REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 13, NR. 4, 53-85, PARIS LEGAL PUBLISHERS © 2020

Article 51 of the EU Charter of Fundamental Rights from the Perspective of the National Judge

Petr Mádr*

Joint PhD Candidate, Charles University, Faculty of Law; Université Paris 2 Panthéon-Assas

Abstract

This article contributes to the growing scholarship on the national application of the EU Charter of Fundamental Rights ('the Charter') by assessing what challenges national courts face when dealing with Article 51 of the Charter, which sets out the Charter's material scope of application. In keeping with this aim, the relevant case law of the Court of Justice of the EU (CJEU) – with its general formulas, abstract guidance and implementation categories – is discussed strictly from the perspective of the national judge. The article then presents the findings of a thorough study of the case law of the Czech Supreme Administrative Court (SAC) and evaluates this Court's track record when assessing the Charter's applicability. National empirical data of that kind can provide valuable input into the CJEU-centred academic debate on the Charter's scope of application.

1. Introduction

The essence of national courts' obligation to give effect to the Charter of Fundamental Rights of the European Union ('the Charter') is captured in Article 51 of the Charter. Read as a whole, this provision contains a hypothesis (when Member States are *implementing* Union law and only then) and a disposition (they shall 'respect the rights, observe the principles and promote the application thereof'). From the constitutional viewpoint, the hypothesis of Article 51 reflects the EU's lack of general fundamental rights competence and the corresponding limited scope of EU fundamental rights law. From the viewpoint of a national judge, Article 51 is the principal point of reference for ascertaining if the Charter is applicable in a case before them. The second point of reference are the Explanations to Article 51, which summarise the case law of the Court of Justice of the EU (CJEU or 'the Court') as to when EU fundamental rights

* DOI 10.7590/187479820X16098444161677 1874-7981 2020 Review of European Administrative Law
The research was supported by the Charles University, Project GA UK No 540219, conducted at the Faculty of Law, Charles University. Thanks are due to Professor Richard Král, the two anonymous reviewers, and Rosemary McCabe for helpful suggestions on earlier drafts of this article.

apply to Member States.[1] It is clear from the CJEU's post-Charter judgments that Article 51 brings no change to that case law. It is equally clear, however, that the conditions of the Charter's national applicability resist attempts to encapsulate them in abstract formulas and straightforward tests.[2] The term *implementation* is in fact a shorthand for a long line of case law spanning decades, and laments about its uncertainties have been voiced for much of that time.[3]

Where does this leave national judges, who are meant to give effect to the Charter as a matter of judicial routine in fulfilment of their EU-law mandate? A common claim is that the uncertainty about the Charter's scope is the principal factor that inhibits national judges from engaging with the Charter, which can have a negative effect on the fundamental rights protection of individuals.[4] There is more at stake than individual interests, however: the rules laid down in this provision, together with those of Article 53 of the Charter on the level of protection, are at the core of the relationship between EU law and Member States' constitutional law. Whenever national courts deal with Article 51 of the Charter and give effect (or not) to the Charter in concrete cases, they participate in coordinating different systems of fundamental rights protection and – by extension – in fleshing out the exact contours of the EU fundamental rights sphere.

Even if these constitutional aspects of Article 51 have overshadowed the day-to-day reality of the Charter's role in proceedings before national courts, there is a growing scholarship on the national application of the Charter.[5] In an effort to contribute to that scholarship, the contents of the ensuing analysis are dictated by national judges' perspective. I will concentrate on the current state of the law, for the practical purposes of determining whether or not a particular dispute before a national court falls within the scope of EU law. This will be done first

---

1 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17. Despite the Explanations' self-avowed lack of legal status (see their introductory paragraph), the CJEU and national courts are under an obligation to give them 'due regard': see Consolidated Version of the Treaty on European Union [2016] OJ C202/15 [Treaty on European Union], art 6(1) and Charter of Fundamental Rights of the European Union [2016] OJ C202/389 [Charter], art 52(7).

2 In an Opinion issued in September 2017, Advocate General (AG) Bobek devoted a significant part of his analysis to the issue of the Charter's applicability, admitting he could not find a clear test in the case law: Case C-298/16 *Ispas* EU:C:2017:650, Opinion of AG Bobek, see text accompanying footnotes 28-29 infra.

3 Temple Lang called for more clarity on this issue as early as in 1991: see J Temple Lang, 'The Sphere in Which Member States Are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles' (1991) 18(2) Legal Issues of European Integration 23, 34.

4 F Fontanelli, 'Implementation of EU law through domestic measures after Fransson: The Court of Justice buys time and "non-preclusion" troubles loom large' (2014) 39(5) European Law Review 682, 682-683.

5 L Burgorgue-Larsen (ed), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of Fundamental Rights as apprehended by judges in Europe* (Pedone 2017) and J Mazák et al, *The Charter of Fundamental Rights of the European Union in Proceedings before Courts of the Slovak Republic* (Pavol Jozef Šafárik University 2016).

with reference to the CJEU's basic formulas and general guidance (Section 2), then by assembling a typology of situations in which the Charter applies (Section 3). In this way, I will be able to assess what challenges national courts generally face when called to apply Article 51 of the Charter (Section 4). After establishing the criteria for evaluating national courts' performance in confronting those challenges (Section 5), I will shift the focus to the Czech Supreme Administrative Court and analyse its case law (Section 6). As opposed to merely highlighting one or two court decisions to illustrate how strikingly well or poorly a certain national court dealt with the applicability question in a given case, the idea is to examine the case law of a single national court in detail. Only then can the national data provide valuable input into the CJEU-centred academic debate on the Charter's scope of application.

2. Basic Formulas, General Guidance, and the Search for a Workable Test

It is the CJEU's judgment in *Fransson* that is cited as the leading reference, both by the doctrine and the Court itself in subsequent case law.[6] In its judgment, the Court provided what it described as a *definition* of the field of application of EU fundamental rights.[7] I will cite the relevant passage in full, as it contains the Court's basic formulas on the material scope of the Charter, as well as demonstrating the kind of terminological plurality that permeates the Court's case law:

The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, *but not outside such situations*.[8]

After references to previous cases and to the Explanations to the Charter, the CJEU continued:

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law *entails applicability of the fundamental rights guaranteed by the Charter.*

6 Case C-617/10 *Fransson* EU:C:2013:105.
7 ibid, para 20. Importantly, as confirmed in *Fransson*, the scope of application of the Charter and of the general principles is the same.
8 ibid, para 19 (emphasis added).

Where, on the other hand, a legal situation does not come within the scope of European Union law, *the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (…).*[9]

Far from providing an exact definition of the Charter's scope of application, the Court set out the tenets of its long-established case law on the scope of EU fundamental rights. It follows from the Court's reasoning that 'a situation governed by EU law', 'a situation within the scope of EU law' and 'a situation to which EU law is applicable' all denote the same concept of EU law: the same autonomous concept which is condensed into the term *implementation* – and its equivalents in other language versions – of Article 51. The term *implementation* had been traditionally used with a stricter meaning to denote cases when Member States act as agents of the EU and adopt measures to comply with EU legislation (the so-called *Wachauf*-scenario), as opposed to cases when Member States act in derogation of EU law (the *ERT*-scenario).[10] For this reason, some had considered that the wording of Article 51 was more restrictive than previous CJEU case law.[11] In constructing the basic formulas, the *Fransson* judgment put to rest this much-discussed question in favour of the broader view.

We could rephrase the general statement that the applicability of EU law entails applicability of the Charter in more vivid terms: if there is at least one rule of EU law other than the Charter that is applicable to a legal situation (i.e. the triggering rule), the Charter is also applicable to that situation.[12] In other – even more vivid – terms, the Charter is the 'shadow' of EU law.[13] Expressed negatively in another of the Court's by now well-established formulas, the Charter is *not* applicable when 'the objective of the [national proceedings] does not concern the interpretation or application of a rule of Union law other than those set out in the Charter'.[14] Hence, the identification of – or the search for –

---

9 ibid, paras 21-22 (emphasis added).

10 See the discussion in Section 3 infra.

11 For the doctrinal debate on Article 51 prior to *Fransson*, see eg V Kronenberger, 'Quand "mise en œuvre" rime avec "champ d'application": la Cour précise les situations qui relèvent de la Charte des droits fondamentaux de l'Union européenne dans le contexte de l'application du *ne bis in idem*' (2013) 84(1) Revue des affaires européennes 147.

12 See eg A Rosas, 'Five Years of Charter Case Law: Some Observations' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 17.

13 K Lenaerts and JA Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1568.

14 Case C-265/13 *Torralbo Marcos* EU:C:2014:187, para 33. See also S Platon, 'Applicabilité et inapplicabilité de la Charte des droits fondamentaux aux Etats: La ligne jurisprudentielle sinueuse de la Cour' (*Journal d'Actualité des Droits Européens*, 7 May 2014) <http://revue-jade.eu/article/view/596> accessed 27 April 2020.

the triggering rule susceptible of activating the Charter's provisions becomes the main focus.

Taken in isolation, the Court's basic formulas can be of use for a national judge when he or she has no doubt about the case falling within or outside the scope of EU law. In these cases, a simple reference to one of the formulas can be sufficient to deal with the Charter's applicability or non-applicability quickly;[15] after all, the CJEU itself uses this approach.[16] At the same time, however, exclusive reliance on the formulas carries some risks. As we saw in preceding paragraphs, the wording of the formulas might itself lead judges to interpret the scope of EU law too narrowly. Equally, since no area of national law is ever completely immune from the influence of EU law – and there will often be a norm of EU law more or less related to the case before the national judge – there is a danger of false positives at odds with the limits set by Article 51 of the Charter. Therefore, whilst constituting a useful shorthand, the basic formulas cannot, due to their abstract nature, capture the scope of EU law in all its variety.

In practice, the issue turns on the degree of connection between the triggering norm and the case before the national judge, or – from a slightly different but essentially equivalent perspective – between the triggering norm and the norms of national law that govern the case before the national judge. How 'EU-heavy' must the case be to come within the scope of the Charter?[17]

There is some further general guidance in the case law of the CJEU designed to provide answers to that question. First and foremost, the triggering norm must impose an *obligation* on Member States with regard to the matter before the national judge.[18] In principle, such an obligation is capable of triggering the applicability of the Charter ever since the entry into force of the EU-law provision containing it.[19] Moreover, it is immaterial if Member States have

---

15 De Witte observed that the *Fransson* formula 'is adequate for excluding the application of the Charter in cases where national laws have really no connection with EU law obligations': B de Witte, 'The scope of application of the EU Charter of Fundamental Rights' in M Gonzáles Pascual and A Torres Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 32-33.

16 Fontanelli (n 4) 694, in reference to Case C-390/12 *Pfleger and Others* EU:C:2014:281.

17 Expression borrowed from A Ward, 'Article 51' in Peers et al (eds) (n 13) 1452.

18 Case C-206/13 *Siragusa* EU:C:2014:126, para 26; Case C-177/17 *Demarchi Gino* EU:C:2017:656, para 25. The concept of obligation is emphasised in the doctrine: see eg Lenaerts and Gutiérrez-Fons (n 13) 1566 and Kronenberger (n 11) 153. cf F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) 20(3) Columbian Journal of European Law 193, 210, who argues that a test based on the obligation requirement is incomplete.

19 In the case of EU directives, the situation is slightly more complex: see B Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3(1) European Papers 133 <www.europeanpapers.eu/sites/default/files/EP_eJ_2018_1.pdf> accessed 3 May 2020, 151-152.

discretion in executing that obligation.[20] The Court further recognised that 'a certain degree of connection' to the matter is required 'above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[21] The Court also indicated that a look at EU competences is not conclusive: 'the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable'.[22] On the other hand, the mere fact that a national measure was not explicitly enacted with a view to implementing a specific EU-law obligation does not automatically render the Charter inapplicable: no intention to implement is required.[23] In a handful of cases, the Court laid down some criteria to be taken into account, namely:

among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.[24]

A number of scholars have, however, identified various problems with these criteria, which limit their practical usefulness.[25] In any case, the criteria can only be indicative, not definitive.[26] A recent attempt to operationalise the degree-of-connection requirement was made by Advocate General Bobek. In his view, the necessary degree of connection is present whenever a national measure is 'instrumental to the effective realisation of an EU law-based obligation on the

---

20 For various types of discretion, see T Lock, 'Åkerberg Fransson and its progeny' (2018) University of Edinburgh School of Law Research Paper 2018/23 <http://ssrn.com/abstract=3192803> accessed 27 April 2020.

21 Case C-206/13 *Siragusa* EU:C:2014:126, para 24.

22 Case C-198/13 *Julian Hernández and Others* EU:C:2014:2055, para 36. This also works the other way round: the absence of EU legislative competence does not in itself prevent the Charter from being applicable.

23 F Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (2013) 9(2) European Constitutional Law Review 315 (note), 315. Consequently, a Member State is implementing EU law even when it is not actively doing anything: see C Nivard, 'Les conditions d'application de la Charte des droits fondamentaux' in A Biad and V Parisot (eds), *La Charte des droits fondamentaux de l'Union européenne: Bilan d'application* (Anthemis 2018) 41. See also Case C-682/15 *Berlioz Investment Fund* EU:C:2017:2, Opinion of AG Wathelet, para 44.

24 Case C-40/11 *Iida* EU:C:2012:691, para 79, citing Case C-309/96 *Annibaldi* EU:C:1997:631, paras 21-23. See also Case C-206/13 *Siragusa* EU:C:2014:126, para 25. The CJEU mainly uses them as exclusionary criteria, i.e. to show that a certain situation is not sufficiently connected to an EU-law obligation.

25 For a comprehensive critique, see M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union law" ' (2015) 52(5) Common Market Law Review 1201, 1230-1235.

26 See Case C-298/16 *Ispas* EU:C:2017:650, Opinion of AG Bobek, para 47.

national level [...] *unless* the adoption and operation of that national rule is not reasonably necessary in order to enforce the relevant EU law'.[27]

Whether or not the CJEU adds this brand new formula to its repertoire, we can conclude as follows: while the CJEU's general guidance usefully complements the Court's basic formulas and brings some clarifications for national judges, it does not constitute a complete analytical framework. It is not possible for national judges to decide, on the sole basis of the general guidance, whether the Charter is applicable in every conceivable case and with absolute certainty. After all, the criteria demonstrate that the approach is contextual and quite a lot of 'contexts' are to be considered, countering the possibility of assembling a definitive clear-cut test.

This absence of a workable and clear-cut test, based on a legitimate rationale, that would demarcate the scope of EU law has been much criticised by some scholars.[28] Others have emphasised the conceptual difficulty inherent in creating such a test: clear-cut tests can only work in clear-cut cases, and the scope of EU law is simply too complex.[29] It is one thing to demand that the CJEU's general guidance be logically consistent and theoretically solid. It is another thing to demand the CJEU to create a perfect one-size-fits-all test that would be neither underinclusive nor sweeping. Here is not the place to enter this debate. It suffices to say, from our perspective, that the criteria must be workable; they must be such that national courts can apply them with ease. With that aim in mind, it is hard to imagine, for example, how national courts could successfully apply a teleological criterion of the kind suggested by Advocate General Cruz Villalón in *Fransson*. In his Opinion, he proposed that EU fundamental rights apply only in presence of 'a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union'.[30] Can national courts be required to assess the EU's specific interest in each and every case before them? Equally impractical – but also problematic as a matter of principle – would be a teleological criterion which the CJEU alluded to in *Siragusa*. In its judgment, the CJEU seemed to be saying that EU fundamental rights apply whenever there is a risk of varying level of protection in Member States that undermines the unity, primacy and ef-

27 ibid, para 56. Bobek calls this a 'rule of (reasonably foreseeable) functional necessity'.

28 See eg Lock (n 20) 6 and E Dubout, 'Le défi de la délimitation du champ de la protection des droits fondamentaux par la Cour de justice de l'Union européenne' (2013) 6(1) European Journal of Legal Studies 3.

29 See eg B van Bockel and P Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson' (2013) 38(6) European Law Review 866, 873 and A Rosas, ' "Implementing" EU Law in the Member States: Some Observations on the Applicability of the Charter of Fundamental Rights' in L Weitzel (ed), *L'Europe des droits fondamentaux: mélanges en hommage à Albert Weitzel* (Pedone 2013) 200.

30 Case C-617/10 *Fransson* EU:C:2012:340, Opinion of AG Cruz Villalón, paras 40-41.

fectiveness of EU law.[31] If this was to become the main criterion for determining the applicability of the Charter, national courts would struggle as a result of not being equipped to perform such analysis. It is essential to bear in mind that the primary addressees of Article 51 are national bodies, not the EU institutions.

A very helpful supplement to basic formulas and abstract guidance is a list of all the types of situations that the Court identified as falling within the scope of the Charter. It is tempting to try to define the Charter's scope not by devising general formulas and abstract guidance, but by enumerating the individual scenarios when the Charter applies. At this point in time, however, there is no hope for there to be a true enumerative definition, since such a definition must – by definition – contain a complete set of items. The case law of the CJEU has simply not stabilised itself.[32] There is, nevertheless, no shortage of scholarly attempts to categorise the various scenarios in which the Charter is applicable. As we will see below, this approach is far from being trouble-free, but it is likely to be more useful for national judges – just because it operates at a lower level of abstraction. In any case, the Fransson formula needs to be read together with the casuistic case law pre- and post-*Fransson* on which the scholarly categorisations are based.

3. Typology of Situations: Something Cloudy, Something Clear

Traditionally, the discussion is framed with reference to two categories of cases: when national legal acts execute, directly apply or implement EU-law obligations (originally identified in the *Wachauf* case, but since extended to other situations by case law);[33] and when national legal acts derogate from

---

31 Case C-206/13 *Siragusa* EU:C:2014:126, para 32. See also Case C-198/13 *Julian Hernández and Others* EU:C:2014:2055, para 47. This criterion was formulated in Case C-399/11 *Melloni* EU:C:2013:107, as part of the analysis under Article 53 of the Charter. For a discussion of the use of this criterion for the purposes of Article 51(1), see C Rizcallah, 'La protection des droits fondamentaux dans l'Union européenne: L'immuable poids des origines? Examen critique de l'existence et du fonctionnement d'un critère téléologique dans la détermination de l'applicabilité de la protection européenne des droits fondamentaux' (2015) 2/3 Cahiers de droit européen 399. On the relationship between the principle of effectiveness and the scope of application of EU law, see E Dubout, 'Être ou ne pas être (du droit)? Effectivité et champ d'application du droit de l'Union européenne' in A Bouveresse and D Ritleng (eds), *L'effectivité du droit de l'Union européenne* (Bruylant 2018) 98-108.

32 cf Pirker (n 19), who attempts to create an exhaustive typology by identifying clusters of typical situations.

33 Case 5/88 *Wachauf* EU:C:1989:321, and cases cited in footnotes 43-55 infra.

EU-law obligations (originally identified in the *ERT* case in the context of free movement provisions, but since extended to other derogations)[34].

Under the ERT category, the Charter applies if a national legal act 'makes use of the derogations or justifications to restrictions allowed by EU law'.[35] Although there are scholars who criticise its conceptual basis,[36] this category is now a standard part of most typologies, and its interpretation is well-established in case law. The real difficulty here is not Charter-specific but relates to ascertaining the scope of the triggering norm itself, particularly when the latter is a highly abstract and open-ended market freedom provision. Consider Article 56 of the Treaty on the Functioning of the European Union (TFEU), which applies to any, even non-discriminatory, Member State measure that is liable to impede or render less advantageous the exercise of the free movement of services.[37] Member States can lawfully maintain such a measure only if they can rely on one of the Treaty derogations or mandatory requirements. However, in doing so, Member States cannot infringe fundamental rights of service providers or recipients. In ERT-type cases, therefore, virtually any national norm in any area of law – even an area in which Member States have fully retained their competences[38] – can potentially be brought into the scope of the Charter if it constitutes an obstacle to free movement. The scope of application of the Charter thus suffers from the uncertainties regarding the scope of application of free movement provisions.[39] Therefore, in these cases national judges need to be familiar with the intricacies of the case law on free movement before they can correctly deal with the Charter-based claim.

More problematic from a conceptual point of view is the Wachauf category, and this is also where typologies proposed by scholars diverge.[40] In any case,

---

34 Case C-260/89 *ERT* EU:C:1991:254, para 43; confirmed post-*Fransson* in Case C-390/12 *Pfleger and Others* EU:C:2014:281, para 35 and Case C-98/14 *Berlington Hungary and Others* EU:C:2015:386, para 74.

35 Case C-298/16 *Ispas* EU:C:2017:650, Opinion of AG Bobek, para 32.

36 For a review of the debate, see AP van der Mei, 'The Scope of Application of the EU Charter of Fundamental Rights: "*ERT* Implementation"' (2015) 22(3) Maastricht Journal of European and Comparative Law 432 (note) and J Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' (2015) 21(2) European Public Law 285.

37 See eg Case C-58/98 *Corsten* EU:C:2000:527, para 33.

38 For an impressive list of such areas with references to case law, see N Cariat and P Dermine, 'La détermination de l'applicabilité du droit de l'Union européenne à une situation particulière' in N Cariat and JT Nowak (eds), *Le droit de l'Union européenne et le juge belge* (Bruylant 2015) 109-110.

39 See F Fontanelli and A Arena, 'The Charter of Fundamental Rights and the Reach of Free Movement Law' in M Andenas, T Bekkedal and L Pantaleo (eds), *The Reach of Free Movement* (T.M.C. Asser Press 2017) 293-312.

40 For some of the categorisations, see X Groussot, L Pech and GT Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 113; Nivard (n 23) 45-55; E Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50(5) Common Market Law Review 1411 (note),1418-1421; M de Mol, 'Article 51 of the Charter in the Legislative Processes of the Member States' (2016) 23(4) Maastricht Journal of European and Comparative Law 640; A Bailleux and E Bri-

if the traditional dichotomy of implementation–derogation is to be preserved,[41] the concept of 'implementation' needs to be – sometimes rather artificially – extended in order to accommodate all the diverse situations in which the Charter was held to be applicable by the CJEU. Within the Wachauf category, it is much more useful to provide a list of the most typical situations in which the Charter was held applicable, even if those situations may conceptually overlap and may be grouped or divided into different categories on the basis of different criteria.

Thus, the Charter is applicable whenever the national judge:[42]

1. applies a norm of EU primary law;[43]
2. applies a norm of EU secondary law, typically a regulation;[44]
3. applies a national norm expressly intended to implement an EU-law obligation (transpose a directive,[45] transpose a framework decision,[46] implement a regulation,[47] a Treaty provision,[48] an external agreement,[49] or a memorandum of understanding between the EU and a Member State[50]);
4. applies a national norm which was not expressly intended to implement a norm of EU law, but objectively 'serves to implement' an EU-law obligation.[51] This includes cases when the national judge:
   a. applies a concept of national law referred to in a norm of EU law and does so within an EU normative scheme (i.e. in connection with applying a norm of EU law or a national norm intended to implement a norm of EU law);[52]

---

bosia, 'La Charte des droits fondamentaux de l'Union européenne' in S van Drooghenbroeck and P Wautelet (eds), *Droits fondamentaux en mouvement: Questions choisies d'actualité* (Anthemis 2012) 108-114 and 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(5) Common Market Law Review 1267, 1279-1287.

41 For example, de Mol (n 40) 648, insists on only two categories, while others propose more: see eg Case C-427/06 *Bartsch* EU:C:2008:297, Opinion of AG Sharpston, para 69.

42 The typology is based on C Gauthier, S Platon and D Szymczak, *Droit européen des droits de l'Homme* (Sirey-Dalloz 2016) para 146; Nivard (n 23) 45; Bailleux and Bribosia (n 40) 108-114 and Groussot, Pech and Petursson (n 40) 113.

43 Case C-74/14 *Eturas and Others* EU:C:2016:42, para 38.

44 Case C-559/14 *Meroni* EU:C:2016:349, para 44.

45 Case C-176/12 *Association de médiation sociale* EU:C:2014:2, paras 42-43 and Case C-314/12 *UPC Telekabel Wien* EU:C:2014:192, para 46.

46 Case C-168/13 PPU *Jeremy F* EU:C:2013:358, paras 40-41 and Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, para 84.

47 Case C-292/97 *Karlsson and Others* EU:C:2000:202, para 37.

48 Case C-300/04 *Eman and Sevinger* EU:C:2006:545, paras 56-61.

49 Case C-7/98 *Krombach* EU:C:2000:164. cf Case C-370/12 *Pringle* EU:C:2012:756.

50 Case C-258/14 *Florescu* EU:C:2017:448, para 48.

51 Case C-489/10 *Bonda* EU:C:2011:845, Opinion of AG Kokott, para 20 and Nivard (n 23) 46.

52 Case C-401/11 *Soukupová* EU:C:2013:223, paras 25-28. This category does not include cases where 'EU law fully defers a preliminary decision to national law': Pirker (n 19) 148, referring to Case C-400/10 PPU *McB* EU:C:2010:582, para 42.

   b. applies a norm of national law that serves to guarantee execution of an EU obligation or to sanction its non-execution;[53]
   c. applies a general norm of national law which provides remedies or establishes procedures and does so in relation to a claim based on EU law;[54]
   d. applies a national norm which falls within the exact scope of a norm of EU law;[55]
5. applies a national norm that constitutes a derogation or justification to restrictions allowed by EU law (*ERT*).[56]

These situations are not characterised by the same level of comprehensibility and clarity. While in some of these scenarios, like the direct application of an EU-law norm (Categories 1 and 2), the applicability of the Charter is rather obvious and clearly defined, in other scenarios it can be rather vague and controversial. The latter is most palpable regarding Category 4(d), which dates to the landmark *Kücükdeveci* case. The case concerned a provision of the German Civil Code which fixes different notice periods for dismissal of an employee depending on the length of employment; in calculating that length, periods prior to the completion of the employee's 25th year of age are not considered.[57] According to the CJEU, this provision falls within the scope of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.[58] When the period for its transposition ended, that Directive had the effect of bringing within the scope of EU law the Civil Code provision, 'which *concerns a matter governed by that directive*, in this case the conditions of dismissal'.[59] The uncertainty relates to the extent to which a mere overlap of subject matter between national rules and EU rules is sufficient to trigger the applicability of the Charter.[60] Contrary to fears expressed at the time of that decision, however, the solution reached in *Kücükdeveci* does not mean that the Charter applies 'whenever the exercise of [Member States'] own regulatory competences happens

53 Case C-617/10 *Fransson* EU:C:2013:105, para 27 and Case C-405/10 *Criminal proceedings against Özlem Garenfeld* EU:C:2011:722, para 48.
54 Case C-279/09 *DEB* EU:C:2010:811, paras 28-30 and Case C-349/07 *Sopropé* EU:C:2008:746, paras 33-37.
55 Case C-555/07 *Kücükdeveci* EU:C:2010:21, paras 23-27. See also Case C-81/05 *Anacleto Cordero Alonso* EU:C:2006:529, where the Court held that national provisions which were adopted before the entry into force of an EU directive, but are capable of ensuring that national law is consistent with that directive, come within the scope of the directive.
56 Case C-260/89 *ERT* EU:C:1991:254, para 43.
57 Case C-555/07 *Kücükdeveci* EU:C:2010:21, para 11.
58 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16 [Directive 2000/78/EC].
59 Case C-555/07 *Kücükdeveci* EU:C:2010:21, para 25 (emphasis added).
60 T Lock, 'Article 51 CFR' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A commentary* (Oxford University Press 2019) 2246.

to *touch upon a matter* also subject to some form of legislative intervention by the Union itself'.[61] Directive 2000/78 contains a specific prohibition of discrimination on the basis of age in a concretely specified area of 'employment and working conditions, including dismissals and pay'.[62] In *Kücükdeveci*, therefore, the connection between the Directive and the disputed provision clearly went above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

Some further conditions need to be added to the categories above. In cases of direct application (Categories 1 and 2), the EU-law norm in question must be truly applicable *ratione personae*, *ratione materiae* and *ratione temporis* in the case before the national judge.[63] The same goes for the cases of express implementation of EU law (Category 3): not all norms that are part of a national implementation measure always constitute measures truly required by an EU-law obligation. For example, insofar as a national measure transposing a directive on the labelling, presentation and advertising of foodstuffs contains provisions on the *sale* of foodstuffs – which is not governed by that directive – it does not constitute a transposition measure.[64] In other words, the national norm expressly intended to implement an EU-law obligation must also objectively 'serve to implement' that obligation in order for the Charter to be applicable. In cases grouped into Category 3 and 4, therefore, there always needs to be a sufficient degree of connection between the national norm and a specific EU-law obligation, as explained above. Ultimately, the typology of situations is not to be disconnected from the Court's basic formulas and general guidance, with the key criterion being the 'sufficient degree of connection'.

4. A Thought for National Judges

Throughout this article, I have hinted at many practical difficulties involved in determining the scope of application of the Charter. To make sense of the CJEU's basic formulas and general guidance, national courts need to read them together with the Court's case law, which has grown increasingly complex. There are two principal factors which have been fuelling this complexity.

---

61 Editorial Comments, 'Scope of Application of the General Principles of Union Law: An Ever Expanding Union' (2010) 47(6) *Common Market Law Review* 1589, 1594 (emphasis added).

62 Directive 2000/78/EC, article 3(1)(c).

63 Importantly, if the referring court does not justify the applicability of the triggering norm, the CJEU can refuse to rule on the applicability of the Charter for lack of relevant facts: see eg Case C-23/12 *Zakaria* EU:C:2013:24, para 39.

64 Case C-144/95 *Maurin* EU:C:1996:235, paras 11-12.

The first one stems from the character of EU law and its national implementation as such: EU law covers vast and diverse areas of regulation; it is dependent on a decentralised system of enforcement in Member States; and its relationship with national law is highly nuanced, depending on the area in question. As discussed above, the Charter applies whenever a triggering norm of EU law is applicable – that is, whenever a Member State measure enters into a framework or normative scheme laid down by EU law. However, the boundaries of some EU-law normative schemes are notoriously difficult to draw. That difficulty is particularly acute where such a normative scheme interacts with discretionary choices of Member States: for instance, does the Charter apply to more stringent national measures that go beyond the minimum standards prescribed by the EU legal act in question?[65]

In broader terms, the *functional* logic of the Charter's scope of application – as opposed to purely formal and technical logic associated with intentional implementation of EU law – will sometimes be far removed from the daily reality of national courts.[66] A good understanding of structural principles of Union law (like the principle of effectiveness or decentralised enforcement) is required, together with a knowledge of mechanisms governing the coexistence of Union law and national law (like the concept of minimum harmonisation or Member State discretion). For all these reasons, the 'curse of legal uncertainty' over the Charter's scope is – in part – due to the fundamental characteristics of EU law as a supranational legal order operating within the limits of the powers conferred on the EU.[67] Therefore, the Charter's impact on national judicial decision-making will ultimately depend on the extent to which national judges are ready and willing to assume their role as Union judges. However, it will

---

65 After a long period of uncertainty, the CJEU answered this question in a recent judgment in Case C-609/17 *TSN and AKT*, EU:C:2019:981. While Advocate General Bot argued in his Opinion that the Charter applies to more favourable national measures exceeding the minimum requirements of EU directives, the Grand Chamber of the CJEU took the opposite view. According to the CJEU, such national measures 'fall within the exercise of the powers retained by the Member States, without being governed by [the directive concerned] or falling within its scope' (para 52). By enacting such measures, the Member States are not implementing any specific EU-law obligation imposed on them in the area concerned. Accordingly, such national measures are not 'implementing' EU law under Article 51(1) of the Charter and fall outside the scope of the Charter.

66 See eg P Jeney, 'The Scope of the EU Charter and its Application by the Hungarian Courts' (2016) 57(1) Hungarian Journal of Legal Studies 59, 71-74, who reports several judgments in which Hungarian courts gave a narrow reading to Article 51 of the Charter, limiting 'implementation' only to acts specifically adopted to transpose EU law. See also M Bobek, 'Kam až sahá právo EU? K věcnému aplikačnímu rámci unijního práva v členských státech' [How Far Does EU Law Reach? On the Material Framework of Application of Union Law in Member States] (2013) 18(1) Právní rozhledy 611. The functional logic also implies that in some cases the legal regime can be split depending on the facts of the case: Lock (n 20) 7.

67 M Ovádek, 'Le champ d'application de la Charte des droits fondamentaux de l'Union européenne et les États membres: la malédiction du critère matériel' [2017(10)] Journal de droit européen ex Journal des Tribunaux Droit européen 386, 390.

also depend on the extent to which the CJEU facilitates – or frustrates – this task.

This last remark leads us to the second source of complexity of the CJEU's case law: the approach the Court has adopted in delineating the scope of the Charter is not conducive to legal certainty, for a variety of reasons.

To begin with, as discussed above, the case law is chronically casuistic. The CJEU's basic formulas and its attempts to formulate some general guidance have been criticised for being too vague and inconsistent.[68] Some decisions reached by the CJEU in individual cases were also subject to critique, as was the fact that the CJEU did not address certain existing tensions in the case law.[69] Often, the criticism concerns the Court's analysis of the sufficient degree of connection. While in some cases the degree of connection was arguably stronger than the Court admitted, in other cases the link relied on by the Court seemed a little forced.[70] Furthermore, when it comes to some individual elements of the Court's reasoning, it is at times unclear whether they only relate to the case under consideration, or if they can (and should) be generalised. This observation applies, for instance, to the *Kücükdeveci* case: were the Court's pronouncements limited to the special context of Anti-Discrimination Directive 2000/78, which 'merely gives expression to, but does not lay down'[71] the principle of equal treatment contained in the Charter?

Another criticism concerns the lack of formal clarity of the Court's reasoning. There are cases where the CJEU seems to have overlooked the distinction between national measures that are outside the scope of the triggering norm, and national measures that come within the scope of the triggering norm but are not precluded by EU law.[72]

The Court has also been criticised for excessive judicial minimalism in its handling of Charter-focused references for a preliminary ruling. A trend has been emerging whereby the CJEU provides only limited guidance and leaves the national courts to their own devices when determining the applicability of the Charter; arguably, the trend is part of a broader strategy to increase efficacy in the context of the growing number of preliminary references.[73] This practice

---

68 For example, Dougan (n 25).

69 See eg Nivard (n 23) 54 and Snell (n 36) 299.

70 L Azoulai, 'The Case of Fundamental Rights: A State of Ambivalence' in HW Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 207-217.

71 Case C-555/07 *Kücükdeveci* EU:C:2010:21, para 50.

72 Fontanelli (n 4).

73 See eg L Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*' (2012) 49(6) Common Market Law Review 1841. For a concrete example, see Case C-256/11 *Dereci and Others* EU:C:2011:734, para 72 which, incidentally, left perplexed AG Kokott in Case C-489/10 *Bonda* EU:C:2011:845, Opinion of AG Kokott, footnote 18.

raises fears of a potential chilling effect on national courts' readiness to refer questions for a preliminary ruling, or even to apply the Charter in the first place.[74]

While this section presents a formidable set of difficulties for national courts, it is still possible to conclude on an optimistic note, by outlining the full scope of the difficulties and highlighting some strategies employed by national courts to surmount them. After all, the existing national empirical studies paint a truly diverse picture of national courts' approaches to Article 51 of the Charter, a picture in which scenes of great struggle contrast with examples of confident competence.[75]

Naturally, the academic focus is on complex and more controversial cases. However, we should not lose sight of the fact that, in most cases, the Charter will obviously be applicable. Dougan even goes as far as to claim that 'the overwhelming majority of the case law concerning the scope of Union law has been (and indeed continues to be) both clear and predictable'.[76] Also, scholarly criticism of the Court's handling of certain cases is not always united; the CJEU's judgment in *Fransson* is a case in point. While some considered it to be a completely logical and uncontroversial continuation of classic case law, others saw it as an unacceptable extension of the reach of EU fundamental rights.[77] In ad-

74 For a similar argument, see F Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights – Does *curia*.eu Know *iura*.eu?' (2014) 14(2) Human Rights Law Review 231, 263.

75 See eg Mazák et al (n 5) 249 (in proceedings before Slovak courts, 'the question of when the Charter is binding upon a Member State has not been correctly understood and answered to date') and M Rhimes, 'Charting the Charter: A UK Guide to the Application of the EU Charter' (2017) 22(3) Judicial Review 295, 301 (UK courts 'have not had particular difficulty in relation to the question of what falls within the scope of EU law'). cf Fontanelli (n 18) 195-196 (examples of UK courts avoiding the applicability assessment); Jeney (n 66) (examples of Hungarian courts incorrectly finding the Charter inapplicable); E Stoppioni, 'Italie' in Burgorgue-Larsen (n 5) 484-488 (after some fluctuation in the case law of Italian ordinary courts, the Italian Constitutional Court clarified the Charter's scope in an important judgment, which was subsequently followed by other Italian courts) and E Dubout, P Simon and L Xenou, 'France' in Burgorgue-Larsen (n 5) 333-341 (difficulties persist in some cases; while administrative courts are attentive to the question of applicability, the approach of general courts is less precise). A good illustration of the difficulties are the many Charter-related preliminary references in cases manifestly outside the scope of EU law: A Rigaux, 'Recevabilité: De quelques suggestions de nature à résorber l'inflation des ordonnances d'irrecevabilité manifeste des questions préjudicielles fondées sur une appréciation erronée par le juge de renvoi de la Charte des droits fondamentaux de l'Union' (2013) (8-9) Europe Commentaire 337 and P-V Aastresses, 'Belgique' in Burgorgue-Larsen (n 5) 139.

76 Dougan (n 25) 1218.

77 For criticism that the judgment is too broad and 'hardly reconcilable with the respect for national identities required by Article 4(2) TEU and the purpose of Article 51(l) [of the Charter]', see A von Bogdandy et al, 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* Doctrine' in A von Bogdandy and P Sonnevend, *Constitutional Crisis in the European Constitutional Area* (Nomos 2015) 252. For remarks on the not-at-all revolutionary nature of the judgment, see U Bernitz, 'The Scope of the Charter and its Impact on the Application of the ECHR: The *Åkerberg Fransson* Case on *Ne Bis in Idem* in Perspective' in de Vries, Bernitz and Weatherill (eds) (n 12) 162.

dition, when it comes to some judicial excesses – like *Carpenter*[78] – their precedential value should not be exaggerated. The fears that the Court would, after establishing the broad Fransson formula, use (abuse) its open-ended nature in order to extend the limits of EU law in a systematic manner have not materialised.

Furthermore, an increasing number of situations are now 'actes éclairés' – that is, they have been concretely judged by the CJEU to fall within or outside the scope of the Charter. An illustration of this point is found in EU VAT law. Since *Fransson*, which concerned national criminal proceedings for VAT-related offences, the Court had the opportunity to rule on the Charter's applicability in the context of: a VAT adjustment after an abusive practice;[79] taxpayers' procedural rights in the administrative tax procedure;[80] or the income tax assessment based on evidence that was obtained during a pre-trial investigation initiated due to suspicion of VAT fraud.[81] Nevertheless, Member State courts do run into difficulties even where the CJEU case law on the matter is clear, as evidenced by some CJEU orders declaring a preliminary reference inadmissible for lack of connection with EU law.[82]

Most importantly, though, national judges can rely on certain presumptions of relevance that can alert them to the possibility of the Charter being applicable. Besides cases requiring a norm of EU law to be applied directly, one of the most obvious presumptions is the explicit intention to implement. This intention can be apparent in various ways: a footnote reference to EU rules implemented by the national measure in question; a provision of the measure listing all the implemented EU legislation; or information in the explanatory memorandum.[83] Other, weaker presumptions include the fact that the case falls within a highly harmonised area, or that it has intra-EU cross-border elements. Of course, all these presumptions can be rebutted. Because only those national provisions which are truly necessitated by an EU legal act can be objectively considered as implementing provisions, the Charter does not, for instance, apply to national provisions that voluntarily extend the rules of the implemented EU act to cover

78 Case C-60/00 *Carpenter* EU:C:2002:434. See the criticism in Editorial Comments, 'Freedoms Unlimited? Reflections on Mary Carpenter v. Secretary of State' (2003) 40(3) Common Market Law Review 537.

79 Case C-419/14 *WebMindLicenses* EU:C:2015:832.

80 Case C-298/16 *Ispas* EU:C:2017:843.

81 Case C-469/18 *Belgische Staat* EU:C:2019:895.

82 See eg Case C-14/13 *Cholakova* EU:C:2013:374 (administrative detention in a purely internal situation).

83 For example, § 363 of the Czech Labour Code lists all the provisions of the Labour Code which implement EU law. In the Czech Republic, footnotes referring to the implemented EU legal acts are obligatory under Article 48 of the Rules for Legislative Drafting of the Czech Government.

situations which are outside the scope of that EU act.[84] Next, even in highly harmonised areas, the Charter is never applicable in matters that are expressly excluded from the scope of EU law.[85] The presumption based on cross-border elements is the easiest to rebut. This is because certainly not all intra-EU cross-border situations are currently regulated by EU law: when an EU citizen travels to another Member State he is *not* entitled to say '*civis europeus sum*' and invoke that status in order to oppose any violation of his EU fundamental rights.[86] In general terms, the role of these presumptions as 'EU-law alarm bells' is however undisputed.

Finally, in cases of uncertainty, national judges have the possibility to refer the case to the CJEU for a preliminary ruling and explicitly raise the question of the Charter's applicability (or the applicability of the relevant triggering norm that the referring judge had identified). In practice, the question of applicability will often be raised indirectly, for instance when the referring court asks whether the Charter precludes a certain national rule. Considering the Court's handling of some requests for preliminary rulings described above, national courts are nevertheless advised to address the question of applicability directly and identify potential triggering norms with reference to the facts of the case before them.

There are a few other secondary aspects which allow for a more positive outlook. In some areas of regulation, EU law is applied as a matter of routine, which means that the application of the Charter might also become a matter of routine, for example in Dublin transfer cases or administrative expulsion cases. Moreover, specialisation of national judges in a particular, 'EU-heavy' area means that they are more likely to become familiar with the rules of the Charter's applicability. Administrative judges will thus generally be better acquainted with the application of the Charter than civil or criminal judges, even though this is likely to change with the gradual expansion of EU law to other areas of regulation. In parallel with the development of the CJEU's case law in certain areas, it is reasonable to expect that national case law on Article 51 has also been growing steadily. As the conditions of the Charter's applicability are interpreted by a Member State's constitutional or supreme courts, the door is opened for a more effortless and systematic application of the Charter in lower courts.

Before turning to the framework for evaluation, it is important to acknowledge the role of litigants and their counsel, who are exposed to the same Charter-related difficulties identified above. Submissions of the parties regarding the

---

84 On this and other examples of gold-plating, see R Král, 'On the Gold-Plating in the Czech Transposition Context' (2015) 5(4) The Lawyer Quarterly 300.

85 For examples of exclusionary clauses in EU secondary legislation, see Sarmiento (n 40) 1285.

86 An echo to the AG Opinion in Case C-168/91 *Konstantinidis* EU:C:1992:504, Opinion of AG Jacobs, para 46.

applicability of the Charter can be a convenient starting point for a court's own analysis. Reports from Member States suggest, however, that in most cases the parties do not explicitly engage in detailed analysis of the Charter's applicability. In fact, they tend to ignore the Charter's limited material scope and they often 'throw the Charter into the mix' in a cavalier fashion without any substantiation.[87] While the exact extent of a party's burden of argument will depend on the legal parameters of the national procedure in question,[88] the activity or otherwise of the parties when invoking the Charter is an important contextual factor to consider in examining national case law.

5. Framework for Evaluation

Article 51 of the Charter and the CJEU's case law interpreting it – with its general formulas, abstract guidance and implementation categories – is the principal benchmark against which we should evaluate national courts' performance when it comes to the assessment of the Charter's applicability or the absence thereof. However, other considerations should also be borne in mind.

First, it is not only about reaching the correct result, but also the manner in which it is achieved. Applicability assessments of national courts should not only comply with Article 51, but also respect the general requirements on the quality of judicial reasoning, as they are set down in both EU and national procedural law. The duty to give reasons is embedded in the right to a fair trial under Article 47 of the Charter and is fundamental to the EU being a Union of law.[89] The same duty is imposed by national constitutions and procedural codes, even if the exact extent of this duty and the courts' reasoning style will inevitably vary among Member States. For instance, the Czech Supreme Administrative Court – whose case law is studied below – is required, *inter alia*, to give its opinion about both facts and law of the case in a clear and succinct way, and to

87 See eg Mazák et al (n 5) 185 and 250 (mere citations of Charter articles, confirming a 'general failure to exploit the potential of the Charter') and Bailleux and Bribosia (n 40) 122-123 (tendency of judges and counsel to see the Charter as another fundamental rights catalogue of general application). For this trend in the practice of the Czech Supreme Administrative Court, see Section 6.3 infra.

88 For a comparative discussion as to which national courts apply the Charter *ex officio* and which do not, see LM Díez-Picazo and M Fraile Ortiz, 'Application of the Charter of Fundamental Rights of the European Union by national courts: The experience of administrative courts: Final report' (XXIIIrd Colloquium of the Association of Councils of State and the Supreme Administrative Jurisdictions of the European Union, Madrid, 25-26 June 2012) 24-25 <www.aca-europe.eu/colloquia/2012/General_report.pdf> accessed 27 April 2020.

89 See eg Case C-300/11 *ZZ* EU:C:2013:363, paras 53-55.

ensure that the justification of its judgment is persuasive.[90] The need for legal certainty and argumentative rigour takes on an added resonance when it comes to supreme courts, whose role is not limited to administering justice in individual cases. One of their key tasks is to ensure uniform application of law and to provide interpretation guidance to lower courts; in the context of the Charter, this task entails making the CJEU's guidance more accessible to these courts.[91] Thus, the role of supreme courts in providing a comprehensive and clear Charter guidance should go beyond the strict legal requirements of the duty to provide reasons, in the interests of ensuring the effectiveness of the Charter across all levels of the judiciary.

Secondly, taking a more pragmatic standpoint, it would be unreasonable to expect national courts' applicability assessments to go into the same level of detail in every decision mentioning the Charter. These assessments should be tailored to the particulars of each case. The level of detail should first reflect the role of the Charter in the court's principal line of reasoning and its impact on the solution of the case. Where the Charter plays a significant role in the reasoning, or even determines the outcome of the case – for instance, when a court relies on the direct effect of a Charter provision to set aside conflicting national legislation – the court should be exhaustive in laying out its applicability assessment. Next, the level of detail should be directly proportional to the level of detail of the parties' submissions.[92] Finally, a distinction can be made between easy and hard cases, the latter requiring a more comprehensive applicability assessment than the former.[93] It should be emphasised, however, that while these considerations can provide valuable input into the evaluation exercise, they are only relevant as long as the legal requirements on the quality of reasoning are respected.

It follows that, in evaluating the performance of national courts as regards the applicability of the Charter, we should adopt two perspectives. First, whether and how national courts *formally* address the (in)applicability of the

---

90 § 157(2) of the Czech Code of Civil Procedure in conjunction with § 64 of the Czech Code of Administrative Justice. See also Z Kühn, 'The Quality of Justice and of Judicial Reasoning in the Czech Republic' in M Bencze and G Yein Ng (eds), *How to Measure the Quality of Judicial Reasoning* (Springer 2018) 179-180.

91 For a more developed argument in the context of the application by supreme courts of the European Convention on Human Rights, see P Lemmens, 'Guidance by Supreme Courts to Lower Courts on the Requirements of the European Convention on Human Rights' (Regional conference organised by the Directorate General of Human Rights and Legal Affairs and the Supreme Court of Serbia in the framework of Serbia's Chairmanship of the Committee of Ministers of the Council of Europe, Belgrade, 20-21 September 2007) 36-51 available at: <http://rm.coe.int/16806f1519> accessed 27 April 2020.

92 For more details on this aspect, see Section 6.3 infra.

93 An example of an easy case, where even a very brief applicability assessment would suffice, is when the applicability of the Charter is triggered by direct application of an EU regulation: see category 2 in the categorisation of Section 3 supra.

Charter in the text of their decisions. Secondly, whether and to what extent national courts' assessment of the Charter's (in)applicability *materially* corresponds to the conditions laid down in Article 51 and the CJEU's case law.

6. The Czech Supreme Administrative Court and its Track Record on Article 51 of the Charter

Having analysed the CJEU's case law on Article 51 and the challenges that it can present for national judges, it is only logical to shift the focus to the hard realities of national judicial decision-making in concrete cases. In this section, I will examine whether and when the Czech Supreme Administrative Court[94] (SAC) declares the Charter (in)applicable in cases where the Charter is invoked by the parties, or where the SAC gives effect to it of its own motion. Where such an applicability assessment is present, I will evaluate whether it was done in compliance with Article 51 and the CJEU's case law. The analysis is based on a corpus of all SAC decisions containing a reference (of any kind) to the Charter, which was compiled using a full-text search in the SAC's online database.[95]

6.1. No Standard Methodology (Yet)

The overall impression is one of a variety of approaches. Right from the very beginning, in the pre-Lisbon days, the SAC would sometimes dismiss a Charter-based claim of the complainant due to the lack of binding force of the Charter;[96] at other times, it would simply look the other way without expressly dealing with such a claim.[97] The chosen approach seems to depend on how much didactic instruction the judges are willing to provide. Both approaches persist in the post-Lisbon era: when the Charter is invoked by the parties, there does not seem to be a standard practice whereby the SAC would always either declare the Charter inapplicable or declare it applicable before examining the merits of the claim. In some cases, the silence of the SAC could be explained by the fact that the complaint was decided on other grounds, for instance on the basis of the Czech Charter of Fundamental Rights and

94 The system of administrative justice in the Czech Republic has two levels: i) specialised administrative chambers in regional courts, and ii) the SAC, the latter having jurisdiction to hear cassation complaints against decisions of regional courts in matters of administrative justice.

95 Available at the website of the Supreme Administrative Court: <www.nssoud.cz> accessed 3 May 2020.

96 SAC, 7 Afs 114/2006-78, 31 May 2007; SAC, 8 Afs 119/2005-118, 27 July 2007 and SAC, 2 As 20/2008-73, 22 July 2008.

97 SAC, 8 Afs 59/2005-83, 20 July 2007 and SAC, 5 Afs 42/2004-61, 31 May 2006.

Freedoms[98] or solely on procedural grounds.[99] Another reason could be that the Charter was invoked in a case clearly without any EU-law link, and the judges did not feel the need to signal that.[100] In a significant number of cases, however, it was arguably because the Charter-based argument was so marginal and under-substantiated that the SAC did not find it necessary to explicitly react to it in the text of the decision.[101] In sum, the analysis of the SAC's case law did not reveal any systematic method when it comes to addressing the applicability or otherwise of the Charter in response to a Charter-based claim.

In a few cases, the SAC declared that there was no breach of the Charter in situations outside the scope of EU law. In other words, the SAC made a declaration of non-violation instead of a declaration of non-applicability. For instance, *Š. N. v. Liberec Regional Authority* concerned a procedure conducted by a local authority authorising a closure of roads for an automobile race under the Road Act.[102] The complainant, an owner of land adjoining the roads in question, was challenging the fact that he did not have standing in the authorisation proceedings, in which he saw a violation of Article 41(2) of the Charter. The SAC held that

[t]he parties to the proceedings in question are directly defined in law, which does not permit to grant standing to owners of land adjoining the roads at issue in the administrative proceedings. Nor is it possible to infer such interpretation from the principle of transparency of public administration, the principle of a fair trial, or from the case law of the [CJEU] and Article 41(2) of the [Charter]. It does not follow from any of these that the owners of adjoining land should be granted standing.[103]

We found a handful of other cases where the distinction between non-violation and non-application is ignored or blurred.[104] While the lack of proper dis-

98 See eg SAC, 4 Ads 134/2014-29, 30 October 2014 (the SAC found that the respondent authority violated a provision of the Social Services Act read in the light of the Czech Charter and some other international fundamental rights instruments) and SAC, 6 As 123/2013-37, 3 April 2014 (the SAC found that the respondent authority violated a provision of the Act on the Right of Assembly read in the light of the Czech Charter and the European Convention on Human Rights).

99 See eg SAC, 1 As 113/2018-29, 16 May 2018 or SAC, 8 Azs 14/2017-34, 28 March 2017 (the cassation complaint was rejected as 'unacceptable' under § 104a Code of Administrative Justice).

100 See eg SAC, 6 Ads 117/2011-48, 20 October 2011 (concerning old-age pensions): the SAC dismissed the complainant's reference to the Charter as irrelevant due to it being inapplicable, and it did so only by way of *obiter dictum*, 'only as a marginal note' (para 32). This suggests that the SAC did not consider itself obliged to make such declarations of non-applicability.

101 See eg SAC, 4 Ads 108/2010-39, 27 January 2011 and SAC, 7 As 234/2018-15, 26 July 2018. See also Section 6.3 infra.

102 SAC, 7 As 344/2018-35, 6 December 2018.

103 ibid, para 15. This and all the other translations of the SAC's judgments are my own.

104 SAC, 2 Ads 266/2017-20, 26 October 2017, para 21 and SAC, 5 Ads 211/2017-39, 14 November 2017, para 23. See also SAC, 1 Ans 3/2012-34, 11 July 2012, para 27 (declaration of non-applicability: 'there is no doubt in the present case that this is not a dispute in which Union law is implemented – the applicant is seeking the initiation of administrative criminal proceedings

tinction between non-violation and non-application was materially insignificant in all these cases (the outcome of the case is the same in both scenarios), such an approach is formally imprecise and problematic in that it can cause or perpetuate confusion about the Charter's scope. Cases of this kind, however, seem to be rather isolated in the practice of the SAC.

Where the SAC does explicitly address the applicability of the Charter, it does so in various degrees of detail. In a few cases, the SAC simply held that the Charter did not apply without further explanation.[105] In three clusters of cases, the SAC – very much conscious of the limited applicability of the Charter – engaged in more serious analysis.

6.2. Examples of Good Practice (With Some Caveats)

The first cluster of cases concerned the Czech levy on photovoltaic power plants (the 'solar levy') adopted in 2010 to attenuate the economic effects of an extremely beneficial support scheme that had been introduced to promote solar energy. The potential links to EU law were Directives 2001/77/EC and 2009/28/EC, which lay down an obligation for Member States to ensure that the share of energy from renewable sources equals or exceeds the specified targets.[106] Several producers argued that the solar levy violated these Directives and the Charter. In *BS Park II. v. Appellate Financial Directorate*, the SAC's reaction to that challenge was still rather tentative.[107] Having summarised the content of the Directive and drawn attention to the large margin of discretion left to Member States, it held that Directive 2009/28/EC is not sufficiently precise and unconditional to have direct effect, and thus the complainant could not invoke it. The SAC concluded that

[t]he applicable legislation concerning the solar power levy is not modelled on any norm of EU law, nor does any such norm prevent the introduction of this levy. (...) the introduction of the levy most certainly does not compromise the objective of Directive 2009/28/EC (...).[108]

---

against Mr J. V. [regarding an alleged assault]') and para 29 (declaration of non-violation). It is interesting to note that the SAC also referred to the Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union [2016] OJ C202/355, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

105 See eg SAC, 4 Ads 169/2011-86, 28 March 2012.

106 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33 and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.

107 SAC, 1 Afs 22/2013-47, 11 July 2013.

108 ibid, para 35.

The first sentence arguably echoes the two Wachauf and ERT implementation scenarios and hints at the case not being within the scope of EU law, but the SAC did not explicitly declare the Charter inapplicable.[109]

In *BEAS SUN v.Appellate Financial Directorate*, the SAC developed its reasoning a little further, paraphrasing the wording of Article 51 of the Charter:

[The Charter] relates to the protection of fundamental rights of persons against steps taken by the EU institutions and Member State authorities when implementing EU law. Nevertheless, the only element with a Union dimension in this case is the obligation to ensure an increase in the share of energy produced from renewable sources by a certain date. How this is to be achieved is then a question of national law. [...] In this case there is no direct application of Union law, but there is a certain systemic interconnectedness between Czech law and EU law.[110]

The SAC's remark that a mere 'systemic interconnectedness' is not sufficient to trigger the applicability of EU law is reminiscent of the requirement identified by the CJEU for there to be 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. If the SAC did indeed consciously model this concept on the CJEU's case law, one can ask why it did not refer explicitly to the degree of connection criterion as formulated in *Siragusa*.[111]

Finally, in *BEAS SOLAR v.Appellate Financial Directorate*, the SAC followed the same logic but approached the issue through the prism of Article 51 and substantiated its reasoning by ample reference to the CJEU's case law, arguably because the applicant referred explicitly to Article 51.[112] The SAC first cited Article 51 in its entirety; it then referred to the CJEU's judgment in *Fransson* and its formula that 'the fundamental rights guaranteed in the legal order of the Union are applicable in all situations governed by Union law, but not outside such situations'. It also cited *Currà and Others* ('the provisions of the Charter relied upon cannot, in themselves, form the basis for any new power')[113] and enumerated in full the criteria first established in *Iida*.[114] Applying the CJEU's guidance to the case in hand, the SAC relied on its previous assessment of the obligations of Member States laid down in Directive 2009/28/EC and concluded that

---

109 See also SAC, 7 Afs 17/2013-46, 23 May 2013, which contains a similar reasoning.

110 SAC, 2 Afs 106/2013-35, 16 April 2014, paras 34-35. See also SAC, 9 Afs 141/2013-39, 14 August 2014, where the SAC followed the same reasoning and added that '[t]he solar levy [...] is a tax that is not regulated on the European Union level' (para 37).

111 See supra text accompanying footnote (n 21).

112 SAC, 5 Afs 152/2015-35, 27 November 2015.

113 Case C-466/11 *Currá and Others* EU:C:2012:465, para 26.

114 Case C-40/11 *Iida* EU:C:2012:691, para 79, citing Case C-309/96 *Annibaldi* EU:C:1997:631, paras 21-23. See also Case C-206/13 *Siragusa* EU:C:2014:126, para 25.

[i]n the light of the wording of Article 51 of the Charter, the Charter therefore does not apply to the present case and the Court of Justice is not competent to decide on the questions for preliminary ruling proposed by the applicant.[115]

In all the cases cited above, the SAC reached the correct conclusion that the Charter was not applicable, but only in the last case was its assessment transparent and methodologically satisfactory. Interestingly, the SAC's conclusion was validated in no uncertain terms by the Czech Constitutional Court.[116]

In the second cluster of cases, several Czech companies challenged administrative decisions by which the competent authorities withdrew their gambling licences, and argued, *inter alia*, that the withdrawal was in violation of the freedom to conduct a business and the right to property, enshrined in Articles 16 and 17 of the Charter respectively. In the leading case *SYNOT TIP v. Ministry of Finance*, the SAC dismissed the complainant's argument alleging a violation of the Czech Charter of Fundamental Rights and Freedoms, and addressed the EU Charter-based claim 'only for the sake or completeness':

Only for the sake of completeness, the Supreme Administrative Court observes that the complainant cannot invoke the [Charter] in this case because it is not (or at least does not claim to be) an entity exercising the free movement of persons, goods or services in the present case. Therefore, its situation is not covered by European Union law including the EU Charter.[117]

In support of this conclusion the SAC then cited both paragraphs of Article 51 of the Charter, the Explanations to the Charter and several CJEU judgments, including a quote of the Fransson formula and the 'certain degree of connection' requirement.[118] The SAC concluded that

---

115 SAC, 5 Afs 152/2015-35, 27 November 2015, para 32.

116 Czech Constitutional Court, II.ÚS 2071/14, 3 October 2014. The Court held that Directive 2001/77/EC does not regulate the taxation of electricity produced from renewable sources, and the tax regulation at issue therefore does not constitute 'implementation of Union law' within the meaning of 51(1) of the Charter (para 9). It added that '[t]his view of the Constitutional Court is supported also by the judgment of the [CJEU in C-198/13 *Hernández*], which observed with reference to previous case law that "the concept of 'implementing Union law', as referred to in Article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other" (para 34)'. See also Case C-215/16 *Elecdey Carcelen* EU:C:2017:705, para 37.

117 SAC, 6 As 285/2014-32, 24 February 2015, para 40.

118 ibid. Namely, the SAC cited Case C-617/10 *Fransson* EU:C:2013:105; Case C-459/13 *Milica Široká* EU:C:2014:2120; Case C-418/11 *Texdata Software* EU:C:2013:588 and Case C-198/13 *Hernández* EU:C:2014:2055.

[i]n the present case it must be observed that the national decision does not contain any specific element based on which it could be considered that Union law is being applied in the case. Directive (...) 2006/123/EC on services in the internal market (...) explicitly excludes from its material scope gambling activities which involve wagering a stake with pecuniary value in games of chance (...). The areas of gambling concerned are not regulated by Union law and the provisions of the Gambling Act at issue do not aim to implement provisions of Union law. (...) The Supreme Administrative Court concluded that the present case does not fall into the scope of Union law, and the conditions for the EU Charter to be applicable are therefore not fulfilled.[119]

The SAC's recapitulation of the Charter's applicability criteria was exemplary. However, their application to the case in hand was slightly misleading, for it suggested that gambling is outside the scope of EU law due to it not being covered by the Services Directive, when in fact gambling activities can be caught by the TFEU provisions on free movement of goods and services.[120] The SAC, however, soon had an opportunity to return to this point.

In *BONVER WIN v. Ministry of Finance*, the complainant did not agree with the SAC's assessment that the Charter was not applicable; it argued that its business activities were caught by the Treaty provisions on the free movement of services, since some of its clients were nationals of other EU Member States.[121] It cited *Berlington Hungary and Others*, in which the CJEU reviewed the Hungarian gambling legislation against Article 56 of the TFEU and the Charter; the cross-border element on the basis of which the CJEU established its jurisdiction was that 'a number of the customers of the applicants in the main proceedings were European Union citizens holidaying in Hungary'.[122] Nevertheless, the SAC was not persuaded by the complainant's arguments. Although it admitted that Article 56 can apply to activities excluded from the scope of the Services Directive, the SAC saw no connecting factor with EU law in the case. As for the argument based on the *Berlington Hungary* case, the SAC stated that

[t]he applicability of EU law must be distinguished from the admissibility of the reference for a preliminary ruling in such a case. (...) The passages of the Berlington Hungary decision cited by the complainant deal with the admissibility of the preliminary reference, not with the applicability of EU law in a purely internal case. (...).

---

119 ibid, para 41.

120 See C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2019) 436.

121 SAC, 1 As 297/2015-77, 20 January 2016, para 24.

122 Case C-98/14 *Berlington Hungary and Others* EU:C:2015:386, para 25. At para 26, the Court repeated the principle which it formulated in previous case law that '[s]ervices which a provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 56 TFEU'.

As was stated above, in the present case there is no connection with trade between the Member States.[123]

Whilst in certain limited circumstances the CJEU chooses to issue a preliminary ruling even in cases lacking a cross-border element, i.e. it holds the reference admissible even if EU law is not applicable in the national dispute at hand,[124] *Berlington Hungary* was not such a case. It follows from paragraphs 23 to 28 of the judgment that the CJEU considered EU law applicable due to the fact that (i) a number of customers of the applicants in the main proceedings were EU citizens, and (ii) 'it is far from inconceivable that operators established in Member States other than Hungary have been or are interested in opening amusement arcades in Hungary'.[125] However, the SAC pushed through its own assessment, failing to deal with the complainant's argument and to distinguish the case from *Berlington Hungary*.

It is important to note that the true issue here is the applicability of the triggering norm (Article 56 of the TFEU), not the applicability criteria of the Charter. Interestingly enough, due to doubts expressed by some SAC judges, the Extended Chamber of the SAC finally made a reference for a preliminary ruling to seek clarification on *Berlington Hungary*. The Extended Chamber asked the CJEU whether Article 56 of the TFEU can be held applicable solely because a service primarily provided to Czech nationals can also be used, or is being used, by a number of nationals from other EU Member States.[126] In fact, *BONVER WIN v. Ministry of Finance* can be taken as a perfect illustration of the difficulties national judges face in ERT-type cases when assessing the applicability of free movement Treaty provisions.

The last cluster of cases in which the SAC dealt with the applicability of the Charter at length concerned disputes regarding housing benefits in non-cross-border scenarios. In *J. Z. v. Ministry of Labour and Social Affairs*, the complainant took issue with the calculation of housing benefit; he argued that – as a self-employed person – he had been discriminated against and claimed a violation of the Charter.[127] Once again, the SAC first set out the rules: it cited Article 51,

---

123 SAC, 1 As 297/2015-77, 20 January 2016, para 30. For a similar approach, see also eg SAC, 5 As 255/2015-58, 26 May 2016.

124 K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 91-92 and Case C-28/95 *Leur-Bloem* EU:C:1997:369.

125 Case C-98/14 *Berlington Hungary and Others* EU:C:2015:386, para 27.

126 SAC, 5 As 177/2016-61, 21 March 2019 and Case C-311/19 *BONVER WIN* (pending). In his Opinion, Advocate General Szpunar opined that Article 56 of the TFEU applies to the facts at issue in the proceedings before the SAC: Opinion of AG Szpunar in Case C-311/19 *BONVER WIN*, EU:C:2020:640.

127 SAC, 5 Ads 181/2014-21, 11 August 2016.

referred to *Fransson*, *Nagy*,[128] and quoted a long passage from *Siragusa*.[129] Applying these rules to the facts of the case, the SAC considered two potential triggering norms – Regulation (EC) 883/2004 on the coordination of social security systems and 'the anti-discrimination directives based on Article 19 of the TEU' – but it held that they could not in fact trigger the application of the Charter:

The said Regulation or any other acts of Union secondary law, however, do not regulate the substantive eligibility conditions for, and the extent of, the said benefit. When Member States lay down the conditions for granting a housing benefit and determine the extent to which such benefit is granted, they are not implementing Union law (see, by analogy, the [CJEU judgment in C-333/13 Dano, paras 89–91]).

Neither is the relevant issue covered by provisions of Union anti-discrimination directives adopted on the legal basis of Article 19 [TEU], whose scope is limited to the enumerated grounds of discrimination [which do not apply to the case of the complainant] [see, by analogy, the CJEU judgment in C-354/13 Fag og Arbejde (FOA), paras 36–39].[130]

This assessment of the Charter's applicability, which the SAC repeated in at least two other cases,[131] was exemplary: it was thorough, logical, and firmly anchored in CJEU's case law. However, we could ask why the SAC shied away from such thorough analysis in other similar cases.[132]

The three clusters of cases discussed had one important thing in common: they all fell outside the scope of Union law, and the Charter was held inapplicable. In contrast, when the Charter *is* applicable, there is sometimes no need to undertake such a detailed analysis – especially in cases when the applicable national rule was intended to implement an EU-law obligation, or when the national court directly applies an EU-law norm. A quite simple, but entirely sufficient assessment can look like this:

The general provisions governing the interpretation and application of the [Charter] in Article 51(1) provide that the provisions of this Charter are addressed not only to the institutions, bodies, offices and agencies of the Union, but also to the Member States when they are implementing Union law (CJEU judgment in [C-617/10 Fransson]). This condition is fulfilled in the present case because the complainant

---

128 Cases C-488/12 to C-491/12 and C-526/12 *Nagy and Others* EU:C:2013:703, para 15.
129 SAC, 5 Ads 181/2014-21, paras 27-28.
130 ibid, paras 29-30.
131 See SAC, 1 Ads 94/2016-20, 27 September 2016 and 5 Ads 89/2018-20, 29 March 2019.
132 See eg 6 Ads 238/2017-33, 14 February 2018.

was detained under national legislation (§ 123b et seq. of the Act on the Residence of Foreign Nationals) implementing Articles 15 to 18 of [Directive 2008/115/EC].[133]

A slightly more complex interpretation of the implemented secondary law was required in *M. K. v. Appeal Commission on the Residence of Foreign Nationals* in order for the Charter to be found applicable.[134] Here, the SAC referred to Article 51 of the Charter and emphasised the need to verify the Charter's applicability in a separate argumentative step,[135] but it did not consider it necessary to refer to any of the CJEU's general formulas or guidance.[136] It is important to note that in both these judgments the SAC relied on the direct effect of the Charter (and of the Directive in question) to disapply a conflicting national rule. In some other decisions of the SAC – including those in which the Charter played a major part in the reasoning – there is no express reference to the Charter's limited applicability, to Article 51, or to the concept of 'implementing Union law'. However, the applicability of the Charter is implied in the text of the decision, and the triggering norms are evident from the context.[137] This approach is typical in Dublin transfer cases, which are clearly within the scope of EU law; Article 3(2) of the Dublin Regulation even explicitly lays down an obligation to conduct a Charter-based review.[138] Thus, all in all – similarly to declarations of non-applicability – there is no standard practice or established method whereby the SAC would first explicitly declare the Charter applicable before referring to it or giving effect to it in its reasoning.

Finally, there are frequent instances in the SAC's case law where a provision of the Charter is cited (i) as part of a general and purely descriptive statement with the sole purpose of saying that such and such right or principle is enshrined in the Charter, or (ii) in order to outline the fundamental rights background of the case. By way of illustration, in *M. D. and N. S. v. Foreign Police Directorate*,

---

133 SAC, 6 Azs 320/2017-20, 29 November 2017, para 51. See also 10 Azs 112/2018-50, 18 September 2019, para 11: 'Since the Member States, when assessing the grounds for dismissing a visa application, rely on the provisions of the Code on Visas (they implement Union law), they must also take into consideration the provisions of the [Charter].'

134 SAC, 6 Azs 253/2016-49, 4 January 2018.

135 ibid, para 33.

136 ibid, paras 31-35. In this case the complainant was challenging the refusal of his application for a long-term student visa. The SAC held that even though the conditions for issuing long-term visas, i.e. visas issued for a period exceeding three months, are not as such subject to EU-wide regulation and are therefore a matter for Member States, under Czech law a long-term visa is coterminous with a resident permit within the meaning of Directive 2004/114/EC allowing third-country nationals to stay for the purpose of studies (para 35). This meant, according to the SAC, that the case in hand was within the scope of EU law.

137 See eg 1 As 186/2017-46, 26 April 2018, para 33: 'Due to the fact that the underlying facts of the offence consist in a violation of EU law, Article 49 of the [Charter] is also relevant in this context [...]'.

138 See eg SAC, 1 Azs 82/2016-26, 14 September 2016.

the SAC stated that a person cannot be extradited if there could be a disproportionate interference with the right to private or family life because

[t]his sphere is protected by the fundamental right to respect of private and family life within the meaning of Article 8 of the [European Convention on Human Rights] and Article 10(2) of the [Czech] Charter of Fundamental Rights and Freedoms and – when applied in a situation that is covered by EU rules – Article 7 of the Charter of Fundamental Rights of the European Union.[139]

Here, the SAC was careful not to create the impression that the Charter was applicable, but on other occasions the parenthetical disclaimer was missing.[140] These kinds of statements – typically regrouping all the equivalent provisions of different fundamental rights instruments – are of such a level of generality that we can hardly speak of the Charter being 'applied' or 'given effect'. If they appear in cases outside the scope of EU law,[141] they are therefore not too problematic from the competence-creep point of view (they could even be considered as a comparative argument, albeit a very rudimentary one). They might, however, create or add to the confusion about the scope of the Charter when the issue of the Charter's (in)applicability is passed over.

6.3. Role of Litigants and Their Lawyers

The study of the SAC's case law suggests that it is quite frequent for parties to claim violation of Charter rights, but these claims are often very superficial and lacking in precision and seriousness. Typically, the Charter is thrown in as a makeweight, alongside similar or equivalent provisions of the Czech Charter of Fundamental Rights and Freedoms and of international treaties. A good illustration of such a chain of claims occurred in *S. A. H. v. Foreign Police Directorate*, in which the complainant argued that the Foreign Police Directorate did not accept the complainant's intention to file a claim for international protection and by doing so it

violated its obligation to act in conformity with international and constitutional commitments (...). In his application the complainant specifically referred to Article 33 of the Convention Relating to the Status of Refugees, Article 3 of the [European Convention on Human Rights], Article 3 of the Convention against Torture, Article 7 paragraph 2 of the [Czech] Charter of Fundamental Rights and Freedoms, Article 37 paragraphs 2 and 3 of the [Czech] Charter of Fundamental Rights and Freedoms,

139 SAC, 6 Azs 20/2016-36, 3 March 2013, para 29. For a similar disclaimer in a case clearly outside the scope of EU law (eligibility to serve as a judge), see SAC, 13 Kss 12/2013-78, 18 June 2014.

140 See eg SAC, 1 As 207/2017-61, 13 December 2017, para 58.

141 See eg SAC, 4 As 7/2012-82, 20 December 2013, para 20.

Article 43 of the [Czech] Charter of Fundamental Rights and Freedoms, Article 18 of the Charter of Fundamental Rights of the European Union.[142]

The practice of such references is widespread in cases both outside[143] and within[144] the scope of EU law, with complainants rarely tackling the question of the Charter's applicability or developing a fully-fledged argument.

The more detailed the Charter-based plea, the greater the chances of it being taken seriously. A general reference to the Charter without pointing to a specific provision risks not being dealt with by the SAC at all.[145] In a few cases, the SAC mildly reproached the applicants for the lack of detail in their Charter-based claims, which eventually led to these claims being rejected.[146] When dismissing a Charter-based argument, the SAC tends to highlight that the argument lacks in precision as a way of reinforcing its reasoning.[147] In *J. Š. v. General Financial Directorate*, where the complainant invoked the Charter in a very crude manner, the SAC observed that complaints relating to a violation of fundamental rights can only be dealt with at the abstraction level which corresponds to the abstraction level of the complaint.[148] The SAC added that, should it go beyond the arguments of the complainants and search for circumstances in their favour, it would lose its status as impartial arbitrator of the dispute.[149] This approach is in line with the general requirement that the plea in law must be sufficiently precise and individualised; that is, it must be clear how exactly the plea relates to the contested administrative decision.[150] According to the Czech Constitutional Court, a court is not obliged to give a detailed response to every single complaint raised, as long as that court develops its own logical and coherent line of argumentation which sufficiently supports the court's conclusions.[151] The SAC

142 SAC, 5 Azs 89/2016-25, 22 July 2016, para 2.

143 See eg SAC, 6 As 149/2014-21, 30 October 2014 (administrative offence against social cohesion) and SAC, Nao 151/2017-52, 12 April 2017 (land register).

144 See eg SAC, 5 Azs 89/2016-25, 22 July 2016 and SAC, 1 As 113/2018-29, 16 May 2018.

145 See eg SAC, 4 Ads 108/2010-39, 27 January 2011 and SAC, 7 As 234/2018-15, 26 July 2018.

146 See eg SAC, 10 Azs 51/2015-38, 15 April 2015 and SAC, 1 Ads 64/2015-35, 17 September 2015.

147 SAC, 1 Afs 22/2013-47, 11 July 2013, para 35; SAC, 6 As 285/2014, 24 February 2015, para 41 (the complainant did not highlight any link to EU law) and SAC, 7 Afs 17/2013-46, 23 May 2013 (the complainant did not specify exactly in what way its Charter rights were violated).

148 SAC, 6 Afs 2/2014-25, 23 April 2014.

149 ibid.

150 SAC, 10 Ads 215/2017-62, 30 May 2018, para 12. This was an extreme case where the applicant simply stated in its submissions that the contested decision violated several articles of the Czech Charter and the EU Charter. See, more generally on the extent of the duty to provide reasons in the context of a party's submissions, SAC, 2 As 155/2015-84, 16 March 2016, para 30.

151 Czech Constitutional Court, III. ÚS 989/08, 12 February 2009, para 68. Similarly, according to the ECtHR, '[w]ithout requiring a detailed answer to every argument put forward by a complainant, [the obligation to state reasons] nevertheless presupposes that the injured party can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question': see *Antonescu v Romania* App no 5450/02 (ECtHR, Admissibility, 8 February 2011).

considers this approach particularly relevant when the individual complaints are arranged unsystematically or they overlap,[152] a scenario often arising when litigants invoke the Charter's provisions alongside provisions of other instruments. In large measure, the quality of the complainants' Charter-based pleas will thus determine the depth of the SAC's analysis. In this respect it is interesting to note that, in many of the cases described above as examples of good practice, the complainants did indeed submit substantiated Charter-based arguments.[153]

6.4. Evaluation from Two Perspectives

The two perspectives within the framework for evaluation established above call for a twofold conclusion.

From the material viewpoint, the SAC has shown a good understanding of the fact that the Charter's scope of application is not unlimited; it adheres to the applicability criteria set down in Article 51 of the Charter and developed in the CJEU's case law. The interpretation of the triggering norms did prove difficult, especially in the derogation scenario. However, the SAC demonstrated that, when it decides to include an applicability assessment in the text of the decision, it is perfectly capable of making an exemplary one. There is no indication in the SAC's case law of extending or reducing the binding effect of the Charter at odds with Article 51. We would expect nothing less from an EU-friendly top national court, which even has its own research department specialising, *inter alia*, in EU matters.[154]

From the formal viewpoint, the SAC's record leaves something to be desired in terms of consistency and sometimes clarity. Putting aside a few isolated incidents of bad practice, there is no clear general method as to when explicit applicability assessments should be made and how they should look. It would be misplaced to demand that a national court like the SAC, whose judgments tend to be discursive and allow some scope for individual reasoning styles,[155] use the same formulaic and immutable approach as the CJEU. It is also true that, to a large extent, the variety of approaches reflects the specific features of individual cases. Whilst the SAC was careful to include explicit applicability assessments in cases where it relied on the exclusionary direct effect of the Charter, it was less consistent in other cases, including those in which the parties did not introduce a serious Charter-based plea. Finally, it should be said

---

152 SAC, 8 Afs 41/2012-55, 29 March 2013, para 21.

153 See eg SAC, 5 Afs 152/2015-35, 27 November 2015 and SAC, 6 Azs 253/2016-49, 4 January 2018, paras 8-10.

154 See 'The Activities of the Service' (*Supreme Administrative Court*, 14 December 2010) <www.nssoud.cz/Cinnost-oddeleni/art/499?menu=191> accessed 27 April 2020.

155 For more on the style of legal reasoning of Czech courts, see Kühn (n 91).

that even though an informed observer can easily find a few inconsistencies in the reasoning of the SAC – for example, when it comes to the sometimes blurry line between non-applicability and non-violation – these did not have any impact on the outcome of the case. Nevertheless, due to the public mission of the SAC, which extends to ensuring consistency of the case law of lower courts,[156] the SAC should work towards eliminating those inconsistencies and establishing a more robust methodology across the board.

7. Conclusion

As we have seen throughout this article, the minimalism of the Fransson formula stands in sharp contrast to the huge variety of constellations that can potentially arise in cases before national judges. The complexity of the CJEU's case law on Article 51 of the Charter – as reflected in the typology of situations set out in Section 3 – is largely due to the intrinsic characteristics of the EU legal order, and it is further compounded by the lack of clarity of some CJEU decisions. The determination of the Charter's applicability is highly context-based and may require a careful reading of not only the relevant applicable primary or secondary law, but also the CJEU's general guidance and its concrete applications. Nevertheless, the analysis of the SAC's case law revealed that this complexity does not necessarily translate into a general lack of understanding of the Charter's applicability criteria. In fact, the SAC manages to make sense of the CJEU's complex case law and to reach a materially correct conclusion on the Charter's applicability. To do so, it does not hesitate to explicitly draw on certain elements of the CJEU's Article 51 guidance.

The rule in Article 51 is, however, not the only benchmark against which we should evaluate national courts' engagement with the Charter, the other being whether national courts' decisions contain an explicit assessment of applicability and what the formal quality is of that assessment. What emerges from the SAC's case law is a considerable variety of approaches to applicability assessments. This variety is acceptable insofar as the level of detail of applicability assessments reflects the particulars of each case. More generally, the variety is symptomatic of the primary preoccupation of judges: to solve a case. A more pragmatic and results-based approach, combined with the fact that judicial resources are limited, means that the Charter (and its applicability) will only be referred to in cases where it can potentially have an added value. The SAC and other Member State supreme courts should, however, be careful not to succumb to such pragmatism in a way that would run counter to legal certainty and methodological clarity. This requirement stems from the essential role these

[156] See § 12(1) Czech Code of Administrative Justice.

courts play in promoting the correct national application of the Charter. As well as respecting the material scope of the Charter, supreme courts should be careful not to create or perpetuate confusion about that scope on the part of lower courts and, crucially, the beneficiaries of the Charter rights and principles. From this angle, there appears to be room for a more consistent approach in the SAC's practice.