trstenjak (see par. 82 of the Conclusions); Cf. also the conclusions of V. Trstenjak in the case C-245/11, par. 83-92.

²⁹ We should note, however, that the first ECJ judgment in which the Court referred to the British-Polish protocol no. 30, concluding that it was not important as for the assessment of the problems posed in the pre-judicial question.

³⁰ Cf. par. 88 in which the ECJ quotes the judgment of ECtHR in case *M.S.S. against Belgium and Greece* from 21 January 2011.

³¹ See par. 33 of motives of the judgment, in which ECJ reformulated the question this way.

incompliance of national measures with art. 47? Most of the participants (including the European Commission)³² strongly objected to application of art. 47 since – in their opinion – the principles of effectiveness of EU law and of effective judicial protection cannot extend so far as to require Member States to grant legal aid to legal persons. They stressed also that the matter is not subordinated to harmonizing measures adopted at European Union level and it is entirely justified and reasonable to make any conditions that may exist governing the grant of legal aid to legal persons much more stringent than those applying to natural persons.

However, the ECJ adopted a different solution concluding that

"The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer".³³

The ECJ also listed a series of additional conditions which have to be met in order to apply art. 47 of the Charter.³⁴ One of the arguments for interpretation of art. 47 of the Charter was Strasbourg case law with regard to the judicial protection (Article 6 of the ECHR).³⁵

The following remarks have arisen in this context.

The scope of application of the Charter of Fundamental Rights with regard to national regulations also in this case goes beyond the boundaries which are connected with direct and formal implementation of European law by a Member State. The German procedural regulations were not adopted in order to implement European acts. They referred to the questions which were not subject to harmonization. Therefore, it would have been difficult to see application of the approach in the model Wachauf case ("model" – because it was quoted in the explanations to the Charter). The sphere of European law impact was in this case defined by the principle of effectiveness, in this case broadly interpreted. As it seems, the principle of effectiveness may also play the role of a special "gear" between the national and European system, used in order to extend the field of application of fundamental rights' guarantees.

McB Case – Is the Status of an Illegitimate Child Subject to European Law?

McB case is especially interesting as it concerns the problem of the Charter's application with regard to national regulations in the field of family relations connected with the application of EU law, namely Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility ('so-called' Brussels 2). In a procedure held before the Irish court, the biological father demanded a confirmation (certification of the fact) that the mother took their children illegally to England without his consent. Under Irish law the father's right to custody over an illegitimate child does not arise automatically (as is in the case of the mother) but it is a consequence of a court decision issued upon the father's request. From this point of view, *de facto* custody over a child by the natural father (as it was the case) was not sufficient to acknowledge that the decision to take the children to

³² Apart from the Commission, also the Danish, French, German and Italian government.

³³ The same view was also expressed by Advocate General P. Mengozzi

³⁴ See par. 3 of the judgment: "In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts".

³⁵ Cf. par. 45-47 of the judgment

England without the father's consent was illegal. The fact that the biological father's right to custody over children was not formally confirmed before prevented the court from concluding that the act of taking the children to another country was illegal.

In its reference for a preliminary ruling the Irish court asked to establish whether such an obstacle for the biological father in the national law may be recognized as compliant with European law, and in particular with Council Regulation 2201/2003 quoted above, interpreted in the light of art. 7 of the Charter of Fundamental Rights (respect for private and family life).

The real difficulty in this case consisted in the fact that European law, namely Council Regulation 2201/2003 does not lay down the legal and material basis on which to obtain parental status and to have the right of custody over a child. The Regulation stipulates purely formally the illegality of the act of taking a child to another country without the consent of person disposing the right to the custody; it does not say, however, what the basis for obtaining the rights whose breach may cause the above illegality is.³⁶ In this domain (sources of rights to custody) it is the national law which decides and to this law the quoted provision refers (art. 2(11)). Can interpretation of European law in such a case indirectly lead to the assessment of affiliation (legal-family-related) solutions, included in the national system?

In *McB* case, the answer seems to be positive if the subject of analysis in the motives of the judgment is the status of a biological father in Irish law and the assessment of the national system solution, which assumes lack of automatic acquisition by the father of the right to custody over a child. Compliance of such a solution with the right to family life (art.7) and the right of the child (art. 24) guaranteed in the Charter is also tested in the judgment by the reference to Strasbourg case law (cf. par. 53-56 of the judgment).

The test result is positive for Irish law: the judgment finally states in conclusion that the requirement of Irish law to have a court decision to acknowledge the biological father's right to custody over a child complies with Council Regulation 2201/2003.³⁷

The ECJ made an express reservation that it did not assess the national law as such but it only investigated – by interpreting a regulation – whether a mere reference to the national law (which – according to a preliminary analysis made by the ECJ in paragraph 44 of the judgment – means exclusive competence of national regulation to establish the right to custody) ensured results compliant with the protection of fundamental rights (cf. clause 52 of the judgment's motives³⁸).

Analysing this mode of argument, we might assume, without much risk of being wrong, that the subject of the test of compliance with art. 7 and art. 24 (the right of the child) of the Charter of Fundamental Rights was finally the national law (indirectly, "and not as such ") while the reference included in the regulation played the role of a "gear" in this case. One could easily imagine the consequences of such an "indirect" assessment of national law in a hypothetical situation in which

³⁶ Article 2(11) of Regulation No 2201/2003 provides that the "removal or retention ... of a child" is wrongful where: "(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention /...".

³⁷ The judgment states as follows: "Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation."

³⁸ It follows that, in the context of this case, the Charter should be taken into consideration solely for the purposes of interpreting Regulation No. 2201/2003, and there should be no assessment of national law as such. More specifically, the question is whether the provisions of the Charter preclude the interpretation of that regulation set out in paragraph 44 of this judgment, taking into account, in particular, the reference to national law which that interpretation involves.

Irish law fully excluded acquisition of the biological father's right to custody (the case deemed earlier in Strasbourg case law as incompliant with art. 8 of the Convention on Human Rights³⁹), not even leaving the possibility of lodging an application for granting such a right. What answer would ECJ give in such a case? The question is rhetorical because it results from the very reasoning behind the McB judgment that such a solution would obviously have to breach the rights guaranteed by the Charter of Fundamental Rights and even the essence of the biological father's right to private life (cf. par. 55 of the judgment). The ECJ's answer would have to point out that the national law, excluding in any conditions granting the right to custody to the biological father, does not comply with art. 2(11) of the Regulation even despite the fact that this provision, as mentioned above, does not provide its own regulation of the conditions for the custody over a child and remains in this area, under national law.

Did the national law in the McB case fall within the sphere of implementation of European law in the meaning of art. 51(1) of the Charter? Do family law provisions constitute a field, even in such context, for the application of the Charter? The ECJ, quoting art. 51(1) and 52(2) of the Charter in its judgment, seems to attach importance to the fact that the clear demarcation line between national competences and those of the European lawmaker should be retained (cf. par. 51 and 59 of the judgment). We can agree with such an approach – and I, personally, share this view – but it requires the adoption of an express assumption that the scope of application of the Charter of Fundamental Rights be significantly broader than the field of direct application of European law or its formal, technical implementation in national law.

Three “Gear” Mechanisms between the European Law and the National Systems

The above examples of extrapolation of European law and, in consequence, the fields of application of the Charter of Fundamental Rights show clearly special boundary lines. Trespassing on these could be considered as breach of the division of competences between EU institutions and the national lawmaker. Each of these examples represents a slightly different mechanism or a way of seeking a connector between national law and European law, which is the condition to accept that the area in which the guarantees of fundamental rights operates is still within the scope of European law and so is the effect of operations by the national lawmaker, which could be described as a form of "*mis en oeuvre du droit européen*".

The first of the mechanisms applied in *NS case* may be defined as a "mechanism of complementarity" of the national law vis-à-vis European law. The national lawmaker executes its own prerogatives, directly confirmed by an European act (art.3(2) of the Regulation), but the regulatory sphere in which it operates corresponds with the competences effected by European lawmaker (in this case acting in the field of common policies concerning immigration and asylum) and in this sense it is a component of a broader "package" of legal instruments. Even the discretion left to the national lawmaker not only as to the content of the national regulations but also in respect of the decision on very need of the adoption of the domestic act does not definitely prevent – in ECJ's opinion – from making reference to the Charter. Such a mechanism seems *prima facie* to be fully compliant with the established line of ECJ case law, which deems that the acts implementing European law are also such executive acts which leave discretionary freedom to the lawmaker and even those which go beyond the need defined in the directive itself.⁴⁰ However, the specific character of *NS case* consists in the fact that this case was not about implementation of EU law in the narrow meaning described above (Regulation becomes automatically binding and does not require implementation) and the British regulation was only a part of a broader domain, in which the European lawmaker directly left some issues outside the area of regulation, referring to national law.

³⁹ Cf. Judgment of ECtHR (CEDH) in case *Zaunegger c. Germany*, 3 December 2009

⁴⁰ Cf. e.g. judgment in the case *Zuckerfabrik Franken*, (C-71/81), 18 February 1982, par. 22 -28; judgment in case *Booker Aquacultur and Hydro Seafood*, (joined cases C-20/00 and C-64/00), 10 July 2003, par. 88-93

The second mechanism, applied in *DEB case* is based on the principle of effectiveness or even more general - on the principle of 'so-called' "*effet utile*". The connection between European law and the national regulation is explained here not in the category of formal execution of a European act by the national lawmaker, but by the assessment of effects which may result from the application of certain regulations, falling within the sphere of autonomic competences of the national lawmaker which operate beyond the prerogatives of the European lawmaker. The "added value" resulting from the judgment in *DEB case* lies in broadening of the meaning and sense of the criterion of effectiveness. In the meaning which was here adopted by the ECJ, effectiveness requires not only that the mechanisms of European law operated (here the mechanisms are connected with a Member State's indemnity for breach of European law) but also that the means used within the autonomous national law were compliant with the guarantees of protection of fundamental rights adopted in the Charter (in this case the right to effective jurisdictional protection).

The third mechanism, in *McB case*, can be defined as a form of "close functional relationship" between EU law and national regulation not being in principle the matter of EU law. Despite the similarities which exist, the difference between this and the first situation (although in both cases EU law referred to national law) consists in the fact that national regulations assessed in *McB case* concern matters which in principle do not belong to the competences of the European lawmaker at all (family issues, affiliation of an illegitimate child). This close functional relationship between EU procedural regulation in the field of judicial co-operation in family matters and the material law of a Member State (which is not subject to the prerogatives of the European lawmaker) allows us to create a connection, which – in the light of art. 51(1) of the Charter – may sufficiently justify application of the Charter of Fundamental Rights.

Field of Application of General Principles versus the Scope of the Charter's Application

An important criterion which allows us to define the correct method of interpretation of the Charter is the ECJ's position delineating the field of application of general principles of EU law. According to long-established case law these principles ensured the effective protection of fundamental rights to freedom within EU law. The importance and scope of applying general principles are – as we know – a subject of doctrinal controversy⁴¹ but as it seems, we can venture a thesis that ECJ case law has expressly declared itself in favour of the appropriateness and acceptability of application of general principles with reference to national regulations in two categories of situations, not connected directly with implementation of EU law as such, namely: a/ to national regulation introducing restrictions to Treaty freedoms (the 'so-called' derogation situation)⁴² and b/ to regulations which, although not being an instrument of transposition, are included in the domain regulated by the directive.⁴³

⁴¹ Cf. in this matter K. Lenaerts, *The Court of Justice of The European Union and the Protection of Fundamental Rights*, see also in this matter e.g. position represented by Jacobs, *Human Rights in the European Union: the role of the Court of Justice*, *European Law Review* no 26, 2001, p.331, 336, directly indicating that under "derogation situation" the national law is not subject to assessment from the point of view of fundamental rights.

⁴² The Treaty provisions provide for a possibility of derogation based on the reasons of public policy, public security and public help (i.e. Articles 36, 45(3), 52 and 65(1)(b) TFEU).

⁴³ This position is expressly favored by Advocate General Yves Bot in his conclusions to case *Scattolon* (C-108/10), judgment from 6 September 2011, par. 116-119, who stated that : "In my view, the wording adopted by the authors of the Charter does not mean that they sought to restrict the scope of that Charter in relation to the case-law definition of the scope of general principles of EU law. That is demonstrated by the explanations relating to Article 51(1) of the Charter, which, in accordance with the last paragraph of Article 6(1) TEU and Article 52 of the Charter, must be taken into account for the purpose of interpreting the Charter. I would note, in that regard, that those explanations indicate that, as regards the Member States, 'it follows unambiguously from the case-law of the Court of Justice 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'. Furthermore, those explanations concern the case-law relating to the various cases where there is a connection between national legislation and EU law, to which I referred above. In my view, those two elements allow the

As to the former category (derogation situation), application of the same standard of assessment in the field of fundamental principles and of the Charter seems to be directly defined in the explanations annexed to art.51(1) of the Charter which point to the judgment in *ERT* case,⁴⁴ concerning the assessment of national regulation derogating – due to the public interest – the application of the Treaty principle of free movement of services (privileged position of a public TV broadcaster).

As to the latter category, the problem seems more complex, but a series of judgments passed recently accepted a broad application of the rules in the area situated outside the sphere which is directly regulated by the directive and which in principle belongs to national prerogative (*Hudzyński*⁴⁵ case and *Achughbabian*⁴⁶ case). Naturally, we do not say that any general or abstract connection with European regulations is sufficient. This connection should be confirmed by the existence of a norm of European law defining express boundaries in which the national lawmaker, although outside the framework of transposition, establishes its own regulation (it must not be e.g. a competence norm as in the case of anti-discriminatory regulations, laid down in art. 19 TFUE (former art.13 TWE)).⁴⁷

It would be very hard to accept the existence of a dual regime with reference to the sphere of impact of general principles and fundamental rights.⁴⁸ The following arguments are clearly against this.

Firstly, the scope of general principles and that of fundamental rights overlap considerably, and their common function is the guarantee within EU law of an axiology which expresses itself in the protection of fundamental rights. It would be quite artificial, and first of all, irrational, to make a distinction between "old rights" (covered by the general principles) and those which have acquired express protection on the basis of the Charter.⁴⁹

(Contd.)

Court to adopt a broad interpretation of Article 51(1) of the Charter without distorting the intention of the Charter's authors. It could thus be accepted that that article, read in the light of the explanations relating to it, must be interpreted as meaning that the provisions of the Charter apply to the Member States where they act within the scope of EU law. Furthermore, when referring to the specific case of directives, the concept of implementation of EU law should not be restricted merely to measures transposing that law. Such a concept should, in my view, be understood as referring to subsequent and specific applications of rules laid down by a directive, as well as, more generally, to all situations in which national legislation 'concerns' or 'affects' a matter governed by a directive the period prescribed for the transposition of which has expired."

Cf. also V. Trstenjak in opinion to case *ME* (joined cases C-411/10 and C-493/10), par. 71-81.

⁴⁴ Cf. judgment in case *ERT* (C-260/89), 18 June 1991.

⁴⁵ Cf. judgment in the case *Hudzyński* (joined cases C-611/10 and C-612/10), 12 June 2012 - ECJ concluded that in a situation envisaged in art. 48 TFUE assuming lack of harmonization of social laws of Member States, regulations falling within the competences of the national lawmaker may be subject to assessment from the point of view of the Treaty rules and freedoms (the problem of family benefits for employees from a different Member State, which EU law indicated as competent to determine the social status of the employees).

⁴⁶ Cf. judgment in case *Achughbabian*, (C-329/11), 6 December 2011, concerning the status of illegal immigrants. The ECJ imposes an obligation on Member States to respect fundamental rights also outside the scope of the directive, in the field of full competences of the national regulator, cf. par. 48 and 49 of the motives "In particular, Directive 2008/115 does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return" (par. 48). "In that regard, it should be emphasized that, in the context of the application of the said rules of criminal procedure, the imposition of the sanctions mentioned in the previous paragraph is subject to full compliance with fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950" (par. 49).

⁴⁷ Cf. expressly – the judgment in case *Bartsch* (C-427/06). From this point of view Advocate General E. Sharpston clearly separates this case from *Mangold* (C-144/04) case although in both cases there is a problem of the scope of application of the rule prohibiting age discrimination.

The problem of lack of the necessary connection is also illustrated well by judgment in case *Annibaldi* (C-309/96) quoted in the explanations to the Charter.

⁴⁸ As K. Lenaerts rightly points out, op. cit., p. 10.

⁴⁹ K. Lenaerts rightly points that 'scope of application of the Charter and that of general principles of EU overlap', ibid. p.10

Secondly, in both groups of situations (principles and rights) the criterion outlining the area of European law is decisive. The criterion in itself, which results from the above remarks, is not sharp enough, but – logically, and according to the correct methodology of legal interpretation – it cannot lead to a different result: defining a broader area of EU law, in which the principles operate and a narrower field in which the Charter will be applied. *Tertium non datur*: a joint position must be accepted for both categories, or the narrower or the broader one, but not a different one. Adoption of narrower meaning would have to lead to a surprising conclusion: retreat from the present position developed in case law in the context of application of broader principles of EU law. Such an intention would be difficult to ascribe to the European lawmaker in view of art. 51(1) of the Charter.

The logic of certain legal instruments connected with the operation of EU law, e.g. those which order the application of effective legal means to guarantee effective application or "*effet utile*" of the EU law (it applies *inter alia* to penal sanctions) seems to show clearly that application of EU law goes beyond the range of means subject to harmonization and direct implementation, and therefore further than the normative competences of EU institutions. Penal law is not covered by harmonization but it is thought that the legal and penal sanctions introduced by national law, which are supposed to help effective enforcement of EU law (e.g. sanctions in the case of breach of VAT regulations)⁵⁰ should be covered by the operation of fundamental rights and general principles also when their introduction in national law was not directly connected to the implementation and – at the moment of their adoption – was not motivated by the intention of ensuring effectiveness of operation of EU laws.⁵¹ Such an approach expressly indicates the need for the functional interpretation of art. 51(1) of the Charter.

Conclusions

The ECJ has definitely not yet elaborated a position regarding the scope of application of the Charter of Fundamental Rights.

We are able, however, to detect some symptoms of future trends. What we are currently seeing does not give us a clear picture of the role which the Charter of Fundamental Rights may play in the legal order of the European Union. Although it is generally agreed at the level of initial assumptions, and especially with regard to the fact that the Charter may become an instrument modifying the vertical division of competences (between the EU and Member States), that there is a lack of consensus as to where to place the border points for the area in which EU competences may operate in compliance with art.51(1) of the Charter.

For the supporters of the flexible or functional approach, the influence of EU law justifying application of fundamental rights in the above situations will remain in full concordance with the logic and concept adopted by the authors of the Charter and will not shake the vertical competence division.

On the other hand, for supporters of a strict interpretation of the concept of "implementation", it would be an act of crossing the Rubicon and would be in breach of the Treaty principles.

One thing that seems certain is that the key to solving the problem is not a purely linguistic, semantic analysis of the terms used in art. 51(1) of the Charter but a decision as to how correctly define the

⁵⁰ Cf. art. 325(1) TFEU which obliges the Member States to counteract illegal actions breaching the EU financial interests by deterring and effective means. These may also be penal sanctions, cf. judgment in case *Commission v. Greece*, (68/88), 21 September 1989, par. 23 and following of the motives.

⁵¹ Cf. in this case the conclusions of Advocate General J. Kokott in case *Bonda* (C-489/10), par. 20. - there can be no difference as to whether the sanction adopted by a Member State in order to penalize was adopted expressly under transposition of EU law or whether it existed before. It serves implementing EU law in both cases. Application of EU law may not depend on the fact whether a given penal norm has already existed or has it been adopted within transposition of an obligation envisaged in EU law. This question still awaits a decision in another case pending before the Grand Chamber (*Åkerberg Fransson* case).

concept of European legal order and its relationship to national systems taking into consideration the whole diversity and complexity of legal instruments which the EU uses when creating common legal space. One can risk the thesis that the significance of the Charter as an instrument ensuring realistically, not only in the symbolic sphere, a friendly legal environment will depend on resolution this dilemma.

Finally, it is worth showing two factors which may exert – although in different directions – some influence on emerging trends in the areas discussed in this article.

Firstly, the prospect of ratification of the European Convention on Human Rights by the European Union, which may turn the ECJ's attention to the areas of national law functionally connected with EU law although falling within the sphere of national competences⁵². Even if it could be justified by a specific opportunism of the judges, driven by the intention of reducing the risk of a "clash" with the Court in Strasbourg, it would undoubtedly be a factor in favour of a broader application of the Charter.

Secondly, it is the prospect of deciding to what degree interpretation and application of the Charter may be modified to take into consideration constitutional traditions of individual Member States. Could the scope of the Charter's application be differentiated due to a different character of constitutional protective standards adopted in different Member States? The positive answer to this question could hypothetically lead to a narrowing of the sphere of unified application of guarantees of fundamental rights included in the Charter. The future position on interpretation of art. 53 of the Charter will be of primary importance. It states expressly that: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by /.../ the Members States' constitutions".

A case related to this issue is now pending before the Grand Chamber.⁵³

At present, only hypotheses may be formulated with regard to each of the above. This subject would need a different discussion. Here we have to limit ourselves to the conclusion that the wide array of problems awaiting ultimate resolution in ECJ case law will trigger a rich and intellectually inspiring discussion for a long time to come.

⁵² Advocate General Yves Bot in *Scattolon* case seems to notice this problem.

⁵³ Cf. case *Melloni* (C-399/11) initiated by a question of the Spanish Constitutional Court with regard to the European Arrest Warrant, whose implementation, although compliant with the protection of rights guaranteed in the Charter would lead to breaching the norm of the right to trial envisaged in the Spanish constitution.

