



When the EU Funds meet the Charter of Fundamental Rights

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When the EU Funds meet the Charter of Fundamental Rights: on the applicability of the Charter of Fundamental Rights to EU Funds implemented at the national level*

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Abstract: *When does the Charter apply to Member States implementing EU Funds? This is the core question addressed by this paper following the Poclava judgement, whereby the Court of Justice of the European Union (the CJEU) held, for the first time, that the mere finding that a national social policy is supported by EU funds is not in itself sufficient to trigger the applicability of the Charter of Fundamental Rights of the EU (the Charter).¹ The judgement is important as it suggests that the Charter does not apply to all Member States' acts co-funded from EU budgetary resources. Against this background, this contribution sheds lights on situations where the Charter applies to operations implementing EU Funds at the national level departing from a close reading of CJEU case law. Subsequently, the paper explains why the finding that the Charter does not apply to all EU funded actions at national level is not satisfactory and advocates for an active Charter promotion in response.*

Key words: *Charter, EU Funds, applicability, EU governance, promotion*

1. Introduction

The Court of Justice of the European Union (the 'CJEU') recently held in the *Nisttahuz Poclava* case ('*Poclava case*') that the EU Charter of Fundamental Rights (the 'Charter')² does not apply to all national measures going beyond the strict scope of EU legislative action in EU social policy.³ This is so, according to the CJEU, even if EU Funds may be used to finance these measures.⁴

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1 CJEU, Case C- 117/14, Judgement of 5 February 2015, *Nisttahuz Poclava (Poclava)*, EU:C:2015:60, para. 42.

2 O.J. 2012, C 326. "Charter of Fundamental Rights of the European Union".

3 Case C- 117/14 *Poclava* (n 1).

4 This contribution refers to EU Funds implemented under shared management by the Commission and Member States. These include the European Structural and Investment Funds (the 'ESI Funds'), the Common Agricultural Policy Funds (CAP I pillar Funds) and Freedom, Security and Justice Funds (Home Affairs Funds). The 2014-2020 ESI Funds' framework comprises five Funds: European Regional Development Fund (ERDF), European Social Fund (ESF),

The CJEU ruling in *Poclava* feeds into a long line of CJEU case law dealing with the applicability of the Charter to Member States action under Article 51(1) therein. However, the *Poclava* case adds a very important contribution to the field. Namely, it concerns an initiative of a Member State lying outside of the scope of EU law, yet financed by EU financial resources for the attainment of a EU policy objective. This objective is not expressly contained in an EU law norm, yet it is closely implementing an EU policy goal: fostering employment and job creation in the EU.

The question of Charter applicability to EU Funds is not of minor importance. Under the current financial framework,⁵ the EU Funds implemented at the national level represent almost eighty per cent of the EU budget.⁶ EU Funds are at the same time the primary tools to support the EU cohesion policy, social policy, regional development policy, common agricultural policy, common fisheries policy and home affairs policy, to name just a few.⁷ The CJEU pronouncement that the Charter shall not apply at least to some national acts implementing EU Funds means that at least some parts of the EU budget remain completely outside of the scope of EU fundamental rights protection.

This conclusion is highly counter-intuitive, if not contradictory. Since their first establishment, the EU Funds have constantly supported the promotion of social justice, social inclusion and increased enjoyment of fundamental rights in the EU. Under the current financial period, the EU Funds have as dedicated objectives to promote, *inter alia*, employment and job creation, social inclusion and equal opportunities⁸ consistent with the general principle of non-discrimination⁹ and applicable EU law.¹⁰

The finding that the Charter is not ‘applicable EU law’ during all actions implementing EU funding at national level raises at least a number of questions which require thorough consideration. The most important one relates to the EU’s changing modes of governance and the Charter’s limited role in response. In the recent years, EU governance has known dramatic transformations, largely departing from the traditional legal approach to policy making and implementation towards ‘new’ and ‘hybrid’ modes of governance. Particularly in the aftermath of the economic crisis, we find that EU policy toolkit in a given area (for instance, EU economic and social governance) may contain limited or no EU law presence at all. However, the Charter applicability and enforceability at the national level still relies decisively on the existence of a EU law norm. This leads to a result, similar to the *Poclava* case whereby even if a EU policy presence may not be contested, the national implementing action escapes the Charter protection. This result makes us wonder as to

European Agricultural Fund for Rural Development (CAP II pillar - EAFRD), European Cohesion Fund and European Maritime Fisheries Fund (EMFF), see, O. J. 2012 L 347 Regulation (EU) 1303/2013. The Common Agricultural Policy Funds are represented by the EAGF and EAFRD (partially regulated under ESI framework), see O.J. 2012 L 347 Regulation (EU) No 1306/2013. The Home Affairs Funds comprise the Internal Security Fund (ISF) and the Asylum Migration and Integration Fund (AMIF), see O. J. 2014 L 150 Regulation (EU) No 514/2014 .

5 O. J. 2013 L 347 Council Regulation (EU, EURATOM) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020.

6 The rest of EU budgetary resources are implemented directly by the Commission (direct management) or by third parties, such as international organizations or NGOs (indirect management).

7 *Id.*, (n 4).

8 Regulation 1303/2013, art.9, (n 4).

9 Regulation 1303/2013, art.7, (n 4).

10 Regulation 1303/2013, art.6, (n 4).

how fit is the Charter to respond to EU's changing modes of governance, and which are to be the remedies one could adopt in the particular case of EU Funds.

Aiming to investigate these questions, this article begins with a detailed analysis of the *Poclava* case and EU Funds implementation process as illustrative for the problems the Charter encounters during EU funds disbursement at a national level. Subsequently, it inquires as to the situations where the Charter would be found applicable to Member States' action in the area, drawing at the same time a line beyond which the national action escapes the Charter's scope. Finally, the article explains why the finding that the Charter does not apply to all national actions implementing EU Funds is not satisfactory, concluding with a critical appraisal of the forgotten obligation to promote the Charter in response.

2. *Nisttahuz Poclava* Case

The *Nisttahuz Poclava* case concerned a Spanish social policy scheme encouraging the conclusion of indefinite duration employment contracts. The measure aimed to fight unemployment, to boost job creation and to contribute to economic growth in times of deep economic crisis. Ms. Poclava, a beneficiary of an employment contract of indefinite duration under the scheme, saw her contract terminated on the basis of a one-year probationary period clause. Importantly, it was a national law that provided for the text of the employment contract. In this context, Ms. Poclava brought legal proceedings against her employer and questioned the compliance of the disputed contractual clause with the Charter's Article 30 on protection against unjustified dismissal. The labour tribunal of Madrid referred the question to the CJEU requesting the clarification of whether the Charter indeed applied to the matter at stake.¹¹

In answering the question, the CJEU held that it lacked jurisdiction to rule on the matter and adopted a strict reasoning based on the text of Article 51 (1) of the Charter.

The CJEU's reasoning was based upon three main arguments.

Firstly, the Court focused on making a distinction between the EU and national legislative measures in order to determine the scope of EU law applicable to the case. In doing so it dismissed the applicability of the EU Framework Agreement Directive on fixed-term contracts (the 'Framework Directive'), which is intended to protect the employees from abusive use of successive short-term contracts.¹² The Spanish legislation, in the Court's opinion, aimed to establish a scheme encouraging the conclusion of indefinite duration employment contracts.

Furthermore, neither Article 151 TFEU objectives nor the Employment Guidelines and Recommendations adopted by the Council under Article 148 TEFU were found applicable. Apparently these did not impose clear obligations (but rather objectives and in-

11 Juzgado de lo Social No 23 de Madrid.

12 O. J. 1999 L 175, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEPpp. 43-48.

tentions) on Member States regarding probationary periods in labour contracts.¹³ Thus, national acts adopted pursuant to those objectives may not be considered an implementation of EU law.¹⁴

Second, the CJEU denied the applicability of the general principles of EU law. In this sense, contrary to its prior standing in *Viking*¹⁵ and *Laval*¹⁶ judgements on the right to collective action, the CJEU refused to recognise protection against wrongful dismissal as a general principle of EU law based on the European Social Charter provisions or the ILO convention on wrongful dismissal.¹⁷

Finally, and most importantly for our discussion, the CJEU held, with a certain novelty, that the potential financial support from the EU Funds did not help the claim of Charter's applicability.¹⁸

"In addition, the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Article 51(1) of the Charter."

It is still not clear to what extent the *potential* rather than the *actual* source of EU funding has played a role in the court's reasoning, and whether, once proven, the EU funding source could have changed the outcome. What is clear, however, is that the applicability of the Charter does not extend to the universality of Member States' action financed from EU Funds. In this vein, the ruling suggests that the sole EU origin of financial resources is not sufficient *per se* to qualify a Member State's action as implementation of EU law and subsequently, does not trigger the applicability of the Charter.

It is worthwhile noting that the CJEU judgement was issued whilst the European Ombudsman was conducting an investigation on fundamental rights irregularities reported in EU Funds implementation.¹⁹ In addition, one should take note of the fact that the one-year probationary period clause used in the disputed labour contracts scheme was found to be in non-conformity with Article 4(4) of the European Social Charter of 1961 by the European Committee of Social Rights.²⁰

13 *Nisttahuz Poclava*, op. cit., para 40 (n 1).

14 *Nisttahuz Poclava*, op. cit. para 41 (n 1).

15 Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Viking)* EU:C:2007:772, para 43.

16 Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet (Laval)* EU:C:2007:809, para.90

17 *Poclava*, (n), para 43.

18 *Poclava*, (n), 42.

19 Case OI/8/2014/AN, European Ombudsman, *Respect of fundamental rights in the implementation of the EU cohesion policy* (19 May 2014) <<http://www.ombudsman.europa.eu/en/cases/summary.faces/en/59871/html.bookmark>> consulted on 11 May 2014.

20 European Committee of Social Rights, Conclusions XX-3 (2014), Spain, January 2015, p. 18: "[t]he Committee notes in the present case that no notice period or compensation is provided for dismissal during the exceptional probationary period of the entrepreneur support contract. It therefore considers that section 4, paragraph 3 of Law No. 3/2012 is not in conformity with Article 4§4 of the 1961 Charter in this respect.", <http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXX3_en.pdf> consulted on 11 May 2014.

3. A basic introduction to the EU Funds' shared management setting

The EU Funds discussed in this article are implemented under shared management administrative proceedings between the Commission and Member States. EU administration by shared management has been defined by Paul Craig as a:

"[...] management of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully."

In the same vein, EU Funds shared management administration implies a continuous interaction between the Commission and national authorities. Depending on the implementing stage, the process is stronger influenced either by the EU or national actors, however, in no instance is the process a purely EU or a national product. The smooth functioning of the system relies strongly on the concurring supranational, national, regional and local decisions, whereby the tasks and responsibilities of the EU institutions, Member States and their bodies are shared and intertwined.

In practical terms, the EU funding cycle is generally shaped around two main stages: programming and implementation. The Commission closely supervises and guides Member States during the programming stage, which starts with Member States drafting their multiannual strategic expenditure documents ('the programming documents').²¹ The programming documents define and detail Member State's investment priorities in line with the objectives of each funding regulation. If found in compliance with the EU funding regulations and consistent with EU policy objectives, the Commission approves the programming documents, giving rise to the implementation stage.

During the implementation stage the Member States take the lead. Through their established managing, monitoring and financial control bodies Member States proceed to the approval of subsequent implementing measures, select the beneficiaries and monitor the progress of spending. As such, Member States are the first to ensure a sound implementation of EU funds. The Commission, however, monitors the process, as it remains the primary responsible actor for the EU budgetary performance under Article 317 TFEU. In this sense, the Commission may order an interruption of payment deadlines, suspension of payments or financial corrections where irregularities or serious failures are detected.

The above process of EU Funds implementation is of crucial importance to the question of Charter applicability to Member States' action. Whereas the Charter applies to all EU action, of a soft law or hard law nature, it shall only apply to national acts *implementing EU law*. Having in mind the above multilevel and closely inter-twined process of EU

²¹ See, for instance: Regulation (EU) 1303/2013(n 4), at Articles 15 and 16 for PAs and Article 96 for OPs. For example, in the 2014-2020 ESI Funds framework the programming documents are called Partnership Agreements (PAs) and Operational Programmes (OPs). The PAs include a comprehensive description the ESI Funds investment strategy per each Member State throughout the entire programming period, whereas the OPs further detail the implementation of ESI Funds pursuant to each investment objective, and subsequent investment priorities.

Funds administration, we shall further present in detail the complexity of the Charter applicability during EU Funds implementation process.

4. The applicability of the Charter to EU Funds at national level

The question of the Charter applicability to EU Funds as implemented at the national level is not an easy one. The case law decided so far by the CJEU, including the recent *Poclava* case, provides helpful indications as to when the Charter applies. Yet, when one scratches the surface, the question marks multiply, originating essentially from the EU Funds shared management setting explained above and the Charter's own applicability provisions.

In a nutshell, the analysis of the CJEU case law shows that the Charter applies to Member States when implementing EU Funds each time there is an EU law obligation applicable to the situation at stake. The EU law obligation may be traced back directly in the text of EU Funding Regulations or other EU law sources applicable during EU Funds' disbursement. The EU law obligation triggering the applicability of the Charter may also stream directly from EU treaties or general principles of EU law as developed by the CJEU. To the contrary, in cases such as that of *Poclava*, in the absence of an EU law obligation, the Charter does not apply to the Member States. In the next sections we shall develop the above findings.

4.1 General principles of Charter applicability to Member States

The Charter is not an autonomous EU law instrument when it comes to Member States' action. According to Article 51(1) therein, the Charter shall apply to Member States only when implementing EU law. Therefore, the applicability of the Charter to Member States relies decisively on the applicability of another EU law source, different from the Charter²² - the so-called 'Charter trigger-rule'.²³

The above principal rule on Charter applicability may be translated in Lenaerts' metaphorical assessment: "*the Charter is the shade of EU law*";²⁴ or in the pragmatic reasoning of the Advocate General Sharpston: "*once EU law applies, the Charter applies*".²⁵ Yet, the overall conclusion is the same: the Charter is not an autonomous EU law fundamental rights instrument. Its applicability relies on the existence of another EU law rule, which shall be assessed in consistency with or interpreted in the light of the Charter.

This conclusion is consistent with the Court's case law standing since the incorpora-

22 Rosas, "The Applicability of the EU Charter of Fundamental Rights at National Level" EYHR 13, pp. 97-113.

23 Centre for Judicial Cooperation, European University Institute, *Practical Guidelines on the applicability of the Charter*, <<http://www.eui.eu/Projects/CentreForJudicialCooperation/Publications/Index.aspx>> consulted on 10 May 2014.

24 As cited by Kronenberger, D'Alessio, Placco (eds.) "De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins", Mélanges en l'honneur de Paolo Mengozzi, (Bruylant, 2013)..

25 Joined Cases C-141/12 and 372/12, *YS and others v Minister voor Immigratie (YS and others)*, Opinion of AG Sharpston, EU:C:2013:838, para. 86.

tion of fundamental rights in the EU legal order. The rationale behind such complementary nature of the Charter has been to protect the primacy of EU law by ensuring that EU legislation complies with fundamental rights as recognized and protected by Member States' constitutional traditions and the European Convention on Human Rights.²⁶ The conclusion was consistently endorsed by CJEU case law whereby the court held expressly that the very rationale for fundamental rights protection at the EU level both with regards to EU and Member States' action, starting from the pioneering *Internationale Handelsgesellschaft*²⁷ ruling and culminating with the case of *Melloni*²⁸, being: "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law".²⁹

The same applicability limitation follows from Article 51(2) of the Charter, which states that the latter may not extend, modify or otherwise affect EU competences, powers or tasks as defined under the treaties. This means that the Charter is not meant to add to EU competences, but rather to ensure that the respective competences are exercised in compliance with fundamental rights safeguards, both when EU or Member States' acts are under scrutiny.³⁰

Much has been written on Charter's applicability to Member States action.³¹ As underlined by those participating in the Charter negotiations, the lack of consensus on a large scope for Charter applicability, as opposed to a narrow one, gave birth to the compromise applicability text we have today.³² The explanations to Article 51 of the Charter have attempted to mitigate the result. They mention that the Charter shall apply 'unambiguously' to Member States when they are acting within 'the scope of EU law'³³ as opposed to the Charter wording of Member States 'implementing EU law'.³⁴ The CJUE did not however embrace the idea. The court rather refers to both expressions as synonym formulas.³⁵ Furthermore, the court adds its own wordings to describe the situations where Member

26 Weiler and Lockhart, "Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence - Part I", 32 CML Rev. (1995), 51-94.

27 Case C- 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

28 Case C-399/11, *Stefano Melloni v Ministerio Fiscal (Melloni)*, EU:C:2013:107.

29 See: Case C-206/13, *Siragusa v Regione Sicilia (Siragusa)* EU:C:2014:126, para.32; Case C-198/13, *Julian Hernández and Others v Reino de España and Others (Julian Hernández and Others)*, EU:C:2014:2055, para 47.

30 De Schutter, Commentary of Article 51, in: EU Network of Independent Experts on Fundamental Rights "Commentary of the Charter of Fundamental Rights of the European Union", (2006) available at <https://sites.uclouvain.be/cridho/documents/Download.../NetworkCommentaryFinal.pdf>, consulted on 20.04.15.

31 See with a title of example: Rosas, op. cit. (n 25), pp. 97-112; Groussout, Pech and Gunnar, "The Reach of EU Fundamental Rights on Member State Action after Lisbon", in Neergard and Nielsen (eds.), *European Legal Method in a Multi-Level EU Legal Order* (Djoef, 2012), p. 135; Jacqué, 'La Cour de Justice de l'Union et l'application de la Charte dans les Etats membres : « Mehr Licht ? »', in EYHR 2014, pp. 125-148; Kronenberger, (n 24); Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, (Beck/Hart, 2014).

32 Benoît-Rohmer, "La Charte des droits fondamentaux de l'Union européenne dix ans après sa proclamation", EYHR 2011, pp. 25-26; Jacqué, (n 35), p. 130.

33 O. J. 2007 C 303, Explanations Relating to the Charter of Fundamental Rights, Explanation on Art. 51.

34 Charter, Art. 51 para.1.

35 Based on the post-2009 case law of the Court. See, *inter alia*: Case C-206/13, *Siragusa v Regione Sicilia (Siragusa)* EU:C:2014:126, , paras 20-21; Case C- 256/11, *Murat Dereci and Others v Bundesministerium für Inneres (Dereci)* EU:C:2011:734, , para 71; Case C- 617/2010, *Åklagaren v Hans Åkerberg Fransson (Åkerberg Fransson)*, EU:C:2013:105, , paras 17-19; Case C-483/12, *Pelckmans Turnhout NV v Walter Van Gestel Balen NV and Others (Pelckmans Turnhout)*, EU:C:2014:304, para 12.

States are bound by the Charter such as: ‘*matters covered by EU law*’,³⁶ ‘*all situations governed by EU law*’³⁷ and in ‘*connection to EU law*’.³⁸

Hence, the drafters of the Charter have left it to the Court to further crystallize the Charter’s scope of application to Member States and the Court has been busy in the last six years doing so.³⁹ Based on the analysis of Judge Safjan, the Court embraced the question in a genuinely functional approach, understood as a perfect compromise between a narrow textual interpretation approach and a broad approach encompassing all situations touching upon EU law matters.⁴⁰

So far the Court has ruled that both fundamental rights as general principles of EU law and fundamental rights as enshrined in the Charter after December 1st 2009, bind Member States when: Member States apply directly and unconditionally an EU law norm⁴¹; Member States apply an EU law norm exercising discretion based on the text of a EU Regulation,⁴² or a Decision⁴³ or when transposing a Directive⁴⁴; when Member States der-

36 *Siragusa*, note 29, para 22.

37 *Pelckmans Turnhout*, note 34, para 18.

38 Case C-498/12, Order of the Court of 7 February 2013, ECLI:EU:C:2013:76 Antonella Pedone v N. (*Pedone*), nyr.

39 The outcome of the Charter’s scope of applicability to Member State action is currently projected in the perpetually strained dialogue between the national courts and CJEU. Indeed, the judicial dialogue is expected to bring a gradual clarity to the questions left open. Nevertheless, there is still a long way to go. Since its entry in force on December 1st 2009, the CJEU has been called to adjudicate an ever-increasing number of cases invoking the Charter. According to the 2014 Report on the Application of the EU Charter of Fundamental Rights, the decisions of CJEU quoting the Charter counted 43 decisions in 2011, 87 in 2012, 114 in 2013 and finally 210 decisions 2014, available at: http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf, consulted on 05.06.2015. Whilst the development should be praised, for it proves a growing interest of Member States, national courts and individuals alike towards the Charter; given the large number of lack of competence orders, the situation raises concerns towards the legal uncertainty the Charter brought. See further on the dramatic increase of preliminary references on the Charter during 2009-2012 in: Grainne De Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, Rochester, NY, Social Science Research Network, 1 September 2013. plainCitation: "D Burca & Grainne, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?, Rochester, NY, Social Science Research Network, 1 September 2013, <<http://papers.ssrn.com/abstract=2319175>> [accessed 30 January 2014],", "dontUpdate": true, "citationItems": [{"id": "526", "uris": ["<http://zotero.org/users/1706164/items/W4NER98U>"], "uri": ["<http://zotero.org/users/1706164/items/W4NER98U>"], "itemData": {"id": "526", "type": "report", "title": "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", "publisher": "Social Science Research Network", "publisher-place": "Rochester, NY", "genre": "SSRN Scholarly Paper", "source": "papers.ssrn.com", "event-place": "Rochester, NY", "abstract": "This article examines the engagement by the Court of Justice of the European Union (CJEU

40 Safjan, Marek, ‘Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union’, EUJ, Centre for Judicial Cooperation, Distinguished Lecture 2014/02.

41 See in this respect: Case C- 5/88, Judgement of 13 July 1989, ECLI:EU:C:1989:321, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft (Wachauf)*, Rec 1989 02609, paras.17-19; Case C-491/10 PPU, Judgement of 22 December 2010, ECLI:EU:C:2010:828 (*Aquirre Zarraga*), paras. 60-61;

42 See in this respect: Case C-202/97, Judgement of 13 April 2000, ECLI:EU:C:2000:202, *Kjell Karlsson and Others (Karlsson)*, para.35-38; Joined Cases C-411/10 and C-493/10, Judgement of 21 December 2011, ECLI:EU:C:2011:865, *N. S. v Secretary of State for the Home Department (N.S.)*, Rec. 2011 I-13905, paras. 64-69.

43 See in this regard: *Melloni*, note 28; Case C-168/13 PPU, Judgement of 30 May 2013, ECLI:EU:C:2013:358, *Jeremy F. v Premier Minister (Jeremy F)*, nyr, para. 42.

44 See in this respect: Case C- 176/12, Judgement of 15 January 2014, ECLI:EU:C:2014:2, *Association de médiation sociale v Union locale des syndicats CGT and Others (AMS)*, nyr, para 23; Case C- 70/10, Judgement of 24 November 2011, ECLI:EU:C:2011:771, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (Scarlet Extended)*, Rec. 2011 I-11959, paras. 43-46; even if the national measure not intended to transpose the given Directive, but has in fact that effect: Case C-555/07, Judgement of 19 January 2010, ECLI:EU:C:2010:21, *Seda Küçükdeveci v Swedex GmbH & Co. KG (Kucukdeveci)*, Rec 2010 I-00365, paras. 22-27; see also to that effect *Akerberg Fransson*,

ogate from market freedoms under the treaties⁴⁵; when Member States adopt measures according to their procedural autonomy which must ensure an effective enforcement of EU law and equally, ensure the respect of the Charter.⁴⁶

To the contrary, the Court held that the Charter would not apply to situations that concern purely national situations,⁴⁷ where only an indirect link to EU law or no sufficient connection to EU law is established,⁴⁸ and where the case at hand does not put in question the interpretation, application or validity of an EU law norm or the interpretation of a Union general principle.⁴⁹

This jumbled framework has been presented in a rather simplified and useful manner by Lenaerts,⁵⁰ which we shall borrow for our further analysis. The approach departs from the premises of *existence* or, on the contrary, *lack of a EU law obligation*. According to the judge, the Explanations to the Charter send us to three possible scenarios on the Charter applicability to Member States.⁵¹

First, one should refer to situations where EU law imposes an obligation on Member States. Second, one must consider the *ERT* - 'derogatory acts' scenario on obligations to be followed by the Member States when derogating from EU market freedoms. Finally, we discuss the *Anibaldi* case, a 'purely national situation' scenario, where the lack of a EU law obligation is equal to the lack of scope for the Charter applicability.

In the following section we shall apply this three-dimensional classification to EU Funds operation at a national level.

note 34.

45 See in this regard: Case C-112/00, Judgement of 12 June 2003, ECLI:EU:C:2003:333, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich (*Schmidberger*), Rec. 2003 I-05659, para. 71-77; Case C-36/02, Judgement of 14 October 2004, ECLI:EU:C:2004:614, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (*Omega*), ECR 2004 I-09609, para 33-35; Case C-145/09, Judgement of 23 November 2010, ECLI:EU:C:2010:708, Land Baden-Württemberg v Panagiotis Tsakouridis (*Tsakouridis*), Rec 2010 I-11979, para. 52; Case C-396/11, Judgement of 29 January 2013, ECLI:EU:C:2013:39 European arrest warrants issued against Ciprian Vasile Radu (*Radu*), para.36-39; *Viking*, note 10; *Laval*, note 11.

46 See in this respect: Case C- 418/11, Judgement of 26 September 2013, ECLI:EU:C:2013:588, Texdata Software GmbH (*Texdata*), nyr, para. 74-77; Case C-279/09, Judgement of 22 December 2010, ECLI:EU:C:2010:811, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (*DEB*), ECR 010 I-13849, paras. 30-33; Case C-69/10, Judgement of 28 July 2012, ECLI:EU:C:2011:524, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (*Diouf*), ECR 2011 I-07151, paras. 48-50.

47 Case C-309/96, Judgment of 18 December 1997, ECLI:EU:C:1997:631, Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio (*Anibaldi*) ECR I-7493, para. 21-24; Case C- 33/13, Judgement of November 2014, ECLI:EU:C:2014:2358, Elisabeta Dano and Florin Dano v Jobcenter Leipzig (*Dano*), nyr, para. 87-91.

48 Cases *Siragusa, Julian Hernández and Others*, note 33.

49 Order of the Court in Case C-498/12, *Pedone*, note 42, para 14: "[...]il n'en demeure pas moins que la décision de renvoi ne contient aucun élément concret permettant de considérer que l'objet de la procédure au principal concerne l'interprétation ou l'application d'une règle de l'Union autre que celles figurant dans la Charte."; See also, Rosas, note 26, pp. 110-112.

50 K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', in *European Constitutional Law Review (EuConst)*, vol. 8, 2012, pp. 375-403.

51 *Id.*

4.2 The Charter applicability to Member States implementing EU Funds

When testing Lenaerts' hypothesis⁵² in the case of EU Funds disbursed at national level, it follows that the Charter applicability could be discussed in the same three situations:

- (1) when Member States are acting pursuant to a EU law obligation;
- (2) when Member States derogate from market freedoms;
- (3) when Member States do not act pursuant to an EU law obligation.

We shall subsequently analyse each situation.

(1) Member States acting pursuant to a EU law obligation

a. Member States as agents scenario

Firstly, the Charter shall apply to Union funding operations each time EU Funds legislative frameworks impose a clear obligation on Member States subject to no discretion. In this situation, the States act purely as '*agents*' of the Union (*Wachauf* scenario),⁵³ fulfilling the mandate vested upon them by the EU law rule.

The Court's line of reasoning in *Wachauf* finds corresponds to the EU Funds architecture in the *Volker* ruling.⁵⁴ The case concerned the processing of personal data of beneficiaries of agricultural aid.⁵⁵

In fact, the framework financial Regulation on Common Agricultural Policy (CAP), as amended in 2007, laid an explicit obligation on the Member States to publish *ex-post* the data on beneficiaries and the amount of aid received *per* beneficiary from the CAP funds.⁵⁶ The Commission implementing Regulation⁵⁷ further detailed the publication rules as to their content, form, date, as well as rules relating to information on beneficiaries.⁵⁸

⁵² *Id.*, pp. 375–403.

⁵³ *Wachauf*, note 40.

⁵⁴ Joined cases C-92/09 and C-93/09, Judgement of 9 November 2010, ECLI:EU:C:2010:662, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen (Volker)*, ECR I-11063.

⁵⁵ For a detailed analysis of the case from a data protection and constitutional law point of view, see: M Bobek, 'Joined Cases C-92&93/09, "Volker und Markus Schecke GbR and Hartmut Eifert", Judgment of the Court of Justice (Grand Chamber) of 9 November 2010', in *Common Market Law Review*, vol. 48, Issue 6, 2011, pp. 2005–2022.

⁵⁶ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy, OJ 2005 L 209, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007 OJ 2007 L 322, p. 1-ss, art. 44a.

⁵⁷ Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), OJ 2008 L 76, p. 28.

⁵⁸ Both the provisions of CAP financing Regulation and the Commission's implementing regulations were in fact adapting the general EU Financial Regulation rules on ex-post publication of financial data by Member States, see: Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248 of 16.09.2012.

As the above provisions imposed a clear and detailed EU law obligation on Member States, allowing for no discretion, the Court found the Charter applicable. More specifically, the Court found that Article 7 (right to private life) and Article 8 (protection of personal data) were applicable both to the EU Regulation and the Commission's implementing Regulation provisions on the matter. As the two Charter rights are not absolute, their enjoyment could be limited under Article 52(1) of the Charter only where subject to a limitation provided by law, be proportionate and not going against the very essence of the rights at stake. In the *Volker* case, the limitation of the Charter rights, as balanced against the general principle of transparency, was found disproportionate by the Court in as far as the publication concerned the data of natural persons. Consequently, the challenged provisions were declared void.

Applying *mutatis mutandis* the above reasoning to the broader legislative framework of EU Funds disbursed under shared management, it follows that Member States are bound to observe the Charter each time they implement an obligation allowing no discretion. The obligation may be found directly in the funding regulations or in Commission's delegated or implementing regulations.

It is usual that under EU Funds legislative frameworks the obligations allowing for little or no discretion for Member States shall be few. As mentioned already, most of EU Funds operations imply considerable planning cooperation, decision-making and subsequent implementing measures at national level, which implies a high level of decentralisation and by consequence, a high level of discretion.

Nevertheless, 'Member States as agents' situations are not excluded. For instance, under the ESI Funds Regulations and corresponding Commission's implementing and delegated acts, obligations allowing for little discretion will target institutional and substantive settings for an uniform application of EU funding throughout the twenty eight systems of the Member States. They especially concern: the form and design of the programmes; the design and tasks of the managing, monitoring; certifying and control authorities; the collection, processing or storage of data; rules on eligible expenditure; rules on beneficiaries; selection criteria; and the conditions for financial correction of wrongful expenditure.⁵⁹ The CAP package is richer in specific obligations, especially with regards to the level of direct payments, award conditions for agricultural aid, and with respect to communication and information.⁶⁰

b. Member States as 'administrators' scenario

The Charter will also apply to Member States' implementing EU provisions that allow for large discretion and a margin of appreciation. During EU Funds operation the degree of discretion exercised by the Commission and Member States shall differ depending on the moment in the procedure. As emphasised in the first part of this paper, the latter

⁵⁹ See, for instance, the corresponding provisions in the ESI Funds legislative package: Regulation (EU) 1303/2013, note 4; further the Commission's delegated Regulations available at: http://ec.europa.eu/regional_policy/en/information/legislation/delegated-acts/ and the Commission's Implementing Regulations, available at: http://ec.europa.eu/regional_policy/en/information/legislation/implementing-acts/ (consulted on 29.04.2015).

⁶⁰ Regulation (EU) No 1306/2013, note 4.

shall usually enjoy a narrow margin of manoeuvre during the planning stage and a larger leeway during the actual implementation of EU funding.

As such, the Charter will apply when Member States do not act as mere administrative tools implementing EU law, but exercise their national discretion with regards to the means and measures chosen to achieve the objectives of EU Funds Regulations. The CJEU has been consistent on this matter both before and after the Charter has gained binding force.

i- Decisions of national authorities

In its early *Borelli* ruling, the court held that an act adopted by national authorities concerning the refusal or, to the contrary, approval of agricultural aid must comply with the requirement of judicial control as a general principle of EU (then Community) law.⁶¹ Tracing back the basis of the EU fundamental rights applicability in this case one must note the following: first, the Member State was under a EU law obligation to adopt a prior opinion on the award of agricultural aid deriving from Article 13(3) of Regulation 355/77; secondly, in doing so, the Member State authority was implementing an EU law mandate. Hence, EU fundamental rights applied to the case, binding the national authority.

The CJEU confirmed this principle ruling also after the Charter has gained binding force. This time, the Court departed from Article 47 of the Charter on the right to effective judicial protection.

In the *Liivimaa Lihaveis* case the applicant's request for subsidies was rejected by a decision of the monitoring committee set under a EU territorial cooperation programme established between Lithuania and Estonia, financed from regional development resources.⁶² Both implementing acts, the operational programme and the programme manual, lacked a provision allowing for judicial review of the decisions adopted by the said monitoring body.

For the purposes of Charter application, it is necessary and sufficient to note the following: First, EU law required both Member States to implement the territorial cooperation programme.⁶³ Second, EU law required the two Member States to set a body monitoring the programme.⁶⁴ Third, EU law mandated the body to select (or reject implicitly) the funded operations.⁶⁵ Accordingly, the two Member States were acting within the scope of EU law, in the sense of Article 51(1) of the Charter. Hence, the Charter's Article 47 was applicable to the case at hand and opposed a situation where a programme manual does not allow for a judicial remedy against decisions of the monitoring committee.

61 C-97/91, Judgement of 3 December 1992, EU:C:1992:491, *Oleificio Borelli v Commission (Borelli)*, ECR 1992 I-06313, paras.14-15.

62 Case 562/12, Judgement of 17 September 2014, ECLI:EU:C:2014:2229, *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee (Liivimaa Lihaveis)*, nyr, paras. 71-73.

63 *Id.*

64 Regulation (EC) 1083/2006 on ERDF, OJ L 2010 of 31.07.2006, Art. 63(1).

65 Regulation (EC) 1080/2006, OJ L 2010 of 31.07.2006, Art. 19.

ii- *Selection criteria*

Member States' discretion is also subject to the Charter when they draw and implement selection criteria for operations supported from EU Funds.⁶⁶ Under EU funding rules, it is usually the responsibility of Member States to draw the selection criteria and select the programme's beneficiaries, within the limit of discretion granted under the funding Regulations.

In *Malom* the CJEU held that selection criteria must be consistent with the principle of equality and non discrimination, in as much as these may not allow for direct or indirect discrimination between the potential beneficiaries eligible for aid under the rural development funding. In this case the selection criteria set by the Member State provided that the support could be granted only to the mills in the view of renovating the existing capacity. The criteria excluded the applicants, which, instead of renovating the old mills, chose to build new facilities without increasing the existent capacity. The Court found that the Charter and the principle of non-discrimination should be observed, as long as the replacement of the existing capacity and the renovation are in comparable situations.

Similarly, in the *Soukupová* case the CJEU found the Charter applicable to eligibility criteria set by Member States implementing a farmers' early retirement scheme financed from rural development aid.⁶⁷ The Court held that the Charter opposed any national selection criteria, which are discriminatory on grounds of gender, as setting a different retirement age for men and women, and further discriminating between women on the ground of the number of children raised.⁶⁸

Under 2014-2020 ESI Funds legislative setting, the managing authorities designated by each Member State shall be responsible to "*draw up and, once approved, apply appropriate selection procedures and criteria that [...] are non-discriminatory and transparent*", are consistent with the principles of gender equality and prevent status discrimination.⁶⁹ There is thus an EU law obligation on Member States authorities to set the selection criteria. Accordingly, in exercising their national discretion by drafting appropriate eligibility criteria and subsequently when selecting applications, Member States are also under an obligation to respect the Charter, which shall always apply to national selection criteria and procedures.

iii- *Additional rules set at the national level*

Another case of Member States' discretion refers to the situation where, whilst the funding regulations provide for a clear obligation, specifying compulsory conditions for its fulfilment, Member States decide to go further by adding supplementing conditions

⁶⁶ Case C-135/13, Judgement of 15 May 2014, ECLI:EU:C:2014:327, *Szatmári Malom Kft. v Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve (Malom)*, nyr, paras. 65-71.

⁶⁷ Case C-401/11 Judgement of 11 April 2013, ECLI:EU:C:2013:223 *Blanka Soukupová v Ministerstvo zemědělství (Soukupová)*, nyr, paras. 28-29.

⁶⁸ *Id.* Here it is important to remember that the Court adopted pro-active reasoning. It qualified the financial measure as a structural action in support of the agricultural sector and excluded the application of the Union social provisions of Directive 79/7 (OJ 1979 L 6), which allow for retirement age differences between women and men.

⁶⁹ Regulation 1303/2013, Article 7 and 125(3), note 1.

when implementing a given obligation.

In the *Nektar Leader* case⁷⁰ the Court held that when a Member State establishes additional eligibility conditions regarding the legal form of a local development action group, the given act should necessarily be exercised within the limits of the Charter guarantees and the limits of discretion allowed by the funding regulations. In fact, the EU Regulation 1698/2005 on rural development fund⁷¹ stated that these are local action groups designated by Member States that should, under certain conditions, lead the Community-inspired local development support. While implementing this obligation, the Member State decided to go beyond the EU law conditions and regulated additional guarantees relative to the legal form of the local action groups, specified in the national selection criteria. In ruling on the matter the CJEU held that Member States may choose to exercise their discretion in such cases, however the Charter must be observed, and in particular the principles of equal treatment and non-discrimination.⁷²

iv- 'Member States may...' rules

Another form of Member States' discretion may be observed in the CJEU's case law, expressed generally by 'Member States may...' norms. According to the Court's case law, the Charter shall apply even when no *stricto sensu* obligation is at stake, but, nevertheless, Member States choose to act under options allowed by EU law. In this case, the expression of intent binds the Member State and so the Charter shall apply.⁷³

The same reasoning shall apply when EU law leaves the option to Member States to implement or not a funding scheme, or to choose from several available support options. In the *IBV* case,⁷⁴ the Directive 2004/8 on cogeneration and Directive 2001/77 on renewable energy allowed Member States to set supporting schemes for promotion of cogeneration and renewable energy. The Member States had the option to choose and combine various support schemes such as "investment aid, tax exemptions or reductions, green certificates and/or direct price support schemes".⁷⁵ In this case, the Court held that, when opting for a particular support scheme setting, Member States are exercising national discretion, however, they must observe the Charter and the principles of equal treatment and non-discrimination, in particular when setting selection criteria and operational rules for access to funding.⁷⁶

⁷⁰ Case 24/13, Order of 16 January 2014, ECLI:EU:C:2014:40, Dél-Zempléni Nektár Leader Nonprofit kft. v Vidékfejlesztési minister (*Nektar Leader*), nyr, paras. 29, 37.

⁷¹ Under 2014-2020 framework, see Regulation (EU) No 1305/2013, Articles 42 and ss on LEADER – Community led local development initiative, note 17.

⁷² Case *Nektar Leader*, note 82.

⁷³ This line of reasoning corresponds to the Court's jurisprudence in *N.S.* case, whereby under the Dublin Regulation, the Member State was offered an option to act and it opted to, without being under an obligation to do so. See, Case *N.S.*, note 46, paras. 61-69.

⁷⁴ Case C- 195/12, Judgement of 26 September 2013, ECLI:EU:C:2013:598 *Industrie du bois de Vielsalm & Cie (IBV) SA v Région Wallonne (IBV)*, nyr, paras. 48-49.

⁷⁵ Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC, OJ 2004 L 052 considerations (26); Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market OJ 2001 L 283, considerations (14).

⁷⁶ Case *IBV*, note 86, para. 49.

The environmental support scheme under scrutiny was financed from national resources, however the reasoning is valid, *mutatis mutandis*, in the case of EU Funds optional clauses. The Charter shall thus be applicable from the moment the state expresses its intention to opt for a given support scheme. For instance, Member States may opt to set financial instruments under one or several national programmes.⁷⁷

Similarly, the Charter shall apply to CAP support measures from the moment Member States choose to adopt a support scheme allowed by CAP Regulations which may exclude certain farmers from direct payments.⁷⁸

c. Cross-sectorial EU law obligations

Beyond the obligations vested on Member States directly through Union funding regulations (allowing or not for national discretion), the Charter shall equally apply to situations where the Union funds are financing measures, falling under the scope of other EU law obligations. We may refer to these as cross-sectorial EU law obligations, situated outside the EU funding regulations framework.

In EU Funds setting the probability of a cross-sector applicable EU law rule is very high. This is due to the principle of consistency of EU funding action, which mandates EU Institutions and Member States to design financial actions consistent with the overall EU legal framework relevant to the area of investment.

With the CAP financial framework, the most representative example refers to the Union law on environmental protection, plant or animal welfare.⁷⁹ With ESI Funds we might imagine a funding scheme where an EU law obligation derived from Union equality legislation would be applicable. If we take the example of the *Poclava* case,⁸⁰ had the factual situation concerned a discrimination case, rather than an unfair termination of a labour contract, the EU non-discrimination law could have been found applicable. As such, the EU cross-sector law obligation would trigger subsequently the applicability of the Charter.

d. Member States' procedural autonomy and the principles of effectiveness and equivalence

Finally, in line with the court's well-established case law on principles of effectiveness and equivalence, the Charter applies to national procedural rules, which are meant to ensure the effective application and operation of Union law and funding.⁸¹

⁷⁷ Regulation 1303/2013, Article 37, note 1.

⁷⁸ See, for instance: Regulation 1307/2013, OJ L 347 of 21.12.2013, Article 9 (3): "In addition to paragraphs 1 and 2, *Member States may decide*, on the basis of objective and non-discriminatory criteria, that no direct payments are to be granted to natural or legal persons, or to groups of natural or legal persons: (a) whose agricultural activities form only an insignificant part of their overall economic activities; and/or (b) whose principal activity or company objects do not consist of exercising an agricultural activity."

⁷⁹ *Id*, Chapter 3, Articles 43 and ss.

⁸⁰ *Poclava*, note 1.

⁸¹ CJEU, Case C-63/01, *Samuel Sidney Evans v The Secretary of State for the Environment (Evans)*, ECLI:EU:C:2003:650, 2003 I-14447, paras. 45-46.

In this case Member States do not enjoy a limited discretion or margin of manoeuvre; they enjoy *complete procedural autonomy* if not otherwise provided by EU law. The principle of procedural autonomy is nevertheless subject to the general EU law obligation to ensure effective and equivalent protection of the rights derived from Union law on equal footing with the ones derived from national legal orders. Hence, it is this general obligation of EU law based on the principles of effectiveness and equivalence that trigger the applicability of the Charter, and notably Article 47 on effective judicial and non-judicial remedies and guarantees.

In this sense, in the *Agrokonsulting* case the CJEU held that the Charter applied to a national rule on administrative courts' jurisdiction adopted specifically in the area of Union agricultural support. The rule was accountable in the light of the Charter as it was able to affect the right to effective judicial remedy and access to courts to individuals claiming a right derived from the EU legal order – the right to agricultural aid.⁸² Whereas the Member State designated one single high court as materially competent to handle the agricultural aid disputes, the CJEU held that such a measure constitutes limitation of the right to effective judicial protection, however, the limitation was found proportionate, hence compatible with Article 47 of the Charter.⁸³

This point is especially important for the overall attribution of EU Funds. National authorities and bodies are the ones mandated under EU funding regulations to draw and implement the operations selection procedures, to undertake a first control of the financial spending and penalise the acts that intimidate the financial interest of the Union. As such, the imperatives of Article 47 of the Charter must always be observed when the delegated national bodies adopt the procedural rules governing the area.

In this respect it is for the Member States to ensure that during the practical operation of EU Funds individuals have access to effective judicial and non-judicial remedies, the corrections and penalties are imposed in line with the general EU principles of dissuasiveness⁸⁴ and proportionality, as well as that the applicants' case is handled in a transparent and impartial manner. The principle of proportionality, as a general principle of EU law, applied in the particular case of national rules imposing sanctions for the breach of EU law in the area of EU funding, mandates that these sanctions do not go beyond an appropriate and necessary sanction to attain the objectives prescribed by EU law, namely: to protect the financial interests of the Union and to ensure effective and lawful expenditure.⁸⁵ Moreover, where Union funding regulations or subsequent national implementing rules provide for several available measures, recourse must be given to the least onerous ones, having regard to the possible disadvantages caused and the aims

82 Case C-93/12, Judgement of 27 June 2013, ET *Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond «Zemedelie» - Razplasztatelna agentsia (Agrokonsulting)*, nyr, paras. 59-61.

83 *Id.*, para. 59.

84 The principle of dissuasiveness guides national judicial and administrative authorities to adopt remedies (including corrections, sanctions and other penalties) which must be able to safeguard the objectives pursued by the EU rule they protect and genuinely deter the opposite conduct. See, Joined Cases C-387/02, C-391/02 and C-403/02, ECLI:EU:C:2004:624, *Silvio Berlusconi and Others, Opnion AG Kokott*, para. 88-92.

85 See by analogy, Case C-443/13, Judgement of 13 November 2014, ECLI:EU:C:2014:2370, *Ute Reindl v Bezirkshauptmannschaft Innsbruck (Reindl)*, para. 39.

pursued.⁸⁶

(2) Member States in derogation from EU single market freedoms

The *ERT* well-established case law tells us that EU fundamental rights, and accordingly the Charter, shall apply to acts of Member States that derogate from EU market freedoms under the treaties. The Charter may be relied upon both as restriction to Member States' derogatory acts,⁸⁷ as well as justification for such derogations.⁸⁸

Adapting the above reasoning to EU funded operations at national level, it follows that the Charter shall apply each time Member States derogate from a Union freedom when implementing a EU funded scheme.

Such is the case, for instance, when the EU Funds eligible criteria might conflict with freedom of establishment or freedom to provide services, thus limiting the access of non-nationals to EU financial support.

The CJEU has dealt with this issue in the *Dirextra Alta Formazione* case.⁸⁹ The case concerned a regional aid scheme financed from EU Funds (European Social Fund) aiming at enhancing the level of post-graduate education in the region. One of the eligibility criteria of the educational institutions providing postgraduate education programmes was that the institutions prove at least ten years of continuous experience in the area; a condition which the applicant did not fulfil. As the applicant was an educational body established in another Member State, providing educational services in the region, it was subject to the Treaty rules on freedom to provide services (Article 56 TFEU). The eligibility criterion was qualified by the Court as a restriction to free movement of services, nevertheless, the Court appreciated that the scheme was applied in a non-discriminatory manner to national and non-national, public and private service providers, and even if it might have a greater negative impact on non-national service providers, the Court held that such a limitation was proportionate and justified, having regards to the aim of ensuring high quality postgraduate education. Even if the applicants invoked Charter Article 14 on the Right to Education, the Court did not analyse the provision. Nevertheless, as the treaty rules on freedom to provide services applied to the case, the Charter is applicable to the case.

Again, returning to the EU obligation-based analysis, in the light of the treaties, Member States are obliged to guarantee the freedom to provide services to operators established in other Member States. When derogating from this obligation under the strict treaty rules, Member States are equally obliged to observe the Charter, especially the principle of non-discrimination on grounds of nationality as provided by Article 21(2) thereof.

86 *Id.*, para. 40.

87 Case C-260/89, Judgement of 18 June 1991, ECLI:EU:C:1991:254, *ERT V DEP (ERT)*, ERC I-02925

88 Case *Omega*, note 49.

89 Case C-523/12, Judgement of 12 December 2013, ECLI:EU:C:2013:831 *Dirextra Alta Formazione srl v Regione Puglia (Dirextra Alta Formazione)*, nyr, paras.21-30.

(3) Member States exercising no EU law obligation

Finally, when none of the obligations described above exist the Charter shall not apply to national operations financed from EU Funds.

As a matter of principle, in *Annibaldi*⁹⁰ the Court held that EU fundamental rights shall not apply to situations falling outside the scope of EU law. In particular, the Court emphasised that when a national measure is not intended to implement a Union law provision, EU fundamental rights would not be applicable even if the national legislation may touch upon Union objectives, such as environmental protection or cultural heritage, and even when such a national measure is liable to impact in an indirect manner on EU agricultural policy.⁹¹

The Court has further held in *Siragusa* that the Charter shall not apply to national situations that do not prove a sufficient link to EU law, that are merely in a close relation to a EU law matter or may have only an indirect impact on the latter, departing from the intention, nature and objectives pursued by the national measure at stake.⁹² Moreover, the fact that EU enjoys competences in a given area shall not lead by default to the conclusion that the Charter applies to national measures in the area, if no implementing element can be detected.⁹³

This last scenario brings us back to the initial *Poclava* case,⁹⁴ closing this circle of CJEU case law analysis. In *Poclava* the Court found that Spain did not implement an EU law obligation even if the employment support scheme related to EU social and employment policy objectives and even if the measure could be financed from Social Fund resources. Hence, the scenario was not found to be under the scope of the Charter's application and fell exclusively within the scope of national law. In the next section we shall show why, from the point of view of EU spending governance structure, the above non-applicability conclusion is not easy to accept.

5. What lies beyond the Court's case law on the Charter applicability to EU Funds?

In the previous section we have defined the situations that would allow for the Charter's applicability to EU funds operations implemented at the national level based on the Court's landmark rulings in the area. The current section of this review adds an essential dimension to the discussion. It reflects on the role of the Charter in situations where in absence of EU law implementation a EU policy implementing action at a national level through EU Funds cannot be denied. In such cases, it is argued that there is still scope for the Charter under its positive dimension 'to promote'.

90 *Annibaldi*, note 46, para. 21-24.

91 *Id.*, para. 22-23.

92 *Siragusa*, note 33, para. 29.

93 *Julian Hernández and Others*, note 29, para.34-37, 47.

94 *Poclava*, note 1.

5.1 EU funding, EU governance and the Charter

Even if perfectly in line with our obligation-based analysis, the CJEU's solution in the *Poclava* case⁹⁵ is somehow counter-intuitive. The core reason behind the discord lies within the EU peculiar governance model in delivering on EU policy objectives through the use of EU Funds.

The EU Funds discussed in this article must be understood as *one* of the multiple tools of the EU policy toolbox dedicated to policy delivery in a particular setting of Union governance, including the areas of employment and social policy.⁹⁶ The EU Funds are horizontal and, often, decisive policy tools, largely used to influence conduct of the Member States towards achieving EU policy objectives. Daintith referred to this technique of governance as – ‘government by dominium’ – whereby a government chooses to pursue policy objectives by deploying financial resources alternatively, or complementary to, enacting binding norms backed by sanctions – ‘government by imperium’ technique.⁹⁷

At the EU level, the composition of a policy toolkit shall necessarily differ from one policy to another, primarily depending on the competences of the Union (Articles 3-6 TFEU), political support or other strategic considerations at stake. In practical terms, this means that the EU governance policy toolkit may completely lack or contain only limited legislative measures, especially in the areas of shared competence (Article 4 TFEU) or, even more so, in areas of Union cooperative competence (Articles 5, 6 TFEU). The Union funding shall nevertheless ‘serve’ in a coherent manner the overall EU policy toolkit, composed of both legally binding and non-binding instruments.

The Spanish scheme co-funded from European Structural Funds resources and disputed in the *Poclava* case was contributing to the implementation of Union employment and economic governance policy objectives. The financial support measure was implementing the European Council Recommendations adopted pursuant to Articles 121 and 148 TFEU in the framework of the European Semester.⁹⁸ The latter referred explicitly to labour market reform⁹⁹, which included the disputed indefinite labour contract scheme.¹⁰⁰

In the *Poclava* case the CJEU established that all these EU documents lay out rather broad and general policy targets and vest no specific EU legal obligation binding on Member States to allow for the applicability of the Charter.¹⁰¹ However, in no instance did

95 *Poclava*, note 1.

96 European Commission, ‘COM(2001) 428 Final’.

97 Daintith, Terence ‘The Techniques of Government’ in: *The changing constitution*, JL Jowell & D Oliver (eds), 1994, pp. 209–236.

98 See, Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Spain and delivering a Council opinion on the Stability Programme of Spain, 2012-2016, consideration (13), recommendation 4, OJ C 217 of 30.07.2013; Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015 OJ C 2019; Council Recommendation on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated Stability Programme of Spain, 2011-2014, considerations (13)-(14), recommendation (6).

99 OECD, *The 2012 Labour Market Reform in Spain* (2014).

100 *Id.*, note 97.

101 *Poclava*, note 1.

the ruling discuss the applicability of the Charter to EU institutions involved.

Here, it must be stressed that the Charter shall always and fully apply to EU institutions pursuant to its Article 51 (1), irrespective of whether these adopt legislative or non-legislative acts.¹⁰² This means that the Charter shall apply to European Council recommendations on a given reform measure supported from EU Funds. Similarly, the Charter shall apply to all acts of the Commission during the implementation of EU Funds, be they of legal, policy or soft law nature. This is a core consideration on the Charter applicability to EU Funds operation, which has not been, however, emphasised enough in the CJEU case law so far.¹⁰³

When assessing the Charter compliance of a national measure implementing EU Funds, it should be first established what are the relevant legislative or non-legislative acts of EU institutions involved and whether the latter are in compliance with the Charter article at stake. Only once such an analysis has been performed should the applicability of the Charter with regards to Member States be discussed.

By consequence, only where EU institutions' acts of non-legislative nature are found in compliance with the Charter the non-applicability of the Charter to Member States may be discussed having regards to the CJEU *Poclava* case.¹⁰⁴

However, even in this case, we shall further argue that the absence of an applicable EU law provision does not mean that there is no place for the Charter at the Member States level.

5.2 The obligation 'to promote'

The debates on the scope and thus applicability of the Charter usually shift the attention from another highly important element of Article 51, namely the positive obligation 'to promote' the rights and principles therein. Beyond the obligation of EU Institutions and Member States to respect the rights and observe the principles of the Charter, both EU Institutions and Member States shall "*promote the application thereof according to their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties*".

The formulation "shall" leaves no scope for interpretation. As opposed to the applicability of the Charter, the promotion of its rights and principles knows no substantive boundary. Hence, the Member States obligation to promote the Charter is not limited to situations where Member States are 'implementing EU law', but extend to all implement-

¹⁰² See, as an analogy, the discussion of Charter applicability to crisis driven acts of EU institutions: C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 405; A. Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?', 1156–1160.

¹⁰³ Refer to, on the applicability of the Charter to the Commission's acts outside the EU (ESM) setting, Case C-370/12, *Pringle v. Government of Ireland (Pringle)*, View of Advocate General, ECLI:EU:C:2012:675, coherently ns and eliver on ava case to n titutions at stake discussed.ke. Only once such an analysis has been performed shouldpara.176.

¹⁰⁴ *Poclava*, note 1.

ing actions at a national level, be they EU laws, policies or other cooperative instruments.

This could be done first by restating Member States' obligation to respect and promote the Charter directly in the text of EU funding regulations. Second, a holistic approach to Charter mainstreaming through funding is to be coherently advanced. Third, a continued effort to train both EU and national staff on a fundamental rights responsible approach to EU funding is to be further promoted. There have been a number of attempts to advance the Charter's position across the EU's policies, including in EU funding. A number of initiatives deserve a mention here as best practices in the area.

A prominent example in this sense are the EU Funds set up in the area of freedom security and justice for 2014-2020 programming period, which all mention expressly that Member States' implementing action shall comply with the Charter provisions.¹⁰⁵ The Asylum, Migration and Integration Fund (AMIF) goes further and explicitly obliges the Member States to comply in all implementing action with the rights *and* principles of the Charter.¹⁰⁶

Such a direct obligation to promote the respect of the Charter in all actions supported from EU Funds leads to an interesting legal outcome. On the one hand, we have an obligation to respect (comply with) the Charter, vested by the fund-specific regulations; on the other hand, we have the Charter provisions that explicitly limit its applicability to situations where Member States 'implement EU law'.

In a strict legal hierarchy, the Charter articles shall necessarily prevail over secondary law provisions of regulations, when in conflict. Yet, in the present case, there is hardly a conflict.

The Charter will be still found non-applicable where EU financial resources disbursed at national level are not implementing an EU law obligation. However, in the given situation, we are in the presence of a clear obligation 'to promote'. Consequently, a Member State may be found in violation of the Regulation obligation to promote the compliance with the Charter rights and principles in all national operations financed from EU Funds.

Another pertinent example is offered by the three general ex-ante conditionalities in the area of gender equality, non-discrimination and disability, as introduced in the new legal framework of the 2014-2020 ESI Funds, as well as several fundamental rights related thematic conditionalities such as the ones in the area of inclusion of marginalised communities, environmental protection and social rights.¹⁰⁷

Further good examples could be encouraged by promoting a fundamental rights institutional culture at the level of EU and national authorities mandated with complaints handling.¹⁰⁸ The same is true with regards to Commission officials and national certifying

105 Regulation (EU) 513/2014, Article 3, para. 5; Regulation (EU) 515/2014, Article 3, para. 4; Regulation (EU) 516/2014 Article 19, para. 2, note 18.

106 Regulation (EU) 516/2014, Article 19 para. 2, note 18.

107 Regulation (EU) 1303/2013, Article 19 and Annex XI.

108 Regulation (EU) 1303/2013, Article 74 para. 3, note 4.

authorities in charge of assessing the consistency of EU Funds related expenditure with the applicable EU rules, which may be actively trained to perform a gatekeeper task of ensuring a fundamental-rights compliant expenditure.¹⁰⁹

Why is the obligation to promote the Charter rights *and* principles increasingly important in the area of EU Funds disbursement at national level? The response lies in the rising incidence of individual complaints reporting fundamental rights disregards during the process of EU Funds disbursement at national level. The aforementioned European Ombudsman investigation on fundamental rights compliance during EU Funds implementation is a solid indication in this sense.¹¹⁰

The question discussed in this article is thus not only one of Charter applicability; it is one of fundamental rights protection at the EU level. We stress again that, shortly after the CJEU ruling in the *Poclava* case the one-year probationary period clause was found to be in non-conformity with Article 4(4) of the European Social Charter of 1961 by the European Committee of Social Rights.¹¹¹ This means that both the national¹¹² and EU legal system first, failed to protect the individual's fundamental rights and second, failed to offer satisfactory remedies to individuals who saw their fundamental rights violated during EU Funds disbursement at national level. Another question to be raised is one of EU reputational damage. While the implementation of programmes financed from EU Funds falls under the primary responsibility of Member States, the funded actions are nevertheless largely perceived as EU acts at the national level. Accordingly, the increasing incidence of fundamental rights violations impact inevitably the positive public perception of the EU's role in the field, causing important reputational damage to the EU and its capacity to soundly manage EU public resources. Given the principle of administrative and procedural autonomy of Member States in the area, an integrated approach to Charter promotion throughout EU Funds operations at national level is at least desirable, if not imminent to mitigate such negative outcomes.

Finally, one should note that varying standards of fundamental rights protection in EU Funds disbursement impact inevitably on the efficiency of EU spending. Fundamental rights infringements should not be seen in complete isolation. Infringements impede individuals to effectively enjoy EU budgetary resources and actively participate in EU co-funded projects. Moreover, legal uncertainty regarding effective redress or other fundamental rights infringements discourages potential beneficiaries from using EU funds, hampering the effectiveness and efficiency of EU spending and ultimately the policy objectives supported thereby.

109 Regulation (EU) 1303/2013, Article 126 para.1 (c) "certifying the completeness, accuracy and veracity of the accounts and that the expenditure entered in the accounts complies with applicable law and has been incurred in respect of operations selected for funding in accordance with the criteria applicable to the operational programme and complying with applicable law"

110 European Ombudsman, Respect of fundamental rights in the implementation of the EU cohesion policy, Case: OI/8/2014/AN of 19 May 2014, available at: <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/59871/html.bookmark>, consulted on 11.05.2014.

111 See, European Committee of Social Rights, note 15.

112 Juzgado de lo Social No 23 Madrid, Sentence 103/2015 of 3 February 2015, SJSO 19/2015 - ECLI:ES:J-SO:2015:19, available at: <http://www.poderjudicial.es/search/indexAN.jsp>

6. Conclusion

This article intended to diligently assess the long pending question of Charter applicability to EU Funds implemented at a national level. Based on the CJEU's case law, the picture emerging is relatively clear on the surface, yet hides many complications at a deeper level.

Departing from the EU law-obligation approach, the examined case law shows that the Charter shall be applicable to EU Funds operations each time Member States act pursuant to a EU law obligation. First, the obligation may derive directly from the EU funding regulations where the provisions thereby mandate a certain conduct on Member States or allow a certain level of discretion. Second, the Charter applicability may be triggered by an EU treaty obligation, a general principle of EU law or a EU law cross-sector rule applicable to national acts implementing EU Funds. On the contrary, the Charter shall not apply where EU financial action falls outside the scope of EU law.

In sum, we have established that, on the basis of the standing case law, the Charter shall not apply to all national actions implementing EU Funds. Clearly, such a conclusion is not always satisfactory, particularly in the area of EU Funds disbursed at a national level, where the implementing acts of the Member States aim primarily to deliver on EU policy prescriptions and objectives. Spending EU budgetary resources in fundamental rights compliant terms is a core constitutional requirement for both the EU and its Member States. Hence, the finding that the Charter would not coherently apply to EU spending action at Member States level goes against EU policy standing on the matter. The inconsistency is even more pressing when a EU funded action is actually intended to promote EU social justice aims, but rests nevertheless outside the scope of the Charter applicability.

Against this backdrop, a comprehensive approach to Charter promotion in EU Funds operation was advocated. Contrary to the obligation to *protect* and *respect*, the obligation to *promote* the Charter does not know any limitation with regards to the legal or non-legal nature of EU acts implemented by the Member States. Therefore, an active Charter promotion in EU Funds operation could currently be the best placed tool to fill, at least in part, the gap of Charter applicability at Member States' level.