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THE ROLE OF THE EU CHARTER IN THE MEMBER STATES

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[Excellencies],

Dear students, colleagues and friends,

I am very grateful to the organisers of this event jointly hosted by the University of Cyprus and the University of Central Lancashire (Cyprus Campus) for giving me the opportunity tonight to share with you some thoughts on the Charter of Fundamental Rights of the European Union (the 'Charter').

Ever since the Charter became legally binding with the entry into force of the Treaty of Lisbon on 1 December 2009, academic literature has, some exceptions notwithstanding,[1] focused on studying the Charter as interpreted and applied by the EU Courts, rather than on its interpretation and application at national level.

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[1] See, e.g., L. Burgorgue-Larsen, *La charte des droits fondamentaux saisie par les juges en Europe* (Paris, Iredies, 2017).

For this reason, it seems to me that the time is right to answer some questions regarding the impact and the role of that catalogue of fundamental rights in the legal orders of the Member States. To that end, I will explore in three steps the way in which the Charter is applied in the Member States.

First, I shall explore the question of competences, by examining the way in which EU law allocates powers between the EU and its Member States in the field of fundamental rights protection with a focus on the expression 'implementing EU law' within the meaning of Article 51(1) of the Charter.

Second, once it is established that a national measure is 'implementing EU law', the question that arises is whether EU law allows room for national law to provide for a higher level of protection. I shall support the contention that such a higher level of protection may take place where EU law does not provide for a uniform level of protection and in so far as 'the primacy, unity and effectiveness of EU law are [not] compromised'.[2] The existence or absence of such a uniform level of protection is, subject to compliance with primary EU law, a question for the EU political process to resolve in the light of the principle of democracy on which the EU is founded.

Third and last, in the light of recent developments in the case law of the Court of Justice, I shall explore the question of the horizontal application of fundamental rights.

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But before examining those questions, allow me to recall very briefly the three constitutional functions that the Charter is called upon to play.[3] First, it serves as a source

[2] Judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para. 60.
[3] See K. Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review*, 375.

of inspiration for the discovery of general principles of EU law.[4] Second, it serves as an aid to interpretation. Given that the provisions of the Charter are primary EU law, secondary EU law and national law implementing EU law must be interpreted in the light of those provisions.[5] Finally, it has been relied upon as providing grounds for judicial review.[6] EU legislation that breaches the Charter is to be annulled or declared invalid,[7] and national law implementing EU law that contravenes the fundamental rights enshrined therein must be set aside.[8]

I. The Question of Competences

The question of competences is, in my view, what distinguishes the Charter from national systems of fundamental rights protection as well as from the European Convention on Human Rights (the 'ECHR').

This is because the Charter is governed by the principle of conferral which is given concrete expression in the field of fundamental rights protection by Article 51(1) thereof.

[4] See, e.g., judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, para. 22.

[5] See judgment of 5 October 2010, *McB.*, C-400/10 PPU, EU:C:2010:582, para. 51 (holding that 'the Court [of Justice] is called upon to interpret, in the light of the Charter, the law of the [EU] within the limits of the powers conferred on it.'). See also judgments of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, para. 71; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, para. 78; of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, para. 179; of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, para. 40; of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, para. 20; of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, para. 32; of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi*, C-152/17, EU:C:2018:264, para. 33, and of 25 October 2018, *Anodiki Services EPE*, C-260/17, EU:C:2018:864, para. 38.

[6] See, e.g., Judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84. See also judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335, para. 38 (noting that 'the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights').

[7] See, e.g., judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662; of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100; of 18 July 2013, *Commission and Others v Kadi (Kadi II)*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518; judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650.

[8] See, e.g., judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 79; of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, para. 91, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, para. 80.

That provision states that '[t]he provisions of [the] Charter are addressed […] to the Member States *only* when they are implementing [EU] law'.

Writing extrajudicially, I tried to explain the meaning of the expression 'implementing EU law' by the following metaphor: 'the Charter is the "shadow" of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter'.[9] I am happy to see that that metaphor has caught on in academia,[10] and that Advocate General Bobek referred to it in two of his opinions.[11]

By means of that metaphor, I sought to give visibility to the fact that the '[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter'.[12] Simply put, there can be no situation that is governed by EU law in which the Charter does not apply as this would be contrary to the rule of law within the EU. In order to determine whether a Member State is implementing EU law, one must look at the scope of application of EU law and, in particular, at the link between that law and the national measure in question.

In the light of the case law of the Court of Justice, it is now safe to say that the Charter applies to the so-called 'agency situations' and to the so-called 'derogation situations'.[13]

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[9] K. Lenaerts and J.A. Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights : A Commentary* (Oxford, C.H. Beck, Hart, Nomos, 2014) 1560, at 1568.

[10] See, e.g., D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 *Common Market Law Review* 1267, at 1278, and M. Bonelli and M. Claes, 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14 *European Constitutional Law Review* 622, at 630.

[11] Opinions of Advocate General Bobek in *Moro*, C-646/17, EU:C:2019:95, point 81, and in *Ispas*, C-298/16, EU:C:2017:650, point 29.

[12] Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 21.

[13] See, in this regard, K. Lenaerts and J.A. Gutiérrez-Fons, 'The EU Internal Market and the EU Charter: Exploring the "Derogation Situation"', in F. Amtenbrink, G. Davies, D. Kochenov and J. Lindeboom (eds), *The Law of the EU Internal Market and the Future of European Integration : Essays in Honour of Laurence W. Gormley* (Cambridge, Cambridge University Press, *forthcoming*).

However, that same case-law has also revealed that the *classical* 'two-constellations' typology may not always suffice in itself to explain convincingly why the Charter applies in complex situations.[14] This is because, just as happens with any shadow, there are gray areas where it is difficult to determine where the darkness ends and the brightness begins.

Perhaps, that is the reason why in *Iida*, the Court of Justice provided additional guidance to examine 'penumbra' cases. In that case, it held that in determining whether a national measure is implementing EU law within the meaning of Article 51(1) of the Charter, 'it must be ascertained *among other things* whether the national legislation at issue is intended to implement a provision of [EU] law, what the character of that legislation is, and whether it pursues objectives other than those covered by [EU] law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of [EU] law on the matter or capable of affecting it'.[15] I concur with Advocate General Bobek in that the *Iida* criteria 'are neither cumulative, nor exhaustive. They merely constitute indicative criteria aimed at providing guidance to national courts'.[16]

The Court of Justice has also pointed out that the mere substantive proximity with a provision of EU law does not suffice to consider the national measure in question to be 'implementing EU law' within the meaning of Article 51(1) of the Charter.[17] The link between EU law and the national measure in question 'must reach a certain level of specificity in normative terms'.[18] In my view, in determining the existence of such a level of specificity, one must examine whether by adopting the national measure in question,

[14] P. Benedikt, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 *European Papers* 133.
[15] Judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, para. 79. See also judgments of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, para. 41; of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, para. 25, and of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, para. 37. See also order of 7 September 2017, *Demarchi Gino and Garavaldi*, C-177/17 and C-178/17, not published, EU:C:2017:656, para. 20.
[16] Opinion of Advocate General Bobek in *Ispas*, C-298/16, EU:C:2017:650, point 47.
[17] See judgment of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, para. 24 (holding that 'the concept of "implementing [EU] law"[…] requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'). See also judgments of 17 September 2014, *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229, para. 62; of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, para. 34, and of 6 October 2016, *Paoletti and Others*, C-218/15, EU:C:2016:748, para. 14.
[18] Opinion of Advocate General Bobek in *Ispas*, C-298/16, EU:C:2017:650, point 48.

the Member State concerned is fulfilling 'a specific obligation' imposed by EU law with regard to the situation in the main proceedings. Two examples taken from the case law in which the Court of Justice reached different outcomes may illustrate this point. The first is a Spanish reference, the second a reference from Romania.

In Spain, employers are required to pay remuneration during proceedings challenging an unfair dismissal. However, where judicial proceedings last more than sixty days, the employer is entitled to seek from the Spanish State payment of outstanding remuneration due to the employee who was dismissed. In the event of the employer's insolvency, the employee may, by operation of legal subrogation, claim that remuneration directly from the State but only in cases of *unfair* dismissal. In *Julián Hernández and Others*,[19] applicants in the main proceedings – who were dismissed by a private company that became insolvent – argued that Spanish legislation was incompatible with Article 20 of the Charter, since legal subrogation did not take place in cases of *invalid* dismissal.[20] The Spanish court asked whether the Spanish legislation at issue fell within the scope of EU law, in particular of Directive 2008/94 which provides minimum protection to employees in the event of the insolvency of their employer.[21] If so, it also asked whether that legislation was compatible with the Charter.

The Court of Justice ruled that the Spanish legislation at issue did not implement EU law within the meaning of Article 51(1) of the Charter. First, unlike Directive 2008/94, that legislation did not seek to protect employees, but to compensate the employer for the excessive length of judicial proceedings.[22] Second, the Spanish legislation did not adversely affect the provisions of that Directive. On the contrary, Spain had fulfilled its obligations under Directive 2008/94 given that the applicants had already obtained from

[19] Judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055.
[20] Article 20 of the Charter, entitled 'Equality before the law', states that 'Everyone is equal before the law.'
[21] Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L 283/36.
[22] Judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, para. 40. The Court of Justice observed that the claim against the State only covered the period after the 60th working day following the date on which judicial proceedings challenging the dismissal were commenced. Thus, unlike Article 3 and 4(2) of Directive 2008/94 that guarantee the payment of remuneration during the minimum period of the last three months of the employment relationship, the legislation at issue did not cover the first 60 working days.

Spain the payment of remuneration which satisfied the obligation of minimum protection imposed by that Directive.[23] Third and last, the adoption of the legislation at issue did not result from EU law but 'from the exercise of exclusive competence of the Member States'.[24]

By contrast, in *Florescu*, the Court of Justice found that the Charter applied to austerity measures adopted by Romania in order to implement the conditions that the EU had attached to the grant of financial assistance to that Member State. In particular, those austerity measures prohibited the combining of a public-sector retirement pension with income from activities carried out in public institutions (such as universities), if the amount of the pension exceeded a certain threshold. At the outset, the Court of Justice found that the Memorandum of Understanding (the 'MoU') entered into by the EU and Romania was adopted on the basis of the relevant provisions of EU law that govern the grant of mutual assistance to a Member State whose currency is *not* the euro.[25] It thus ruled that the MoU in question was to be regarded as an act of an EU institution.

Next, it found that the MoU required, *inter alia*, a reduction of the public sector wage bill and a reform of the pension system. Since the austerity measures at issue pursued those two objectives, the Court of Justice reasoned that those measures 'implemented the MoU' within the meaning of Article 51(1) of the Charter. Most importantly, the fact that the MoU left Romania some discretion in deciding the means of attaining those two objectives was irrelevant for present purposes. Referring to its previous judgment in *N.S and Others*,[26] the Court of Justice held, and I quote, that 'where a Member State adopts measures in the exercise of the discretion conferred upon it by an act of EU law, it must be regarded as implementing that law, within the meaning of Article 51(1) of the Charter'.[27]

[23] *Ibid*., para. 43.
[24] *Ibid*., paras 44 and 45.
[25] Article 143 TFEU and Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] OJ L 53/1.
[26] Judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paras 65.
[27] See judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, para. 48.

Before moving onto the second part of my opening address, I would like to make a brief comment regarding the seminal judgment of the Court of Justice in the *Portuguese Judges* Case (*Associação Sindical dos Juízes Portugueses*).[28] In paragraph 29 of that judgment, the Court of Justice drew a distinction between the expression 'implementing EU law' within the meaning of Article 51(1) of the Charter and that of 'in the fields covered by EU law' within the meaning of the second subparagraph of Article 19 TEU.

In so doing, the Court of Justice decided not to examine whether the salary-reduction measures adopted by Portugal in the context of the euro crisis implemented EU law, leaving that question open.[29] Instead, it preferred to examine the compatibility of those salary-reduction measures with the guarantee of judicial independence embedded in Article 19 TEU, given that those measures affected the level of remuneration of Portuguese judges. In order to determine whether the applicants in the main proceedings – who were members of the *Tribunal de Contas* (Court of Auditors) – could benefit from that guarantee, the referring court had to undertake two verifications: first, whether the *Tribunal de Contas* was a 'court or tribunal' within the meaning of EU law and second, whether that Tribunal may 'rule […] on questions concerning the application and interpretation of EU law'.[30]

Whilst it is too soon to provide any insights regarding the interpretation of the expression 'in the fields covered by EU law', suffice it to say that that expression may serve to clarify that of 'implementing EU law'.

[28] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.
[29] Cf. Opinion of Advocate General Saugmandsgaard Øe in *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2017:395.
[30] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para. 40.

II. The Autonomous Development of the Charter and the Question of Higher National Levels of Protection

Once it is established that a national measure is implementing EU law, the question that arises is whether national law may provide for a higher level of protection. I refer to a higher level because a national measure implementing EU law may not disregard the level of protection guaranteed by the Charter.

In so far as the Charter contains rights that correspond to those guaranteed by the ECHR, it follows from Article 52(3) of the Charter that 'the meaning and scope of those Charter rights shall be the same as those laid down by the said Convention'. This means, in essence, that the level of protection guaranteed by the Charter may not disregard that guaranteed by the ECHR.[31]

That said, the need for normative consistency does not prevent EU law from providing more extensive protection. As the Court of Justice held in *TC*, '[a]ccount must […] be taken of [the] ECHR […], as the minimum threshold of protection'.[32] It follows that the Charter allows room for autonomous developments in the field of fundamental rights protection. The seminal ruling of the Court of Justice in *Menci*, which concerned the application of the *ne bis in idem* principle in the context of non-payment of VAT, illustrates this point.[33]

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[31] See, e.g., judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, para. 77; of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, para. 50; of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, para. 62; of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie (Suspensory effect of the appeal)*, C-180/17, EU:C:2018:775, para. 31 and of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)*, C-175/17, EU:C:2018:776, para. 35.

[32] Judgment of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, para. 57.

[33] Judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197. See also judgments of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, and of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192. However, only the judgment in *Menci* refers to the judgment of the ECtHR in *A and B* v *Norway*.

In that case, the Court of Justice had to decide whether it would align its interpretation of Article 50 of the Charter with the judgment of the European Court of Human Rights (the 'ECtHR') in *A and B v Norway*, in which that Court modified its previous case law.[34] According to that judgment, where tax penalties are criminal in nature, a duplication of tax and criminal proceedings and penalties punishing the same violation of the tax law does not infringe the *ne bis in idem* principle enshrined in Article 4 of Protocol No 7 to the ECHR, where the tax and criminal proceedings at issue have a sufficiently close connection in substance and time.[35] If that connection exists, there is simply no '*bis'*.

Alternatively, the Court of Justice could develop its own approach based on the Charter that would nevertheless comply with the level of protection guaranteed by the ECHR resulting from *A and B v Norway*.[36] This was actually what the Court of Justice did. At the outset, the Court of Justice recalled that the ECHR 'does not constitute, as long as the [EU] has not acceded to it, a legal instrument which has been formally incorporated into EU law',[37] and that normative consistency between the Charter and the ECHR may not adversely affect the autonomy of EU law.[38] Next, it went on to find that a duplication of tax and criminal proceedings and penalties constitutes a limitation on the *ne bis in idem* principle laid down in Article 50 of the Charter, that must comply with Article 52(1) of the Charter. Such compliance requires national law implementing EU law to comply with the following conditions. First, national law providing for such a duplication must pursue an objective of general interest which is such as to justify it (e.g. combatting VAT offences). Moreover, tax and criminal proceedings must have complementary objectives. Second, national law must contain rules ensuring coordination that limits to the strict necessary the disadvantages resulting from such a duplication. Third, national law must provide for rules making it possible to ensure that the severity of all of the penalties

[34] ECtHR, judgment of 15 November 2016, *A and B* v *Norway*, CE:ECHR:2016:1115JUD002413011.
[35] *Ibid*., § 132.
[36] See, in that regard, Opinion of Advocate General Campos Sánchez-Bordona in *Menci*, C-524/15, EU:C:2017:667, paras 78 et seq.
[37] Judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, para. 22. See also judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 44, of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, para. 45.
[38] Judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, para. 23. See also judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, para. 47, and of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, para. 50, and of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie (Suspensory effect of the appeal)*, C-180/17, EU:C:2018:775, para. 31.

imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.[39] Finally, the Court of Justice observed that its interpretation of Articles 50 and 52(1) of the Charter provided a level of protection of fundamental rights that was not in conflict with that guaranteed by the ECHR.

It follows from *Menci* that a right contained in the Charter may be interpreted by the Court of Justice so as to provide a higher level of protection than that guaranteed by the ECHR.[40] It is worth noting that, unlike other rights recognised by the Charter, the application of the *ne bis in idem* principle does not often entail a conflict with other fundamental rights. Where a conflict of fundamental rights exists, the question of providing a higher level of protection becomes, in my view, more complex. The reason is that there is risk of tilting the golden balance struck by the ECtHR, in so far as providing a fundamental right with a *higher* level of protection may inevitably entail providing a conflicting fundamental right with a *lower* level of protection. In *Puškár*, Advocate General Kokott examined this question. She posited that departure from the case law of the ECtHR is 'only permitted provided that it does not also cause another fundamental right in the Charter corresponding to a right in the ECHR to be accorded less protection than in the case-law of the ECtHR'.[41] This would suggest that the autonomous development of the Charter is not always possible.

Moreover, the EU legislator may impose a uniform level of fundamental rights protection. It may do so, provided that it does not disregard the level of protection guaranteed by the Charter. Needless to say, the EU legislator is free to decide whether to impose a uniform level of protection that is higher than that guaranteed by the Charter. That uniform level

[39] Judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, para. 63.

[40] See, e.g., M. Luchtman, 'The ECJ's recent case law on ne bis in idem: implications for law enforcement in a shared legal order' (2018) 55 *Common Market Law Review* 1717, at 1730 (who notes that in *Menci*, 'the [Court of Justice] clearly deviates from the approach of the [ECtHR], which does not recognize such combinations as a limitation of the principle, but rather excludes such combinations from the scope of the principle; according to the ECtHR, they are not considered to be a *bis*. Precisely because of that difference, it is important to stress that the [Court of Justice] does establish a higher *ne bis in idem* threshold than the ECtHR, although the [Court of Justice] itself makes no mention of that difference, nor does it refer to the aforementioned final sentence of Article 52(3) [of the Charter]').

[41] Opinion of Advocate General Kokott in *Puškár*, C-73/16, EU:C:2017:253, point 123. The Court of Justice declared that question to be inadmissible as it 'was raised by the referring court in general terms and was not clearly drafted. .See judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725 , para. 119.

of protection rules out diversity as it precludes the application of higher levels of protection provided for by national law.

By contrast, where the EU legislator has not provided for a uniform level of protection, there is room for national diversity. However, that diversity is not absolute as it must, first, comply with the level of protection guaranteed by the Charter and, second, respect 'the primacy, unity and effectiveness of EU law'. It follows that, subject to compliance with the Charter and other provisions of primary EU law, the choice between European unity and national diversity is a political question that is adopted at EU level on the basis of the principle of representative democracy.

I have read with keen interest what some commentators have said about the judgment of the Court of Justice in *M.A.S. and M.B.* (also known as *Taricco II*). Some commentators have compared that judgment with that in *Melloni*, asking themselves whether the latter judgment was overruled.[42] However, in my view, that is *clearly not* the right approach. The reason is very simple. As Advocate General Bobek noted in his Opinion in *Dzivev*,[43] whilst in *Melloni* the EU legislator had laid down a uniform level of protection, that was not the case in *M.A.S. and M.B.*[44]

In *Melloni*, the EU legislator amended, in 2009, the European Arrest Warrant Framework Decision with a view to protecting the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. To that effect, the EU legislator introduced a new provision that lists the circumstances under which the executing judicial authority may *not* refuse execution of a European Arrest Warrant issued against a person convicted *in absentia*. In that regard, the Court of Justice noted that the new provision complied with Articles 47 and 48 of the

[42] F. Vigano, '*Melloni* overruled? Considerations on the 'Taricco II' judgment of the Court of Justice' (2018) 9 *New Journal of European Criminal Law* 18.
[43] Opinion of Advocate General Bobek in *Dzivev*, C-310/16, EU:C:2018:623, points 81 et seq.
[44] See, in this regard, C. Rauchegger 'National constitutional rights and the primacy of EU law: *M.A.S.*' (2018) 55 *Common Market Law Review* 1521, at 1533 (who observes that '[t]he lack of harmonization by the EU legislature distinguishes *M.A.S.* from *Melloni*.').

Charter – two provisions that are in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the Convention[45] – given that it only applied to situations where the person convicted *in absentia* was deemed to have voluntarily and unambiguously waived his or her right to be present at the trial in the issuing Member State. Since the EU legislator had itself struck, in compliance with the Charter, a balance between the protection of those fundamental rights and the requirements of mutual recognition of judicial decisions, the application of a higher national level of protection was ruled out.

By contrast, in *M.A.S. and M.B.*, another VAT case, the Court of Justice recalled that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonization, it is for the Member States to adopt the limitation rules applicable to criminal proceedings relating to those cases. This means, in essence, that whilst a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that limitation rules form part of substantive criminal law. Where that is the case, the Court of Justice pointed out that such a Member State must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter which corresponds to Article 7(1) of the Convention.[46] Accordingly, even where the limitation rules at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules in so far as that obligation is incompatible with Article 49 of the Charter. That does not mean, however, that those limitation rules are left untouched to the detriment of the financial interests of the EU. In the light of the primacy, unity and effectiveness of EU law, it is, first and foremost, for the national legislator to amend those limitation rules so as to avoid impunity in a significant number of cases of serious VAT fraud.

[45] Judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, para. 50.
[46] Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, para. 55.

Accordingly, in my view, the judgment of the Court of Justice in *M.A.S. and M.B.* fits well with those in cases such as *Åkerberg Fransson*,[47] *F.*,[48] *Kolev and Others*,[49] and

[47] Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 29. In that case, the Court of Justice held that, in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. In taking that decision, the national legislator must comply with Article 50 of the Charter, which enshrines the principle of *ne bis in idem*. Accordingly, it is only where an administrative penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that the Charter precludes criminal proceedings in respect of the same acts from being brought against the same person. As to the primacy, unity and effectiveness of EU law, the option chosen by the national legislator had to provide for sanctions that protected the financial interests of the EU in an effective, dissuasive and proportionate fashion.

[48] Judgment of 30 May 2013, *F.*, C-168/13 PPU, EU:C:2013:358, para. 55. In that case which related to the European Arrest Warrant, the Court of Justice found that there was room for national diversity in the context of the speciality rule. According to that rule, before the issuing judicial authorities prosecute the person concerned for offences other than those for which he or she has been surrendered, they must obtain the consent of the executing judicial authority. Thus, in *F.*, the question was whether EU law prevented the person surrendered from bringing an appeal having suspensive effect against a decision taken by the executing judicial authority by which it gave its consent. In that regard, the Court of Justice found that the European Arrest Warrant Framework Decision, interpreted in the light of Article 47 of the Charter, neither imposed nor opposed such a right of appeal. It noted that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, 'affords an individual a right of access to a court but not to a number of levels of jurisdiction'. Thus, it was for the constitutional law of the executing Member State – and only for that law – to determine the existence or absence of such a right at national level. That said, if that right did exist, its exercise could not compromise the primacy, unity and effectiveness of EU law. For the case at hand, this meant that the exercise of that right of appeal could not have the effect of preventing the executing judicial authority from adopting a decision within the time-limits prescribed by EU law.

[49] Judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392. That case involved criminal proceedings brought against eight customs officers who were charged with having participated in a criminal undertaking for more than a year by demanding bribes from those crossing the border between Bulgaria and Turkey in order not to carry out customs inspections and not to document any irregularities identified. Under Bulgarian law, if the prosecutor did not bring to an end the pre-trial stage of criminal proceedings on the expiry of two years after the bringing of charges for serious offences, the accused could request a court to close the criminal proceedings. If that period had indeed expired, such a court would grant the prosecutor an additional period of 3.5 months during which he or she could bring the case for trial. Thereafter, the court was required to examine whether the prosecutor had infringed essential procedural requirements. In the affirmative, the prosecutor enjoyed an additional period of one month to cure those infringements (see *ibid*, para. 21). Thus, the referring court asked, in essence, whether the relevant EU law provisions that protect the financial interests of the EU (by means of ensuring the effective collection of custom duties) opposed such a procedure for terminating criminal proceedings. After noting that EU law does not contain rules on the termination of custom-related criminal proceedings, the Court of Justice ruled that the Member States 'must nonetheless ensure that cases of serious fraud or any other serious illegal activity affecting the financial interests of the Union in customs matters are punishable by criminal penalties that are effective and that act as a deterrent'. In that regard, the procedure at issue in the main proceedings affected those financial interests in so far as it was liable to impede the effectiveness of criminal prosecution and the punishment of acts that may be categorised as serious fraud or other serious illegal activity. In particular, the periods of 3.5 months and one month did not stop running in the event of the accused deploying delaying tactics. Whilst the national court had to give full effect to the relevant EU law provisions that protect the financial interests of the EU, it must do so in compliance with the Charter (*ibid*, para. 68), in particular in compliance with Article 48(2) thereof and with the right to be heard within a reasonable time. Most importantly for present purposes, where the national court enjoys, under national law, a number of approaches in order to give full effect to EU law, it may only choose those which provide effective judicial protection to the fundamental rights in questions. However, that does not mean choosing the option that brings about the most favorable outcome for the accused, but that that ensures compliance with the Charter whilst not compromising the primacy, unity and effectiveness of EU law (*ibid*., para. 75).

Dzivev,[50] where the EU legislator did not lay down a uniform level of fundamental rights protection.

III. The Horizontal Application of the Charter

It is true that, unlike the EU institutions, bodies, offices and agencies as well as the Member States but only when implementing EU law, private parties are not explicitly mentioned in Article 51(1) of the Charter amongst the Charter's addressees. That absence led some commentators to support the view that the Charter as a whole is unable to produce horizontal direct effect.[51]

However, in *AMS*,[52] the Court of Justice recognised, albeit implicitly, that some provisions of the Charter may produce horizontal direct effect. Indeed, instead of ruling out that the Charter as a whole may produce such effect, the Court of Justice went on to examine in detail whether a specific provision of the Charter – its Article 27 (Workers' right to information and consultation within the undertaking) – met the requirements to be directly applicable in disputes between private parties. Whilst Article 27 of the Charter did not meet those requirements, subsequent judgments have confirmed that other provisions of the Charter may do so.

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[50] Judgment of 17 January 2019, *Dzivev and Others*, C-310/16, EU:C:2019:30. In that case, a Bulgarian court that lacked jurisdiction ordered the interception of telecommunications of the applicants in the main proceedings on suspicion of having committed VAT fraud. The entire case rested on the taking of that evidence alone. However, under Bulgarian law, the referring court had no choice but to exclude that evidence from prosecution. Thus, the referring court asked, in essence, whether the relevant EU law provisions that protect the financial interests of the EU (by means of ensuring the effective collection of VAT) opposed such exclusion. At the outset, the Court of Justice found that rules of procedure for the taking of evidence and the use of that evidence in VAT-related criminal proceedings were not governed by EU law. That said, the autonomy enjoyed by the Member States in adopting those rules was circumscribed by the principles of effectiveness, equivalence and proportionality (*ibid*, para. 30). Referring to its previous ruling in *M.A.S. and M.B.*, the Court of Justice found that that autonomy was also circumscribed by the fundamental rights guaranteed by the Charter (*ibid*, para. 33). In particular, Articles 7 and 52(1) of the Charter require any limitation on the exercise of the right to private life to be provided for by law. This was not the case in the main proceedings, since the interception of telecommunications was ordered by a court that did not enjoy the necessary jurisdiction (*ibid*, para. 37). Thus, the Court of Justice found that EU law did not oppose the exclusion of such evidence.

[51] See, notably, Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, points 80 et seq. Cf. Opinion of Advocate General Cruz Villalón in *Association de médiation sociale*, C-176/12, EU:C:2013:491, points 28 et seq.

[52] Judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2.

In *Egenberger*, *IR*, *Bauer and Willmeroth*, *Max-Planck* and *Cresco Investigation*,[53] the Court of Justice held that a fundamental right enshrined in a provision of the Charter may produce horizontal direct effect, provided that such a Charter provision is sufficient in itself and does not need to be made more specific by other provisions of EU or national law to confer on individuals a right on which they may rely as such. Accordingly, such a right is unconditional and mandatory in nature, applying not only to the action of public authorities, but also in disputes between private parties.[54] To date, this is the case of Articles 21(1), 31(2) and 47 of the Charter (respectively, the right to non-discrimination, the right to paid annual leave and the right to effective judicial protection).

Moreover, in *Bauer and Willmeroth* and *Max-Planck* – two cases concerning the horizontal application of the right to paid annual leave enshrined in Article 31(2) of the Charter –, the Court of Justice explicitly stated that no conclusion may be drawn from the fact that Article 51(1) of the Charter does not mention individuals amongst its addressees. First, 'the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals'.[55] This is true if one looks at cases such as *Walrave and Koch*, *Defrenne* and *Angonese*.[56] Second, Article 51(1) of the Charter could not prevent the fact that some provisions of the Charter – such as Article 21(1) of the Charter – are sufficient in themselves to confer on individuals rights which they may rely on as such in a dispute with another individual.

[53] Judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 57; of 11 September 2018, *IR*, C-68/17, EU:C:2018:696; of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, and of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43.

[54] K. Lenaerts and J.A. Gutierrez-Fons, 'The European Court of Justice as the Guardian of the Rule of "EU Social law"' in F. Vandenbroucke, C. Barnard, and G. De Baere (eds), *A European Social Union after the Crisis* (Cambridge, CUP, 2017) 407, at 446 et seq.

[55] Judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, para. 87, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874.

[56] Judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140; of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, and of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296.

Third and last, the exercise of some fundamental rights entails, by the very nature of those rights, the imposition of obligations on other private individuals.[57]

Another element that is worth mentioning regarding the judgments of the Court of Justice in *Bauer and Willmeroth* and *Max-Planck* is that it is only the essence of Article 31(2) of the Charter that may produce horizontal direct effect. This is in sharp contrast with Articles 21(1) and 47 of the Charter that may, as a whole, produce such effect. Accordingly, it is only where a national measure does not respect the essence of the right to paid annual leave that Article 31(2) of the Charter may be relied upon in a dispute between private parties.[58]

Moreover, some commentators who opposed the horizontal application of the Charter have argued that the theory of 'positive obligations' put forward by the ECtHR would suffice to provide effective judicial protection to the fundamental rights recognised in the Charter.[59] Whilst the system of fundamental rights protection established by the ECHR does not cover violations committed by private parties as only States are parties to that Convention (pending accession of the EU), it does impose on the Contracting Parties a 'duty to protect' individuals against violations of ECHR rights committed by other individuals.[60] However, I respectfully disagree with those commentators. The reason is twofold.

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[57] Judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paras 87 to 90, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paras 76 to 79.

[58] K. Lenaerts, 'Limits on limitations: The essence of fundamental rights in the EU' (2019) *German Law Journal* (with editors). In the light of the judgments of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, one may argue that Article 31(2) of the Charter may be relied upon where a national measure compromises the essence of the right to paid annual leave by bringing about the loss of that right. Conversely, that is not the case in respect of non-essential elements of that right, such as the precise duration of annual leave and, where appropriate, certain conditions under which that right is to be exercised.

[59] See, notably, Opinion of Advocate General Trstenjak in *Dominguez*, C-282/10, EU:C:2011:559, points 84 to 87.

[60] In the context of employment law, see, e.g., ECtHR, judgment of 13 August 1981, *Young, James and Webster v. the United Kingdom*, CE:ECHR:1981:0813JUD000760176 (where the ECtHR held that the UK had the positive obligation to prevent an employer (British Rail) from lawfully dismissing three employees who had refused to join three trade unions with which such an employer had entered into an agreement stating that membership of one of those unions was a condition of employment. In so doing, the ECtHR pointed out that

First, the question of the horizontal application of fundamental rights is not a new one but is as old as the judgment of the Court of Justice in *Defrenne*.[61] In the light of that judgment and of those that relate to the horizontal application of the fundamental freedoms,[62] it is safe to say that the horizontal application of fundamental rights is firmly established in the case law of the Court of Justice.

Second, as I mentioned in January 2018 during my speech at the Opening of the ECtHR's Judicial Year, although both the ECHR and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way. Whilst the ECHR operates as an external check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an internal component of the rule of law within the EU.[63] As such, that system benefits from the special features of EU law that include the principle of primacy and, of course, the principle of direct effect. The differences between the system of fundamental rights protection established by the ECHR and that established by EU law can be seen in *XC and Others*.[64]

In that case, Austrian legislation provided for a judicial remedy that allowed for criminal proceedings closed by means of a final decision to be reheard in the event of a violation

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'there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control').

[61] Judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56.

[62] See, e.g., judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140, and of 6 June 2000, *Angonese*, C-281/98, EU:C:2000:296. It is worth noting that an unjustified restriction on a fundamental freedom may entail an unjustified limitation on the rights enshrined in Articles 15 to 17 of the Charter (respectively, the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business and the right to property). See, in this regard, judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:28, para. 60 (holding that 'an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary'). See also judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paras 102 and 103 (holding that 'a regime […] such as the regime established by the legislation at issue in the main proceedings […] infringes Article 49 TFEU. On identical grounds, such legislation also fails to comply with the principle of proportionality laid down in Article 52(1) of the Charter and, therefore, with Article 16 thereof').

[63] K. Lenaerts, 'The ECtHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection', speech delivered on the occasion of the Opening of the Judicial Year at the ECtHR, 26 January 2018, Strasbourg. An article based on that speech was published in (2018) *Il Diritto dell'Unione Europea* 9.

[64] Judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853,

of the ECHR. That remedy was applicable where the ECtHR had issued a ruling finding that Austria had committed such a violation. In addition, the same applied where it was the Austrian Supreme Court itself that made that finding, provided that the conditions of admissibility set out in the ECHR were met, notably that concerning the exhaustion of domestic remedies.[65] However, the judicial remedy at issue did not apply where the final decision was adopted in breach of EU law, and in particular of the Charter. Thus, the question that arose was whether, in order for that remedy to comply with the principles of equivalence and effectiveness, its scope had to be expanded so as to include infringements of EU law.

As to the principle of equivalence, the Court of Justice examined whether the judicial remedy at issue was, in the light of its purpose and cause of action, similar to those that seek to safeguard the rights that EU law confers on individuals.[66]

On the one hand, the Court of Justice described the main features of the remedy at issue in the main proceedings. It pointed out that that remedy was functionally linked to proceedings before the ECtHR.[67] It sought to implement the rulings of the ECtHR in the Austrian legal order. In addition, it aimed to anticipate situations where the ECtHR would find that Austria had breached the ECHR. That was the reason why reliance on the remedy at issue was made conditional upon complying with the admissibility requirements set out in the ECHR.[68]

On the other hand, the Court of Justice provided an overview of the constitutional framework within which judicial remedies that seek to protect EU rights operate. First, by virtue of the principles of primacy and direct effect, national measures that are incompatible with directly effective rights recognised in the Charter cannot form part of

[65] See Article 35 ECHR.
[66] Judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, para. 27.
[67] *Ibid*., para. 31.
[68] *Ibid*., para. 34.

the EU legal order.[69] Second, the EU system of judicial protection entrusts national courts with responsibility for protecting effectively the rights that EU law confers on individuals. To that end, those courts may and, where appropriate, must engage in a dialogue with the Court of Justice, by means of the preliminary reference mechanism.[70] That mechanism has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties. Third and most importantly for present purposes, national courts called upon to apply provisions of EU law are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means.[71]

Accordingly, the Court of Justice reached the conclusion that the remedy in question and those that seek to protect the rights that EU law confers on individuals were not similar, given that the EU 'constitutional framework guarantees everyone the opportunity to obtain the effective protection of rights conferred by the EU legal order even before there is a national decision with the force of res judicata'.[72]

As to the principle of effectiveness, the Court of Justice recalled its previous case law on the principle of *res judicata*. In that regard, it held that EU law does not require a national court automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court of Justice after delivery of that judgment. Given that no element of the file called into question the effective protection of the rights of the applicants in the main proceedings, the Court ruled that the principle of effectiveness did not preclude a limitation of the scope of the remedy at issue to a violation of the ECHR. In any event, the Court of Justice added that, where a final decision is adopted in breach of EU law,

[69] *Ibid*., para. 37.
[70] *Ibid*., paras 40 and 41.
[71] *Ibid*., para. 44.
[72] *Ibid*., para. 46.

applicants can still seek damages against the defaulting Member State in accordance with the *Köbler* line of case law.[73]

IV. Concluding remarks

In retrospect, the entry into force of the Charter is one of the most important achievements in the history of European integration. It shows that the European integration project is more than its internal market. The EU is, first and foremost, a union of democracies, a union of justice and a union of rights, which draws on the constitutional traditions common to the Member States.

In my view, gone are the days where academic debates revolve around the question whether fundamental rights are taken seriously at EU level. Fundamental rights are part and parcel of the rule of law within the EU that the Court of Justice is firmly committed to upholding.

It is true that prior to 1st December 2009, fundamental rights in the EU were protected as general principles of EU law. However, the Charter has given more visibility to those rights. The Charter has facilitated national courts across Europe becoming acquainted with the protection of fundamental rights at EU level.

In concrete terms, the fact that national courts have become familiar with the Charter has brought about an increasing number of references in which those courts asked, either explicitly or implicitly, the Court of Justice to interpret the Charter. A search of the Court of Justice's internal database reveals that in 2018 that Court decided 684 (760) cases, of which 112 contained the expression 'the Charter' in the part of the decision where the

[73] *Ibid*., paras 54, 55 and 58. See also judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565.

Court put forward its reasoning (≈ 16%).[74] This quantitative change means that the legal discourse of the Court has changed qualitatively. Fundamental rights occupy centre stage in the judicial dialogue between the Court of Justice and national courts.

More than ever before, national courts, the ECtHR and the Court of Justice must work together in order to ensure that the plurality of sources that protect fundamental rights operates to the benefit of individuals. In my view, that requires some sense of order that creates synergies. However, those synergies may only take place where courts respect each other and are willing to influence and be influenced by the legal orders that surround them.

In the light of the uncertain times in which we live, courts should not insulate themselves from external influences. In my view, the fact of allowing the free movement of constitutional ideas across borders contributes to improving the protection of fundamental rights. That is so, be it at national, supranational or international levels.

Thank you very much for your attention.

[74] Of those 112, 65 were decisions adopted in the context of the preliminary references procedure. Also, in 2018, 30 decisions mentioned the Charter in their dispositive part.