CIVIL LIBERTIES UNION FOR EUROPE

RELYING ON THE EU CHARTER OF FUNDAMENTAL RIGHTS FOR HUMAN RIGHTS LITIGATION

A Handbook for Civil Society Organisations and Rights Defenders

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STRIVE Strengthening Rights and Values

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About this Handbook

The EU Charter of Fundamental Rights – the EU's own catalogue of human rights – has a great potential yet to be explored for the protection and advancement of human rights across the EU.

While human rights defenders across Europe have over the past decades consolidated their experience in litigating cases before the European Court of Human Rights for violation of the rights protected by the European Convention on Human Rights, relying on the Charter for human rights litigation is a rather untapped area. Yet, relying on the Charter and EU law for human rights litigation can be a strategic avenue to consider in a wide range of cases.

Since the past year, Liberties has been developing and offering to its members a training programme on "Relying on the EU Charter of Fundamental Rights for human rights litigation". The overall objectives of this training programme are to raise awareness and capacity on the value added of using the Charter for human rights litigation and enhance and value the role of civil society organisations (CSOs) in promoting the application of the Charter before national courts and the Court of Justice of the EU. This Handbook is conceived as a complement to such training programme and is aimed at providing basic guidance on the use of the Charter and EU law to litigate human rights in the EU.

Building on existing resources, including guidance and practical tools developed by the European Commission and by the EU Agency for Fundamental Rights (FRA), referenced throughout the text, this Handbook is aimed at briefly illustrating, with a practical and hands-on approach, the basic features of the Charter and at providing guidance to human rights defenders on how to rely on it for human rights litigation. The Handbook further explores the concrete relevance and value added of the Charter to advance human rights in selected thematic areas. Based on a first needs assessment among Liberties' members, the current version of the Handbook looks in particular into privacy and data protection, discrimination and intolerance and civic space. Inspired by a comprehensive approach to litigation, the Handbook also includes advice and tips on Charter litigation-related advocacy, framing and campaigning.

Liberties is a Berlin-based non-governmental organisation (NGO) promoting human rights across the EU. As an umbrella organisation, Liberties coordinates advocacy, campaigning and public education activities through its expanding network of national civil liberties NGOs. Currently, we have member organisations in 18 EU Member States including Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden. Many of Liberties' members engage in human rights litigation, and Liberties has coordinated a number of joint litigation initiatives. Liberties also offers capacity building, mentoring, as well as training resources such as guides and e-learning courses to its members and other human rights NGOs. It has developed a unique expertise in values-based framing and strategic communications.

1. The EU Charter of Fundamental Rights: the basics

1.1 The Charter's catalogue

1.1.1 A wide range of protected rights

A legally binding instrument and part of primary EU law since 1 December 2009, the Charter of Fundamental Rights ('the Charter') encompasses a wide range of civil and political, economic, social and cultural rights in a catalogue of 50 fundamental rights and principles.

DIGNITY

Article 1: Human dignity – everyone has the right to be treated with dignity

Article 2: Right to life – everyone has the right to life, and the death penalty is forbidden

Article 3: Right to integrity of the person – this includes medical consent and the prohibition of certain genetic practices

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

Article 5: Prohibition of slavery and forced labour – this includes trafficking

FREEDOMS

Article 6: Right to liberty and security

Article 7: Respect for private and family life

Article 8: Protection of personal data – data should be processed fairly and for specified purposes and on the basis of consent or some other lawful basis

Article 9: Right to marry and right to found a family – guaranteed in accordance with national laws

Article 10: Freedom of thought, conscience and religion – this includes the right to publicly profess a religious belief and the right to change religious beliefs

Article 11: Freedom of expression and information

Article 12: Freedom of assembly and of association – including the right to join trade unions

Article 13: Freedom of the arts and sciences – this includes academic freedom.

Article 14: Right to education – this includes the freedom for parents to have their

children taught in accordance with religious (or other) beliefs

Article 15: Freedom to choose an occupation and right to engage in work – for non-EU citizens who have the right to work in the EU, they should have the same working conditions as EU citizens

Article 16: Freedom to conduct a business

Article 17: Right to property – property refers to possessions, and not just land and/or housing. This includes intellectual property

Article 18: Right to asylum

Article 19: Protection in the event of removal, expulsion or extradition – this includes the prohibition of removing a person to a country where they are at risk of being tortured (or other degrading or inhuman treatment)

EQUALITY

Article 20: Equality before the law

Article 21: Non-discrimination – forbids discrimination on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or other belief, political opinion, membership of a national minority, property, birth, disability, age or sexual orientation

Article 22: Cultural, Religious and linguistic diversity – shall be respected

Article 23: Equality between men and women – this does not prevent positive measures to give advantages to the under-represented gender (in a workplace for example)

Article 24: The rights of the child – the child's best interest must be the primary consideration when a decision is made by a public or private body on behalf of a child. Children have the right to maintain a regular personal relationship with their parents, unless it is not in the child's best interests to do so

Article 25: The rights of the elderly – to live a life of dignity and to participate in social and cultural life

Article 26: Integration of persons with disabilities

SOLIDARITY

Article 27: Workers' right to information and consultation within the undertaking – workers (or their representatives) must be consulted in situations that are covered by EU law (for example, transfer of undertakings)

Article 28: Right of collective bargaining and action – both employers and workers have the right to negotiate collective agreements, and to take collective decisions to

protect their interests (for example, to take strike action)

Article 29: Right of access to placement services –free placement services should be available to assist people to look for work

Article 30: Protection in the event of unjustified dismissal

Article 31: Fair and just working conditions – this includes the right to safe working conditions, a maximum working week, rest periods and to annual leave

Article 32: Prohibition of child labour and protection of young people at work – the minimum age for working cannot be below the minimum age for leaving school except in limited circumstances

Article 33: Family and professional life – this includes the protection of pregnant workers and parents on maternity or parental leave

Article 34: Social security and social assistance

Article 35: Health care – under the conditions established by national law

Article 36: Access to services of general economic interest – this allows member states to put in place extra assistance for disadvantaged areas

Article 37: Environmental protection – policies of the EU should be sustainable

Article 38: Consumer protection

CITIZENS' RIGHTS

Article 39: Right to vote and to stand as a candidate at elections to the European Parliament

Article 40: Right to vote and to stand as a candidate at municipal elections

Article 41: Right to good administration – this includes the right to have a say in any decision that would have a negative effect on you, the right to access your file, and the obligation to give reasons for decisions

Article 42: Right of access to documents – this refers to documents held by any EU institution

Article 43: Ombudsman – any person or company in the EU can refer cases of maladministration in the institutions of the EU to the European Ombudsman

Article 44: Right to petition – any EU citizen or company can petition the European Parliament

Article 45: Freedom of movement and of residence – within the EU

Article 46: Diplomatic and consular protection – if you are outside the EU in a country that does not have an embassy or consulate of your EU nationality, you are

entitled to protection/assistance from another EU Member State

JUSTICE

Article 47: Right to an effective remedy and to a fair trial – this includes a right to legal aid where you are deemed to lack sufficient resources

Article 48: Presumption of innocence and right of defence – everyone is presumed innocent until proven guilty according to law, and a person charged with a crime is entitled to a defence

Article 49: Principles of legality and proportionality of criminal offences and penalties – this includes prohibiting retrospective crimes and punishments and the principle that punishments should be in proportion to the seriousness of the crime

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

For certain rights, the **scope of the protected rights is wider, and the formulation of rights is more articulated**, than in relevant international and regional instruments, including the European Convention on Human Rights (ECHR). In certain cases, this is an attempt to directly incorporate relevant case-law of regional and international courts, and in particular the Court of Justice of the EU (hereinafter CJEU) and the European Court of Human Rights (hereinafter ECtHR).

Examples

- Article 3 on integrity contains a dedicated paragraph on medicine and biology
- Article 5 on prohibition of slavery contains a specific reference to trafficking
- Article 11 on freedom of expression corresponds to Article 10 of the ECHR, but includes an explicit mention of freedom and pluralism of the media
- Article 12(1) on freedom of assembly corresponds to Article 11 of the ECHR, but includes an explicit mention of political parties
- Article 14(1) on right to education corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training
- Article 17 on property explicitly refers to intellectual property

As a relatively young and progressive human rights instrument, the Charter also includes explicit reference to a number of **rights that are not or very rarely included in the texts of national constitutions or human rights instruments.**

Examples

- Article 16 on freedom to conduct a business
- Article 18 on the right to asylum
- Article 23 on equality between women and men
- Article 24 on the rights of the child
- Article 25 on the rights of the elderly

- Article 26 on the rights of persons with disability
- Articles 37 and 38 on environmental and consumers protection

The Charter further encompasses a number of **rights specific to EU citizens or the EU legal order.**

Examples

- Article 45 on the right to freedom of movement and residence
- Article 44 on the right to petition the European Parliament
- Article 41 on the right to good administration vis à vis EU institutions, bodies, offices and agencies

1.1.2 Rights and principles

The Charter's catalogue is made up of both rights and principles: **subjective rights shall be respected**, whereas **principles shall be observed** (Article 51(1) of the Charter). In some cases, an Article of the Charter may contain both elements of a right and of a principle.

Examples

- Articles 25 [the rights of the elderly]
- Article 26 [integration of persons with disabilities]
- Article 37 [environmental protection]
- Article 23 [equality between women and men]
- Article 33 [family and professional life]
- Article 34 [social security and social assistance]

Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement EU law); accordingly, they become significant for the courts only when such acts are interpreted or reviewed.

In terms of legal effects, the 'principles' cannot be invoked directly by individuals to prevent the implementation of contrary national provisions. They do not give rise to direct claims for positive action by the EU institutions or Member States' authorities.

1.1.3 Interpretative rules: scope and level of protection of guaranteed rights

The Charter contains specific provisions which detail the scope of guaranteed rights (Article 52) and the corresponding level of protection (Article 53). These provisions are aimed at ensuring that the Charter is interpreted in harmony with the EU Treaties, with international and regional human rights instruments and with the Member States' common constitutional traditions.

As regards the EU Treaties (the Treaty on European Union [TEU] and the Treaty on the Functioning of the European Union [TFEU]), reference is made in particular to the **scope and interpretation of the rights already guaranteed therein**, such as the rights to free movement of persons (Article 45 TFEU), freedom of establishment (Article 49

TFEU), free movement of services (Article 56 TFEU) or the right to non-discrimination on grounds of nationality. These rights shall be interpreted and applied in accordance with relevant provisions of the Treaties, as interpreted by the CJEU. This is particularly relevant as regards the possible limitations to such rights: namely, the notion of "objectives of general interest" shall be intended as referring to the general interests recognised by the Union and be related both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and internal market provisions.

As regards **international and regional human rights instruments**, Article 53 of the Charter clarifies that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements. The relation with the **ECHR** is of particular importance: according to Article 52(3), the level of protection may never be lower than that guaranteed by the ECHR. Examples

Examples

- Article 9 of the Charter covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation

As regards the Member States' **common constitutional traditions**, a number of Charter provisions, in the spirit of subsidiarity, make explicit reference to national laws and practices.

Examples

- Article 14(2): freedom to found educational establishments in accordance with national laws
- Article 16 on freedom to conduct a business

Generally speaking, the reference to the Member States' common constitutional traditions serves a high standard of protection: rather than following a rigid approach of 'a lowest common denominator', the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the EU legal order and in harmony with the common constitutional traditions.

Case C-36/02 Omega (2004): German police banned laser tag on the ground of protecting public order and the ban was upheld by the German Constitutional Court on the ground that laser tag simulated homicide and thus diminished human dignity, as protected under the German Basic Law. The claimant, a UK-based laser tag company, alleged that the ban was incompatible with the free movement of goods under the EU Treaties. The CJEU held that the respect for human dignity should also be considered a general principle of EU law, and that the market restrictions which resulted in the derogation from EU provisions on free movement of goods, resulting from the level of protection to human dignity provided in the German Basic Law, could be considered a proportionate and necessary one.

However, in some cases, the effectiveness of EU law can act as a limit to a progressive interpretation building on Member States' constitutional traditions.

CJEU Case C-399/11 Melloni (2013): in this case, the CJEU held that the surrender of a person to the judicial authorities of another Member State pursuant to a European arrest warrant cannot be made subject to the additional possibility, not provided for by EU law, of judicial review of the conviction handed down in absentia on the basis of national constitutional law. Giving supremacy to a more favourable national provision would in such a case put at risk the principle of mutual trust and would therefor compromise the efficacy of EU rules on the European arrest warrant.

1.2 The Charter's scope of application

According to its Article 52, the Charter applies to EU institutions and bodies and to the Member States when they are implementing EU law.

1.2.1 Temporal application

As regards the Charter's temporal scope, reference should be made to the **entry into force of the Lisbon Treaty (1 December 2009).**

As regards **national measures**, tthe Charter will not be deemed directly applicable if the facts underlying the case occurred prior to 1 December 2009 – unless the fundamental right in question was already recognised and protected as such as a general principle of EU law, prior to the entry into force of the Lisbon Treaty.

CJEU Case C-316/13 Fenoll (2015): the CJEU clarified that the Charter is not apt to be invoked and apply to a situation which relates to a period before the date of entry into force of the Lisbon Treaty and, therefore, before the date from which the Charter acquired the same legal value as the Treaties, pursuant to Article 6(1) of the EU Treaty.

By contrast, with respect to alleged violations of fundamental rights deriving from **EU acts,** the Charter may be used as a benchmark even if the act at issue was adopted before the entry into force of the Lisbon Treaty.

CJEU Case C-293/12 Digital Rights Ireland (2014): in this case, the CJEU ruled on the compatibility with Articles 7, 8 and 11 of the Charter of the EU Data Retention Directive, which was adopted in 2006.

1.2.2 Acts of EU institutions and bodies

As mentioned above, the Charter binds EU institutions, bodies, as well as offices and agencies of the EU in the exercise of any of their competences and powers. As the CJEU had the opportunity to clarify, this is always the case, **even when such entities "act outside the EU legal framework".**

CJEU Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising Ltd and Others (2016): in this case, the CJEU assessed against Article 17 of the Charter on the right to property a memorandum of understanding signed by the European Commission and Cyprus within the framework of the European Stability Mechanism to grant financial assistance to the country, while having acknowledged that such act fell outside the EU legal order.

1.2.3 Member States "implementing EU law"

The concept of "implementing EU law" for the purpose of determining whether the Charter can be relied on against a Member State or in a case involving a national law or practice has given rise to heated debates.

In essence, this concept refers to the fact that the Charter can be invoked only when a provision of EU primary or secondary law, other than the provisions of the Charter itself, is applicable to the situation at issue. In other words, the Charter applies only hand in hand with other provisions of EU law, which may be referred to as '**trigger rules**'.

This, in turn, requires that there must be a **sufficient connection** between the national acts or provisions allegedly violating the Charter and a provision of EU law other than the fundamental right enshrined in the Charter.

The tentative classification of national acts which follows may turn useful with a view to identifying categories of national provisions entailing such "sufficient connection".

Classification

Direct implementation

- National provisions adopted in order to give effect to EU law
- Application by a national authority of EU law provisions or of national provisions implementing them
- National provisions "gold-plating" EU law

Indirect implementation

- National provisions that give effect to EU law, though not adopted for that purpose

National provisions specifying notions contained in EU measures

- National provisions governing the exercise before national courts of (ordinary) rights conferred on individuals by EU law

National provisions on penalties applying to failure to perform EU law obligations

Indirect connection

- National provisions incidentally impacting on the application of EU provisions
- National provisions running contrary to the so-called "duty of sincere cooperation"

Direct implementation

This category refers to national provisions which are adopted or implemented in response to an EU act, and would include:

- **National provisions adopted in order to give effect to EU law** (secondary or primary law)

Case C-650/13 Delvigne (2015): in this case, which concerned the loss of the right to vote, including in European Parliament elections, of citizens convicted of a criminal offence, the CJEU found that, in terms of admissibility, although EU law on the elections of the members of the European Parliament does not define expressly and precisely who are to be entitled to voting rights, in defining the persons entitled to exercise that right a Member State acts within the scope of such EU provisions and therefore has to ensure compliance with the Charter.

In this respect, it is worth noting that, according to relevant case-law of the CJEU, relevance can be given to the reference made by the national legislator to certain EU law provisions even in a purely domestic measure, provided that the reference is fashioned in a way such as to make the EU law provision concerned applicable "directly and unconditionally".

Case C-482/10 Cicala (2011): applying this reasoning, the CJEU maintained in this case that national rules establishing the principle of a duty to state reasons for administrative decisions making a reference in a general manner to 'principles derived from the Community legal order' may not be regarded as making directly applicable Article 41(2)(c) of the Charter or other rules of EU law concerning the duty to state reasons for acts.

- **Application by a national authority of EU law provisions or of national provisions implementing them**

CJEU Case C-329/13 Stefan: the CJEU clarified that authorities of the Member States, and in particular their administrative and judicial bodies, must ensure compliance with the Charter when they act within the observance of the rules of EU law, such as when handling request for access to information with environmental relevance.

- **National provisions "gold-plating" EU law**, meaning adopting rules going beyond what required by EU law, provided that:

  - the relevant EU act stresses that Member States shall exercise their remaining powers/margin of discretion in accordance with EU law; or

  - the exercise by the Member States of their remaining powers/margin of discretion affects the effectiveness of relevant EU rules. Conversely, where gold-plating simply reflects the exercise of a power or competence which the Member States maintain despite the minimum harmonisation provided for by EU law, this **may not be considered implementation of EU law.** This may happen, for example, where a Member State introduces new offences in an area

of criminal law which has been only partly harmonised by EU law, such as counterterrorism, anti-money laundering or the facilitation of irregular migration.

CJEU Case C-234/12, Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni (2013): in this case, the CJEU assessed national law on the differentiation of television advertising limits between pay television and free-to-air broadcasters against Articles 20 and 21 of the Charter on the principle of equal treatment, despite such area not being regulated as such by applicable provision of EU law, considering that EU legislation (Article 4(1) of the Audiovisual Media Services Directive) granted Member States the option to lay down more detailed or stricter rules than those contained in EU law provided that such rules are in compliance with EU law.

Indirect implementation

For legislative proposals that are purely national in origin and thus not initiated as a result of EU legal acts, there may be less, or no, awareness of the possible binding force of the Charter. However, even in scenarios in which Member States legislate within their competences or legislate without the intention of transposing EU law into national law, the Charter may apply. This category would include:

- **National provisions that give effect to EU law, though not adopted for that purpose**, such as national measures that were adopted before the implemented EU law obligation came into existence.

CJEU Case C-555/07 Kücükdeveci (2010): in this case, provisions of the German Civil Code on notice periods for dismissals, which pre-existed relevant EU law, were considered by the CJEU as falling within the scope of EU rules and conditions for dismissal, and thus examined in the light of the principle of non-discrimination.

- **National provisions specifying notions contained in EU measures.**

CJEU Case C-571/10 Kamberaj (2012): the CJEU found that national provisions regulating the granting of house benefits to third-country nationals fell within the scope of EU rules on equal treatment between EU citizens and third-country nationals who are long-term residents with respect to social security, social assistance and social protection.

- **National provisions governing the exercise before national courts of (ordinary) rights conferred on individuals by EU law.** These will often constitute procedural provisions, such as the national provisions regulating right to compensation for damages caused by a Member State's failure to implement its obligations under EU law.

- **National provisions on penalties applying to failure to perform EU law obligations.**

CJEU Case C-617/10 Åkerberg Fransson (2013): in this well-known case, the CJEU ruled that national law sanctioning false

information on tax payment should have been regarded as implementing EU law, insofar as it bore relevance to the enforcement of EU provisions on VAT collection.

Indirect connection

A third category would refer to national provisions that directly affect areas governed by EU law. This category would include:

- **National provisions incidentally impacting on the application of EU provisions**, such as market freedoms.

CJEU Case C-145/09 Tsakouridis (2010): in this case, the CJEU examined the compatibility with the Charter of national law providing for the expulsion of foreigners (including EU citizens) in connection with criminal offence, because of its impact on the enjoyment of the right to free movement.

CJEU Case C-112/00 Schmidberger (2003): this case concerned a decision not to prohibit a demonstration by environmental protesters which resulted in the complete closure of the Brenner motorway for almost 30 hours, where the CJEU weighed the right to freedom of assembly against the impact on EU rules on the free movement of goods.

- **National provisions running contrary to the so-called** "duty of sincere cooperation" for the fulfilment of their obligations under EU laws and the achievement of the EU objectives.

CJEU Case C-61/11 PPU El Dridi (2011): in this case, the CJEU held that national legislation providing for a prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of the Member State fell within the scope of EU rules on return to the extent that such national legislation could frustrate the objectives of EU law, at odds with the duty of sincere cooperation. .

Practical Tips:

When looking for indicators as to whether a situation can be regarded as falling within the scope of EU law:

- Check if the applicable national law makes any reference to EU law (primary and secondary)

- Assess whether the applicable national law relies on concepts used in EU law

Examine whether the situation presents any cross-border elements (material/personal; actual/potential)

- Verify whether the subject matter is covered by EU competence, and try and map relevant EU provisions and legal acts on the matter or capable of affecting it

Practical online tools exist to support you in this assessment, such as the Your Europe Advice portal, which offers informal and quick advice in national languages, FRA e-guidance on the field of

application of the EU Charter and the European E-justice portal e-tool.

FURTHER RESOURCES

- *Full text of the Charter*
- *Explanations relating to the Charter*
- *FRA Charterpedia*
- *E-Justice Portal Charter tutorial*
- *CJEU Case-law digest article by article*
- *FRA Handbook on Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*
- *FRA e-guidance on the field of application of the EU Charter & European E-justice portal e-tool*
- *CJEU factsheet on Field of application of the Charter*
- *CJEU case-law digest on Article 51 of the Charter*
- *All EU-r rights, Online blog series (Charter article-by-Charter article) published by EURAC Research*
- *FRA thematic handbooks*
- European University Institute, *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter – Module 1 General Rules on the Scope and Application of the EU Charter of Fundamental Rights (2019)*, available at https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.a-Module-1.pdf
- *Michal Bobek and Jeremias Adams-Prassl (eds.), The Charter of Fundamental Rights in the Member States (Hart/Bloomsbury 2020)*
- *Steve Peers, Tamara Hervey, Angela Ward (2021), The EU Charter of Fundamental Rights. A Commentary, Hart*

1.3 The Charter as a legally enforceable instrument

1.3.1 Using the Charter to challenge national laws and decisions by public authorities

As explained in the previous section, national measures can be reviewed in the light of the Charter whenever they fall within the scope of EU law.

EU provisions shall prevail on conflicting national provisions pursuant to the principle of primacy of EU law.

A conflict between national provisions and the Charter should ideally be solved through a **Charter-compliant interpretation of national law.**

Where this is not possible, and where the Charter provisions are sufficiently precise and unconditional, pursuant to the principle of direct effect they can lead to the **immediate disapplication of the conflicting national law provision**.

The CJEU clarified that in order to assess whether a certain EU provision, including a Charter provision, has direct effect, one has to check whether the provision in question imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition

regarding application of the rule laid down by it – meaning, it is **clear, precise and unconditional** and does not give the Member States substantial discretion in its application.

Disapplication can be performed by any national court hearing the case, or another competent authority, without having to request or await the prior setting aside of the conflicting national provision by legislative or constitutional means.

The direct effect of Charter provisions can also lead to the **creation of rights that are not available in national law.**

CJEU Case C562/13 Abdida (2014): in this case, the CJEU interpreted Article 47 of the Charter as granting the right to a judicial remedy with a suspensive effect in appeal against a return decision. While national law did not provide such suspensive effect, the CJEU considered it necessary to ensure the judicial remedy to challenge the return decision would be effective, considering the risk that the person be exposed to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment upon return.

Member States may be held liable for damage caused to individuals as a result of breaches of the Charter under general conditions set by the jurisprudence of the CJEU. In particular, a Member State will be required to make reparation for the damage caused where:

- the rule of law infringed was intended to confer rights on individuals,

- the breach is sufficiently serious (the Member State concerned has manifestly and gravely disregarded the limits on its discretion), and

- there is a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

1.3.2 Using the Charter in cases involving private parties

Direct effect may not only refer to the enforcement of EU law against the state or an emanation of the state (so-called "vertical" direct effect); it may also refer to the enforcement of EU law against another individual (so-called "horizontal" direct effect).

As other provisions of EU law, **Charter rights may also generate horizontal effect**. Well-established CJEU case-law confirms the direct effect of provisions on non-discrimination, but other provisions have also been held as producing horizontal direct effect.

CJEU Joined Cases C-569/16 and C-570/16, Bauer and others (2018): the CJEU clarified in this case that the right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is both mandatory and unconditional in nature, not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. The CJEU therefore considered the provision sufficient in itself to confer on workers a right that they may

actually rely on in disputes between them and their employer in a field covered by EU law.

1.3.3 Using the Charter to challenge EU laws and decisions

The Charter has the importance of primary law (that is to say, equal to the EU Treaties), and therefore hierarchically stands over all acts adopted on the basis of the Treaties (so-called "secondary law").

It follows that any act by an EU institution, body, office or agency may be assessed against its compliance with provisions of the Charter. This means that the Charter may form the basis for **assessing the validity of secondary acts of EU law** (decisions, directives, regulations, etc) and annulling them.

CJEU Case C-293/12 Digital Rights Ireland (2014): in this case, the CJEU declared the EU Data Retention Directive to be invalid, considering it incompatible with Articles 7 and 8 of the Charter, insofar as it entailed a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what was strictly necessary.

1.4 The Charter as a reference instrument

1.4.1 Human rights-based interpretation of national law

The Charter can be relied on as a key instrument to support a **progressive interpretation of provisions of national law.**

As mentioned above, national courts are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law (as interpreted by the CJEU).

CJEU Case C-634/18, criminal proceedings against JI (2020): in this case, the CJEU relied on the principle of legality of criminal offences, enshrined in Article 49 of the Charter, to underline the need for the interpretation of national criminal provisions on illicit drug trafficking, falling within the scope of EU harmonisation measures, to be reasonably foreseeable.

Even if the Charter is not applicable in the pending case, the national judge may decide to take account of the Charter, and of the relevant case-law of the CJEU, in the process of interpreting national fundamental rights. This way, the protection afforded to a fundamental right based on the domestic sources may be extended through the use of the Charter.

1.4.2 Human rights-based interpretation of EU law

The Charter can also be relied on to promote a **human rights-based interpretation of provisions of EU law**, be it primary or secondary law.

CJEU Case C-129/18 SM (2019): interpreting relevant provisions of the EU Family Reunification Directive in the light of the right to respect for family life and the protection of the best interests of the child as enshrined respectively in Articles 7 and 24 of the Charter, the CJEU held that a minor in the guardianship of a citizen of the EU under the Algerian kafala system is to be regarded as falling within the notion of 'other family members', obliging national authorities to facilitate his/her entry and residence on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds.

CJEU Case C-131/12 Google Spain (2014): CJEU interpreted Directive 95/46/EC on the protection of individuals with regard to the processing of personal data in the light of Articles 7 and 8 of the EU Charter; although there was no express provision in the Directive, the Court held that it must be interpreted as acknowledging the 'right to be forgotten'.

CJEU Case C-128/18 Dumitru-Tudor Dorobantu (2019): in this case, the CJEU relied on the prohibition of torture and inhuman or degrading treatment or punishment reaffirmed by Article 4 of the Charter to guide national authorities on the application of the European Arrest Warrant, clarifying that systemic or generalised deficiencies in the conditions of detention in the prisons of the Member State asking for the surrender should trigger an in-depth assessment on the existence of a risk for the person to be surrendered of being subjected to inhuman or degrading treatment, which may lead to the refusal of the surrender.

1.4.3 Relevance to the interpretation of international and regional instruments

The opportunity to rely on the Charter to interpret other sources of international and regional law, including human rights instruments, may also be considered, in relation to specific rights on which the Charter takes a particularly progressive approach.

ECtHR Case Scoppola v. Italy (No 2) (2009): the ECtHR, quoting Article 49(1) of the Charter, interpreted Article 7(1) ECHR on the principle of non-retroactivity of criminal law and penalties as also encompassing the principle of the retroactivity of national law that provides for a lighter criminal penalty (previously excluded by the ECtHR).

FURTHER RESOURCES

- *FRA Handbook on Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*
- European University Institute, *ACTIONES Handbook on the Techniques of Judicial*

Interactions in the Application of the EU Charter – Module 2 Judicial Interaction Techniques available to national judges in the Field of European Fundamental Rights (2019), available at https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.b-Module-2.pdf

- European University Institute, e-Booklet on the Use of the Charter of Fundamental Rights of the EU (2020), available at https://cjc.eui.eu/wp-content/uploads/2020/05/eNACT_ebooklet.pdf
- Poltorak, N.: The application of the rights and principles of the Charter of Fundamental Rights. Working Paper, EUI RSC, 2021/34, Centre for Judicial Cooperation (2021), available at https://cadmus.eui.eu/handle/1814/70536

2. The EU Charter and litigation avenues

2.1 Relying on the Charter before national courts

Charter-based litigation will in most cases be conducted as part of proceedings before national courts.

Indeed, EU law, including the Charter, are meant to be applied in a **decentralised system of judicial protection**, where national courts are the ordinary courts applying EU law.

Legal arguments pertaining to compliance of national or EU law with the Charter will therefore be brought, as a rule, to the attention of the national court competent under national procedural law to adjudicate on the dispute.

2.1.1 National courts as ordinary courts enforcing EU law

National courts are under an obligation to enforce EU law in disputes before them. This entails solving conflicts between national law and practices and EU law, which they will do using different techniques.

Consistent interpretation

As already mentioned, national judges must interpret national law in compliance with EU law. According to the consistent interpretation doctrine, a national judge must strive to interpret a domestic provision in a way that does not lead to a conflict with EU law.

CJEU Case C-149/10 Chatzi (2010): as a result of this case, in light of the principle of equal treatment enshrined in Article 20 of the Charter, the national legislature was obliged to establish a parental leave regime which ensures that the parents of twins receive treatment that takes due account of their particular needs.

Comparative reasoning

Using comparative reasoning, the national judge can choose a foreign decision with similar facts and adapt the solution to their national legal order. In this respect, raising legal arguments which are grounded in the Charter and its interpretation by the CJEU can also bear relevance to domestic disputes which fall outside the restricted scope of application of the Charter.

CJEU Case C-26/62 Van Gend en Loos (1963): in this landmark case the CJEU used comparative reasoning to establish this principle, holding that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

Proportionality test

This technique requires national judges to appreciate whether the domestic measure interfering with EU law pursues a legitimate aim, contributes to that aim, and is the least restrictive measure that can achieve it. The proportionality test involves a four-step analysis that examines whether the measure in question is suitable, necessary, and proportionate in a narrow and in a wider sense.

CJEU Case C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications (2014): in this case the CJEU ruled about the validity of EU legislation requiring telecommunications companies to retain data on their customers' communications for a specified period. The CJEU held that the legislation constituted a serious interference with the right to privacy and that it was not sufficiently precise or proportionate to be compatible with the Charter.

Disapplication

As already mentioned, if consistent interpretation of internal law proves impossible, national judges will be required to set aside domestic law in those specific case where it conflicts with EU law. As explained above, disapplication is however conditional upon EU law provisions producing direct effect, and thus being sufficiently clear and precise.

CJEU Case C-26/62 Van Gend en Loos (1963): in this case the CJEU held that individuals could rely on EU law provisions in national courts, and that national courts had a duty to disapply national laws that were incompatible with EU law.

2.1.2 Preliminary reference procedure

The preliminary reference procedure allows to bring to the attention of the CJEU disputes where EU law is at stake. It is an **incidental mechanism to proceedings before a national court**, which constitutes a form of direct cooperation between national judges and the CJEU.

A reference for a preliminary ruling may be addressed to the CJEU **at any stage of the proceedings** and does not imply the need to have previously exhausted any remedy available at national level, unlike claims brought before the ECtHR.

The preliminary reference procedure allows any national court to refer questions to the CJEU on **either the interpretation of EU law or the validity of EU acts.**

National courts or against whose decisions there is no judicial remedy under national law are generally obliged, as a court of last instance, to refer a question of EU law to the CJEU if it is relevant to the outcome of a pending case. This obligation extends to all national courts, whether of first or last instance, if at issue is the validity of EU law.

As to the **form and content of the referral**, guidance from the CJEU recommends that the

referral be drafted simply, clearly and precisely. In particular, the referral shall contain:

- a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court, or, at least, an account of the facts on which the questions are based;

- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

- a statement of the reasons which prompted the referring court to inquire about the interpretation or validity of provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

The referring court may also briefly set out the main arguments of the parties to the main proceedings.

The national proceedings will, as a rule, **be stayed until the CJEU has delivered its preliminary ruling.**

The **processing of the case before the CJEU** will entail a written stage and, as a rule, an oral stage in the form of a public hearing. If an opinion of one of the advocate generals is considered necessary, this is given some weeks after the hearing.

The procedure takes on average around 16 months. Under certain circumstances, the CJEU may decide to treat the case via an **expedited or urgent procedure**. In particular, the urgent procedure will be resorted to for the most sensitive issues relating to the area of freedom, security and justice (police and judicial cooperation in civil and criminal matters, as well as visas, asylum, immigration and other policies related to free movement of persons).

The national referring court will be **bound by the judgment rendered by the CJEU**. The CJEU ruling will be limited to clarifying issues around the interpretation and validity of relevant EU provisions, including Charter provisions, and will not concern the interpretation of national law nor issues of fact raised in the main proceedings. Nonetheless, the court will have to **draw conclusions from the CJEU ruling**, and thus interpret and apply EU law in accordance with the response to its preliminary questions provided by the CJEU, with a consequential impact on conflicting rules of national law and on the dispute in the main proceedings. The preliminary ruling rendered by the CJEU will also set a precedent and provide **binding guidance to any other court of any Member State** facing a dispute which involves the same question of interpretation or validity of EU law.

2.1.3 Prompting national courts' assessment on compliance with the Charter

Overall, the receptivity of national courts to Charter-related arguments seems to be limited. This may be due to a lack of familiarity with this instrument and EU law more generally, or to the prominence given to other sources of

human rights law, be it national constitutions or other regional and international human rights instruments. Urging the court to defer relevant questions to the CJEU via the preliminary reference procedure can be a strategic way to overcome national courts' reluctance to assess the dispute before them on grounds of EU law and the Charter.

A reference for a preliminary ruling can be addressed to the CJEU **exclusively on the initiative of the national court**.

Nonetheless, the parties to the main proceedings can express the wish that a question be referred to the CJEU and therefore **prompt the national court to make a referral**. To that effect, parties to proceedings may directly raise and formulate the precise questions for preliminary reference which they would like the national court to address the CJEU as part of the pleas submitted to the national court.

If a first instance court fails to make a preliminary reference, it may be strategic to **try and escalate the case on points of law to the supreme court or the constitutional court**, as these courts will be under an obligation to make a referral to the CJEU, as explained above.

It is worth noting that when a national court, in particular a court of last instance, violates its duty to submit a preliminary reference, the parties may enjoy a **right to damage compensation** under EU law (see paragraph below). The violation of such duty may even amount to a **violation of the right to an effective remedy.**

ECtHR Case Dhahbi v Italy (2014): in a case concerning the refusal by the Italian Court of Cassation to refer to the CJEU a question on the interpretation of EU law, the ECtHR found a violation of the right to an effective remedy enshrined in Article 6(1) ECHR, having found no reference in the relevant judgment of the court of last instance to the applicant's request for a preliminary ruling to be sought or to the reasons why the court considered that the question raised did not warrant referral to the CJEU.

A failure to make a preliminary reference may also **affect the validity of the national court's judgment**.

The same reasoning will apply if national legislation or practice limits the power of the national courts to interact with the CJEU via the preliminary reference procedure.

2.1.4 State liability for an infringement of EU law

The principle whereby a **Member States is liable in damages for loss and harm caused to individuals as a result of breaches of EU law** is inherent to the system of judicial protection of rights granted by EU law.

According to longstanding jurisprudence of the CJEU, the principle applies to any case of infringement of EU law by a Member State, be it of the Treaties, acts of secondary law or even international agreements concluded by the EU with third parties which are binding on the Member States.

Liability of the Member State will be established when three cumulative conditions are met:

-the rule of EU law infringed is intended to confer rights on individuals (which shall be assessed, among others, in the light of its clarity and preciseness and of the degree of discretion left to the Member States for its implementation);

-the infringement of the EU rule is sufficiently serious (without the necessity of showing that the State organ has been at fault, although courts may consider whether the infringement was accidental, whether an excusable error was involved, and whether the advice or action of the European Commission contributed to the breach); and

-there is a direct causal link between that infringement and the loss or harm sustained by the individuals (in accordance with general principles of civil liability).

While these conditions are necessary and sufficient to found a right in favour of individuals to obtain redress, Member States remain free to provide for less strict conditions pursuant to national law.

The State may be liable **regardless of the body or entity** whose action or omission is the cause of that infringement, provided that it is an organ which has acted or failed to act under the auspices of the State. This includes, for example, the national legislature and, in certain cases of manifest infringements, the courts.

The potential liability of national courts for the violation of EU law is illustrated in the infringement proceedings recently brought against Poland by the European Commission, which referred Poland to the CJEU for violations of EU law by the Polish Constitutional Tribunal and its case law, whereby it considered provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law.

When liability is established, the State must make reparation for the consequences of the loss or harm caused **on the basis of the rules of national law on liability**. Individuals may thus seek compensation before national courts, on the basis of national law on civil liability. The CJEU has however clarified that, in accordance with the principle of effective judicial protection, the conditions for reparation of loss or harm laid down by national law **shall not less favourable than those relating to similar domestic claims** (principle of equivalence) and **may not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation** (principle of effectiveness).

CJEU Case C-278/20 European Commission v Spain (2022): following an infringement proceeding brought against Spain by the European Commission brought, the CJEU found that certain Spanish provisions regulating the compensation for damages caused by legislative acts that are in breach of EU law were incompatible with the principle of effectiveness. According to the CJEU, such

rules made compensation for the loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law excessively difficult, insofar as they made compensation subject to the conditions: that there is a decision of the CJEU declaring that the statutory provision applied is incompatible with EU law; that the individual harmed has obtained, before any judicial court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature; that a limitation period of one year from the publication in the Official Journal of the decision of the CJEU declaring that the statutory provision applied is incompatible with EU law is observed, without covering cases in which such a decision does not exist; that loss or harm occurred within five years preceding the date of that publication.

2.2 Direct actions before the Court of Justice of the EU

The possibilities for a natural or legal persons to bring an action directly before the CJEU are extremely limited and they exclusively allow to **challenge legally binding acts of EU institutions and bodie**s. They include:

- **actions for annulment** of an act adopted by an institution, body, office or agency of the European Union. The conditions under which such action can be brought are very stringent and will require the applicant to show that the act is either addressed to them or is of direct and individual concern to them; or is a regulatory act which is of direct concern to them and does not entail implementing measures. Individual concern will be particularly challenging to prove, as it requires, in the interpretation of the CJEU, demonstrating that the contested act affect the applicant "by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the addressee";

CJEU Case C-565/19 P Armando Carvalho and Others (2021): in this case, in line with previous case-law, the CJEU confirmed the inadmissibility because of lack of legal standing of an action for annulment brought against several EU acts relating to greenhouse gas emissions by ten families from Europe, Kenia and Fiji and a Swedish association representing the indigenous Sami youth (Sáminuorra). The CJEU found that the fact that the applicants were particularly affected by climate change was not enough to establish an individual concern.

- **actions for failure to act** to complain that an EU institution, body, office or agency has failed to address to the applicant any act.

Individuals may also bring before the CJEU an **action for damages**, to establish the EU's liability and possibly seek compensation for

damages suffered because of a legislative or administrative act of an EU institution, body or official in the performance of their duties.

The jurisdiction to rule on actions brought by individuals will pertain to the **CJEU General Court**, whose judgments may be appealed, only on points of law, to the CJEU.

The procedure regulating the handling of direct actions is very similar to that regulating the handling of preliminary references and will as a rule include both a written and an oral stage.

2.3 Bringing in the Charter before the European Court of Human Rights

2.3.1 Disputes covered by EU law

The ECtHR has no jurisdiction to review the compliance of EU acts and provisions with the ECHR. In contrast, it has the jurisdiction to rule on the **acts of the Member States, including those putting into effect obligations deriving from EU law**.

The ECtHR has made a distinction between the acts of Member States implementing EU law obligations, which grant some degree of discretion to the Member State in implementing them, and those obligations which grant no such discretion.

Where **no discretion** is allowed for, the Strasbourg Court will not review Member States' (legal) acts, on the presumption that the protection of fundamental rights afforded within the EU system is at least equivalent to that of the ECHR. However, this presumption is relative: it will be rebutted if the protection in the case at issue was manifestly deficient (this is the so-called "Bosphorus presumption", named after the case in which it was developed).

In contrast, there is no special treatment for the acts of Member States implementing obligations deriving from EU law **where certain discretion is afforded to Member States**. These acts can always be the object of an assessment by the ECtHR as regards their compliance with the ECHR. An application may therefore be addressed to the ECtHR to question the compliance with the rights enshrined in the ECHR, and thus the corresponding rights enshrined in the Charter, of acts of the Member States which fall within the scope of application of EU law.

ECtHR, Case Hirsi Jaama and others v Italy (2012): in this case, where the ECtHR found a violation of Article 3 ECHR on non-refoulement in relation to the interception at high seas and summary return of a group of migrants, including asylum seekers, to Libya, the ECtHR acknowledged the position taken by the European Commission, according to which border surveillance operations conducted by the authorities at high seas, such as those during which the dispute before the ECtHR had arisen, would constitute implementation of EU rules of the Schengen Borders Code.

2.3.2 Relevance of the Charter to disputes outside the scope of EU law

As mentioned above, the Charter may also be used as a reference instrument to **promote a progressive interpretation of the ECHR** – eeither building on the broader formulation of relevant Charter provisions themselves, and/or building on relevant case-law of the CJEU. This is a way to indirectly "expand" the relevance and impact of the Charter beyond its restricted scope of application.

ECtHR Case Schalk and Kopf v. Austria (2010): the ECtHR embraced in this case a new interpretation of the personal scope of the right to marry: referring to Article 9 of the Charter which does not mention the beneficiaries of the right, thus encompassing both homosexual and heterosexual couples, the court held that it would no longer consider that the right to marry enshrined in Article 12 ECHR must in all circumstances be limited to marriage between two persons of the opposite sex.

FURTHER RESOURCES

- CJEU, Rules of Procedure
- CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings
- FRA, EU Charter of Fundamental Rights - Use and added value in EU MSs
- European University Institute, ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter - Module 2 Judicial Interaction Techniques available to national judges in the Field of European Fundamental Rights (2019) available at https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.b-Module-2.pdf

3. A strategic use of the EU Charter to protect and promote fundamental rights

3.1 Developing an effective strategy for Charter-based litigation

3.1.1 Assessing the strategic relevance of the case

Considering the Charter's special features, especially as regards its scope of application and the decentralised system of judicial protection in which it is meant to apply, Charter-based litigation will require an extra degree of reflection to assess whether bringing a case relying on the Charter may or may not be strategic, and, if so, how to develop an effective strategy.

First of all, a careful assessment should be made as regards **whether the situation or case at hand falls within the scope of application of the Charter** (see previous chapter). Litigation could still be pursued in case of doubt, especially if the situation at hand offers the **opportunity to achieve a progressive interpretation on the Charter's scope of application.** However, in such case, one should accept the risk that the Charter-related arguments are discarded by the national court and/or the CJEU as inadmissible.

Moving from the starting point that strategic litigation should always be aimed at creating change, beyond the individual interest at stake or individual case at hand, the following criteria should also be taken into account when deciding on whether to invest in litigating on the basis of the Charter:

- The case tests **whether national law or practice complies with EU law**;
- The case concerns a **serious infringement of human rights law** with regard to its nature or scale in an area already regulated by EU law or where the EU has competence to act;
- The case concerns, or presents an opportunity to shed light on, a **serious EU-wide problem**;
- The case presents an opportunity **to clarify or challenge problematic provisions of EU law;**
- The case presents an opportunity to **scale up the level of protection provided by other human rights instruments**, be it the national constitution or regional instruments such as the ECHR. As seen in the previous chapter, this also bears relevance to **cases where the Charter as such is not applicable** but offers the

opportunity to leverage its modern catalogue of rights, or a progressive ruling of the CJEU, before national courts or before the ECtHR.

3.1.2 Engaging national courts

When litigation is used to challenge national law or practice, the **level of familiarity of national courts with the preliminary reference procedure** and/or **receptivity of courts to EU law arguments** should be considered, also in view of the fact that the court maintains discretion in assessing the relevance and necessity of a preliminary reference to the CJEU.

If such familiarity or receptivity is low, one should take into account whether, under national procedural law, **procedural mechanisms exist which allow for the referral of EU law related questions to the supreme or constitutional court.** This is because, as already mentioned in the previous chapter, these last instance courts will be in principle under the obligation to refer the matter to the CJEU, if they do not want to risk incurring in an infringement of their obligations under EU law.

Directly engaging constitutional courts, for example using avenues to directly challenge the constitutionality of national laws and practices – provided that such avenues exist at national level and are available to private parties including CSOs – can also be an effective litigation strategy, including where identifying and/or building a strong and suitable case to litigate proves difficult.

3.1.3 Legal standing

National rules on the legal standing of CSOs will obviously have to be carefully taken into consideration, in order to identify the most suitable litigation strategy.

If national rules contemplate the **legal standing of CSOs as "concerned parties",** it is always convenient to consider the possibility to be a direct party in proceedings when a case build on EU law and Charter arguments – either **as the main plaintiff, or as a third party**. This because in **proceedings before the CJEU**, applicable rules of procedure will in principle allow only those who have the status of parties in national proceedings to present formal observations.

If the case concerns a serious violation with respect to its scale and incidence, the **opportunity of working towards a collective action** should be explored. This could take the form of a **collective claim**, which could be built where it is possible to identify and reach out to multiple claimants with claims sharing common characteristics, to seek a remedy against the same defendant(s). The possibility to pursue this avenue will depend on the existence of procedures for collective litigation in the selected jurisdiction. In this respect, it is noteworthy to recall that the EU has been working on an **EU framework on collective redress**, and has adopted a Recommendation and, more recently, a Directive for the protection of the collective interests of consumers (Representative Actions Directive (EU) 2020/1828) to that effect.

Where a collective claim is difficult to achieve, including where the identification of victims willing to participate poses challenges, an ***actio popularis*** may be considered if permitted by national procedural law, to allow the CSO in question to have collective legal standing on behalf of unidentified legal or natural persons impacted by the contested law or practice.

CJEU Case C-81/12 Asociaţia Accept (2013): in this case, which originated from an action brought before the competent national court by a CSO, the CJEU accepted that the enforceability of EU (anti-discrimination) law does not require a specific and/or identifiable complainant and, when this is provided for under national law, associations with a legitimate interest have the right to bring legal or administrative proceedings to enforce the obligations resulting from EU law.

CJEU Case C-507/18 NH v Rete Lenford (2020): the case concerned homophobic statements made by a person during an audiovisual programme, according to which that person would never recruit persons of a certain sexual orientation to that person's undertaking or wish to use the services of such persons. The case was brought by an association of lawyers having as objective the judicial protection of, and the promotion of the culture and respect for the rights of, LGBTIQ+ persons, which acted for the enforcement of obligations under EU law and sought to obtain damages in that connection. In holding that such statements constitute discrimination contrary to EU law on non-discrimination in employment and occupation when they are made by a person who has or may be perceived as having a decisive influence on an employer's recruitment policy, the CJEU also clarified that national law may well provide that an association has the right to bring legal proceedings under EU law in order to claim damages even if no injured party can be identified.

If national law does not provide for legal standing for CSOs, the opportunity to **partner with a body which can qualify for legal standing, such as the National Human Rights Institution, the Equality Body or a relevant Ombudsman**, could be explored.

CJEU Case C-54/07 Feryn (2008): in this case, concerning discrimination originating from the public statements of an employer concerning its recruitment policy, the CJEU confirmed the existence of the right for an equality body to bring, pursuant to national procedural rules, legal or administrative proceedings to enforce the obligations resulting from EU antidiscrimination law without acting in the name of a specific complainant or in the absence of an identifiable complainant.

When litigation is used to challenge provisions of EU acts, a very careful assessment shall be made as to whether the **conditions for legal standing to bring a direct action before the CJEU** can be met. In particular, the requirement of "individual concern" (see above) will be particularly difficult to meet when the action has been brought directly by the CSO in the interest of the persons concerned. If a CSO sees that it will be unlikely to meet the legal standing criteria for an action for annulment, as will normally be the case for most EU regulations and directives, it should instead

privilege litigation before national courts and request the court seized to consider making a **preliminary reference on the validity of the act** to the CJEU.

3.1.4 Other procedural aspects

When pursuing Charter-based litigation, other relevant procedural aspects should be taken into account, including:

- The possibility of asking the CJEU for an **expedited treatment** of the case when requesting a referral;

- The possibility of asking the CJEU for **interim measures** if the referral concerns the validity of EU provisions or in the context of direct actions (in other cases, including where a referral is requested on the interpretation of EU law, the parties may request interim measures to the national court);

- The **language regime** of proceedings before the CJEU (the language used in the application in case of a direct action, and the language of the national court which makes the referral in case of preliminary reference proceedings);

- The possibility that **Member States and EU institutions might intervene i**n the case before the CJEU.

3.1.5 Financial considerations

Financial considerations will also need to be taken into account, in light of the specific expertise needed to build a case on the basis of EU law and Charter arguments, and the impact this may have on **representation costs.**

It is, in this connection, worth recalling that, if a party to the main proceedings has insufficient means, the CJEU may grant that party **legal aid** to cover the costs, particularly those in respect of its representation, which it incurs before the CJEU during the preliminary reference procedure.

Prospects of damage compensation if a violation is found will also need to be considered. If securing compensation is an important factor for the complainant and/or the CSO bringing the case, the litigation strategy will need to be carefully planned, as the conditions to obtain the compensation of damages for the violation of EU law caused by an organ of the State may be difficult to meet, as illustrated above.

3.1.6 Third-party interventions

If initiating litigation or being a direct party in proceedings does not appear convenient or strategic, third-party interventions are always a strategic avenue worth exploring in order to bring in legal arguments on compliance with the Charter in existing proceedings.

In the context of Charter-based litigation, the following options can be considered:

- **Third-party interventions in national court proceedings:** as an intervening third party, a CSO may be in a position to request the national court to make a preliminary reference to the CJEU and may also be granted by the CJEU a **leave to intervene in preliminary ruling proceedings before the CJEU** if the referral is made. In this respect, it should be noted that the legal possibilities for third parties such as CSOs to intervene in the context of national court proceedings will depend on national procedural rules and may often be limited.

- **Third-party interventions in direct actions before the CJEU**, where the conditions to intervene are somewhat less strict than those applicable in preliminary reference proceedings, as the CJEU rules of procedure recognise a right of intervention to 'any other person which can establish an interest in the result of a case submitted to the Court'. It is important to note, however, that such right may not be exercised by a natural or legal person in cases between Member States, between EU institutions or between Member States and EU institutions.

- **Unofficial third-party intervention in ongoing proceedings before the CJEU**, either in the form of informal amicus briefings or observations presented directly to the CJEU, in the form of annexes to the statements of the parties or of the intervening parties.

- **Requesting an EU institution or a Member State to intervene in a case before the CJEU raising Charter-related arguments** – in view of the fact that EU institutions and Member States always have the possibility to intervene pursuant to CJEU rules of procedure.

- **Drawing attention to Charter provisions through third-party interventions in proceedings before the ECtHR**, where a reference to the Charter could help achieve a more progressive interpretation of ECHR provisions. It is important to recall that third-party interventions are common practice at the ECtHR. Interventions are open to third parties once a case is communicated.

In this context, one may argue that a broader strategic goal can be to push the CJEU further as regards the admissibility and consideration of third-party interventions. As the former Advocate-General Bobek observed, "*It might be recalled that in preliminary rulings, the Court will not collect any evidence, virtually never hear any expert witnesses, with facts being exclusively for the referring court to establish (or rather frequently, in such complex technical cases, unfortunately not to establish). As a result of restrictions on the number of potential interveners, the Court is often left to adjudicate on deeply scientific, factual matters with little data from either the intervening parties or the referring court.*"

The practice of third-party interventions in cases before the CJEU by the UN Refugee Agency (UNHCR) may be regarded as a point of reference. In a number of cases, the

UNHCR joined as intervener at the national level and then intervened formally before the CJEU. In other cases where it did not engage in such formal intervention, the UNHCR issued observations which it published on its website, or managed to have appended in an annex to the observations of the legal representative of the asylum applicant.

FURTHER RESOURCES

- van der Pas, K. (2021) Conceptualising strategic litigation, Oñati Socio-Legal Series, 11(6(S), pp. S116-S145, available at: https://opo.iisj.net/index.php/osls/article/view/1315
- Jasper Krommendijk & Kris van der Pas (2022) To intervene or not to intervene: intervention before the Court of Justice of the European Union in environmental and migration law, The International Journal of Human Rights, 26:8, 1394-1417, DOI: 10.1080/13642987.2022.2027762

3.2 Making a strategic use of advocacy

3.2.1 Resorting to non-judicial avenues in alternative to or in conjunction with litigation

The possibility of pursuing non-judicial avenues is worth considering when **litigation is for some reason ruled out or even in conjunction with ongoing litigation.**

A number of non-judicial avenues are available to challenge problematic national or EU laws and practices on grounds of their alleged incompatibility with provisions of the Charter. These include:

- **Complaints addressed to the European Commission:** a complaint may be addressed to the European Commission about any measure (law, regulation or administrative action), absence of measure or practice by an EU Member State (and its authorities) which is deemed to be against EU law, including the Charter. Complaints should concern rules and practices of general application: if the complaint is about the incorrect application of EU law in an individual case, the Commission will normally invite the complainant to try and solve it at national level (courts or other ways of settling disputes). A standard complaint form exists which may be submitted to the Commission online, by email or post. The complaint is received by the Secretariat General, which then dispatches it to the competent service (Directorate-General). The Commission is supposed to confirm receipt within 15 working days and assess and respond to the complaint within, as a rule, the following 12 months, unless the issue is particularly complex. In such cases the Commission can extend the 12-month period. If the European Commission decides that the complaint is founded, it will initiate a formal infringement procedure against the Member State in question, informing the complainant. In its contacts with national authorities, the Commission will not disclose the complainant's identity

unless the complainant has given express permission to do so. At any time, complainants may share with the Commission additional material about the complaint or ask to meet a Commission representative.

- **Petitions addressed to the European Parliament:** a petition is a form of complaint, request, or observation concerning the application of EU law by the Member States. All European citizens, residents, companies, and organisations headquartered in the EU can file a petition with the European Parliament concerning the application of EU law or an appeal to the European Parliament to adopt a position on a specific matter. Initiating a petition allows to call attention to any infringement of fundamental rights enshrined in the Charter. The petitions are handled by a dedicated Committee on Petitions (PETI). PETI may refer the matter to a competent parliamentary committee, which might decide to look into the issue further. This may prompt MEPs to ask the European Commission parliamentary questions, initiating a Parliament resolution, or, in some cases, make contact with the authorities of the concerned Member State.

- **Complaints to the European Ombudsman** on problematic acts or decisions by EU institutions. For example, if the European Commission fails to treat a complaint effectively, this could be brought to the attention of the European Ombudsman as a case of maladministration. The European Ombudsman's may also address broader systemic issues related to the enforcement of EU law.

Example

The European Ombudsman has over the past years launched a number of strategic inquiries looking into the interpretation and application of EU rules in a variety of areas. Notable examples include:

- the inquiry on the conduct of experts in interviews with asylum seekers organised by the European Asylum Support Office;
- the inquiry on how the European Border and Coast Guard Agency (Frontex) deals with complaints about alleged fundamental rights breaches through its 'Complaints Mechanism';
- the inquiry on the role of national Ombudsmen in ensuring respect for fundamental rights under the Asylum, Migration and Integration Fund;
- the inquiry on how the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece;
- the inquiry on how the European Commission monitors EU Structural and Investment funds to ensure they are used to promote the right of persons with disabilities to independent living and inclusion in the community;

- the inquiry into the use of EU funds in relation to institutional care, against backdrop of COVID-19 pandemic.

- At national level, **complaints addressed to the National Human Rights Institution, Equality Body or other relevant ombudsperson or specialised authority** competent on the matter.

3.2.2 Targeted advocacy to support the implementation of judgments

Implementation of the CJEU decisions is crucial and targeted advocacy should be planned beforehand and conducted in order to ensure this is done in a prompt and proper manner.

At EU level, advocacy should be directed at the European Commission, via a formal complaint or informal advocacy. The **Commission oversees the implementation of the court ruling, and it also has the power to fine** Member States for refusing to abide by the judgments of the CJEU. The Commission can also withhold critical budgetary contributions from offending states.

CJEU, Case C-673/16 Coman (2018): after the CJEU ruling in favour of the applicants – a same-sex couple who had sought recognition of the third-country national husband's right to free movement in the EU as a "spouse" of an EU citizen – in June 2018, and the national Constitutional Court acknowledging the CJEU ruling in September 2018, the competent district court dismissed the action for reopening the case as time lapsed. To date, Romania failed to implement the judgment. A number of advocacy and litigation actions were therefore initiated by national and umbrella CSOs to urge the implementation of the CJEU judgment, including:

- the submission in 2019 by the Romanian CSO ACCEPT of a complaint to the European Commission, urging it to open an infringement against Romania for the failure to comply with the CJEU judgment in 2019;

- the submission in 2022 by the EU umbrella CSO ILGA-Europe and the Hungarian CSO Hátter Society of a complaint to the European Commission, urging it to open an infringement against Hungary for the failure to comply with EU law as interpreted by the CJEU judgment;

- the submission by the applicants, with the help of the Romanian CSO ACCEPT, of an application to the ECtHR; the application was supported by a joint third-party intervention by the EU umbrella CSO ILGA-Europe, the AIRE Centre and the International Commission of Jurists, where they among others, in their arguments, a reference to the possible violation of Articles 53 ECHR and 52(3) of the Charter on the interpretation of Charter's provisions in accordance with the ECH;

- a similar joint third-party intervention by the EU umbrella CSO ILGA-Europe together with the AIRE Centre to another case pending before the ECtHR on the same issue.

3.2.3 Using the Charter in advocacy work on proposed laws and policies

Building arguments based on the Charter can also enhance **advocacy work on proposed laws and policies at the national and EU levels**.

CSOs can incorporate legal arguments based on the Charter when carrying out advocacy at national and EU level, both when preparing the ground for implementation of a judgement and the follow-up advocacy once the decision has been handed down.

Charter-based advocacy can also be successfully used in relation to laws and policies which are not connected to the implementation of a ruling. As illustrated above, EU institutions and bodies must ensure that legislation, policy, and procedures are in line with the fundamental rights enshrined in the Charter. Referencing the Charter at the national level could also be a successful strategy, even though the Charter has so far not been used extensively in national level advocacy work. There is room for such arguments when national authorities or bodies are implementing EU law or when national lawmakers are transposing EU law to the national system.

3.2.4 EU-level advocacy

Meetings with policymakers are an effective way to discuss topics and make an impact on policy making. Officials of EU institutions are often open to an in-person or online discussion with CSOs. In order to identify relevant interlocutors, one may look into the composition of relevant committees as regards the **European Parliament**; the organigrammes of relevant services within the **European Commission** and/or its country representations; and the EU offices of individual countries (called Permanent Representations).

Umbrella NGOs working on the relevant matter can help in strategizing and carrying out advocacy at EU level.

When engaging in advocacy at EU level, for reasons of transparency, CSOs are required to register in the Transparency Register, a database that lists organizations that try to influence the law-making and policy-implementation processes of the EU institutions. The register is accessible to anyone to track lobbyists. The **Transparency Register** number is used when submitting opinions to public consultations, when visiting EU institutions, or meeting with EU officials. Registering a CSO is simple and there is a need to update the data yearly.

3.2.5 Campaigning and raising public awareness about policy issues

Apart from formal mechanisms such as complaints to the European Commission and petitions to the European Parliament, mentioned above, there are other means that can prove effective in advocacy work at EU level. Addressing the Commission, Members of the European Parliament or the Council could be an effective way of calling the attention and triggering reactions.

Open letters are useful to call attention to fundamental rights-related topics. Open letters are often endorsed by many similar CSOs and shared with the press at the same time to ensure everyone is aware of the case the CSOs are trying to address. Usually, having a significant number of signatures is an effective way to communicate with policymakers and press publication.

Email-sending campaigns could also be successful. Sending thousands of emails can be disruptive and easily filtered. People can sign petitions and express their opinion about policy issues.

Using social media can be an effective way to trigger attention on behalf of MEPs and other policymakers. Twitter is still the number one platform for EU legislators where targeted tweets easily reach policymakers.

CSOs can also organize **events**, including online round-table discussions, to trigger the attention of EU policymakers and legislators. Having such events hosted by MEPs is a smart way to raise their profile.

At EU level, the **European Citizens Initiative (ECI)** is also noteworthy, as a unique way to try and shape EU legislation by calling on the European Commission to propose new laws or introduce policies. The Lisbon Treaty introduced ECI in 2009.

At least seven EU Member States should be involved in collecting the minimum threshold of 1 million signatures within 12 months. The signatures must be verified by the national authorities of the Member States within three months after the submission. If the proposal falls within the EU's competence, it is not manifestly abusive or frivolous, and the Commission must examine it and respond to it within three months.

The ECI is a way to directly influence the EU legislative process and to bring issues to the attention of EU policymakers. Even though it is drafted for citizens, CSOs are frequently involved in the planning and organizing phase. It has been used to promote animal welfare, environmental protection, and social and political rights. The process to bring an ECI is however rather complex and burdensome, and most of the initiatives do not reach the Commission for failing to take all the steps required within the strict time limits imposed.

3.3 Litigation-related campaigning and messaging

It is highly likely that at some point during or after litigation, a CSO will find it necessary to speak to a public audience about their case. This could be as minimal as briefing the media at the beginning or conclusion of litigation, or as extensive as a large-scale, public-facing campaign to create public support for the objective behind the litigation. Regardless of the scale on which a CSO is communicating with the public, there are certain messaging rules CSOs need to follow if they hope to create public support.

When talking to the public – directly or indirectly via the media – organisations promoting

human rights tend to dedicate most of their message to exposing the injustice or harm they are fighting. This seems to be premised on the assumption that the best way to move one's audience to action is to make them aware that there is an injustice that is causing certain people harm. Unfortunately, research shows that this is not the case.

People interpret information they receive to fit their existing understanding of a phenomenon. And this understanding is heavily shaped by the media and politicians. For example, a CSO might hope to prove the existence of structural discrimination by communicating statistics showing differential health, educational, housing and employment outcomes for a given ethnic minority. However, public attitude research on discrimination in certain countries suggests that the public tends to think that: structural discrimination does not exist because laws prohibit discrimination; discrimination exists at an individual level and is committed by a few bad people; modern society is meritocratic allowing anyone who works hard and obeys the law to prosper regardless of ethnicity; people from certain ethnic minority groups are prone to involvement in crime or unwilling to work hard. When one's audience thinks about discrimination in this way, showing them statistics of differential treatment does not change the way they think. Rather, they merely interpret the statistics to confirm their existing false, damaging stereotype. The way that CSOs tend to communicate currently usually only appeals to their existing supporters or the minority of people in society who are predisposed to adopting progressive attitudes, because these people already share similar ways of thinking to activists.

Researchers and communications practitioners have found that most people in any given society will not be motivated to support a given cause unless the message they receive follows certain steps. This subsection will elaborate on the basic steps for creating a persuasive message for a non-expert audience. CSOs should also consider seeking advice on how to design and implement an effective campaign.

Before elaborating on these basic rules, it is important to note two general points about communicating Charter litigation. First, CSOs should not attempt to explain the Charter to a non-expert audience. Second, CSOs do not need to attempt to explain their legal arguments to a non-expert audience. Non-experts quickly tune out when faced with terminology they do not understand. Rather, CSOs should focus on explaining what the rights they are talking about deliver to the lives of their audience. This is not to say that CSOs should not elaborate documents like 'explainers' about their case for those who wish further information. However, this educational approach should not form the core of a CSO's messaging about their case.

Where space permits, a CSO should apply the following four steps in the order given. Testing by practitioners have found this to be the most effective order for persuading an audience. Below each step is an illustrative example. Further examples of full messages, which put together the four steps, will be given under the different topics covered by this handbook.

Readers can find further information about messaging through Liberties' website.

3.3.1 Step 1: Show your audience why they should care

Typically, CSOs do not give their audience good enough reasons to care about the cause they are advancing. It is common to see arguments that assert that the audience should care about the issue because it concerns a national or international legal standard, or because it concerns 'human rights' or 'democracy'. Unfortunately, for most people these arguments are too abstract, technical, and / or compete with other concerns that seem to be more pressing, such as your audience being able to meet their basic needs.

Rather, to make most people care, it's important to identify how the issue being spoken about delivers something tangible in the lives of your audience that they find important. This first step is also referred to as a 'values statement'. For example:

Don't say	Try instead
The government should uphold the rule of law because it's an obligation of every EU member state and one of the EU's founding values	Most of us want leaders who use our resources to fund the schools, hospitals and roads our communities need. Independent judges check that politicians stick to the rules to make sure our contributions reach the services we rely on.

3.3.2 Step 2: Explain the 'who', 'why' and 'what' of the problem.

As noted above, CSOs tend to focus the bulk of their messaging on exposing the injustice or harm they are fighting, whether this focuses on an individual victim or community that is harmed or on offering statistics to illustrate the scale of the problem. As explained, the information presented the audience is then interpreted according to the audience's existing understanding of the issue, which is often inaccurate and has even been shaped by our opponents.

Therefore, it's important for CSOs to also dedicate attention to who is causing the harm and why they are doing this. The 'who' need not be a specific person and can include a system or a category of entities or both. When a CSO explains the 'who' and 'why' of the harm, the audience becomes more likely to share the CSO's understanding of the problem, which in turns opens the audience to the solution the CSO might propose.

When engaged in strategic litigation, a CSO is usually trying to address a systemic problem through an individual case. It is important to

reflect this in messaging about the case. While a case offers a CSO the chance to tell a human story, which can create empathy, for example:

Don't say	Try instead
The government's reform of the national judiciary council means its members will be elected by parliamentarians, rather than chosen by their peers. This is alarming because this body is responsible for appointing and promoting judges.	Certain politicians are taking our resources for themselves and their corporate friends. They want to hand pick the country's top judges so that the courts will look the other way when they line their pockets with our contributions.

Currently CSOs tend either to devote little attention to the solution (often merely urging a government to 'do better' or cease or reverse an offending measure) or to use technical legal or policy terms to describe it. Both approaches obscure from the audience how the solution overcomes the problem to bring the situation in line with the values statement in step 1. Practitioners have found, through message testing, that it is important to show the audience that the problem has a solution because otherwise they will not feel motivated to act. It has also been found that non-expert audiences are less likely to show their support for a measure when it is phrased in policy terms compared to an explanation of what the measure delivers. Therefore, while CSOs should have well-developed solutions to offer decision-makers in their advocacy, they should not transplant these into messaging towards a non-expert audience.
For example:

Don't say	Try instead
The government must bring the proposed reforms into line with the standards established by the Council of Europe's Venice Commission	We demand that our judges answer only to the law and not to politicians, so that our leaders fund the services our communities need to thrive

3.3.4 Where feasible and relevant, include a call to action and a reminder of past successes

By asking their audience to do something to show support for their solution, CSOs help to build the audience's attachment to the CSO's cause. A call to action could include something as small as asking the audience to share a message or as big as encouraging participation in a protest.

In addition, campaign practitioners have found that audiences may also be reluctant to act even if they agree with the cause, because they are sceptical that things can be changed for the better. CSOs should be aware that some of their messaging habits may exacerbate this. For example, CSOs often complain that the government has consistently failed to improve the situation despite repeated requests or court decisions. It's not that government inaction can't be mentioned at all. But it should then be set out as part of the explanation of the problem, and the reason for refusing to remedy the situation should be clarified.

To overcome cynicism and fatalism as barriers to action among their audience, CSOs should give their audience examples of times in the past when something in society was changed for the better by people coming together. The examples given need not relate directly to the issues dealt with by the case. For example:

Example

Just like we joined together to achieve paid parental leave / marriage equality / free pre-school day care / care for each other during the pandemic … we can demand that our leaders… If you agree, share this content / talk to a neighbour / tell us why you care and include the campaign hashtag …

4. In-focus: using the EU Charter to fight discrimination and intolerance

4.1 Main legal acts

There is a wealth of EU legislative instruments focussing on non-discrimination, although gaps still exist and the legal framework is characterised by a sort of "**hierarchy of grounds**" – meaning the scope and level of protection is somewhat different depending on the ground of discrimination concerned.

The protection against **discrimination on grounds of nationality** of one of the Member States is articulated in EU primary law and secondary legal acts regulating the free movement of persons, and essentially extends to any area.

Discrimination on grounds of sex is also covered by EU primary and secondary law in a wide range of areas, namely: employment and occupation, social protection, including social security and healthcare, education as well as access to goods and services available to the public. The same goes for **discrimination on grounds of race and ethnic origin**.

Conversely, **discrimination on grounds of religion or belief, disability, age or sexual orientation** is covered only in the area of employment and occupation.

Discrimination on other grounds is currently not regulated under EU law. The proposal for a Horizontal Equality Directive, presented in 2008 by the European Commission with the aim of filling existing gaps and extending protection against discrimination on grounds of age, disability, sexual orientation or religious belief outside the labour market, is still stalled due to the inability of the Member States to reach a unanimous agreement on the text.

ANTIDISCRIMINATION ACTS

-Free Movement Directive (Directive 2004/38/EC)

-Race Equality Directive (Directive 2000/43/EC)

-Framework Employment Equality Directive (Directive 2000/78/EC)

-Gender Recast Directive on discrimination in employment (Directive 2006/54/EC)

-Gender Goods and Services Directive (Directive 2004/113/EC)

Key features of EU anti-discrimination legislation include:

- Wide notion of discrimination (including direct and indirect discrimination, as well as harassment)
- Protection against victimisation

- Consideration of positive action to address inequality and accommodate specific needs, and positive measures in particular to address inequality between women and men (such as rules on work life balance, maternity and pregnancy, women on boards, and a proposal on gender pay gap)

- Judicial and extra-judicial protection, including procedural safeguards such as the reversal of burden of proof

EU instruments also exist which address **other discrimination-related forms of harassment** – namely: the EU framework decision on combating racist hate speech and crime (Framework Decision 2008/913/JHA), the Victims' Rights Directive, which includes provisions specific to victims of bias-motivated crimes (Directive 2012/29/EU), and the recent proposal for a directive on combating violence against women and domestic violence.

Anti-discrimination provisions are also included in a range of EU legal acts regulating a variety of areas such as asylum and migration, healthcare, telecommunications and digital services, and more, pursuant to the principle of **equality mainstreaming**.

4.2 Value added of the Charter among other sources of legal protection

The fundamental rights to equality and non-discrimination are reaffirmed in the Charter by means of different provisions, including:

-Article 20 on the principle of **equality before the law**
-Article 21 on the **right to non-discrimination on any grounds**
-Article 23 on the principle of **equality between women and men**
-Article 26 on the **right of persons with disabilities to reasonable accommodation**

It is important to clarify from the outset that, despite reaffirming the right to be protected against any form of discrimination based on any ground, the **Charter cannot be used to expand the, currently limited, scope of protection offered by existing provisions of EU primary and secondary law**, and thus solve the issue of the "hierarchy of grounds", mentioned above.

Nonetheless, the Charter has a rather unexplored potential to help fill gaps in existing EU antidiscrimination legislation. The following areas appear particularly worth noting:

- **Clarifying concepts enshrined in EU antidiscrimination law**, to promote a progressive interpretation of existing provisions, building on, and potentially going beyond, CJEU case-law.

CJEU, Case C-423/04 Richards (2006): in this landmark case, the CJEU was called on to rule on the extent to which discrimination on grounds of sex may be regarded as also covering gender identity. While the CJEU did confirm that in certain situations EU law on discrimination on grounds of sex offers protection to those who have undergone or are undergoing gender reassignment, many commentators have regarded the CJEU approach as overly restrictive. The Charter may, in such cases, help achieving a more progressive approach.

CJEU, Case C-354/13 Fag og Arbejde (2014): this case is an example of the CJEU attempts to interpret the ground of "disability" as an autonomous notion of EU antidiscrimination law. While the CJEU did not refer to the Charter in this case, such instrument could help the CJEU in promoting a progressive interpretation of the scope and level of protection of antidiscrimination rules on the ground of disability, also building on the evolving case-law of the ECtHR.

CJEU, Case C-83/14 CHEZ (2015): in this case, the CJEU clarified that EU provisions on discrimination on grounds of race and ethnic origin may also cover cases of "discrimination by association", providing protection to those who, although not themselves a member of the ethnic group concerned, suffer, together with the former, less favourable treatment or a particular disadvantage on account of a discriminatory measure. In this case, the CJEU relied on Article 21 of the Charter, paving the way for use of this provision to extend protection against forms of "discrimination of association" under other instruments of EU law. A similar reasoning had already been developed in relation to discrimination on grounds of disability in CJEU, Case C-303/06 Coleman (2008), in a case concerning the dismissal of an employee who was not himself disabled but the primary carer of a disabled child.

Cases C-157/15 Achbita (2017): in this case, which concerned the dismissal of an employee wearing the Islamic headscarf pursuant to an internal rule of her private employer prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, the CJEU relied on Article 10 of the Charter to clarify that the concept of 'religion' shall be regarded as including the freedom of persons to manifest their religion.

- **Integrating provisions of EU antidiscrimination law as regards access to justice and the right to an effective remedy**: Article 47 of the Charter on the fundamental right to an effective remedy could be used to expand or strengthen judicial remedies and procedural safeguards supporting the enforcement of EU antidiscrimination law, beyond the general provisions already included in EU antidiscrimination instruments (which are limited to the right to complain and the reversal of the burden of proof). This could be relevant, for example, to promote a favourable interpretation of the admissibility of means of proof in discrimination cases, or explore the opportunity to advocate for the availability of collective redress mechanisms in the field of non-discrimination.

- **Addressing issues related to intersectional discrimination,** which is not as such protected in any EU instrument.

CJEU, Case C-344/20 LF v SCRL (2022): in this case, concerning neutrality provisions prohibiting workers from manifesting their religious or philosophical beliefs, in particular in connection with the wearing of the Islamic headscarf, the national referring court questioned the CJEU over the acknowledgement of intersectional religious and gender discrimination. Although the CJEU did not eventually engage on this aspect in its ruling, an extensive intersectional analysis was developed by the Advocate General in its opinion to the case, pointing to a possible progress in the CJEU's approach to intersectional discrimination.

- **Mainstreaming non-discrimination in areas not covered by EU antidiscrimination law**: Article 21 of the Charter, as well as other relevant Charter provisions, can be used to challenge discriminatory rules and practices in areas not covered by EU antidiscrimination instruments, where a situation falls within the scope of another provision of EU law.

CJEU, Case C-528/13 Leger (2015): in this case, the CJEU relied on the right to non-discrimination on grounds of sexual orientation as enshrined in Article 21 of the Charter to rule on a permanent deferral from blood donation for men who have had sexual relations with another man in force in a Member State. The CJEU found that such permanent deferral may not respect the principle of proportionality, unless it can be established that those persons are at a high risk of acquiring severe infectious diseases, such as HIV, having regard to the situation prevailing in the Member State concerned and that there are no effective detection techniques or less onerous methods for ensuring a high level of health protection for recipients.

CJEU, Case C-673/16 Coman (2018): in this landmark case, the CJEU clarified that the term 'spouse' within the meaning of the provisions of EU law on the free movement of EU citizens and their family members includes spouses of the same sex, which therefore shall have a derived right of residence also in Member States which do not authorise marriage between persons of the same sex. The CJEU relied on Article 7 of the Charter on the right for respect of private and family life to observe that the relationship of a same-sex couple falls within the notion of 'private life' and that of 'family life' in the same way as a relationship of a heterosexual couple.

CJEU, Case C-490/20 Stolichna obshtina, rayon 'Pancharevo' (2021): the case concerned a child whose birth certificate was drawn up by the Member State of residence and designated as parents two persons of the same sex, and which was not recognised by the Member States of which the child was a national. The CJEU considered that the measure would have impacted on the child's enjoyment of free movement rights as an EU citizen and held that the Member State of which the child is a national is obliged to issue an identity card or a passport to that child without requiring a birth certificate to be drawn up beforehand by its national authorities.

- **Raising relevant fundamental rights issues in discrimination-related cases**, to strengthen the case with other human rights related considerations.

CJEU, Case C-443/15 Parris v Trinity College Dublin (2016): the case concerned alleged intersectional age and sexual orientation discrimination deriving from a national rule on a survivor's pension limiting the payment by a requirement that the member and his surviving civil partner entered their civil partnership prior to the member's 60th birthday. It was brought by a same-sex couple, in circumstances where they were not permitted by national law to enter a civil partnership until after the member's 60th birthday, although the member and his civil partner had formed a committed life partnership before that date. The CJEU held that such national provision would not be precluded by the EU Framework Employment Equality Directive, as it did not constitute discrimination on grounds of age nor sexual orientation taken in isolation, nor could be regarded, therefore, as capable of creating discrimination as a result of the combined effect of sexual orientation and age. No argument on the possible violation of the applicant's rights to respect for family life was raised in this case.

CJEU, Case C-490/20 Stolichna obshtina, rayon 'Pancharevo' (2021): in this case, mentioned above, the CJEU relied on the right for respect of private and family life enshrined in Article 7 of the Charter and on the protection of the best interests of the child enshrined in Article 24 of the Charter, interpreted in the light of the UN Convention on the Rights of the Child, to acknowledge that the combination of these provisions imply that the right to be registered immediately after birth, the right to a name and the right to acquire a nationality shall be recognised to a child without discrimination against the child in that regard, including discrimination on the basis of the sexual orientation of the child's parents. The case was built on in discussions, ongoing at the time of the CJEU ruling, on possible EU rules on the recognition of parenthood in the Member States, and was later referred to in the proposal presented by the European Commission in 2022.

Relying on the Charter when litigating discrimination in situations which fall within the scope of EU law – be it antidiscrimination law or provisions of EU law outside the field of discrimination – can therefore have an important added value.

The paragraphs which follow offer a **non-exhaustive series of examples on the possible use of the Charter** when litigating national discriminatory laws and practices or when litigating disputes between private parties. The examples focus on areas selected on the basis of their relevance as regards the prevalence, or the emergence, of forms of discrimination across the EU.

4.3 Challenging national discriminatory laws and practices

4.3.1 Discrimination in the access to and provision of public services and benefits

Discrimination in the access to and provision of public services and benefits is protected by **EU antidiscrimination instruments** on grounds of race and ethnic origin and of sex, and namely:

- the **Race Equality Directive** (Directive 2000/43/EC), covering discrimination on grounds of race and ethnic origin as regards social protection, including social security and healthcare, education, and goods and services available to the public, including housing;

- **Gender Goods and Services Directive** (Directive 2004/113/EC), covering discrimination on grounds of sex as regards the provision of goods and services which are available to the public.

Other EU acts are also potentially relevant to counter discrimination in this area, as they can be used as "trigger rule" to cover situations falling outside the scope of EU antidiscrimination instruments and expand protection against discrimination – either by means of specific provisions that such acts may contain, or by relying on Article 21 of the Charter. Examples include:

- EU legislation regulating **services of general interest** subject to European internal market and competition rules. Such rules shall be interpreted in line with the principle of non-discrimination and taking into account the need to protect citizens' access to basic services. It is worth noting in this context that **services of non-economic nature** (social security schemes, employment services and social housing) are already covered by the anti-discrimination framework

- EU legislation regulating **audiovisual media services**

- EU legislation regulating **free movement of persons**

- EU legislation regulating **treatment of legally residing third-country nationals**

- EU legislation in the area of **health** – for example, EU rules on patients' rights in cross-border healthcare

- EU legislation on **rights of victims of crime**

- EU legislation on **rights of suspects and accused in criminal proceedings**

- EU legislation on **data protection**

While the legal framework which result from the combination of such provisions is quite a

comprehensive one, **many gaps remain** both as regards the grounds of discrimination covered and the type of services concerned.

There are, therefore, a number of **areas where relying on the Charter could be strategic:**

- **Address untackled forms of discrimination in the access to or provision of public services**, which are not as such covered by existing EU provisions

Example

- **Discrimination against LGBTIQ+ persons in access to and provision of healthcare services**, via EU rules on cross-border healthcare, taken in conjunction with Article 21 of the Charter
- **Discrimination against trans people in social security or social advantages**, by advocating for an expansion of the notion of sex discrimination as covered by the Gender Goods and Services Directive, on the basis of Article 21 of the Charter
- **Discrimination against Muslim women in education**, by using the concept of intersectional discrimination in the interpretation of the Race Equality Directive or the Gender Goods and Services Directive, on the basis of Article 21 of the Charter
- **Discrimination within the justice system**, via EU rules on the rights of victims of crime or on the rights of suspects and accused in criminal proceedings, taken in conjunction with Article 21 of the Charter

- **Advocate for positive measures**

Example

- Advocating for the **reasonable accommodation of the specific needs of persons with disabilities,** relying on Article 26 of the Charter
- Arguing for a **stronger protection of pregnancy and maternity** beyond the minimum standards provided for by EU law, including a preferential treatment in accessing certain social security benefits/ social advantages, relying on Article 23 of the Charter
- Advocating for **reasonable accommodation over the use of religious symbols** when accessing to or providing public services, such as education, healthcare, or audiovisual media services, relying on Article 21 of the Charter

- **Tackling emerging areas of discrimination**

Example

- **Addressing discrimination in the use of Artificial Intelligence and algorithms**, via EU data protection rules taken in conjunction with Article 21 of the Charter

In 2019, it was revealed that the Dutch tax authorities had used a self-learning algorithm to create risk profiles in an effort to spot child-care benefits fraud. Authorities penalized families over a mere suspicion of fraud based on the system's risk indicators, which were arguably based on an intrinsically discriminatory algorithm disproportionately targeting households with lower incomes or belonging to ethnic minorities. The system was **considered to be at odds with several rules of the EU General Data Protection Regulation** by the Dutch Data Protection Authority.

- **Challenging discriminatory restrictions on the dissemination of audiovisual content**, relying on Article 21 of the Charter

In December 2022, the European Commission took Hungary to the CJEU on grounds of the violation of several EU rules on media services, advertising and electronic commerce taken in conjunction with Articles 1, 7, 8(2), 11 and 21 of the Charter, on account of provisions imposing a number of prohibitions and restrictions in relation to the promotion or portrayal of gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality

4.3.2 Racial segregation practices

The **Race Equality Directive** (Directive 2000/43/EC) is the main EU legislative instrument to rely on to challenge racial segregation practices in the area of **healthcare, housing or education.**

Other potentially relevant EU provisions include:

- rules regulating the **treatment of legally residing third-country nationals**, and
- rules regulating the **free movement of EU citizens.**

The Charter, taken in conjunction with these 'trigger rules', can bring a clear added value in particular in relation to:

Intersectional discrimination – for example, in a case concerning **housing segregation of Roma who are also EU citizens**, relying on EU rules on free movement to argue over the existence of intersectional discrimination between nationality and ethnic origin, on the basis of Article 21 of the Charter

Positive measures – for example, in a case concerning **segregation in education of Roma or migrant pupils with disabilities**, to argue for the need of reasonable accommodation of their specific needs, relying on Article 26 of the Charter

Emerging areas of discrimination – for example, in a case concerning the **discriminatory use of Artificial Intelligence and algorithms in educational systems**, relying on the Race Equality Directive taken in conjunction with Article 8 of the Charter on the right to data protection, or relying on the General Data Protection Regulation taken in conjunction with Article 21 of the Charter

4.3.3 Profiling and discriminatory law enforcement

Profiling and discriminatory law enforcement are areas which are **not covered by the EU anti-discrimination framework. Relying on Articles 20 and 21 of the Charter can therefore be a strategic way** to challenge such practices on grounds of the violation of the principle of equality and the right to non-discrimination.

The most obvious 'trigger rules' one could rely on in order to litigate profiling and discriminatory law enforcement practices include:

-**EU data protection law**, including the General Data Protection Regulation (Regulation (EU) 2016/679) and the Data protection law enforcement directive (Directive (EU) 2016/680), as well as other sectoral instruments such as the Passenger Name Record (PNR) Directive (Directive (EU) 2016/681);

-**EU rules on judicial cooperation in criminal matters**, including rules harmonising criminal law, such as the EU Counterterrorism Directive (Directive (EU) 2017/541), or instruments creating databases and regulating access to such databases, such as the European Criminal Records Information System (ECRIS);

-**EU rules on migration and border management**, such as the Schengen Borders Code (Regulation (EU) 2016/399), relevant when profiling and discriminatory law enforcement occurs in the context of border surveillance and border management.

CJEU, Case C-817/19 Ligue des droits humains (2022): in this case, the CJEU was called on, among other things, to rule on the compatibility with the right to non-discrimination of the automated processing of PNR data under relevant rules of the PNR Directive taken in conjunction Article 21 of the Charter. The CJEU clarified that such automated processing shall use databases which are non-discriminatory and shall be based on pre-determined criteria which do not give rise to direct or indirect discrimination. The CJEU also held that advance assessments, or screenings, may not rely on the use of artificial intelligence technology in self-learning systems ('machine learning'), capable of modifying without human intervention or review the assessment process and, in particular, the assessment criteria on which the result of the application of that process is based as well as the weighting of those criteria; and that the appropriateness of the system of automated processing shall depend on the individual review of positive results obtained, as a second step, by non-automated means, subject to guidance and support for the purposes of ensuring full respect for fundamental rights including Article 21 of the Charter.

4.4 Achieving change by litigating cases between private parties

The right to non-discrimination, as general principle, has horizontal direct effect, meaning it can benefit from direct application in disputes between private parties, as consistent CJEU jurisprudence illustrates.

Over the past years, the CJEU has also increasingly made use of **Article 21 of the Charter as a provision with horizontal direct effect**, illustrating that relying on this provision can have an interesting value added to clarify obligations upon private parties in relation to discriminatory laws and practices.

The paragraphs which follow offer some examples of areas where relying on Article 21 as well as other provisions of the Charter in disputes between private parties can have added value.

4.4.1 Discrimination in the field of employment

Discrimination in employment and occupation is a typical area where the Charter can be relied on in cases between private parties.

Discrimination in the field of employment and occupation is regulated by a number of **EU legislative instruments**:

-**Race Equality Directive** (Directive 2000/43/EC) offering protection against discrimination in a variety of areas, including employment and occupation, on grounds of **race and ethnicity**;

-**Framework Employment Equality Directive** (Directive 2000/78/EC) offering protection against discrimination in employment and occupation on grounds of **religion or belief, disability, age or sexual orientation**;

-**Gender Recast Directive on employment and occupation** (Directive 2006/54/EC) on the implementation of the principle of equal opportunities and equal treatment of **men and women in matters of employment and occupation**.

Treaty provisions on the free movement of workers may be relied on in cases of discrimination based on nationality.

Relying on the Charter can prove strategic in this area, in particular with a view to:

- **Clarify obligations upon private employers in addressing discriminatory practices**, even when they are put in place pursuant to national legislation, pursuant to Article 21 of the Charter

CJEU, Case C-193/17 Cresco (2019): in this case, the CJEU ruled on the obligations of private employers which result from the incompatibility with the right to non-discrimination on grounds of religion or belief as enshrined in EU law of national legislation granting only certain employees a holiday on Good Friday. The CJEU held that Article 21 of the Charter implies that, until the Member State has

amended its legislation, a private employer who is subject to such legislation is obliged, under certain conditions, also to grant his other employees a public holiday on Good Friday, in order to ensure equal treatment.

- **Advocate for the need of positive measures at the workplace**, for example reasonable accommodation to address the specific needs of persons with disabilities pursuant to Article 26 of the Charter, or the situation of persons of a certain religion or belief pursuant to Article 10 of the Charter

Cases C-157/15 Achbita (2017): this case concerned the dismissal of an employee wearing an Islamic headscarf pursuant to an internal rule of her private employer prohibiting the visible wearing of any political, philosophical or religious sign in the workplace. The CJEU held that the assessment as to whether such prohibition is necessary and proportionate would include verifying whether, taking into account the inherent constraints to which the undertaking is subject, the employer considered the possibility to offer the person concerned a post not involving any visual contact with customers.

- **Strengthen judicial protection of victims of discrimination at the workplace**, for example by advocating for procedural rules ensuring an effective judicial review of discriminatory practices on the basis of Article 47 of the Charter on the right to an effective remedy

CJEU, Case C-30/19 Braathens Regional Aviation AB (2021): in this case, the CJEU clarified that the Race Equality Directive, read in the light of Article 47 of the Charter, precludes a national law which prevents a court seised of an action for compensation based on an allegation of prohibited discrimination from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination.

Relying on Article 47 in cases related to discrimination in employment may be particularly helpful in order to advocate for a **progressive approach on the means of proof**, considering that such discrimination is often difficult to prove in the absence of overt statements, and means such as hidden recordings, or the use of statistical data could prove helpful.

4.4.2 Discrimination in the access to and provision of services

Discrimination in the access to and provision of services is regulated by:

-**Race Equality Directive** (Directive 2000/43/EC) as regards discrimination on grounds of **race and ethnicity;**
-**Gender Goods and Services Directive** (Directive 2004/113/EC) as regards discrimination based on **sex.**

Beyond these, **Treaty provisions and secondary acts on the free movement of services** (such as the Directive 2006/123/EC) may also be relied on as 'trigger rules' in situations not covered by the above-mentioned EU

antidiscrimination instruments. Sectoral rules may also come into play, such as EU rules on **consumers' rights** (such as Directive 2011/83/EU), patients' rights in cross-border healthcare as regards discrimination in relation to **healthcare services** (Directive 2011/24/EU), or EU rules regulating digital services.

The use of the Charter can prove strategic in this area, in particular with a view to:

- **Expand protection to grounds of discrimination not covered by EU anti-discrimination instruments** by relying on EU provisions on the free movement of services taken in conjunction with Article 21 of the Charter

- Rely on general or sectoral EU provisions regulating the access to and provision of services taken in conjunction with Article 21 of the Charter to **bring cases in underexplored areas such as access to financial services, access to healthcare services or services in the online environment**

In this context, it is important to bear in mind that relying on internal market rules on services will only be possible in relation to **cases which present a cross-border element**.

4.4.3 Hate crime and hate speech

The **Framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law** (Council Framework Decision 2008/913/JHA) is the only existing EU legal instrument harmonising criminal law in relation to hate crime and hate speech. In 2021, the Commission proposed to amend the Treaties and grant the EU competence and powers to legislate on any forms of hate speech and hate crime, but for such proposal to go through a unanimous agreement by all the Member States is required, which has not been reached to date.

The **EU Victims' Rights Directive** (Directive 2012/29/EU) is also a relevant instrument when it comes to the rights of victims of crime and includes the consideration of the specific needs of victims of crime committed with a discriminatory or bias motive.

This is a rather unchartered area where the use of the Charter could be strategic, in particular with a view to:

- **Strike a fair balance between non-discrimination and the right to freedom of expression and information enshrined in Article 11 of the Charter in hate speech cases** falling within the scope of the Framework decision on combating racism and xenophobia

- **Protect the right of victims to an effective remedy**, against the background of gaps in the investigation and prosecution of the bias motivation of offences, relying on relevant provisions of the Framework decision on combating racism and xenophobia or the Victims' Rights Directive taken in conjunction with Article 47 of the Charter

- **Expand the protection offered by the Framework decision on combating racism and xenophobia to racist hate crime or hate speech targeting human rights**

defenders, relying on Article 21 of the Charter and the concept of discrimination by association

- **Address intersectional bias motives** relying on relevant provisions of the Framework decision on combating racism and xenophobia or the Victims' Rights Directive taken in conjunction with Article 21 of the Charter

4.5 Litigation, advocacy and campaigning tips

4.5.1 Considerations specific to Charter-based litigation in the area of non-discrimination

Considering the sheer amount of cases one may come across, strategic litigation in the area of discrimination will always need to consider whether the case can result in important clarifications and adjustments of the applicable law and positive changes going beyond the particular case. As regards Charter-based litigation, particular relevance shall be given to those **cases where the use of the Charter can**, as illustrated in the examples above, **help fill some of the gaps left by the EU anti-discrimination framework**.

When this does not appear to be the case, and the situation at stake appears easily solvable on the basis of existing national or EU law, one should carefully assess whether it is more convenient to rather **refer the person to a non-judicial body** who could mediate the case, take up litigation or at least provide legal advice, such as the equality body or a competent ombudsperson.

If, on the contrary, one is of the opinion that the case is strong, and concerns a systemic or institutional form of discrimination, or a serious violation with respect to its scale and incidence, the **opportunity of working towards a collective action** could be explored. This may relate to the building of a collective claim, or to an *actio popularis* where the CSO vests itself with collective standing on behalf of unidentified victims of a discriminatory law or practice.

CJEU Case C-81/12 Asociaţia Accept (2013): this case originated from an action brought before the competent national court by the CSO Accept, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights in Romania, on account of a public statement of an employer which was considered by the CSO as amounting to discrimination on grounds of sexual orientation in recruitment matters. The CJEU, as regards the legal standing of the CSO, clarified that the enforceability of EU anti-discrimination law does not require an identifiable complainant who claims to have been the victim of such discrimination. It follows that, when this is provided for under national law, associations with a legitimate interest have the right to bring legal or administrative proceedings to enforce the obligations resulting from EU anti-discrimination law without acting in the name of a specific complainant or in the absence of an identifiable complainant.

CJEU Case C-507/18 NH v Rete Lenford (2020): the case originated from an action brought by an association of lawyers having as objective the judicial protection of, and the promotion of the culture and respect for the rights of, LGBTIQ+ persons, which acted for the enforcement of obligations under the EU Framework Employment Equality Directive and sought to obtain damages in that connection. As regards the association's legal standing, the CJEU clarified, building on its ruling in the ACCEPT case, mentioned above, that national law may well provide that an association has the right to bring legal proceedings under EU law in order to claim damages even if no injured party can be identified.

When litigation is aimed at challenging national discriminatory laws and practices, **identifying a suitable case to litigate using the Charter may be difficult** and may require a certain degree of artifice. When identifying or building a strong case proves too complicated, one may consider the **convenience of resorting to non-judicial avenues alternative to litigation**, such as addressing a complaint to the European Commission and urge it to open infringement proceedings against the Member States in question. In such cases, the Directorate-General (DG) responsible to assess the matter will be DG Justice and Consumers.

4.5.2 Supporting advocacy

In discrimination cases, advocacy may prove particularly important to **ensure a timely and proper implementation of judgments**.

At national level, the **equality body**, provided it is independent, competent and resourced enough, may prove an important ally, and could help, among others:

-Follow up with the undertaking to check whether they have taken action to remedy the discrimination in disputes between private parties;
-Where the decision implies a change in the law or general practice, bringing the matter to the attention of policymakers within the government and/or the national parliament;
-Monitoring complaints regarding the issue raised.

Equinet, the European Network of Equality Bodies, offers many relevant resources about equality bodies in the EU, including a European Directory of Equality Bodies providing basic information about these bodies in each Member State.

Addressing a complaint to the European Commission can also be an effective way to put pressure on the government to ensure that relevant laws are changed or enforced.

In certain cases, **bringing a case to the ECtHR for the failure to implement the ruling** can be a further step to accompany advocacy efforts and put pressure on the Member State and the European Commission.

CJEU, Case C-673/16 Coman (2018): despite the CJEU ruling in favour of the applicants, recognising that the definition of 'spouse' in EU law on freedom of movement includes

same-sex couples, and therefore all EU countries must treat same-sex couples in the same way as different-sex couples when they exercise freedom of movement rights, Romania failed to implement the judgment, and the applicants, with the help of the Romanian CSO ACCEPT, decided to submit their case to the ECtHR claiming the non-implementation of EU law as transposed in Romania as well as the violation of relevant ECtHR articles. In parallel to this application, a number of advocacy steps were taken to urge the implementation of the CJEU judgment, including the submission in 2019 by the Romanian CSO ACCEPT of a complaint to the European Commission, prompting it to open an infringement against Romania for the failure to comply with the CJEU judgment in 2019; and the submission in 2022 by the EU umbrella CSO ILGA-Europe and the Hungarian CSO Hátter Society of a complaint to the European Commission, prompting it to open an infringement against Hungary for the failure to comply with EU law as interpreted by the CJEU judgment. ILGA-Europe also submitted joint third party interventions before the ECtHR in the Coman case, together with the AIRE Centre and the International Commission of Jurists, as well as on a similar case, together with the AIRE Centre, highlighting among others, in their arguments, a reference to the possible violation of Articles 53 ECHR and 52(3) of the Charter on the interpretation of Charter's provisions in accordance with the ECHR.

4.5.3 Campaigning and messaging

When talking to a public audience about a case, CSOs should follow the steps set out in chapter 3.4. This sub-section will first note some particularities of messaging on discrimination before offering some examples of messages for inspirations. Readers can refer to messaging guides from Liberties: 'How to message on the rights of people from marginalised groups' and 'How to talk about ethnic profiling: A guide for campaigners' for more detailed guidance.

As noted in chapter 3.4.1, the first step to an effective message is to explain to an audience why they should care about the cause being promoted, by pointing out how the standard being promoted delivers something they find important. When speaking about discrimination against people from marginalised groups, it is additionally important to stimulate empathy in your audience towards the group in question and / or reveal how the harm being caused to the marginalised group is part of a strategy to harm your audience. There are several ways to achieve this, which are discussed in full in the messaging guide 'How to message on the rights of people from marginalised groups'. Below are some examples. These example messages do not include step 4 of the message: the call to action and reminder of past successes. This is because the wording of step 4 varies according to what the audience is being asked to do, and what kinds of past successes will resonate with the audience in a given country.

Example message on marriage equality

(Values) All of us have fallen in love. When we find someone special, many of us want to make a long-term commitment to each other through marriage.

(Problem) But today, our government denies some of us the freedom to commit to the person we love and found a family just because of who we are attracted to.

(Solution) All of us should be free to commit to the person we love, no matter our sexual orientation.

Example message on strategic racism

(Values) No matter who we pray to or the colour of our skin, most of us want the same things in life: to contribute to our communities and support our families.

(Problem) But today, certain politicians are cutting taxes for the very richest and allowing corporations to underpay the people who work for them while they defund our schools and hospitals. Then they point the finger for hard times at people from ethnic minorities or people who have arrived in the country recently.

(Solution) We want new rules to stop politicians spreading hatred. When we take away from our representatives the tools they use to distract us from their failures, we can demand that they do what's best for ordinary citizens.

FURTHER RESOURCES

- Equinet overview of EU antidiscrimination framework
- CJEU case-law digest on non-discrimination, on Article 20 and on Article 21 of the Charter
- FRA Handbook on antidiscrimination law
- Thematic reports of the European Equality Law Network
- FRA Handbook on preventing unlawful profiling
- Open Society Justice Initiative Handbook on ethnic profiling
- NJCM Guide on strategic litigation to combat ethnic profiling
- European University Institute, *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter – Module 6 Non-discrimination (2019),* available at https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.f-Module-6.pdf
- Equinet Handbook on strategic litigation
- *A. Ward, The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang*?, Cambridge Yearbook of European Legal Studies,Volume 20, December 2018, pp. 32 – 60, available at https://doi.org/10.1017/cel.2018.11
- L. Farkas, *Collective actions under European anti-discrimination law*, in European Anti-discrimination Law Review Issue 19, available at https://www.migpolgroup.com/_old/wp-content/uploads/2014/11/Review-19-EN-web-version.pdf

5. In-focus: using the EU Charter to safeguard civic space

5.1 Relevance of the Charter and EU law to civic space issues

The Charter reaffirms all the core freedoms underlying an open civic space, and namely:

- the **right to freedom of assembly** (Article 12)
- the **right to freedom of association** (Article 12)
- the **right to freedom of expression and information** (Article 11)

Other rights may be relevant for the protection of civic space and the establishment and operations of CSOs, too, such as the **right to good administration** (Article 41), the right to **data protection** (Article 8), the right to **non-discrimination** (Article 21), or the right to an **effective remedy** (Article 47).

Currently, **no EU standards exist on the establishment and operations of CSOs**, or generally on the exercise of the freedoms of assembly, association, expression or information.

The European Parliament has called on the European Commission to present proposals on a statute for a European Association and on common minimum standards for non-profit organisations in the EU. However, no proposal has yet been presented at the time of writing.

Nonetheless, **EU law already offers some "trigger rules" which may be used to challenge civic space restrictions**, insofar as CSOs and their staff are subject to a number of rights and obligations deriving from EU law. These include:

- as market actors, beneficiaries of **market freedoms**, and in particular **freedom of establishment** (Article 49 TFEU) and **free movement of services** (Article 56 TFEU). Indeed, the non-profit nature of CSOs' activities does not detract from CSOs being economic actors, if they exercise an activity of economic relevance

- as recipients of funds and donations, beneficiaries of **free movement of capital** (Article 63 TFEU), and subject to **obligations** (as regards transparency of funding, pursuant to **anti-money laundering regulations**

- beneficiaries of **free movement of persons** (Article 45 TFEU), their staff being citizens and workers moving across the EU

- **entities and individuals subject to rights** granted by EU law (such as for example in the area of **data protection, protection as**

victims against certain forms of attacks and harassment)

- actors providing services which may be relevant to the **enforcement of sectoral EU law** (for example, in the area of **asylum and migration, support to victims of crime**)

- **public participation actors** (Article 11 TEU and sectoral legislation, e.g. in the area of **environment**)

- **actors of the EU law enforcement chain** (Article 19 TEU)

The paragraphs which follow offer a non-exhaustive series of examples of how some of these EU law provisions may be relied on in conjunction with the Charter in order to address the most common challenges facing CSOs across the EU.

5.2 Challenging national restrictive laws and practices

5.2.1 Unfavourable regulatory frameworks applicable to CSOs

National rules on **establishment and dissolution, registration, charitable status, or regulating operations of CSOs** may be challenged on grounds of EU law by relying on the right to freedom of association as protected by the Charter, taken in conjunction with a range of possible "trigger rules", such as EU provisions on:

- **Free movement of services:** CSOs being often service providers, one may argue that an unfavourable regulatory framework applicable in one Member State to CSOs offering their services on its territory may have the effect of dissuading CSOs established in other Member States from providing services in that Member State. In order to rely on such argument, one should be able to demonstrate that the laws in question constitute unjustifiable and discriminatory requirements affecting the setting up or carrying out of a relevant service in their country, which particularly affect, or are capable to affect, CSOs from other EU countries.

- **Freedom of establishment:** similarly, one may argue that an unfavourable regulatory framework regulating the enjoyment of the right to association in one Member State may have the effect of dissuading CSOs from establishing an office or branch in that Member State. In this respect, it is relevant to note that TFEU provisions on the right to establishment exclude from their scope non-profit-making entities (Article 54 TFEU). It can however be derived from the case-law of the CJEU that any organisations (including CSOs) may be regarded as exercising their freedom of establishment when setting up entities involved in some form of economic activities, regardless of whether generating profit is a primary aim of the economic activity. As above, in order to rely on such argument, one should be

able to demonstrate that the laws in question constitute unjustifiable and discriminatory requirements affecting the setting up of an office or branch in the country in question.

- **Free movement of workers**, if the unfavourable rules affect CSOs' staff or their family members and are such as to particularly dissuade citizens from other Member States to exercise the rights of movement and residence and the right to work in that Member State

- **EU data protection rules**, if the restrictive provisions involve the storage or processing of personal data of managers, staff or other persons associated to a CSO

- EU rules on public procurement, if the restrictive rules affect the ability of CSOs to be contracted under public procurement, in violation of the minimum standards of transparency and equal treatment established by EU law

5.2.2 Funding restrictions on CSOs

EU law and the Charter can be usefully relied on to challenge funding restriction on CSOs, in particular **restrictions which (may) also impact cross-border donations**.

A number of rights enshrined in the Charter provide protection to the right of CSOs when seeking and accessing funding, including:

-freedom of association;
-the right to property;
-equal treatment and non-discrimination;
-data protection, as regards in particular the disclosure of data of donors.

Relevant EU provisions to bear in mind as possible "trigger rules" include:

- Free movement of capital, insofar as cross-border donations fall in the notion of movement of capital, and restrictive, unfavourable or stigmatising rules on donations to CSOs in force in a Member State may unjustly dissuade donors established in other Member States from offering donations to CSOs in that Member State

CJEU, Case C-78/18 Commission v Hungary (2020): in this case, which originated from a ground-breaking infringement initiated by the European Commission against Hungary's 2017 anti-NGO law, the CJEU held that by imposing obligations of registration, declaration and publication on certain categories of CSOs directly or indirectly receiving support from abroad exceeding a certain threshold and providing for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary introduced discriminatory and unjustified restrictions with regard to both the organisations at issue and the persons granting them such support. The CJEU confirmed that such restrictions ran contrary to the obligations on Member States in respect of the free movement of capital and to Articles 7, 8 and 12 of the Charter on the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.

- **EU data protection rules**, if the rules in question provide for the disclosure, processing and storage of data of donors

- **EU rules on anti-money laundering**, if the restrictive rules in question have been adopted with the purported aim of increasing transparency to implement obligations under EU anti-money laundering acts

- **the EU Common Provisions Regulation** (Regulation EU/2021/1060), if the rules or practices in question relate or lead to the discriminatory disbursement to CSOs of EU funds under shared management by public authorities, on grounds for example of their political or other opinion, or by means of discrimination by association on grounds such as sex, race, colour, ethnic origin, language, religion or belief, membership of a national minority or sexual orientation

5.2.3 Obstacles to the work of CSOs, activists and rights defenders

Laws and practices hindering the work of CSOs, activists and rights defenders may be tackled on grounds of their incompatibility with the rights to freedom of association, freedom of expression or of information as enshrined in the Charter, taken in conjunction with "trigger rules". Possible examples include:

- **Non-disclosure of information on the side of public authorities**, which may be tackled on grounds of **EU rules on access to information**, the most obvious being the detailed rules on **public access to environmental information** (in particular those contained in Directive 2003/4/EC), on which the CJEU has progressively developed a considerable body of case-law

- **Retaliation for exposing wrongdoings**, which may be tackled under **EU rules on whistleblower protection** if the situation in question falls within their scope of application

- **Obstacles or criminalisation of certain forms of assistance provided by CSOs pursuant to national law or practices**, which may be tackled by relying on **EU provisions recognising the role of CSOs in providing such assistance**

Examples

- In the area of **asylum**, EU rules on asylum procedures (Directive 2013/32/EU) and on the reception of asylum seekers (Directive 2013/33/EU) acknowledge the **role of CSOs in offering legal advice and counselling to asylum seekers and in monitoring detention facilities.**

- CJEU, Case C-821/19 Commission v Hungary (Criminalisation of assistance to asylum seekers) (2021): in this case, which originated from an infringement proceeding brought against Hungary by the European Commission, the CJEU held that Hungary violates EU rules on asylum procedures and on the reception of asylum seekers by criminalising,

in its national law, the actions of any person providing assistance, in connection with an organising activity, in respect of the making or lodging of an application for asylum in its territory. The CJEU did not rely on the Charter in is ruling, as no argument based on the Charter was included in the action brought by the Commission.

- In the area of **victims' rights, EU rules on the rights of victims of crime** (Directive 2012/29/EU) provide for an obligation for Member States to ensure that **victims and their family members have access to confidential victim support services, which may be set up as non-governmental organisations** and may be organised on a professional or voluntary basis.

5.2.4 Limitations on CSOs' participation in law- and policy-making

The **fundamental right to good administration** – a general principle of EU law – may be relied on in order to challenge **limitations on CSOs' participation in law- and policy-making. EU rules providing for participation obligations in certain areas** – for example, in environmental decision-making – could be relied on as "trigger rules" to that effect.

While currently **no EU standards exist on CSOs' participation in decision-making** either at EU or at national level, **maintaining an open, transparent and regular dialogue with representative associations and civil society** is an obligation upon EU institutions (Article 11 TEU). Considering that decision-making at EU level is inherently interconnected with decision-making at national level, as EU rules always have to be transposed into national law, or at least enforced at national level, the potential of such a horizontal principle could be explored as a means to leverage **Member States' duty of sincere cooperation** in ensuring meaningful participation of civil society in national-level policy-making related to the transposition or enforcement of EU law.

5.2.5 Laws and practices hindering activism

Restrictions hindering activism such as campaigning and protests may be challenged on grounds of their compatibility with, for example, the rights to freedom of expression and the right to freedom of peaceful assembly. In the absence of EU rules regulating the exercise of such freedoms, "trigger rules" may be found in:

- **EU rules on audiovisual media services, e-commerce, rules on unfair commercial practices, or rules on online content moderation as regards restrictions on freedom of expression**

The infringement brought by the European Commission against Hungary on account of provisions imposing prohibitions and restrictions in relation to the promotion or portrayal of gender identities that do not correspond to the sex assigned at birth, sex

reassignment or homosexuality, mentioned in the previous chapter, bears a clear relevance for CSOs' campaigning on the rights of LGBTIQ+ persons.

- **EU rules on free movement**, insofar as restrictions on public gatherings and assemblies may be regarded as capable of dissuading the exercise of activists of their right to move freely across the EU as regards **restrictions on freedom of assembly**

- **Data protection rules**, for example in relation to the collection, processing and storage of personal data of protesters by law enforcement authorities as regards **monitoring and surveillance**

5.3 Seeking justice for attacks targeting CSOs, activists and rights defenders

Attacks targeting CSOs, activists and rights defenders may possibly be tackled under **EU rules on the criminalisation of hate crime and hate speech**, using the concept of discrimination by association (see previous chapter). Currently, as mentioned in the previous chapter, this is only foreseeable for offences which amount to **racist hate crime and hate speech**, relying on the **EU Framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law** (Council Framework Decision 2008/913/JHA).

In 2022, the European Commission proposed rules to offer procedural safeguards to legal and natural persons targeted by **strategic lawsuits against public participation (SLAPPs)**, which are currently being discussed by the European Parliament and the Council.

5.4 Addressing the impact of EU law on civic space

A number of **EU rules are turning out to be problematic for CSOs**, for the way they are worded and/or transposed and/or applied at national level. These include:

- **EU rules on anti-money laundering** (in particular Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and Regulation (EU) 2015/847 on information accompanying transfers of fund), insofar as they consider non-governmental organisations (NGOs) as being potential 'subjects at risk', either as fronts for terrorist organisations that raise and transfer funds, or as legitimate enterprises that indirectly support the aims of terrorist organisations, and which therefore may be subject to stringent transparency and reporting requirements. The Council of Europe Expert Council on NGO Law recently published a study on the matter, which finds that the way in which the relevant requirements are being applied is leading, or will lead, to significant undue burdens for CSOs that are

in fact not at risk of being implicated in money laundering or terrorist financing.

- **EU rules on counter-terrorism** (in particular Directive (EU) 2017/541), which, as FRA also points out, carry a risk of criminalising lawful activities committed with no terrorist intent, such as humanitarian organisations that have legitimate reasons for pursuing activities such as travelling to conflict zones or studying information related to terrorism; and to expand the notion of terrorism, and consequently the use of counter-terrorism legislation and measures, to activities that are not of such a strictly defined terrorist nature, including public protests of various types, and certain activities by non-governmental organisations.

- **EU rules on facilitation of irregular migration** (Directive 2002/90/EC), which, as the European Commission itself observes, contributed to the increasing criminalisation, undue administrative pressure and sanction of acts carried out for humanitarian purposes including rescue operations at sea and support given to migrants on the move, concerning mostly volunteers, human rights defenders, and crews of boats involved in search and rescue operations at sea. In this connection, the Commission has issued guidance to clarify that humanitarian assistance that is mandated by law cannot and must not be criminalised as it amounts to a breach of international law, and therefore is not permitted by EU law, and has urged Member States to make use of the possibility provided for by EU law, which allows them exclude from criminalisation activities carried out for the purpose of humanitarian assistance.

Other rules may also have a negative impact on CSOs, if badly implemented, such as **rules on content moderation**, including those which derive from EU rules on racist speech (Council Framework Decision 2008/913/JHA) and related commitments of online platforms under the Code of Conduct on Countering Hate Speech Online, and relevant rules of the newly adopted Digital Services Act.

The potential of the Charter could be explored in these areas, either to **challenge the validity of relevant EU provisions**, or to **seek an interpretative ruling from the CJEU which could help delegitimise particularly restrictive national transposition rules.**

In this context, however, attention shall be paid to Member States' margin of discretion, to assess **whether national provisions gold-plating EU law can be considered as "implementation of EU law**" for the purpose of the applicability of the Charter (see above, chapter 1).

5.5 Litigation, advocacy and campaigning tips

5.5.1. Considerations specific to Charter-based litigation in the area of civic space

First, it is important to bear in mind that litigation in this area **can expose CSOs to investigations, prosecutions and sanctions**, as the building of a case to challenge, for example, a national measure restricting freedom of association, freedom of expression, or freedom of assembly will often require an infringement of such measure. The risk is even greater when measures are of a criminal nature. In order to circumvent this risk, preference may be given to **avenues allowing to directly challenge the constitutionality of national laws and practices**, if these are available at the national level and contemplate the legal standing of CSOs.

Furthermore, litigating civic space issues on the basis of EU law and the Charter is a rather unexplored area, with **only very few cases having reached the CJEU so far**. One will therefore need to be creative in how cases can be framed and argued.

If finding the right "trigger rule" proves difficult, and/or if the national courts' receptiveness to and familiarity with EU law and the Charter is low, it will be probably safer to choose avenues other than litigation before national courts, such as:

- addressing **a complaint to the European Commission**, which will have to make its own assessment as to whether the measure or situation at stake raise concerns as regards respect of EU provisions and the Charter. In most cases, the service responsible to assess the matter will be DG Justice and Consumers, in cooperation with other services depending on the matter at stake;

- **addressing a petition to the European Parliament or prompting MEPs to address to the European Commission a parliamentary question**, to which the Commission will be obliged to provide a reasoned response. The Committee on Civil Liberties, Justice and Home Affairs (LIBE) will likely be responsive on such matters;

- **choose the path of ECtHR litigation**, while making reference to EU law and the Charter.

5.2.2 Supporting advocacy

When contemplating advocacy, including in support of litigation, on civic space issues, the **opportunity to partner with the National Human Rights Institution or other relevant Ombudsperson at national level** should be considered – provided that such bodies are independent and resourced enough. Indeed, the protection of civic space and human rights defenders is one of the thematic priorities within the work of the European Network of National Human Rights Institutions.

Other regional and international human rights standards offer a strong framework to assess and frame civic space restrictions, which shall guide the interpretation of the Charter and EU law. **Bringing cases and identified issues to the attention of regional and monitoring bodies** – such as the Council of Europe Expert Council on NGO Law, or the UN Special Rapporteur on Human Rights Defenders – can be an effective escalation strategy.

Alliance building, synergy and joint initiatives with partner CSOs at national or EU level can be pursued rather easily in this area, considering that most CSOs will feel concerned by civic space issues, and can prove very helpful to enhance the legitimacy and impact of litigation initiatives and advocacy work.

5.5.3 Campaigning and messaging

Legal restrictions on civic space are often accompanied by smear campaigns against CSOs to undermine public trust in civil society. Smears consist of inaccurate or false information. While it is important to respond to such attacks, CSOs tend to adopt a counter-productive approach. CSO responses to smear attacks tend to include repeating the smear to contradict it and / or disprove it. Research shows that directly contradicting untrue information carries a high risk of entrenching that information in the recipient's mind. This is because the brain is more likely to retain information that is repeated and because our brains tend to attach more significance to emotive words than to negatives. Thus, contradicting a smear attack alleging CSOs are traitors with 'CSOs are not traitors' will produce the opposite to the desired effect in most people. Similarly, presenting facts to your audience as a means of changing their minds about smears is not enough by itself because, as outlined earlier, people interpret facts according to how they understand the issue already. If smear campaigns have established a way of thinking about CSOs, for example, that they are acting against national interests in the service of foreign powers, then factual explanations about the rules and practices that keep CSOs independent of their donors by themselves will not be enough to correct the lie.

To counter smear campaigns effectively, CSOs need to repeat their own message as often as possible while discrediting their opponents by exposing their malign motives. This approach can be incorporated into the 4 steps of an effective message outlined in chapter 3.4. In particular, when explaining the problem, the CSO should allude to (but not repeat) the smear and point out why they are being attacked. This is referred to as a truth sandwich. Below is an example. As in the previous chapter, the example does not include step 4, the call to action and reminder of past successes, because this is dependent on the particularities of the campaign and history a CSO is running.

Readers can refer to Liberties' messaging guide How to talk about civic space: A guide for progressive civil society facing smear campaigns for in-depth advice on this topic.

Truth Sandwich

- Say what you stand for using a values statement
- Point out that the problem is that your opponent is lying for some malign reason (e.g. to divide or distract the public); allude to but don't repeat the lie
- Return to what you stand for, expressing it as the solution or way forward

Don't say	***Try instead***
Hypothetical attack: CSOs are corrupt. They take money donated by ordinary people and give themselves huge salaries and fancy dinners that most people can only dream of.	Values: Most of us want leaders who fund the things we need to do well in life like good schools to educate the next generation and hospitals to keep our loved ones healthy.
Myth-bust response: Our organisation is fully accountable and our finances are transparent. We are audited every year by independent accountants to check that all our funds are spent legally. Most of our funding comes from foreign governments and foundations. They also check carefully that we spend all their funds in line with their safeguards.	Problem: But instead of doing what's best for us, certain politicians are giving lucrative contracts to their business friends in return for favours. When we call them out they spread lies about us hoping that citizens will not listen and demand they do better.
	Solution: When citizens are free to work together through associations, we can demand that our leaders use our resources to fund the things we need.

FURTHER RESOURCES

- Open Society Justice Initiative, Open Society Justice Initiative, The Use of EU Law To Protect Civic Space (2019)
- European Centre for Not-for-profit Law (ECNL), Handbook on how to use EU law to protect civic space (2020)
- Liberties, How to talk about civic space – A Guide For Progressive Civil Society Facing Smear Campaigns (2022)

6. In-focus: using the EU Charter to protect personal data and privacy

6.1 Relevance of the Charter and EU law to data protection and privacy

Under EU law, data protection has been acknowledged as a distinct fundamental right. It is affirmed in Article 16 of the Treaty of the Functioning of the EU. Furthermore, the **Charter guarantees respect for private and family life (Article 7), but also establishes as a stand-alone fundamental right, the right to the protection of personal data (Article 8)**. Any processing of personal data by itself constitutes an interference with this right. It is immaterial whether the personal data in question relate to an individual's private life, are sensitive, or whether the data subjects have been inconvenienced in any way. The Charter contains a **provision on limitation(s) on exercising the rights and freedoms recognised by the Charter**. According to Article 52 (1), limitations on the exercise of the rights and freedoms recognised by the Charter and, accordingly, on the exercise of the right to the protection of personal data, are admissible only if they:

-are provided for by law, and respect the essence of the right to data protection;

-and subject to the principle of proportionality, are necessary;

-and meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

6.2 The key features of data protection and privacy under the EU legal regime

The **right to private life and personal data protection are interconnected and are the prerequisite for other fundamental rights**, such as freedom of expression, religion, or free and fair elections. The right to private life provides protection against interference in general. It is subject to public interest criteria. In comparison, any form of processing personal data falls under the data protection rules irrespective of the impact on the data subject's private life. It is unnecessary to demonstrate an infringement on private life for data protection rules to be triggered.

The EU's data protection regime was established by the Data Protection Directive in 1995, which was adapted to the **new technological developments by the General Data Protection Regulation** (GDPR) in 2016 and entered into force in 2018. Directive (EU) 2017/680 regulates the processing of personal data by state authorities for law enforcement purposes. The Law Enforcement Directive

(2016) established the data protection rules and principles that govern personal data processing to prevent, investigate, detect, and prosecute criminal offences, or execute criminal penalties.

The GDPR modernized and generalized data protection across Europe, as it is directly applicable, and the Member States don't have to transpose the rules into their national legal system. It creates consistent data protection rules and more balanced enforcement through national data protection authorities. The GDPR aims to consistently apply the regulation by establishing an EU-level enforcement, the **European Data Protection Supervisor (EDPS)**. The EDPS is an independent institution of the EU for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies. The Supervisor advises Union institutions and bodies, and data subjects on all matters concerning the processing of personal data. **The European Data Protection Board (EDPB) is an independent European body composed of representatives of the EU national data protection authorities.** Its primary task is to ensure the consistent application of data protection rules throughout the EU through cooperation between national data protection authorities. It monitors the application of the regulation and applicable court decisions and is empowered to issue opinions and binding decisions in different cases, even when national authorities do not follow the opinion of the EDPB. Independent supervision is an essential component of European data protection law and is indispensable for effectively protecting individuals' rights regarding personal data protection.

CJEU C-362/14, Maximillian Schrems v. Data Protection Commissioner (2015): in this case the CJEU noted that the powers of data protection authorities to monitor and ensure compliance with EU rules on data protection derive from the primary law of the EU, in particular Article 8 (3) of the Charter and Article 16 (2) of the TFEU. "The establishment of independent supervisory authorities is therefore […] an essential component of the protection of individuals with regard to the processing of personal data." The CJEU therefore decided that even where the transfer of personal data has been subject to a Commission adequacy decision, where a complaint is lodged with a national supervisory authority, the authority must examine the complaint with diligence.

6.2.1 What is personal data

The definition of personal data under the GDPR is broad enough to cover various identification possibilities. The legislators must have ensured that the definition is future-proof and possibly covers any information that could possibly identify a data subject. The CJEU further clarified what is to be considered personal data.

GDPR Article 4 (1)

'[P]ersonal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly

or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;

The CJEU in two separate cases clarified that both IP addresses and dynamic IP addresses could be considered as personal data.

CJEU Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (2011): the case concerned the refusal of the internet service provider Scarlet to install a system to filter electronic communications that use file-sharing software to prevent file-sharing that infringes copyright protected by SABAM, a management company that represents authors, composers and editors. The CJEU held that users' IP addresses "are protected personal data because they allow those users to be precisely identified".

CJEU C-582/14 Patrick Breyer v Bundesrepublik Deutschland (2016): in this case the court considered the notion of indirect identifiability of data subjects. The case dealt with dynamic IP addresses, which change every time a new connection is made to the internet. The websites run by federal German institutions registered and stored dynamic IP addresses to prevent cyber-attacks and to initiate criminal proceedings where needed. The internet service provider had the additional information to identify Mr Breyer. "It is not required that all information enabling the identification of the data subject must be held in the hands of one person" for information to constitute personal data. According to the CJEU, when the data processor "has the legal means which enable it to identify the data subject with additional data which the internet provider has about that person", this constitutes "a means likely reasonable to be used to identify the data subject". Therefore, such data are considered personal data.

6.3 Legal Acts

Here we list the most important pieces of legislation related to personal data protection and privacy:

- Treaty on the Functioning of the European Union, Article 16;
- Charter of Fundamental Rights of the European Union, Article 7 (private life) Article 8 (data protection);
- Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive);
- Council Framework Decision 2008/977/JHA on the protection of personal data processed in the context of police and judicial cooperation in criminal matters;
- Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing

Directive 95/46/EC (General Data Protection Regulation);

- Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties and on the free movement of such data, and repealing (Law Enforcement Directive);

- Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the EU institutions, bodies, offices and agencies;

- Directive 2002/58/EC35 concerning the processing of personal data and the protection of privacy in electronic communications (Directive on privacy and electronic communications or e-Privacy Directive).

Sectoral laws with impact on data protection:

- Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act);

- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

Proposals

- Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Health Data Space

- Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)

6.4 Key principles of lawful processing of personal data

The General Data Protection Regulation Article 5 sets out the key principles all personal data processing must fulfil.

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

The principles serve as the starting point for more detailed provisions. Any data processor must follow these principles, and they form a solid basis for litigation.

6.4.1 Lawfulness, fairness and transparency

Lawfulness: CJEU C-131/12, Google Spain SL, Google Inc. V Agencia Española de Protección de Datos (AEPD), Mario Costeja González.

In this case, the CJEU ruled Google, the internet search engine operator, is responsible for the processing that it carries out of personal data which appears on the website published by third parties. The ruling created the 'right to be forgotten', deriving from the right of erasure. The Court held that Article 7(f) of the Data Protection Directive, in relation to the legitimacy of processing, requires a balancing exercise taking into account the data subject's rights deriving from Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter.

Fairness: ECtHR K.H. and Others v. Slovakia, No. 32881/04, 28 April 2009.

In this case, the European Court of Human Rights ruled in the case of eight women, all members of the Roma community in Slovakia who received gynecological and obstetric treatment. The women signed documents related to their treatment, but they were unable to identify the contents of those documents. The claimants consented to representation by lawyers from the Centre for Civil and Human Rights, but the Slovakian Ministry of Health denied the attorneys access to the documents. The ECtHR determined the scope of state obligations under Article 8 of the ECHR (right to private and family life) and the positive obligations that derive from it, namely that a fair balance has to be struck between the general interest of the community and the individual concerned. Based on practicality and effectiveness, the Court found that access to files containing one's personal data must be allowed.

Transparency: ECtHR Haralambie v. Romania, No. 21737/03, 27 October 2009.

In this case, the European Court of Human Rights ruled in the case of Mr Haralambie, who asked the Romanian National Archives of the former Secret Services of the Communist Regime – the Securitate – whether he had been subjected to surveillance measures in the past. The Court reiterated the vital interest of individuals who were the subject of personal files held by the public authorities to be able to have access to them and emphasized that the authorities had a duty to provide an effective procedure for obtaining access to such information. It took six years for the authorities to grant the request. The violation of Article 8 was concluded because of the lack of an effective and accessible procedure and no access to his personal files within a reasonable time.

6.4.2 Purpose limitation

The processing operation should be bound to specific purposes.

CJEU C-131/12, Google Spain SL, Google Inc. V Agencia Española de Protección de Datos (AEPD), Mario Costeja González,

Costeja González brought a complaint before the Spanish Data Protection Agency against *La Vanguardia* newspaper, Google Spain, and Google Inc. González wanted the newspaper to remove or alter the record of his 1998 attachment. He also requested Google Inc. or its subsidiary, Google Spain, to remove or conceal the data. The Agency dismissed the complaint against the newspaper. The Court ruled that a search engine is regarded as a "controller" with respect to the "processing" of personal data. The Court held that the processing of data that is "inadequate, irrelevant or excessive" might also be incompatible with the Directive. In such cases, where the data is incompatible with the provisions of article 6(1) (e) to (f) of the directive, relating to data quality, the information and links in the list of the results must be erased.

6.4.3 Data minimization

The personal data processed should be adequate, relevant and limited to what is necessary.

CJEU, C-293/12 - Digital Rights Ireland and Seitlinger and Others

In this case the CJEU ruled on the validity of EU legislation requiring telecommunications companies to retain data on their customers' communications for a specified period. The CJEU held that the legislation constituted a serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what was strictly necessary.

6.4.4. Data accuracy

The personal data should be accurate.

CJEU, C-553/07, College van burgemeester en wethouders van Rotterdam v. M. E. E. Rijkeboer, 7 May 2009.

In this case, the CJEU ruled whether the restriction provided for in Dutch law on local personal records on the communication of data one year prior to the relevant request is compatible with the Data Protection Directive, with a special focus on the principle of proportionality. The CJEU ruled that the right of access is necessary to enable the data subject to exercise his other rights. In this case, limiting information storage on recipients and content to one year while the basic data is stored much longer does not constitute a fair balance, unless it can be shown that longer storage would constitute an excessive burden on the controller.

6.4.5 Storage limitation

The personal data should be kept no longer than necessary.

CJEU, Joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others [GC], 8 April 2014

In this case, the CJEU held that a European Union Data Retention Directive (2006/24/EC) requiring Internet Service Providers (ISPs) to store telecommunications data to facilitate

the prevention and prosecution of crime was invalid under Articles 7 and 8 of the Charter. Under Article 52(1) of the Charter, limitations of such rights can only be justified when they are provided by law, respectful of the essence of the rights protected by the Charter, and proportionate to the legitimate aim pursued. The Court found that the Directive could interfere with the fundamental rights for an unspecified length of time, falling between six months and two years, and the lack of guarantees regarding how telecommunications data would be processed.

See also C-553/07, College van burgemeester en wethouders van Rotterdam v. M. E. E. Rijkeboer, 7 May 2009 above.

6.4.6 Integrity and confidentiality

Personal data must remain well secured and confidential.

CJEU C-311/18 - Facebook Ireland and Schrems

In this case, the CJEU ruled regarding data transfers from the EU to the USA. Users' personal data, including Mr Schrems', had been transferred by Facebook Ireland to the United States. In 2013, Mr Schrems complained to the Irish Data Protection Commissioner (DPC) to prohibit transfers. His complaint was rejected, and he took the case to the Irish High Court. One of the questions the Court referred to the CJEU was whether the Privacy Shield Framework, the data transfer agreement between EU and US, was valid.

The EU cross-border data transfer rules prohibit personal data transfers to countries with inadequate data protection laws. The Privacy Shield provided a legal mechanism for companies to transfer personal data from the EU to the United States. The Court concluded that the requirements of US national security, public interest, and law enforcement do interfere with the fundamental rights of persons whose data is transferred there. The Court invalidated the Privacy Shield Framework.

6.5 Emerging areas of data protection: profiling and automatic decision-making

Personal data protection and the right to privacy is based on a solid legal framework, but gaps remain, and there are a number of areas where relying on the Charter could be strategic. Invoking the Charter could further strengthen data protection and privacy concerning new technologies. For example, artificial intelligence (AI) or machine learning is in use and has implications for our society. Using personal data and whole profiles in decision-making processes based on data sets needs thorough oversight. Decisions made by AI hold potential risks to human rights in biometric identification technologies, migration management technologies, or the potential discrimination effect on the labour market, to name a few. A clear regulation could decrease these risks. But even the existing legal framework offers enough to litigate primarily based on data protection and anti-discrimination measures.

Case C-817/19 Ligue des droits humains v Conseil des ministres (2022): in this case, the Court ruled that the draft Passenger Name Record (PNR) Agreement between the EU and Canada is incompatible with Articles 7, 8, 21 and 52(1) of the Charter. The CJEU said that "the Passenger Name Record system of safeguards surrounding the automated processing of PNR data under the PNR Directive that the algorithms used for the analysis provided for in that provision must function transparently, and that the result of their application must be traceable. That transparency requirement does not mean that the 'profiles' used must be made public. It does in contrast, require the algorithmic decision-making to be identifiable."

6.6 Litigation, advocacy and campaigning tips

6.6.1 An effective litigation strategy

In data protection cases, there is **more than one successful avenue to take in litigation**. Both domestic litigation that leads to CJEU litigation or taking cases to the ECtHR can be successful depending on the type of infringement. There are also **out-of-court mechanisms available that can be strategically used**. In every Member State, **national Data Protection Authorities (DPAs)** are responsible for the enforcement of data protection rules, and one should carefully assess whether it is more strategic to litigate or to rather refer the case to the DPA, depending on how proactive the authority is and what is their understanding of the legal matter.

Joint action – Collective redress: Representing consumer groups in alleged GDPR violations

The CJEU C-319/20 ruling in April 2022 confirmed that consumer groups have a right to file representative actions over alleged GDPR violations when permitted under national law. Consumer protection organizations can autonomously initiate lawsuits on behalf of consumers against an individual or entity claimed to be responsible for "an infringement of the laws protecting personal data." In relation to collective redress, it is important to note that the Representative Actions Directive (2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC) will be in effect in 2023, which enables consumer groups in all EU countries to launch injunctions or collective redress claims when certain criteria are met.

CJEU C-319/20 Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV (2022): in this case the Federation of German Consumer Organizations filed a lawsuit against Meta Ireland on the bases that Meta infringed personal data and consumer protection rules in relation to making free games from third-party entities available in its "App Center." The German Federal Court of Justice referred the question to the CJEU, asking whether the consumer organization had the standing to bring forward claims on behalf of individual data subjects without a mandate to do so. The ruling clarified that consumer groups have a right to

file representative actions over alleged GDPR violations when permitted under national law.

6.6.2 Out-of-court mechanisms

Finding the right "trigger rule" is relatively easy. Data protection is a well-elaborated field where cross-sectoral rules could be used, and the GDPR applies to various cases. However, some areas are excluded from the scope of the GDPR, such as activities concerning national security or the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policies of the Union. Also, finding a trigger rule is often insufficient, especially when the national courts' receptiveness to and familiarity with EU law and the Charter is low. Therefore, using out-of-court mechanisms could be a successful strategy, including:

- **addressing a complaint to the European Commission**, which will have to make its own assessment as to whether the measure or situation at stake raise concerns as regards respect of EU provisions and the Charter;

- **addressing a petition to the European Parliament or prompting MEPs to address to the European Commission a parliamentary question**, to which the Commission will be obliged to provide a reasoned response;

- filing complaints to **national and EU Data Protection Offices**;

- petitioning the European Data Protection Supervisor on EU law;

- turning to UN bodies to escalate issues;

- filing complaints with the European Ombudsman's office about maladministration by the institutions, bodies and agencies of the European Union;

- turning to DG Justice and Consumers, which develops and monitors the implementation of policies in the area of data protection.

6.2.1 Messaging and campaigning

When speaking to the public about privacy and data protection, it is common for CSOs to make certain messaging mistakes. The most significant of these mistakes relate to step one of an effective message: explaining to an audience why they should care about the cause being promoted.

First, CSOs exhorting their audience to care about a given problem merely because it violates their privacy or data protection, without explaining why privacy and data protection are important. It is likely that for most people, this is not enough to get their support. On one hand, people appreciate the advantages that technology brings such as connection with loved ones, entertainment, and the convenience of performing certain tasks without leaving one's chair, and (a false perception of) improved public safety from crime and terrorism. On the other hand, most people do not

understand the importance of privacy and data protection because they do not see how it delivers things that they value. When set against each other, most people are happy to give up this hollow concept of privacy in return for the tangible advantages of technology.

Second, CSOs often reaffirm the negative framing of privacy promoted by many politicians: if people have nothing to hide, then they have nothing to fear from the authorities being able to access their information. This characterises privacy as a tool to be deceitful and dishonest. According to this framing, anyone who claims that privacy is important must be engaging in rule-breaking behaviour that they want to conceal. CSOs have tended to react to this by arguing that everyone has something that they want to hide and that hiding information about ourselves is legitimate. It is unlikely that this argument is persuasive to most people, since humans have a strong psychological urge to conform to accepted social norms, especially in public. This means that if your audience equates privacy and data protection with concealment of rule-breaking, they are less likely to want to express their support.

CSOs can correct these mistakes by reframing privacy and data protection in positive terms and explaining what they deliver to people's lives. The choices CSOs make will depend on the circumstances of the threat to privacy or data protection. Here are some examples:

Targeted political advertising

Values: No matter who we vote for, most of us want to have a say over who leads us and the decisions they take. That means we need to have accurate and balanced information about what candidates stand for during elections.

Problem: But social media companies like Meta and Google will stop at nothing to make a profit. They are giving politicians our private information and allowing them to manipulate voters with dishonest adverts.

Solution: When we prohibit social media companies from selling information about us to advertisers, we can ensure that when it's time for us to vote, it's really us who gets to choose the leaders we want.

Protecting the data of children

Values: Nowadays the internet is part of every aspect of all our lives. For many of us, our children's and grandchildren's health and safety is a top priority, including when they're online.

Problem: But the number one goal of social media companies like Facebook and Instagram is to make the biggest profits possible, and they don't care when they harm our kids in the process.

Solution: By setting rules to protect children we can make sure that our loved ones are safe and that social media helps the next generation develop and thrive.

Mass surveillance

Values: Most of us want to feel free to share our thoughts and opinions, shop, read and catch up with friends and family without being watched or judged.

Problem: But today, corporations pushing surveillance technology have aggressively lobbied certain politicians to buy their prod-

ucts, claiming that this will solve society's problems.

Solution: Instead of taking away our freedoms, our representatives should fund the things our communities rely on to thrive like schools, roads, libraries, public transport, jobs and community policing.

FURTHER RESOURCES

- CJEU case law
- European Data Protection Supervisor
- European Data Protection Board
- FRA Handbook on preventing unlawful profiling
- Guide to the Case-Law of the of the European Court of Human Rights
- NOYB Database GDPR hub
- Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter DATA PROTECTION
- Data Protection Legal Framework in Nutshell

7. In-focus: using the EU Charter to ensure the right to international protection

This chapter was written by the Hungarian Helsinki Committee.

7.1 Main legal acts

The Common European Asylum System (CEAS) is a legal and policy framework developed to guarantee harmonised and uniform standards for people seeking international protection in the EU, in accordance with the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol thereto. CEAS emphasises a shared responsibility to process applicants for international protection in a dignified manner, ensuring fair treatment and similar procedures in examining cases, irrelevant of the country where the application is lodged. The legislation that governs the minimum standards of the European asylum system is the following:

Qualification Directive 2011/95/EU regulates minimum standards for the qualification and status of third-country nationals and stateless persons for international protection and the content of the protection granted.
Asylum Procedures Directive 2013/32/EU regulates common procedures for granting and withdrawing international protection.

Reception Conditions Directive 2013/33/EU regulates standards for the reception of applicants for international protection.

Dublin III Regulation 604/2013 and **Implementation Regulation** 118/2014 establish the criteria and mechanisms for determining the Member State responsible for examining an application for international protection.

EURODAC Regulation 603/2013 establishes a database for the comparison of fingerprints.

Temporary Protection Directive 2001/55/EC regulates minimum standards for giving temporary protection in the event of a mass influx of displaced persons.

Although not a part of CEAS, **the Family Reunification Directive** 2003/86/EC is also relevant in the field of international protection, as it regulates the right to family reunification of refugees.

Pact on Migration and Asylum

The Pact on Migration and Asylum is a set of new rules managing migration and

establishing a common asylum system at EU level. The new rules entered into force on 11 June 2024 and will enter into application after two years.

The main legislative files are the following:

The **Qualification** and **Asylum Procedures Directives** became regulations (2024/1347 and 2024/1348), which means direct applicability, without the need for transposition into national legislation.

The **Reception Conditions Directive** was recast but remained a directive (2024/1346).

The **Asylum and Migration Management Regulation** 2024/1351 replaces the current Dublin III Regulation and establishes a mandatory system of solidarity for Member States facing migratory pressure.

The **Crisis and Force Majeure Regulation** 2024/1359 addresses situations of crisis, including instrumentalisation, and force majeure, and provides for derogations and solidarity measures for Member States.

The recast of the **Eurodac Regulation** 2024/1358 will turn the existing Eurodac database from an asylum database into a fully-fledged asylum and migration database. The new database will support the asylum system and help manage irregular migration, as well as support the implementation of the Resettlement Regulation and the Temporary Protection Directive.

The new **Screening Regulation** 2024/1356 sets up uniform rules ensuring checks on and proper registration of irregular migrants and asylum seekers entering the EU.

The **Union Resettlement and Humanitarian Admission Framework Regulation** 2024/1350 enhances safe and legal pathways to the EU for people in need of protection, and contributes to strengthening international partnerships with non-EU countries hosting large refugee populations.

7.2 Added value of the Charter among other sources of legal protection

Several fundamental rights guaranteed in the Charter are particularly relevant in the context of international protection:

- **Article 1** contains **the right to human dignity.**
- **Article 2** guarantees **the right to life.**
- **Article 4** contains the **prohibition of torture and inhuman or degrading treatment or punishment.**
- **Article 6** ensures the **right to liberty and security.**
- **Article 7** guarantees the **respect for private and family life.**

- **Article 18** of the Charter contains – for the first time at European level – **a right to asylum.**

- **Article 19** of the Charter includes a prohibition on returning a person to a situation where they have a well-founded fear of being persecuted or runs a real risk of torture or inhuman and degrading treatment or punishment (**principle of non-refoulement**), as well as the **prohibition of collective expulsion**.

- **Article 24** – elaborates on **the rights of the child**, guaranteeing protection and care, right to be heard and right to a direct contact with their parents, including **the child's best interest.**

- **Article 41** on **the right to good administration**, including the right to be heard, the right to access to the file and the obligation of the administration to give reasons for its decisions, is applicable only to the EU institutions. However, this right is also a general principle of EU law and Member States must comply with it when implementing EU law.[1]

- Article 47 of the Charter provides for an autonomous **right to an effective remedy** and lays down **fair trial** principles.

Charter provisions are interpreted in light of international refugee law (1951 Geneva Convention) and regional and international human rights instruments.[2] The added value of the Charter is therefore that it ensures human rights compliance of EU law, human rights-based interpretation of EU law, and compliance of national law with such interpretation.

The Pact introduced many substantial changes to the asylum system in the EU and therefore CJEU judgements, which interpreted the provisions of current CEAS legislation, which have changed substantively by Pact, might not be valid anymore. However, the CJEU's interpretation of the Charter's rights will remain applicable.

CJEU jurisprudence in the field of international protection is very rich. There are several judgements, where the CJEU clarified rights of asylum seekers by deriving the interpretation of secondary law provisions from the Charter.

- Right to reception conditions for asylum seekers awaiting a Dublin transfer

Article 1 – right to dignity
In C-179/11, **CIMADE and GISTI**, the CJEU clarified how to apply the Reception Conditions Directive in the case of transfer requests under the Dublin Regulation. The Court held that the Directive aims to ensure full respect for human dignity and to promote the application of Article 1 of the EU Charter. Therefore, minimum reception conditions must

1 C-604/12, H.N., 8 May 2014; C- C-249/13, Boudjlida, 11 December 2024; C-166/13, Mukarobega, 5 November 2014.

2 Article 78 of the Treaty on the Functioning of the European Union.

also be granted to asylum seekers awaiting a Dublin transfer decision, until the applicant is physically transferred. The CJEU therefore extended fundamental rights protection with reference to the Charter.

- Prohibition of non-refoulement with regard to Dublin transfers

Article 4 - prohibition of torture and inhuman or degrading treatment or punishment
In C-411/10 and C-493/10, **N.S. and M.E.,** the CJEU looked at whether Article 4 of the Charter would be breached if the individuals were transferred to Greece under the Dublin Regulation. It held that EU Member States could not be 'unaware' of the systemic deficiencies in the asylum procedure and reception conditions in Greece that created a real risk of asylum seekers being subjected to inhuman or degrading treatment. Going further in a similar matter, the CJEU decided in C-578/16, **C.K. a.o. PPU** that Dublin transfer should be suspended, not only because of risks stemming from systemic flaws but exceptionally also because of circumstances affecting the individual situation of an applicant – e.g. their medical condition is so serious as to provide substantial grounds for believing that the transfer would result in a real risk of inhuman or degrading treatment under Article 4 of the Charter. In C-163/17, **Jawo**, the CJEU concluded that the Dublin transfer of an applicant to another Member State is inhuman and degrading if it exposes the beneficiary of international protection to a situation of extreme material poverty that does not allow them to meet their most basic needs. These judgements are an example of importance of the absolute right contained in Article 4 of the Charter, which has to be guaranteed, even when applying Dublin Regulation, which is based on a presumption that Member States are safe for asylum seekers.

- Compliance of the detention grounds under Reception Conditions Directive with the Charter

Article 6 – right to liberty and security
The C-601/15 PPU, **J.N.** case concerned an individual with an enforceable return decision who submitted a fourth asylum application. He was detained on grounds of public order and national security under Article 8(3) of the Reception Conditions Directive in the light of prior criminal offences. The preliminary reference questioned compatibility of such a detention ground with Article 6 of the Charter (which has the same meaning and scope as Article 5 of the ECHR). The CJEU found no compatibility issues and reasoned that pending asylum proceedings did not preclude that detention was for the purpose of deportation, as a rejection could lead to the implementation of a deportation order that had already been ordered, so return proceedings were still 'in progress' according to Article 5(1)f) of ECHR and that the EU legislature had struck the correct balance between the right to liberty of the applicant and the requirements of protection of national security and public order. Similarly in the C-18/16, **K.** case, the CJEU found no compatibility issues with Article 6 of the Charter and detention in order to verify the identity and in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when

there is a risk of absconding of the applicant (Article 8(3)a) and b) of the Reception Conditions Directive).

- Prohibition of the use of invasive psychological tests in order to assess credibility in asylum procedures

Article 7 – respect for private and family life
In C-473/16, **F** case, the CJEU concluded that Article 7 of the Charter precludes the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, which purpose is to provide an indication of the sexual orientation of that applicant. The Court's progressive judgment in this case put an end to the qustionnable practice used in credibility assessment.

- Prohibition of non-refoulement with regard to persons excluded from refugee status

Article 18 – right to asylum and Article 19 – non-refoulement
In the Joined cases C-391/16, C-77/17 and C-78/17, **M. a.o.**, the reference to the Charter was used to justify the CJEU jurisdiction, despite the EU not being a contracting party of the Geneva Convention. The CJEU ruled that the recognition by a Member State of a person as a refugee is declaratory and not constitutive of being a refugee; thus, the persons that, under Article 14(4) and (5) of the Qualification Directive, lose their "refugee status" (because of representing a danger to the security of the Member State or because of a conviction for serious crime), continue to be entitled to the international protection which, under Article 18 of the Charter and Article 78(1) TFUE must be guaranteed in compliance with the Geneva Convention. The CJEU concluded that refugees enjoy stronger protection from refoulement under EU law, since any form of removal under the Qualification Directive must be in conformity with the principle of non-refoulement, as enshrined in Articles 4 and 19(2) of the Charter.

- Prohibition of deportation during the asylum appeal procedure

Article 18 – right to asylum, Article 19 – non-refoulement and Article 47 – right to an effective remedy
The C-181/16, **Gnandi** case concerns the adoption of a return decision before the legal remedies against a rejection of an asylum decision have been exhausted, and the asylum procedure has been concluded. The CJEU held that a return decision in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection can be adopted. However, in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter, Member State should ensure that all the legal effects of the return decision are suspended pending the outcome of the appeal, and that applicant is entitled, during that period, to benefit from the Reception Conditions Directive and that he is entitled to rely on any change in circumstances

that occurred after the adoption of the return decision, which may have a significant bearing on the assessment of his situation. This judgement is an important step towards a better legal protection of rejected asylum seekers and a recognition of their right to remain on the territory of the EU during their appeal proceedings.

- Obligation to assess the best interests of the child during asylum procedure

Article 24(2) – best interests of the child
In the case C-646/21, **K. L.** the Court articulated the requirement to consider the 'best interests of the child' when assessing asylum applications, including subsequent ones, in light of Article 24(2) of the Charter, Article 3(1) of the International Convention on the Rights of the Child, and the General Comment No. 14 of the UN Committee on the Rights of the Child. In C-648/11, **MA a.o.**, the CJEU had to determine which state was responsible in the case of an unaccompanied child who had submitted asylum applications in different EU Member States. The Dublin Regulation was not clear whether the responsible Member State should be the one where the minor first applied for asylum, or the one where the minor was physically present. The CJEU stated that Member States, when examining minors' asylum applications, have to take into account the best interests of a child under Article 24 of the Charter and concluded that in the absence of a family member legally present in a Member State, the state in which the child is physically present is responsible for examining such claim.

- Right to a hearing in asylum procedures

Article 41 - the right to good administration and Article 47 - right to an effective remedy
In the case C-277/11, **M.M.**, the CJEU confirmed that the EU right to be heard is recognised as a general principle of EU law and is now affirmed in Articles 41, 47 and 48 of the Charter and that this right must be fully guaranteed in asylum procedures. However this right is not absolute and in the C-348/16, **Moussa Sacko** case, the CJEU ruled that the right to a hearing in an appeal procedure may be restricted, where the factual circumstances leave no doubt as to whether that decision was well founded, under the condition that during the proceedings at first instance, the applicant was given the opportunity of a personal interview. Domestic legislation cannot prevent a hearing, and the court may order that a hearing be conducted if it considers it necessary for the purpose of ensuring that there is a full and *ex nunc* examination of both facts and points of law.

- The scope of judicial review in asylum procedure

Article 47 – right to an effective remedy
In C-585/16, **Alheto** case the CJEU interpreted the right to an effective remedy contained in Article 46(3) of the Asylum Procedures Directive in the light of Article 47 of the Charter and concluded that an appeal court must examine both facts and points of law, which the administrative authority took into account or could have taken into account, and those which arose after this authority's decision. The appeal court's examination may

also concern inadmissibility grounds and if the court plans to examine such an inadmissibility ground that has not been examined by the asylum authority, it must conduct a hearing to allow the applicant to express their point of view in person concerning the applicability of that ground to their particular circumstances. In C-406/22, **C.V.** case, the CJEU ruled that the national court called upon to verify the lawfulness of an administrative decision on international protection must raise of its own motion, as part of its full and *ex nunc* examination, a failure to take account of the rules of EU law relating to the designation of safe countries of origin, even if that failure is not expressly relied on in the appeal.

7.3 Challenging national laws and practices

Domestic legislation should be interpreted in compliance with the EU law. When this is not possible, according to the principle of primacy of the EU law, domestic authorities (not only the courts, but all organs of the State, including the administrative authorities), have a duty to disapply national legislation that is contrary to a provision of EU law, which has a direct effect.[3]

If the domestic courts are in doubt on the interpretation of the EU provision, they may, and sometimes must, refer the case to the CJEU for a preliminary ruling procedure under Article 267 of the TFEU. In the area of freedom, security and justice, the urgent preliminary ruling procedure (PPU) was created to ensure a quick ruling in cases pending before any national court or tribunal.[4] The PPU procedure has so far been granted in cases of a risk of deterioration of the parent/child relationship, of deprivation of liberty and of a risk of interference with fundamental rights.[5]

As the reasons for non-compliance of the asylum legislation with the EU asylum legislation are often political, domestic courts might prefer to refer a preliminary reference and have the CJEU assess the dispute between the EU law and domestic legislation or practice.

In the following case examples, the CJEU was asked to rule on the compatibility of the national legislation with EU asylum legislation.

- Safe transit country inadmissibility ground and short deadline for the courts to decide

Hungary introduced an inadmissibility ground for asylum applications – the so called "safe transit country", which did not figure amongst

3 C-924/19 and C-925/19 PPU, F.M.S. a.o., §§139, 183.

4 Statute of the Court of Justice, Protocol No. 3, Art. 23a and Rules of Procedure of the Court of Justice, Arts. 107–114.

5 CJEU, Research and Documentation Directorate, Fact sheet, Urgent preliminary ruling procedure and expedited procedure, https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/tra-doc-en-div-c-0000-2019-201906086-05_00.pdf.

the permissible inadmissibility grounds in the Asylum Procedures Directive. A preliminary reference was referred and the CJEU ruled in the case C-564/18, **L.H.**, that the Asylum Procedures Directive precludes such national legislation, which allows an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on the territory of the Member State concerned via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed. In the same case the judge also questioned the EU law compatibility of the national legislation imposing an 8 days deadline on the court to decide such cases. The CJEU held that Article 46(3) of the Asylum Procedures Directive, read in the light of Article 47 of the Charter, precludes such a short deadline imposed by the national legislation, in situations where the domestic court is unable to ensure, within such a time limit, that the substantive rules and procedural guarantees enjoyed by the applicant under EU law are effective.

- Reformatory powers of the courts

In the C-556/17, **Torubarov** case the CJEU was asked to address the situation, where the national legislation only enables the courts to annul or confirm a decision of the asylum authority, but does not grant the right to amend it (to grant international protection), leading to a situation of a "ping-pong" between the court and the asylum authorities, not complying with the court judgements. The CJEU did not rule that such national legislation is not compliant with the EU law, but it provided guidance on the power of the domestic courts to comply with the EU law (Article 46(3) of Asylum Procedures Directive and Article 47 of the Charter) in such situations. The Court ruled in essence that if, after a full and *ex-nu*nc examination, a national court has decided that international protection must be granted to the applicant, but the administrative authority subsequently takes a different decision, without establishing any new elements which would justify a re-evaluation of the need for international protection of the applicant, that court must, if according to national law it does not have any means by which it can ensure that its decision is complied with, annul that decision and substitute it with its own judgment, setting aside, if necessary, the national provision prohibiting it from doing so.

- Detention pending Dublin transfer

In the C-60/16, **Mohammad Khir Amayry** case the Court examined compliance of the detention time limit during a Dublin transfer. The Court ruled that Article 28 of the Dublin III Regulation (which provides the grounds for detention) constitutes a limitation on the exercise of the fundamental right to liberty and security and therefore a national authority must take account of Article 6 of the Charter, when imposing a time limit for detention. National legislation, such as that in Sweden, which allows the detention to be maintained for 3 or 12 months during which the Dublin transfer could be reasonably carried out, is not compliant with these provisions.

- Limitations to the access to asylum and extended use of detention during the state of emergency due to mass influx of migrants

The C-72/22 PPU, **M.A.** case concerns the EU law compatibility of Lithuanian legislation which meant that during a state of emergency due to a mass influx of migrants, a third country national who entered the country unlawfully, was denied the opportunity to lodge an application for international protection and was placed in detention. The CJEU ruled that EU law precludes such legislation, highlighting that depriving a third-country national of the possibility of applying for international protection due to the irregularity of their stay, would prevent them from effectively enjoying the right to asylum enshrined in Article 18 of the Charter. Furthermore, the Court held that the mass influx of third-country nationals does not justify the adoption of measures derogating from EU law by mere reliance on Article 72 TFEU. With regard to detention, the CJEU emphasised that in view of the importance of the right to liberty, enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary. According to the Court, an irregular stay does not prove by itself a threat to society.

- Ex officio examination of arguments against the lawfulness of detention

In Joined cases C-39/21 and 704/20, **C. B. and X**, a Dutch court asked through a preliminary ruling whether a national court may, when required to review the lawfulness of detention or continued detention, be limited by a procedural rule of national law which prevents it from taking into account pleas or arguments not put forward by the applicant. The CJEU found that EU directives, read in conjunction with Articles 6 and 47 of the Charter, should be interpreted as requiring courts to raise any failure to comply with conditions governing the lawfulness of detention, including those not invoked by the applicant. In such a case, the courts may not be limited by procedural rules of national law.

- Obligation to apply for a family reunification at the diplomatic or consular post

In C-1/23 PPU, **Afrin** case, the CJEU ruled that Article 5(1) of Family Reunification Directive, read in conjunction with Article 7 and Article 24(2) and (3) of the Charter, preclude national legislation requiring a sponsor's family members' physical presence at a Member State's diplomatic or consular post, as it infringes the right to respect for family unity and makes it impossible to exercise the right to family reunification. However, Member States may require physical presence at a later stage of the procedure, but they must facilitate such an appearance and reduce the number of appearances to the minimum to promote family reunification and protect fundamental rights.

- Aging out during the family reunification procedure

In Joined Cases C-133/19, C-136/19 and C-137/19, **B.M.M. a.o.**, the Court ruled that Article 18 of Family Reunification Directive, read in the light of Article 47 of the Charter

preclude an action against the rejection of an application for family reunification of a minor child from being dismissed as inadmissible on the sole ground that the child has reached majority during the court proceedings.

- Access to classified data in national security cases

In Hungary international protection status is withdrawn based on the non-reasoned opinion of the Security agency, concluding that the applicant is a danger to national security. Such an opinion is binding on the Asylum authority. The applicants or their lawyers do not have access to classified data based on which such opinions are issued. And even if they would be granted access, they would not be allowed to use the data in the procedure. In the case C-159/21, **G.M.**, the CJEU concluded that the rights of defence are not absolute rights, and the right of access to the file, which is the corollary thereto, may therefore be limited, on the basis of a weighing up, on the one hand, of the right to sound administration and the right to an effective remedy (Article 47 of the Charter) of the person concerned and, on the other hand, the national security interests. That weighing up, however, cannot deprive the rights of defence of all effectiveness. The EU law therefore precludes national legislation which enables the rejection or withdrawal of international protection because of national security reasons, which are based on classified data, when the person concerned or their legal adviser can access that information only after obtaining authorisation to that end, and are not provided even with the substance of the grounds on which such decisions are based and cannot, in any event, use in administrative or judicial proceedings the information to which they may have had access. Non-reasoned opinions of Security agencies should not be binding on an Asylum authority. Respect for the rights of defence does not mean that the court has access to classified data, but rather that the person concerned, where appropriate through an adviser, may defend their own interests by expressing their point of view on that information.

- Short appeal deadline

Slovenian legislation provides 3 days for appealing decisions rejecting an asylum application as manifestly unfounded. In the C-58/23, **Y. N.** case, the CJEU found sauch legislation to be incompatible with Article 46(4) of the Asylum Procedures Directive, read in conjunction with Article 47 of the Charter, when rights to the interpreter, legal aid and access to files cannot be guaranteed in such a short deadline.

- Judicial review of circumstances following a Dublin transfer decision

In the C-194/19, **H.A.** case, the CJEU ruled that Article 27(1) of Dublin III Regulation read in the light of recital 19 thereof, and Article 47 of the Charter must be interpreted as precluding national legislation which provides that the court reviewing a Dublin transfer decision cannot take account of circumstances subsequent to the adoption of that decision, which are decisive for the correct application of that regulation.

Seeing the above examples, it can be concluded that the CJEU is not reluctant to find that EU asylum legislation and the Charter preclude certain national legislation or practice that is incompatible with the EU law. Relying on the directly applicable EU asylum law in domestic litigation and in case of doubt a preliminary reference suggestion is therefore strongly advised.

7.4 Litigation, advocacy and campaigning tips

7.4.1. Considerations specific to Charter-based litigation in the area of international protection

Charter-based litigation in the area of international protection has proven to be very important, considering the numerous cases described in previous chapters, where the CJEU referred to the Charter in order to interpret the secondary EU law in this field.

From the above cases, we can derive the strategic potentials of the Charter:

- to argue for the development of new standards and rights not expressly provided for in secondary EU law as in C-648/11, **MA a.o.**, where the determination of a responsible Member State in a case of an unaccompanied minor was developed from the rights of the child under Article 24 of the Charter;
- to contest the validity of EU secondary law as in C-601/15 PPU, **J.N** and C-18/16, **K.**, even though in these cases no incompliance with the Charter was found ;
- to contest the validity of national law and to argue for its disapplication as seen in all the cases under chapter 7.3. above;
- extending judicial review powers of national courts as in C-556/17, **Torubarov**, where the domestic court was empowered by a reformatory power under certain conditions, despite no such competency existing under domestic legislation and C-564/18, **L.H.**, where domestic court was empowered to take longer time to decide, when certain conditions are fulfilled, despite a strict deadline under domestic legislation.

The below example illustrates the strategic litigation used by the Hungarian Helsinki Committee (HHC) in order to tackle the issue of unlawful detention in the transit zones and the lack of an effective judicial remedy to challenge a return decision.

Issues:

(detention) Placement in the transit zone during asylum and return procedure was not considered detention by the Hungarian authorities and no detention order was issued. No judicial review of detention was therefore available. The placement could be challenged only when challenging the decision in the asylum procedure.

(return decision) Since Serbia did not agree to readmit the rejected asylum seekers, the Hungarian authorities amended the country of destination in the initial return decisions, replacing it with the individuals' respective countries of origin, against which no judicial remedy was available.

Litigation strategy:

(detention) Since the issue was very political, the Budapest court that had jurisdiction on the matter refused to rule on whether the transit zone is considered detention and to free the applicants, or to refer a preliminary reference to the CJEU. Besides the ECtHR Grand Chamber ruled in *Ilias and Ahmed v. Hungary* that the placement in the transit zone does not constitute detention under Article 5 of the Convention. The situation seemed hopeless, but the reliance on EU law was still the avenue that left some hope, if only the domestic court could be convinced of the necessity of a preliminary reference. Since there was no domestic remedy to request the review of detention, the HHC turned to the court in an omission appeal, claiming that Asylum and Immigration authorities were in omission for not issuing a detention order based on the direct application of the relevant EU law on detention and that the court should have the competence to issue an interim measure and release the applicants if the placement is found to be unlawful. The jurisdiction for an omission appeal was at the Szeged court, who was more receptive and agreed to refer a preliminary reference.

(return decision) Despite no possibility in the domestic court to appeal the modified destination country in a return decision, the HHC still turned to the court, claiming that modifying the destination country actually means a new expulsion decision, for which a judicial remedy should be available, and that EU law should be applied directly, suggesting a referral to the CJEU.

CJEU judgement:

In joined cases C-924/19 and C-925/19 PPU, **F.M.S. a.o.** the CJEU ruled that placement in the transit zone constitutes detention and that the principle of primacy of EU law and the right to effective judicial protection, guaranteed by Article 47 of the Charter, must be interpreted as requiring the national court, in the absence of a national provision providing for judicial review of the lawfulness of an administrative decision ordering the detention, to declare that it has jurisdiction to rule on the lawfulness of such detention and permit that court to release the persons concerned immediately if it considers that such detention constitutes detention contrary to the EU law. With regard to the modification of the return destination, the CJEU clarified that amending the country of destination in the initial return decision is so substantial that it must be regarded as a new return decision. Effective judicial review needs to be available against such a decision, in accordance with the right to an effective remedy guaranteed by Article 47 of the Charter. Domestic courts are required to disapply any such legislation that hinders judicial review.

There are several tactical elements to consider when engaging in litigation:

- Proposed questions: If the national court shows an interest in making a preliminary reference, it is important to suggest to the court to allow for assistance in drafting the preliminary reference request, as the CJEU is bound by the questions as formulated by the referring court and it does not answer questions that have not been asked. Thus, as the lawyer in the domestic proceedings it is possible to propose a question or set of questions to the judge for a preliminary reference. Unfortunately, it is not possible to engage if not already part of the domestic proceedings.

- Client care: A very important aspect to keep in mind, when trying to engage in strategic litigation is the interest of the client. Although the preliminary reference procedure could bring a systemic change in a Member State, suggesting to the domestic court to refer a case to the CJEU might not always be in the client's interest, as the procedure will last longer. It is therefore important to clearly present all the implications that the preliminary reference procedure has on the client's case and respect their decision.

- ECtHR: Litigation in front of the ECtHR is also very important in the field of international protection, although the Convention does not contain the right to asylum, several other fundamental rights can be at stake concerning an asylum seeker or a beneficiary of international protection. While submitting an application to the ECtHR does not depend on the will of domestic court, it is very important that the client is interested in pursuing their case and to stay in touch with their legal representative all through the proceedings, which can last several years, otherwise the case will be struck out.

- Ensuring a strong case: In order to get a good strategic case in the field of international protection, legal services have to be provided to lots of people, or the lawyer has to be in contact with an NGO, who would refer a strategic case. It is important to pay attention to the actual facts of the case. Although there might be an incompatibility of domestic practice or legislation with the EU law or ECHR, if the facts of the case are not strong enough to support it, it is sometimes better not to push for a preliminary reference in such a case or not to submit an ECtHR application, as it might lead to unfavourable results.

7.4.2. Supporting advocacy

Advocacy can provide meaningful support during and after litigation in a number of ways. Prior to and during litigation, advocacy activities can contribute to a better understanding of the systemic nature of the problem at hand, as well as ensuring that relevant human rights mechanisms feature the issue in their reporting, which in turn strengthens the evidentiary basis of a case. Once a judgment is delivered, advocacy helps to ensure timely and correct implementation especially where work is required to review and change laws and policies.

At national level, the **national human rights institution or ombudsperson**, provided that it is independent and well-functioning, can examine individual complaints, conduct broader investigations, and publish reports and recommendations to state authorities.

In the context of detention, if the state ratified the Optional Protocol to the UN Convention Against Torture (**OP-CAT**), the national preventive mechanism (**NPM**) can be informed of right violations that can trigger its targeted investigation, including visits to relevant facilities.

During the 2021-2027 multiannual financial framework of the European Union, ensuring the effective implementation of the Charter is a so-called **horizontal enabling condition**; in practice, this means that all calls for proposals and projects implemented with the use of Union funds must be in compliance with the rights enshrined in the Charter. In each member state, dedicated complaints mechanisms have been set up. Citizens are able to submit complaints also on behalf of others in case a violation of the Charter has taken place.[6]

Each member state also has **monitoring committees** attached to each EU funded operative programme as well as the EU Home Affairs Funds where independent civil society organisations also participate as members to ensure compliance with EU rules, including the horizontal enabling conditions. In cases of systemic rights violations, putting the issue on the agenda of the relevant committees can be a helpful way to advance the resolution of the issue.

At EU level, lodging a **complaint with the European Commission** and urging it to start an infringement procedure can be an effective way to alert decision-makers to the problem you identified and to put pressure on the government to ensure that the necessary changes required to comply with EU and international law are introduced. This avenue is particularly relevant where a national law is clearly incompatible with EU law, or where in practice there is a systemic failure to implement EU law. It can also be a possible avenue where it is difficult to find the 'right' client for litigation, as there is no need to represent a concrete client in order to start a complaint.[7]

The Council of Europe and its rich human rights mechanisms also provide ample opportunities to bring attention to the legal issue at stake. Of particular relevance are the office of the **Commissioner for Human Rights, the Special Representative of the Secretary General on Migration and Refugees, the Parliamentary Assembly's Committee on Migration, Refugees and Displaced Persons**, as well as expert bodies that carry out monitoring visits, such as the Committee for the Prevention of Torture (**CPT**) or the European

6 Regulation (EU) 2021/1060, Article 69(7).

7 For an example of an infringement procedure in the field of international protection see the case C-823/21, Commission v. Hungary.

Commission Against Racism and Intolerance (**ECRI**).

The **Committee of Ministers**, supervising the execution of judgments of the ECtHR, receive submissions from civil society regarding the state-of-play of the execution of general measures and the domestic implementation of action plans submitted by the relevant member state to comply with the judgment.

7.4.3. Campaigning and messaging

As a large part of xenophobia derives from the fact that people are afraid of foreigners (that they don't know because often they have never met an asylum seeker and or have only seen the demonised images spread by state propaganda or tabloid papers), a main objective is to show humans - who have familiar motives and personalities but have to take decisions under extraordinary circumstances. What makes the international protection field difficult for the campaigning is the fact that personal identities should not be disclosed to the public. Since it is difficult to show human fates and personalities without being able to show them in photos and videos, a good workaround is to create animations and drawings.

A successful campaign used the above-mentioned method to show personal stories of likeable real (but anonymized) clients - each situation was absurd but showed the systemic nature of the Hungarian authorities' treatment of refugees. Each video (on TikTok and Instagram) provoked a way higher level of empathy than the average content in the topic of asylum, and heated debates from both sides.[8]

Another important element of evoking empathy towards asylum seekers is to show that by assuring their fundamental human rights, the government doesn't take these rights away from EU citizens (a general "concern" among opposers). On the contrary: police brutality on the borders might indicate that these authorities disregard human life and dignity in general, and a humane and tolerant community is in everyone's interest in the society.

A good occasion to show that no authority can deny fundamental rights from any human is to celebrate victories in the ECtHR. On the one hand, they serve as good success stories, and on the other, these demonstrate that no authority, no government can treat people arbitrarily, and that human rights are not relative.

Example message on asylum seekers arriving in an EU country:

Values: Hasib arrived as a promising management student, spoke English fluently, he had a bright future ahead of him. He also stood up bravely for human rights in his home country, Afghanistan, that's why terrorists attacked his organisation's office.

Problem: However, when his father lost his job and no longer afforded to pay for his tui-

8 Videos on YouTube (only in Hungarian), https://www.tiktok.com/@helsinkibizottsag/video/7408909922768850208.

tion, he had to finish university. The authorities discovered that he could no longer stay legally and deported him to a third country.

Solution: It is not only unlawful, but also morally unacceptable to deport someone who can prove that he is persecuted in his home country. Every human has the right to asylum when their life is in danger, and the right to a fair procedure. Just as you also have these fundamental rights, whenever you might need it.

FURTHER RESOURCES

- Training Manual, The Role of the EU Charter of Fundamental Rights in Asylum Cases
- FRA, Handbook on European law relating to asylum, borders and immigration
- Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter, Asylum and Migration
- ECRE, DCR, The application of the EU Charter of Fundamental Rights to asylum procedural law
- ECRE Legal Note: The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedures
- Moraru, Madalina, The EU Fundamental Right to Asylum: In Search of its Legal Meaning and Effects
- BODART, Serge; FRANSEN, Caroline; DUBOIS, Claude, EU Charter and the dialog of the judges in asylum and immigration cases
- A. Crescenzi, R. Forastiero, G. Palmisano, Asylum and the EU Charter of Fundamental Rights
- Overview of CJEU judgments and pending cases
- Newsletter on European Asylum Issues

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