



ARTICLES

MAPPING THE SCOPE OF APPLICATION OF EU FUNDAMENTAL RIGHTS: A TYPOLOGY

BENEDIKT PIRKER*

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ABSTRACT: A number of scholars have attempted to delineate the scope of application of EU fundamental rights with regard to the Member States. The present *Article* aims to establish a particularly comprehensive typology of situations in which Member States are bound by EU fundamental rights. It is based on an extensive assessment of the CJEU's case law. Developing its own interpretation of the Court's criteria, the *Article* establishes a number of "clusters" of cases. At the same time, it shows the principles for the application of EU fundamental rights which can be observed in action. Some loose ends remain, however, that the Court is called to address.

KEYWORDS: EU fundamental rights – scope of application of EU fundamental rights – Art. 51 of the Charter of Fundamental Rights of the European Union – scope of EU law – EU competences – EU Constitutional law.

* Senior Lecturer, Institute for European Law, University of Fribourg, benedikt.pirker@unifr.ch. The author would like to thank Andreas Th. Müller, Sian Affolter and the anonymous reviewers for helpful comments on earlier versions of this paper and Rowan Siegenthaler for editorial support. Comments and suggestions are welcome under the email address.

I. INTRODUCTION

One of the many debated issues in EU fundamental rights law is the extent to which EU fundamental rights apply to the Member States. In its decision in *Åkerberg Fransson*¹ in 2013, the Court of Justice held that the scope of EU fundamental rights – fundamental rights forming part of the general principles of EU law and fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (Charter) – was coextensive with the scope of EU law.² The case prompted many reactions. Observers disagreed to what extent the Court had indicated that the scope of application of EU fundamental rights with regard to the Member States had changed or remained the same as before.³ The present *Article*, while agreeing with the latter position, does not intend to enter in this particular debate. Rather, it aims to examine by means of a comprehensive analysis of the case law whether the Court has achieved its goal of a coherent jurisprudence on the topic.⁴ The *Article* finds that most of the case law can be fitted into a convincing categorization. Certain developments, however, remain that do not fit into the otherwise coherent picture and ought to be addressed by the Court.

Subsequently, the *Article* sets out a comprehensive typology of situations in which Member States act respectively within or outside of the scope of EU law. Simultaneously, it scrutinizes the CJEU's case law as to whether it accurately provides reasons why EU fundamental rights apply or do not apply.

¹ Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson*, paras 21-22.

² As becomes clearer subsequently, the scope of application of both kinds of fundamental rights is mostly the same – with the exception of Charter rights aimed exclusively at the EU to the exclusion of the Member States (see *infra*, section IV.9).

³ See, e.g. for a reading that the decision broadened the scope of application of EU fundamental rights N. LAVRANOS, *The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficile*, in *European Law Reporter*, 2013, p. 139; P. GOOREN, *Geltung und Anwendung der EU-Grundrechte-Charta (Anmerkung zu Åkerberg Fransson)*, in *Neue Zeitschrift für Verwaltungsrecht*, 2013, p. 564. See for the opposite view L. OHLENDORF, *Grundrechte als Massstab des Steuerrechts in der Europäischen Union*, Tübingen: Mohr Siebeck, 2015, p. 73. See for appraisals that read the decision as a continuation of the previous case law F. FONTANELLI, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, in *European Constitutional Law Review*, 2013, p. 315; M. SZWARC, *Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on Fransson Case*, in *European Public Law*, 2014, p. 239; D. RITLENG, *De l'articulation des systèmes de protection des droits fondamentaux dans l'Union – Les enseignements des arrêts Åkerberg Fransson et Melloni*, in *Revue trimestrielle de droit européen*, 2013, p. 275; A. EPINEY, *Le champ d'application de la Charte des droits fondamentaux: l'arrêt Fransson et ses implications*, in *Cahiers de Droit Européen*, 2014, p. 293.

⁴ Due to the massive amount of case law to be discussed, the present contribution remains necessarily selective and emphasizes the most crucial and illustrative decisions. The present survey is based on a larger study examining the whole relevant case law of the CJEU up until the summer of 2017, see B. PIRKER, *Grundrechtsschutz im Unionsrecht zwischen Subsidiarität und Integration*, Baden-Baden: Nomos, 2018.

II. THE EXISTING APPROACHES AND THE REASONS FOR A COMPREHENSIVE TYPOLOGY

A number of scholars have undertaken the task of categorizing the case law of the CJEU on the scope of application of EU fundamental rights. The present *Article* suggests going beyond the approaches used to date by creating an exhaustive typology of when Member States are bound by EU fundamental rights.

In the literature, many observers continue to adhere to a classic approach distinguishing two constellations based on two important decisions handed down by the Court of Justice.⁵ Thus, two categories are used to describe when EU fundamental rights apply. In *Wachauf*, the Court held that the requirements of EU fundamental rights were binding on the Member States “when they implement” EU rules.⁶ The doctrine coined the term of an “agency situation” for this constellation.⁷ In *Elliniki Radiophonia Tiléorassi AE (ERT AE)* the Court found that when Member States relied on a justification provided by EU law for measures that were liable to obstruct a fundamental freedom, such a justification had to be interpreted in light of EU fundamental rights. This means that Member States were bound by EU fundamental rights.⁸ The “two-constellations” approach, however, necessarily neglects a variety of situations that do not fit within its perspective, but can also lead to the applicability of EU fundamental rights.⁹

Certain more refined categorizations have been developed in the literature over the years.¹⁰ However, they tend to suffer from the perceived need to create as few categories as possible. As an example, *Sarmiento* distinguishes between a limited number of types of “triggering” rules of EU law, namely mandating, optioning, remedial and exclusionary

⁵ See M. BOROWSKY, *Artikel 51 Anwendungsbereich*, in J. MEYER (ed.), *Charta der Grundrechte der Europäischen Union – Kommentar*, Baden-Baden: Nomos, 2014, para. 24; J. BERGMANN, *Grundrechtcharta der EU*, in J. BERGMANN (ed.), *Handlexikon der Europäischen Union*, Baden-Baden: Nomos, 2012, p. 478 *et seq.*; F. SCHORKOPF, *Grundrechtsverpflichtete*, in CH. GRABENWARTER (ed.), *Europäischer Grundrechtsschutz*, Baden-Baden: Nomos, 2014, paras 18 *et seq.*; B. VAN BOCKEL, P. WATTEL, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson*, in *European Law Review*, 2013, p. 877; M. HOLOUBEK, *Ein Grundrechtskatalog für Europa*, in U. BECKER, A. HATJE, M. POTACS, N. WUNDERLICH (eds), *Verfassung und Verwaltung in Europa*, Baden-Baden: Nomos, 2014, p. 121 *et seq.*

⁶ Court of Justice, judgment of 13 July 1989, case 5/88, *Wachauf*, para. 19.

⁷ J.H.H. WEILER, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in N. NEUWAHL, A. ROSAS (eds), *The European Union and Human Rights*, Den Haag: Martinus Nijhoff Publishers, 1995, p. 67.

⁸ Court of Justice, judgment of 18 June 1991, case C-260/89, *Elliniki Radiophonia Tiléorassi AE (ERT AE)*, para. 43. On the criticism of this constellation see *infra*, section IV.2.

⁹ See for a concise overview and criticism also E. HANCOX, *The Meaning of “Implementing” EU Law under Article 51(1) of the Charter: Åkerberg Fransson*, in *Common Market Law Review*, 2013, p. 1418 *et seq.*

¹⁰ See N. LAZZERINI, *The Scope and Effects of the Charter of Fundamental Rights in the Case Law of the European Court of Justice*, in G. PALMISANO (ed.), *Making the Charter of Fundamental Rights a Living Instrument*, Leiden, Boston: Brill Nijhoff, 2014, p. 40 *et seq.*

rules.¹¹ This categorization is already more refined and helpful as a matter of principle. However, it again leaves out certain topics in the case law that arguably would have merited their own category or a reasoned inclusion in an existing category, such as the situation of minimum harmonization by EU law or of Charter rights not addressed to the Member States. It is thus submitted that the desire to create an all-too limited number of categories ought to be overcome.¹² Instead, a comprehensive typology provides a more realistic and more exhaustive overview of the scope of application of EU fundamental rights to the Member States. The suggested typological approach thus deliberately identifies a larger number of constellations.

Moreover, the typological approach chosen in the present paper intentionally creates “clusters” of typical situations in which EU fundamental rights apply. The notion of “clusters” is used to accentuate that the main objective is exhaustiveness in categorizing the Court’s case law rather than absolute precision in delimitating categories. Due to the various ways in which EU law impacts on national law, any categorization will suffer from penumbral effects at the borders of each category. For example, EU law will sometimes give discretion to national law, e.g. in implementing a directive. In other cases (or even the case of that very same directive), it will require from national law and national judges that they guarantee the effectiveness of rights and obligations derived from EU law, e.g. through the application of adequate procedural guarantees. It is hard to see a clear-cut qualitative difference between the two situations. One will in all likelihood even find borderline cases between the two situations. The “cluster” approach is a reaction to this feature of EU law. It aims to emphasize the core arguments used by the Court to argue that EU fundamental rights do or do not apply. However, it abandons all pretences that clear-cut categories can be developed.

Finally, in its endeavour, the present study intentionally leaves aside two aspects. First, much ink has been spilled on the details of Art. 51, para. 1, of the Charter, its wording, context and purpose.¹³ Arguably, not much would be gained from rehearsing these

¹¹ D. SARMIENTO, *Who's Afraid of the Charter?*, in *Common Market Law Review*, 2013, p. 1279 *et seq.*

¹² See for another example J. NUSSER, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte*, Tübingen: Mohr Siebeck, 2011, p. 146, who tries to rely on one particular term (“*Beruhem*” in the German original) to capture all the complexity of the topic, but ultimately must resort to a broader set of criteria.

¹³ See e.g. on the history of the provision T.C. LUDWIG, *Zum Verhältnis zwischen Grundrechtecharta und allgemeinen Grundsätzen – die Binnenstruktur des Art. 6 EUV n. F.*, in *Europarecht*, 2011, p. 722; S. BARRIGA, *Die Entstehung der Charta der Grundrechte der Europäischen Union*, Baden-Baden: Nomos, 2003, p. 61; on the explanations accompanying the provision J. SNELL, *Fundamental Rights Review of National Measures: Nothing New under the Charter?*, in *European Public Law*, 2015, p. 291 *et seq.*; on the wording F. PICOD, *La hiérarchisation des sources au sein de l'article 6 TUE*, in R. TINIÈRE, C. VIAL (eds), *La protection des droits fondamentaux dans l'Union européenne*, Brussels: Bruylant, 2015, p. 81; F. KIRCHHOF, *Nationale Grundrechte und Unionsgrundrechte – Die Wiederkehr der Frage eines Anwendungsvorranges unter anderer Perspektive*, in *Neue Zeitschrift für Verwaltungsrecht*, 2014, p. 1538; on the context M. CARTABIA, *Article 51 – Field of Application*, in W. MOCK, G. DEMURO (eds), *Human Rights in Europe – Commentary on the Charter of Fundamental Rights of the European Union*, Durham: Carolina Academic Press, 2010, p. 320

arguments; so the Court of Justice will thus be taken at its word when it states in *Åkerberg Fransson* that the provision merely “confirms” the Court’s previous case law.¹⁴ Second, in order to keep a limited scope of inquiry, the much debated follow-up question of the discretion that Member States still enjoy once they are bound by EU fundamental rights will also be left aside.¹⁵

III. THE STRUCTURE OF THE TYPOLOGY AND THE FOUR *IIDA*-CRITERIA

There are different ways to establish a typology of the Court’s case law. A helpful starting point is given by the CJEU itself. After some earlier remarks on the topic,¹⁶ in *Iida* the Court of Justice enumerated criteria that it supposedly used to establish the applicability of EU fundamental rights to the Member States.¹⁷ It established a set of four criteria for this purpose:¹⁸

- the character of a rule of national law and whether it is intended to implement a provision of EU law (called for the present purposes the “criterion of the character of the rule of national law”);
- whether the rule of national law pursues objectives similar to those covered by EU law (hereinafter the “criterion of the convergence of objectives”);
- whether the rule of national law is capable of affecting EU law (hereinafter the “criterion of the impact on EU law”); and
- whether there are specific rules of EU law on the matter or capable of affecting said matter (hereinafter the “criterion of the density of EU regulation”).¹⁹

For the following typology, nothing speaks against using these criteria as the basis. However, a number of *caveats* are required. First, the criteria remain vague and the

et seq.; on the objectives see M. ZULEEG, *Zum Verhältnis nationaler und europäischer Grundrechte. Funktionen einer EU-Charta der Grundrechte*, in *Europäische Grundrechtezeitschrift*, 2000, p. 514.

¹⁴ *Åkerberg Fransson*, cit., para. 18.

¹⁵ See Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni*; judgment of 30 May 2013, case C-168/13 PPU, *Jeremy F.*; and most recently judgment of 5 December 2017, case C-42/17, *M.A.S. and M.B.* See also out of virtually innumerable contributions A. PLIAKOS, G. ANAGNOSTARAS, *Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni*, in *Yearbook of European Law*, 2015, p. 97 *et seq.*; L. BESSELINK, *The Parameters of Constitutional Conflict After Melloni*, in *European Law Review*, 2014, p. 531 *et seq.*; A. TORRES PÉREZ, *Melloni in Three Acts: From Dialogue to Monologue*, in *European Constitutional Law Review*, 2014, p. 308 *et seq.*; see also on a follow-up decision by the German Constitutional Court J. NOWAG, *EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? – Bundesverfassungsgericht: Mr R*, in *Common Market Law Review*, 2016, p. 1441 *et seq.*

¹⁶ Court of Justice, judgment of 18 December 1997, case C-309/96, *Annibaldi*, paras 21–23.

¹⁷ Court of Justice, judgment of 8 November 2012, case C-40/11, *Iida*, para. 79.

¹⁸ Although not all commentators rely on these criteria, see D. SARMIENTO, *Who's Afraid of the Charter?*, cit., p. 1279. See, by contrast, M. DOUGAN, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the “Scope of Union Law”*, in *Common Market Law Review*, 2015, p. 1232.

¹⁹ Confirmed in: Court of Justice, judgment of 6 March 2014, case C-206/13, *Siragusa*, para. 25; judgment of 10 July 2014, case C-198/13, *Hernández*, para. 37.

Court, apart from announcing them, never provides a closer definition in its case law. One can thus base a typology only on one's own interpretation of the mentioned criteria. In the present study, the whole relevant case law of the Court is assessed and categorized under the author's interpretation of each of the four criteria. The aim is to achieve a coherent picture in classifying the Court's decisions, without any final claim to have successfully "read the mind" of the Court. Nonetheless, the vagueness of the criteria leaves discretion for alternative readings. For example, one could argue that the first criterion designates cases of implementation of EU law by the Member States with or without discretion granted by EU law.²⁰ Alternatively, the second criterion could also be read as overlapping with the constellation of the implementation of EU law through procedures and sanctions established by the Member States.²¹ The present approach is thus but one suggestion on how to read the criteria, namely as labels that allow to group together parts of the case law and provide an overall logic for the Court's jurisprudence. Its main benefit is arguably its exhaustiveness in capturing all the Court's *dicta*.

As a second aspect, there is an overwhelming emphasis on one of the four criteria in the jurisprudence. Consequently, the following sections focus strongly on the fourth criterion which does the bulk of the work to create the intended typology of situations in which EU fundamental rights are applicable, the before-mentioned clusters.²² Nevertheless, there remain some elements of the case law that can only be fitted under the other criteria.

Lastly, the Court never expressly clarifies how the four criteria interact. The presently suggested reading of the case law indicates – apart from the mentioned importance of the fourth criterion – that the first criterion of the character of the rule of national law stands somewhat apart from the others. This criterion merely assembles a number of relevant characteristics closely related to the national rule at issue and does not establish the applicability of EU fundamental rights on its own.²³ Furthermore, criterion two and three on the convergence of objectives and the impact on EU law also stand somewhat apart. As a closer analysis of their treatment in the case law shows, the Court seems to use them as safety valves when the analysis under the fourth criterion does not yield a satisfactory result. Their exact relationship to one another and their content remain, however, unsatisfactorily blurred.²⁴

On this basis, the following survey shows that the case law of the Court can be fitted within the corners of the mentioned criteria. The Court has thus indeed achieved a certain degree of coherence. Nonetheless, there remain some worrying elements in this picture, as will be shown.

²⁰ See *infra*, sections IV.1 and IV.2.

²¹ See *infra*, section IV.3.

²² See *infra*, section IV.

²³ See *infra*, section V.

²⁴ See *infra*, sections VI and VII.

IV. THE CRITERION OF THE DENSITY OF EU REGULATION

Based on the large amount of decisions of the Court of Justice, a number of loose categories or clusters can be formed to structure the assessment. For this purpose, one can move from situations of “higher” to “lower” density of EU regulation, establishing a spectrum of density. As an initial *caveat*, the applicability of EU fundamental rights and the jurisdiction of the Court often overlap, but must not be conflated. There can be situations, e.g. in the field of the Common Foreign and Security Policy, where rules of EU law exist and imply the applicability of EU fundamental rights, but the Court is not competent because express rules exclude its jurisdiction.²⁵

IV.1. IMPLEMENTATION OF EU LAW BY THE MEMBER STATES WITHOUT DISCRETION

There is hardly any doubt that EU fundamental rights are applicable whenever Member States simply apply EU rules without any *interim* steps of law-making in national law.²⁶ Examples are manifold.²⁷ Already in this rather clear constellation the Court emphasizes that there is no need for an express clause to render EU fundamental rights applicable.²⁸

IV.2. MARGINS OF DISCRETION GRANTED TO THE MEMBER STATES BY EU LAW

In a number of situations EU law leaves discretion to Member States regarding its implementation. EU fundamental rights apply in these cases. Commentators have doubted whether EU fundamental rights should apply in these situations of discretion granted by EU law, focusing most prominently on the scenario of Member States justifying their action under one of the public interest grounds for restricting the fundamental freedoms of the internal market. The central point of criticism is that there is no need for a uniform application and/or interpretation of EU law that would justify applying EU fundamental rights.²⁹ However, it appears more coherent to apply EU fundamental rights, as arguably

²⁵ See, also on the interpretation of such clauses: Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft*, para. 74.

²⁶ Typically, this will be the case of provisions with direct effect, although they must not necessarily provide rights to individuals, as seen in the following examples.

²⁷ See e.g. on the application of the Union Customs Code: Court of Justice, judgment of 18 December 2008, case C-349/07, *Sopropé*, para. 35; see, moreover, judgment of 15 January 2013, case C-416/10, *Križan*, paras 111-112; judgment of 2 December 2014, joined cases C-148/13, C-149/13 and C-150/13, *A, B and C*, para. 53.

²⁸ Court of Justice, judgment of 3 July 2014, joined cases C-129/13 and C-130/13, *Kamino International Logistics*, para. 31.

²⁹ See TH. KINGREEN, R. STÖRMER, *Die subjektiv-öffentlichen Rechte des primären Gemeinschaftsrechts*, in *Europarecht*, 1998, p. 283; R. KANITZ, P. STEINBERG, *Grenzenloses Gemeinschaftsrecht? Die Rechtsprechung des EuGH zu Grundfreiheiten, Unionsbürgerschaft und Grundrechten als Kompetenzproblem*, in *Europarecht*, 2003, p. 1023; W. CREMER, *Der programmierte Verfassungskonflikt: Zur Bindung der Mitgliedstaaten an die Charta der Grundrechte der Europäischen Union nach dem Konventionsentwurf für eine Europäische Verfassung*, in *Neue Zeitschrift für Verwaltungsrecht*, 2003, p. 1455; TH. KINGREEN, *Artikel 51 GRCh*, in C. CALLIESS, M. RUFFERT (eds), *EUV/AEUV Kommentar*, Munich: C.H.Beck, 2011, para. 17. In the past, some scholars also had

Member States still act within the scope of EU law in these circumstances. They still have to abide by the conditions imposed by EU law, namely by the fundamental freedoms, on their action.³⁰ This also becomes visible in form of the applicability of the principle of proportionality³¹ and the interpretive authority of the Court of Justice.³² It remains, however, unfortunate that the Court has not clearly spelled out these reasons in its case law and left this task mostly to doctrinal debate.

Several scenarios of discretion granted by EU law exist. First, as indicated, Member States are acting within the discretion granted by EU law when they are justifying their action under one of the public interest grounds for restricting the fundamental freedoms of the internal market.³³

Second, Member States are acting within the discretion granted by EU law whenever they rely on fundamental rights as a ground of justification for actions that restrict EU fundamental freedoms. In the classic *Schmidberger* constellation, a Member State fulfills

argued that a distinction should be drawn between written and unwritten grounds of justification, M. RUFFERT, *Schlüsselfragen der Europäischen Verfassung der Zukunft: Grundrechte – Institutionen – Kompetenzen – Ratifikation*, in *Europarecht*, 2004, p. 177 *et seq.*; G. DAVIES, *Can Selling Arrangements be Harmonised?*, in *European Law Review*, 2005, p. 376 *et seq.*

³⁰ A. WALLRAB, *Die Verpflichteten der Gemeinschaftsgrundrechte: Umfang und Grenzen der Bindung der Europäischen Gemeinschaft und der Mitgliedstaaten an die Grundrechte des Europäischen Gemeinschaftsrechts*, Baden-Baden: Nomos, 2004, p. 91 *et seq.*; A. GROBE-WENTRUP, *Die Europäische Grundrechtecharta im Spannungsfeld der Kompetenzverteilung zwischen Europäischer Union und Mitgliedstaaten: eine Untersuchung am Beispiel von Art. 14 und Art. 16 EuGRC*, Berlin: Duncker & Humblot, 2003, p. 60 *et seq.*

³¹ E. SPAVENTA, *Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU*, in M. DOUGAN, S. CURRIE (eds), *50 Years of the European Treaties – Looking Back and Thinking Forward*, Oxford: Hart Publishing, 2009, p. 350 *et seq.*

³² J.H.H. WEILER, N. LOCKHART, “Taking Rights Seriously” *Seriously – The European Court of Justice and Its Fundamental Rights Jurisprudence*, in *Common Market Law Review*, 1995, p. 77.

³³ *ERT*, cit., para. 43; Court of Justice, judgment of 5 October 1994, case C-23/93, *TV 10*, paras 24-26; judgment of 26 June 1997, case C-368/95, *Familiapress*, paras 24-25; judgment of 11 July 2002, case C-60/00, *Carpenter*, paras 40-41; judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Orfanopoulos*, para. 97; judgment of 27 April 2006, case C-441/02, *Commission v Federal Republic of Germany*, para. 108; judgment of 23 November 2010, case C-145/09, *Tsakouridis*, para. 52; judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*, para. 89; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, para. 71. See also with regard to unwritten grounds of justification Court of Justice, judgment of 30 April 2014, case C-390/12, *Pfleger and others*, paras 35-36; judgment of 11 June 2015, case C-98/14, *Berlington Hungary*, para. 74; judgment of 10 March 2016, case C-235/14, *Safe Interenvios*, para. 109; judgment of 21 December 2016, case C-201/15, *AGET Iraklis*, para. 65; judgment of 14 March 2017, case C-157/15, *Achbita*, para. 38.

a positive obligation³⁴ to protect fundamental rights and at the same time restricts a fundamental freedom.³⁵ It is somewhat debated how exactly fundamental rights are to be categorized as a ground of justification.³⁶ The reasons for the applicability of EU fundamental rights are, however, the same as in the context of justifications for restrictions of fundamental freedoms.³⁷

Third, Member States are acting within the discretion granted by EU law where EU secondary law grants them such discretion. In the case of regulations, their provisions can be so detailed and clear that there is no discretion and EU fundamental rights apply because there is simply an implementation of EU law without discretion.³⁸ Apart from this scenario, however, a regulation can also allow for room regarding its implementation that has to be filled by the Member States' choices. In these cases, as far as EU law permits,³⁹ Member States have to take measures e.g. to complement a regulation in accordance with EU fundamental rights.⁴⁰ A more limited form of discretion is left where only specific, pre-defined options for action are given by a regulation. Nonetheless, EU fundamental rights apply for the same reasons.⁴¹ In certain situations, the discretion granted

³⁴ See on the ensuing margin of discretion W. RENGELING, P. SCZCEKALLA, *Grundrechte in der Europäischen Union: Charta der Grundrechte und allgemeine Rechtsgrundsätze*, Cologne: C. Heymann, 2004, para. 417.

³⁵ Court of Justice, judgment of 12 June 2003, case C-112/00, *Schmidberger*, para. 74.

³⁶ The Court classified it as part of the ground of public order, see Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega*, para. 34. See with a similar view M. BULTERMAN, H. KRANENBORG, *What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: The Omega Case*, in *European Law Review*, 2006, p. 100 *et seq.*; in favour of a category of its own J. MORIJN, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, in *European Law Journal*, 2006, p. 39; M. BLECKMANN, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, Tübingen: Mohr Siebeck, 2011, p. 92 *et seq.* See for some indications in this direction Court of Justice, judgment of 11 December 2007, case C-438/05, *Viking*, para. 77; judgment of 18 December 2007, case C-341/05, *Laval*, paras 93 and 103.

³⁷ See W. FRENZ, *Handbuch Europarecht – Band 4 Europäische Grundrechte*, Berlin: Springer, 2009, para. 263; R. STREINZ, W. MICHL, *Artikel 51 GR-Charta*, in R. STREINZ (ed.), *EUV/AEUV Kommentar*, Munich: C.H.Beck, 2012, para. 12.

³⁸ See *supra*, section IV.1.

³⁹ Court of Justice, judgment of 11 June 2009, case C-33/08, *Agrana Zucker*, para. 31.

⁴⁰ See e.g. in the field of agricultural policy Court of Justice, judgment of 13 April 2000, case C-292/97, *Karlsson and others*, para. 35; judgment of 17 December 1998, case C-186/96, *Demand*, para. 35. See also Court of Justice, judgment of 12 June 2014, case C-314/13, *Peftiev*, paras 24-25; judgment of 9 January 2015, case C-498/14 PPU, *Bradbrooke*, paras 51-52.

⁴¹ *Wachauf*, cit., paras 21-22; Court of Justice, judgment of 15 February 1996, case C-63/93, *Duff and others*, para. 29; judgment of 4 July 1994, case C-351/92, *Graff*, para. 18; judgment of 2 October 2014, case C-101/13, *U*, paras 47-49. See also K. LENAERTS, *La Vie après l'Avis: Exploring the Principle of Mutual (Yet not Blind) Trust*, in *Common Market Law Review*, 2017, p. 810.

can become narrowed down to such an extent that it effectively transforms into a positive obligation to act in a particular manner in order to comply with EU fundamental rights.⁴²

In the case of directives, *per definitionem* they are supposed to leave the choice of means for their implementation to the Member States.⁴³ In practice, some directives can be very detailed, with the consequence that the margins of discretion granted to Member States are rather narrow. In such cases, it is hard to distinguish them from regulations offering a certain margin of discretion for their implementation; the Court has thus also applied the same basic reasoning to them. In the case of directives, the Court has thus found that Member States are bound by EU fundamental rights when they implement the directive, e.g. when they use options or explicit exceptions contained in the directive.⁴⁴ Discretion for implementation can be created by express provisions, but also by omissions and silence within a directive.⁴⁵ When implementing directives, Member States must use the discretion granted to them to achieve a result compliant with EU fundamental rights⁴⁶ and balance the protection of fundamental rights with other regulatory goals if necessary.⁴⁷ They may be obliged to implement a directive in a manner that allows for the balancing of the goal of the rule of national law and EU fundamental rights.⁴⁸ They are prohibited from relying on an interpretation of the directive that is contrary to EU fundamental rights.⁴⁹

Directives are not only implemented by means of legislative action. All other competent authorities in Member States are bound by directives, too. For example, courts and administrative authorities have to interpret national law in conformity with directives.⁵⁰ At the same time, in these situations such authorities must act in accordance with EU fundamental rights, because they are acting within the scope of EU law. This can lead to

⁴² Court of Justice, judgment of 21 December 2011, case C-411/10, *N.S.*, para. 68; judgment of 16 July 2015, case C-681/13, *Diageo Brands*, para. 50; judgment of 25 May 2016, case C-559/14, *Meroni*, para. 44.; judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para. 88; see in favour of categorizing this scenario as a separate case of application of EU fundamental rights I. CANOR, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"*, in *Common Market Law Review*, 2013, p. 388.

⁴³ See more generally on the binding force of EU fundamental rights in this context B. MAIER, *Grundrechtsschutz bei der Durchführung von Richtlinien*, Baden-Baden: Nomos, 2014, p. 65 *et seq.*

⁴⁴ See Court of Justice, judgment of 22 September 2016, case C-110/15, *Nokia Italia and others*, para. 44.

⁴⁵ *Jeremy F.*, *cit.*, para. 37.

⁴⁶ Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*, para. 104.

⁴⁷ Court of Justice, judgment of 2 April 2009, case C-421/07, *Damgaard*, paras 25-27. This includes the scenario of conflicting fundamental rights, see Court of Justice, judgment of 29 January 2008, case C-275/06, *Promusicae*, para. 68; judgment of 15 September 2015, case C-484/14, *Mc Fadden*, para. 83.

⁴⁸ Court of Justice, judgment of 19 October 2016, case C-582/14, *Breyer*, para. 63.

⁴⁹ See e.g. *Promusicae*, *cit.*, para. 68; Court of Justice, judgment of 2 December 2015, case C-528/13, *Léger*, para. 41; judgment of 16 July 2015, case C-580/13, *Coty Germany*, para. 34.

⁵⁰ Court of Justice, judgment of 13 November 1990, case C-106/89, *Marleasing*, para. 8. See also W. SCHALLER, *Die EU-Mitgliedstaaten als Verpflichtungsadressaten der Gemeinschaftsgrundrechte*, Baden-Baden: Nomos, 2003, p. 44 *et seq.*

situations where, due to EU fundamental rights, a national court must *not* interpret national law in light of a directive, because this would lead to an extension of the criminal offences contained in the national law and thus a reading *contra reum*.⁵¹ While there is less case law on regulations in this regard, it appears safe to say that these points also apply in the case of their implementation.

IV.3. THE IMPLEMENTATION OF EU LAW THROUGH PROCEDURES AND SANCTIONS ESTABLISHED BY THE MEMBER STATES

In many situations, EU law creates claims such as rights for individuals or requirements such as obligations that the Member States must ensure compliance with; at the same time it leaves it to the Member States' law to establish the mechanisms of enforcement.⁵² The principle of effectiveness is one overarching binding legal guideline for the Member States in these situations.⁵³ EU fundamental rights, however, apply, too. This constellation concerns norms of civil, but also of criminal or administrative procedure law.⁵⁴ In the case of claims, Member States enjoy procedural autonomy, but EU fundamental rights apply; in the case of requirements, Member States are bound by the principle of loyalty to ensure their respect by means of sanctions.⁵⁵

The first group of situations involves claims established by EU law. It has been dealt with by the CJEU in two ways. In some decisions, the Court relied predominantly on the notion of procedural autonomy; EU fundamental rights are found to apply as a limit to this autonomy.⁵⁶ In others, Art. 47 of the Charter provides the central argument for the

⁵¹ Court of Justice, judgment of 12 December 1996, joined cases C-74/95 and C-129/95, *Criminal proceedings against X*, paras 61-63.

⁵² There is no need that there be rights in a narrow sense in EU law. For example, the principle of effectiveness requires Member States to grant access to a court not only where individual rights in a narrow sense are concerned, but also where the interests of individuals are protected more broadly, which may include public interests, see e.g. Court of Justice, judgment of 25 July 2008, case C-237/07, *Janecek*, para. 39. See generally A. EPINEY, *Primär- und Sekundärrechtsschutz im Öffentlichen Recht*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 2002, p. 386 *et seq.*

⁵³ See on its effect in concrete cases e.g. Court of Justice, judgment of 30 November 2006, case C-432/05, *Unibet*, paras 65, 77 and 83; judgment of 5 October 2006, case C-232/05, *Commission v. France*, paras 49 *et seq.*; judgment of 18 March 2010, joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini*, para. 67.

⁵⁴ A. EPINEY, *Le champ d'application de la Charte des droits fondamentaux*, cit., p. 296.

⁵⁵ C. LATZEL, *Die Anwendungsbereiche des Unionsrechts*, in *Europarecht*, 2015, p. 660.

⁵⁶ See Court of Justice, judgment of 10 April 2003, case C-276/01, *Steffensen*, paras 71-72; judgment of 10 September 2013, case C-383/13 PPU, *G. and R.*, paras 35-37; judgment of 6 October 2015, case C-61/14, *Orizzonte Salute*, paras 46 and 49; judgment of 17 March 2016, case C-161/15, *Bensada Benallal*, para. 23; judgment of 30 June 2016, case C-288/14, *Ciup*, para. 51; judgment of 30 June 2016, case C-205/15, *Toma*, para. 28. Even non-procedural rules can be subject to the application of EU fundamental rights. See on rules of substantive civil law case Court of Justice, judgment of 11 October 2007, case C-117/06, *Möllendorf and Möllendorf-Niehuus*, para. 78.

Court to find EU fundamental rights applicable.⁵⁷ The argumentative strategy chosen by the Court does not appear to make a difference regarding the result. Crucially, EU fundamental rights are not applicable in cases where Member States' measures are not applied to pursue goals of EU law. Take the example of *Ymeraga*, where the national legislation on the free movement of persons was applied, but the case did not fall within the reach of EU law on Union citizenship.⁵⁸ The relationship between national law and EU law, including the reach of EU secondary law, thus needs to be examined in detail to clarify whether EU fundamental rights apply.⁵⁹

The second group of situations concerns requirements established by EU law for Member States. These must be enforced by means of sanctions in national law. Again, EU fundamental rights apply.⁶⁰ Member States must respect EU fundamental rights when legislating in such situations, but also when adjudicating through their courts.⁶¹ The Court of Justice decided in favour of the applicability of EU fundamental rights where it found an objective clearly anchored in EU law that, because of the principle of loyalty, the Member States were obliged to pursue by means of their sanctioning powers.⁶² In other cases, the Court found no interest of EU law that was protected by the Member States' sanctioning measures at issue. It decided, therefore, that EU fundamental rights were not applicable.⁶³

⁵⁷ See Court of Justice, judgment of 28 January 2010, case C-264/08, *Direct Parcel Distribution Belgium*, paras 33-34; *Alassini*, cit., para. 49; judgment of 22 December 2010, case C-279/09, *DEB*, paras 28 and 31; judgment of 12 February 2015, case C-662/13, *Surgicare*, para. 33; judgment of 6 October 2015, case C-362/14, *Schrems*, para. 64; judgment of 5 November 2014, case C-166/13, *Mukarubega*, para. 50. Less convincing in this regard the judicial self-restraint of the Court of Justice, judgment of 17 January 2013, case C-23/12, *Zakaria*, paras 39-40. There is no need for an express provision on fundamental rights as was the case in Court of Justice, judgment of 15 May 1986, case 222/84, *Johnston*, para. 20; see judgment of 15 September 2016, joined cases C-439/14 and C-488/14, *Star Storage*, para. 42.

⁵⁸ Court of Justice, judgment of 8 May 2013, case C-87/12, *Ymeraga*, paras 42-43. See also Court of Justice, judgment of 19 April 2005, case C-521/04 P (R), *Tillack v. Commission*, para. 38; judgment of 10 April 2003, case T-353/00, *Le Pen v. European Parliament*, para. 91, confirmed in judgment of 7 July 2005, case C-208/03 P, *Le Pen v. European Parliament*; judgment of 27 March 2014, case C-265/13, *Torralbo Marcos*, para. 37.

⁵⁹ See Court of Justice, judgment of 18 December 2014, case C-562/13, *Abdida*, para. 39.

⁶⁰ See in this regard on sanctions and the limits of competences E. NEFRAMI, "Within the Scope of European Union Law", *Beyond the Principle of Conferral?*, in J. VAN DER WALT, J. ELLSWORTH (eds), *Constitutional Sovereignty and Social Solidarity in Europe*, Baden-Baden: Nomos, 2015, p. 90 *et seq.*

⁶¹ Court of Justice, judgment of 10 November 2011, case C-405/10, *Garenfeld*, para. 48; judgment of 21 December 2016, case C-119/15, *Biuro podróży Partner*, para. 25.

⁶² See Court of Justice, judgment of 4 July 2006, case C-212/04, *Adeneler*, paras 93-94; *Åkerberg Fransson*, cit., para. 27; judgment of 1 October 2015, case C-290/14, *Skerdjan Celaj*, paras 31-32; judgment of 8 September 2015, case C-105/14, *Taricco*, paras 36-37; judgment of 17 December 2015, case C-419/14, *WebMindLicenses*, paras 66-67; judgment of 5 April 2017, joined cases C-217/15 and C-350/15, *Orsi and Baldetti*, para. 16. See for the case of express provisions in EU law on the sanctions to be imposed Court of Justice, judgment of 26 September 2013, case C-418/11, *Texdata*, paras 74-75.

⁶³ Court of Justice, judgment of 13 June 1996, case C-144/95, *Maurin*, paras 11-12; judgment of 29 May 1997, case C-299/95, *Kremzow*, para. 17.

This jurisprudential development has not remained uncontested. EU fundamental rights are applicable to a high number of situations of Member State action in this scenario.⁶⁴ Some commentators fear that the applicability of these rights unduly restricts the Member States' procedural autonomy.⁶⁵ The Court's solution nonetheless appears justified, as national law clearly serves EU law in these cases.⁶⁶ Judges asked to interpret national procedural rules in light of EU fundamental rights are in a similar way fulfilling their duty to pursue the goal of e.g. an EU directive, as the latter always implies compliance with EU fundamental rights.⁶⁷ It should also be noted that in many cases,⁶⁸ the obligations arising from EU fundamental rights do not go beyond what is already prescribed by the principles of equivalence and effectiveness.⁶⁹

IV.4. MINIMUM HARMONIZATION BY EU LAW

In cases where EU law only provides for minimum harmonization of a particular subject area, Member States are entitled to go beyond EU regulation. The Court was called to decide to what extent such Member State action is bound by EU fundamental rights. In the doctrine, authors argue against the applicability of EU fundamental rights beyond the part regulated by EU rules, as this would comply with the general rule established by the Court that only the extent of the exercise of competences by the EU determines the scope of application of EU fundamental rights.⁷⁰ Others counter that the situation of Member

⁶⁴ See in particular on EU fundamental rights concerning criminal procedure law H. JARASS, *Die Bindung der Mitgliedstaaten an die EU-Grundrechte*, in *Neue Zeitschrift für Verwaltungsrecht*, 2012, p. 460. See for a positive assessment J. KÜHLING, *Fundamental Rights*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, Oxford, Munich: Hart C.H. Beck, 2010, p. 499; A. EPINEY, *Le champ d'application de la Charte des droits fondamentaux*, cit., p. 296.

⁶⁵ W. SCHALLER, *Anmerkung zu Case C-276/01 (Steffensen)*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2003, p. 672.

⁶⁶ C. LADENBURGER, *Artikel 51 GRCh (Art. II – 111 VVE) Anwendungsbereich*, in P. TETTINGER, K. STERN (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, Munich: C.H.Beck, 2006, p. 35 *et seq.*

⁶⁷ D. SCHEUING, *Zur Grundrechtsbindung der EU-Mitgliedstaaten*, in *Europarecht*, 2005, p. 165.

⁶⁸ See, however, also Court of Justice, judgment of 16 July 2009, case C-12/08, *Mono Car Styling*, para. 49; judgment of 19 March 2015, case C-510/13, *E.ON Földgáz Trade*, para. 50; judgment of 28 April 2015, case C-456/13 P, *T & L Sugars*, para. 50.

⁶⁹ See e.g. *Alasini*, cit., para. 49; Court of Justice, judgment of 17 July 2014, case C-169/14, *Sánchez Morcillo*, para. 35; judgment of 30 June 2016, case C-200/14, *Câmpean*, para. 70; judgment of 6 October 2015, case C-69/14, *Târșia*, para. 41; see also in the literature M. BLECKMANN, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, cit., p. 69; B. MAIER, *Grundrechtsschutz bei der Durchführung von Richtlinien*, cit., p. 124; M. SAJAN, D. DÜSTERHAUS, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, in *Yearbook of European Law*, 2014, p. 15; E. NEFRAMI, *"Within the Scope of European Union Law": Beyond the Principle of Conferral?*, cit., p. 105 *et seq.*

⁷⁰ C. LADENBURGER, *Artikel 51 GRCh (Art. II – 111 VVE) Anwendungsbereich*, cit., para. 35; H. JARASS, *Charta der Grundrechte der Europäischen Union – Kommentar*, Munich: C.H. Beck, 2013, para. 25, Article 51; B. MAIER, *Grundrechtsschutz bei der Durchführung von Richtlinien*, cit., p. 92.

States is comparable to the one where EU law provides for discretion regarding its implementation, as the Member States' action cannot be considered to be completely autonomous in such a scenario. Ultimately, for them this situation thus falls within a margin of discretion established by EU law and EU fundamental rights ought to be applicable.⁷¹

The Court's case law is not fully consistent,⁷² but at a close reading the Court has achieved a differentiated and generally convincing solution.⁷³ It found that, in the case of a shared competence, EU fundamental rights applied where the Member States exercised the competence only to create minimum harmonization.⁷⁴ By contrast, where the relevant EU competence is limited to mere minimum harmonisation⁷⁵ EU law is prohibited from influencing Member States' law through its principles beyond the reach of the harmonized area. This also means that EU fundamental rights are not applicable.⁷⁶

IV.5. PARTLY EXERCISED EU COMPETENCES

In a number of cases, the Court clarified that the scope of application of EU fundamental rights corresponds to the actual exercise of EU competences, not their potential future exercise or mere existence. One could say that this cluster of cases develops the same point in general for all areas of shared competences that the Court has developed with regard to minimum harmonization in a more specific context.⁷⁷ The mere existence of an EU competence⁷⁸ or of a general EU law provision on a subject matter similar to the topic regulated in national law⁷⁹ is insufficient to trigger the applicability of EU fundamental

⁷¹ H. WEYER, *Gemeinschaftsrechtliche Überprüfbarkeit mitgliedstaatlicher Regelungen der Verkaufsmodalitäten*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2004, p. 457; M. BLECKMANN, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, cit., p. 42.

⁷² See Court of Justice, judgment of 14 April 2005, case C-6/03, *Deponiezweckverband Eiterköpfe*, para. 63.

⁷³ See the evasive reasoning in Court of Justice, judgment of 25 March 2004, case C-71/02, *Karner*, para. 34; the Court seemed to turn to the free movement of goods to avoid the question of minimum harmonisation.

⁷⁴ See, despite the terse reasoning, Court of Justice, judgment of 10 July 2003, joined cases C-20/00 and C-64/00, *Booker Aquaculture*, paras 88-90; see for a clearer expression judgment of 7 July 2016, case C-447/15, *Muladi*, para. 51.

⁷⁵ See e.g. Art. 153, para. 2, let. b), TFEU on social policy.

⁷⁶ Court of Justice, judgment of 17 December 1998, case C-2/97, *Borsana*, paras 35 and 40; *Hernández*, cit., paras 45-46. See for a different reading of the latter case S. BUCHER, *Die Bindung der Mitgliedstaaten an die EU-Grundrechtecharta bei Ermessensspielräumen, insbesondere in Fällen der Richtlinienumsetzung und unter Berücksichtigung der Folgerichtsprerung zu "Åkerberg Fransson"*, in *Zeitschrift für europarechtliche Studien*, 2016, p. 229.

⁷⁷ See *supra*, section IV.4. It is mainly due to this specific context (minimum harmonization) that the two clusters of cases have been separated in the present account.

⁷⁸ See e.g. *Maurin*, cit., paras 11-12; Court of Justice, judgment of 16 January 2008, case C-361/07, *Polier*, paras 11 and 14; judgment of 27 November 2012, case C-370/12, *Pringle*, para. 180.

⁷⁹ See e.g. on Art. 151 and 153, para. 2, TFEU on the objectives and competence of the EU legislator in the field of social policy and national legislation on probation periods during employment contracts of indefinite duration Court of Justice, judgment of 5 February 2015, case C-117/14, *Nisttahuz Poclava*, paras

rights. Crucially, the Court of Justice examines whether EU law creates binding obligations in a particular subject area.⁸⁰ This includes rights created for Member States by EU law against other Member States⁸¹ and the creation of obligations in the field of a mere supporting competence of the EU.⁸² The scope of existing secondary law is at the same time not modified merely by the applicability of EU fundamental rights.⁸³ The objectives enshrined in a piece of secondary legislation constitute one important criterion to determine the scope of exercise of a competence.⁸⁴ If, by contrast, no obligations of EU law are created in a particular subject area, EU fundamental rights are not applicable.⁸⁵

Directives containing rules on fundamental rights constitute a somewhat special case. As a matter of principle, the Court held that there were limits to their interpretation in light of EU fundamental rights. Notably, it held that a directive could not be interpreted broadly to encompass a ground of discrimination not expressly laid down in that directive's text.⁸⁶ By contrast, in the field of data protection the Court proved more than

40-41; see also judgment of 23 September 2008, case C-427/06, *Bartsch*, para. 18; judgment of 17 July 2014, case C-459/13, *Široká*, para. 19.

⁸⁰ See e.g. *Siragusa*, cit., paras 26-27; *Nistahuz Poclava*, cit., paras 35-37; Court of Justice, judgment of 4 June 2015, case C-579/13, *P and S*, paras 38-39; judgment of 17 September 2015, case C-416/14, *Fratelli De Pra*, para. 53; judgment of 21 December 2016, case C-539/15, *Bowman*, para. 19; judgment of 9 March 2017, case C-406/15, *Milkova*, para. 50. See also on differing criteria for the application of primary and secondary law to the same set of facts Court of Justice, judgment of 15 July 2010, case C-271/08, *Commission v. Germany*, paras 48-50.

⁸¹ Court of Justice, judgment of 22 October 2013, case C-276/12, *Sabou*, para. 26.

⁸² Court of Justice, judgment of 17 September 2014, case C-562/12, *Liivimaa Lihaveis*, para. 65. See also on an EU exercise of competences that requires the support of the Member States which in turn are bound by the duty of loyalty judgment of 4 February 2015, case C-647/13, *Melchior*, para. 29; judgment of 10 September 2015, case C-408/14, *Wojciechowski*, para. 53; see in more detail on the applicability of EU fundamental rights in these cases Opinion of AG Mengozzi delivered on 16 October 2014, case C-647/13, *Melchior*, para. 59; Opinion of AG Mengozzi delivered on 11 June 2015, case C-408/14, *Wojciechowski*, para. 65.

⁸³ Court of Justice, judgment of 21 September 2016, case C-221/15, *Etablissements Fr. Colruyt*, para. 30.

⁸⁴ See on data collection for different purposes and secondary law Court of Justice, judgment of 16 April 2015, joined cases C-446/12 to C-449/12, *Willems*, para. 50.

⁸⁵ See as examples out of a large number of cases Court of Justice, judgment of 15 September 2011, joined cases C-483/09 and C-1/10, *Gueye and Sánchez*, paras 50-51; judgment of 8 May 2014, case C-483/12, *Pelckmans Turnhout*, para. 23; judgment of 11 November 2014, case C-333/13, *Dano*, para. 91; judgment of 2 June 2016, case C-122/15, *C*, paras 25 and 30; judgment of 7 March 2017, case C-638/16 PPU, *X. and X.*, paras 44-45; see expressly on the problem that national courts submit requests for a preliminary reference and suggest the application of the Charter without clarifying the actual link to EU law, Court of Justice, order of 16 January 2014, joined cases C-614/12 and C-10/13, *Dutka*, para. 14.

⁸⁶ Court of Justice, judgment of 18 December 2014, case C-354/13, *Kaltoft*, paras 37 and 39.

willing to interpret the structure and provisions of the Data Protection Directive⁸⁷ in light of fundamental rights to establish a broad scope of application for the Directive.⁸⁸

IV.6. REFERENCES IN EU LAW TO THE REGULATION BY MEANS OF NATIONAL LAW

In the Charter, a number of provisions recognize rights in accordance with “national laws and practices”.⁸⁹ Similarly, in secondary legislation EU law sometimes expressly assigns the task of regulating certain questions to national law. In this regard, the case law of the Court of Justice draws a distinction between two scenarios for the purpose of examining the applicability of EU fundamental rights.

First, a reference to the regulation by national law can mean that EU law fully defers a preliminary decision to national law. In these cases, the application of national law leading up to said decision is not subject to the application of EU fundamental rights.⁹⁰ Second, EU law can merely grant a margin of discretion for implementation by means of a reference to the regulation by national law. In that scenario, as indicated earlier, EU fundamental rights remain fully applicable.⁹¹

IV.7. EU SOFT LAW

There are many different forms of soft law in EU law.⁹² The Court of Justice decided very clearly that such soft law cannot have binding effects and also cannot create rights that individuals can enforce before national courts.⁹³ Nonetheless, national courts are bound to take into consideration such soft law in order to decide disputes, in particular where soft law casts light on the interpretation of national measures adopted as binding norms implementing guidelines or recommendations enshrined in soft law or where it is designed to supplement binding norms of EU law.⁹⁴ Soft law such as recommendations thus

⁸⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

⁸⁸ Court of Justice, judgment of 20 May 2003, joined cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, para. 70; see on data processing in non-economic contexts judgment of 6 November 2003, case C-101/01, *Lindqvist*, paras 39 *et seq.*; judgment of 13 May 2014, case C-131/12, *Google Spain*, para. 68.

⁸⁹ See Art. 16 on the freedom to conduct a business, Art. 28 on the right of collective bargaining and action, and Art. 30 on protection in the event of unjustified dismissal.

⁹⁰ See Court of Justice, judgment of 5 October 2010, case C-400/10 PPU, *McB*, para. 42.

⁹¹ See *supra*, section IV.2. In the case law, see e.g. Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj*, paras 78 and 80; judgment of 6 October 2015, case C-650/13, *Delvigne*, paras 31-33. On the scope of application of EU fundamental rights in such contexts see also *Torrallbo Marcos*, cit., paras 41-42.

⁹² See for an overview J. SCHWARZE, *Soft Law im Recht der Europäischen Union*, in J. ILIOPOULOS-STRANGAS, J.-F. FLAUS (eds), *Das soft law der europäischen Organisationen*, Baden-Baden: Nomos, 2012, p. 234 *et seq.*

⁹³ Court of Justice, judgment of 13 December 1989, case C-322/88, *Grimaldi*, para. 16; *Alassini*, cit., para. 40.

⁹⁴ *Grimaldi*, cit., para. 18.

cannot trigger the applicability of EU fundamental rights on its own.⁹⁵ However, it is capable of contributing to finding the meaning of binding norms of EU law. These norms, in turn, then establish the scope of application of EU fundamental rights.

IV.8. MEMBER STATE ACTION IN AREAS OUTSIDE OF THE SCOPE OF EU LAW

Certain areas are excluded from the application of EU fundamental rights by express provision in EU law or by the structure of EU law. One central example for the latter constellation is reverse discrimination. Even if a Member State decides to ensure equal treatment of its own citizens in comparison to EU citizens, it is not bound by EU fundamental rights in this scenario.⁹⁶ In another constellation, certain areas are expressly excluded from the application of EU law. For example, the provisions on the free movement of workers do not apply to “employment in the public service” as stated in Art. 45, para. 4, TFEU.⁹⁷ This is not an area where EU law leaves discretion to Member States; EU law simply does not apply at all within the boundaries of this provision, although the Court is called to define said boundaries.⁹⁸

IV.9. CHARTER RIGHTS NOT ADDRESSED TO THE MEMBER STATES

One of the “least dense” forms of determination of national law by EU law are Charter rights that are explicitly not aimed at the Member States as addressees.⁹⁹ In a dogmatic sense, such rights constitute a deviation from the rule enshrined in Art. 51, para. 1, of the Charter.¹⁰⁰ Art. 41 of the Charter, for example, enshrines the right to good administration, but mentions the institutions and bodies of the Union as only addressees of the right in Art. 41, para. 1. Observers have been divided as to whether this means that the right is

⁹⁵ R. STOTZ, *Die Beachtung der Grundrechte bei der Durchführung des Unionsrechts in den Mitgliedstaaten – Von Stauder über Wachauf zu Åkerberg Fransson*, in D. HEID, R. STOTZ, A. VERNY (eds), *Festschrift für Manfred A. Däuses zum 70. Geburtstag*, Munich: C.H.Beck, 2014, p. 424.

⁹⁶ See, though somewhat cautiously phrased, Opinion of AG Van Gerven delivered on 22 October 1992, case C-206/91, *Poirrez*, para. 13; see also H. JARASS, *Charta der Grundrechte der Europäischen Union*, cit., para. 24. See also on Art. 345 TFEU and its reservation with regard to the Member States’ system of property ownership Opinion of AG Cosmas delivered on 2 October 1997, case C-309/96, *Annibaldi*, paras 21-23.

⁹⁷ See, summarizing its own jurisprudence on the subject in: Court of Justice, judgment of 10 September 2014, case C-270/13, *Haralambidis*, paras 43 *et seq.*

⁹⁸ M.-C. FUCHS, *Die Bereichsausnahmen in Art. 45 Abs. 4 AEUV und Art. 51 Abs. 1 AEUV – Eine Gesamtbetrachtung unter besonderer Berücksichtigung des Notariats und der freiwilligen Gerichtsbarkeit*, Baden-Baden: Nomos, 2013, p. 115.

⁹⁹ See for an overview J. GERKRATH, *Als krönender Abschluss des Grundrechtsschutzes in der EU verlangt die Charta nach einer breiten und dezentralisierten Anwendung*, in J. MASING, M. JESTAEDT, D. CAPITANT, A. LE DIVELLEC (eds), *Strukturfragen des Grundrechtsschutzes in Europa*, Tübingen: Mohr Siebeck, 2015, p. 11.

¹⁰⁰ F. SCHORKOPF, *Grundrechtsverpflichtete*, cit., para. 28; M. HOLOUBEK, U. LECHNER, M. OSWALD, *Artikel 51*, in M. HOLOUBEK, G. LIENBACHER (eds), *Grundrechtecharta-Kommentar*, Vienna: Manz, 2014, para. 11.

applicable to the Member States or not.¹⁰¹ After some rather inconclusive decisions,¹⁰² the Court ultimately clarified that Art. 41 only addresses the EU's institutions and bodies to the exclusion of the Member States.¹⁰³ Nonetheless, this does not necessarily mean that no EU fundamental right applies to Member States in this scenario. The Court also clarified in later case law that the parallel¹⁰⁴ EU fundamental right that forms part of the general principles of EU law can fill the lacuna and apply to Member State action.¹⁰⁵

V. THE CRITERION OF THE CHARACTER OF THE RULE OF NATIONAL LAW

This criterion is perhaps best understood as assembling a number of characteristics closely related to the national rule at issue that the Court examines. In its case law, the Court scrutinizes national law for the purpose of this criterion, but insists on the general rule that it is not competent to interpret national law.¹⁰⁶ Also, the elements discussed below show that the scope of application of EU fundamental rights is determined by EU law and cannot be determined by features of national law that might differ across Member States.¹⁰⁷

One first aspect is whether national law intends to implement EU law.¹⁰⁸ For this purpose, the Court does not examine the subjective intent of the national legislator, but relies on the overall content of national legislation.¹⁰⁹ Under a formalist examination of the

¹⁰¹ See in favour of applying Art. 41 to the Member States Opinion of AG Wathelet delivered on 23 August 2013, case C-383/13 PPU, *G. and R.*, para. 52; Conclusions of AG Mengozzi delivered on 13 January 2016, case C-161/15, *Bensada Benallal*, para. 32; Opinion of AG Mengozzi delivered on 3 May 2016, case C-560/14, *M.*, para. 27; S. BOGOJEVIĆ, X. GROUSSOT, M. MEDZMARIASHVILI, *Adequate Legal Protection and Good Administration in EU Asylum Procedures: H.N. and Beyond – Case C-604/12, H.N. v. Minister for Justice, Equality and Law Reform, Judgment of the Court (Fourth Chamber) of 8 May 2014, EU:C:2014:302*, in *Common Market Law Review*, 2015, p. 1654; see for the opposing view Opinion of AG Sharpston delivered on 12 December 2013, joined cases C-141/12 and C-372/12, *Y.S.*, paras 89-90.

¹⁰² Court of Justice, judgment of 22 November 2012, case C-277/11, *M.*, paras 81-89; judgment of 8 May 2014, case C-604/12, *H.N.*, para. 49.

¹⁰³ Court of Justice, judgment of 21 December 2011, case C-482/10, *Cicala*, para. 28; more explicitly confirmed in judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *Y.S.*, para. 67; judgment of 9 March 2017, case C-141/15, *Doux*, para. 60.

¹⁰⁴ Although there are doubts whether this right is similar in its content to the Charter right, see K. KECSMAR, *Arrêt Mukarubega: droit à une bonne administration à deux vitesses?*, in *Revue de l'Union européenne*, 2016, p. 244.

¹⁰⁵ *Mukarubega*, cit., paras 44-45.

¹⁰⁶ See e.g. *McB*, cit., paras 51-52; Court of Justice, judgment of 5 March 2015, case C-343/13, *Modelo Continente Hipermercados*, para. 19.

¹⁰⁷ See e.g. Opinion of AG Bot delivered on 2 March 2016, case C-241/15, *Bob-Dogi*, para. 95.

¹⁰⁸ Or is "at its service", as D. RITLENG, *De l'articulation des systèmes de protection des droits fondamentaux dans l'Union*, cit., p. 274, phrases it.

¹⁰⁹ Court of Justice, judgment of 7 September 2006, case C-81/05, *Cordero Alonso*, para. 33. See also C. OHLER, *Grundrechtliche Bindungen der Mitgliedstaaten nach Art. 51 GRCh*, in *Neue Zeitschrift für Verwaltungsrecht*, 2013, p. 1434.

intent of the legislator, only cases of national law explicitly expressing its intent to implement EU law would be covered. As a result, for example in the field of Value Added Tax (VAT) collection only a system specialized in collecting the “EU share” of VAT would be covered, rather than the general VAT collection system in a Member State.¹¹⁰

Moreover, the Court does not draw a formal distinction with regard to what type of EU legal act is being implemented by national law.¹¹¹ As shown above, it is the regulatory density of EU law that might lead to differences regarding the applicability of EU fundamental rights. Some scholars have argued that in the case of margins of discretion left by directives, EU fundamental rights should not be applicable to a Member State’s action because there was no need to ensure the uniform application of EU law.¹¹² However, this would mean that EU law could rely on national law for the protection of fundamental rights, although the core of a potential violation of such rights would be found in the provisions of EU law that have to be implemented by the Member States.¹¹³ The Court thus continues to rule that EU fundamental rights limit and guide the use of the discretion the Member States enjoy under such EU rules.¹¹⁴

National law can also fall within the scope of EU law at a later stage in time after its adoption. As a consequence, the national law at issue becomes a measure implementing EU law at that stage only.¹¹⁵ For the situation of directives, a further parallel can be drawn with the general case of implementing measures of EU directives adopted ahead of time that are subject to certain obligations before the deadline of implementation.¹¹⁶ Such measures face a rather superficial scrutiny as to whether they are liable to seriously compromise the result prescribed by a directive. There are only certain indications on this matter in the case law. Arguably this scrutiny could, however, include elements of EU

¹¹⁰ E. HANCOX, *The Meaning of “Implementing” EU Law under Article 51(1) of the Charter*, cit., p. 1427.

¹¹¹ See first on regulations Court of Justice, judgment of 24 March 1994, case C-2/92, *Bostock*, and subsequently, based on a comparable reasoning, on directives, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*. On other legal acts see e.g. judgment of 27 February 2007, case C-354/04 P, *Gestoras Pro Amnistía*, paras 53-54; judgment of 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, para. 47; *Gueye and Sánchez*, cit., para. 55.

¹¹² See TH. KINGREEN, *Artikel 51 GRCh*, cit., para. 12; D. THYM, *Europäischer Grundrechtsschutz und Familienzusammenführung*, in *Neue Juristische Wochenschrift*, 2006, p. 3250.

¹¹³ J. KÜHLING, *Fundamental Rights*, cit., p. 498; A. EPINEY, *Zur Reichweite der Grundrechtsbindung des Gemeinschaftsgesetzgebers*, in *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 2007, p. 63 *et seq.*

¹¹⁴ N. MATZ-LÜCK, *Europäische Rechtsakte und nationaler Grundrechtsschutz*, in N. MATZ-LÜCK, M. HONG (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem – Konkurrenzen und Interferenzen*, Berlin: Springer, 2012, p. 170.

¹¹⁵ The very entry into force of EU law always remains a clear temporal border for the applicability of EU fundamental rights, see Court of Justice, order of 12 July 2012, case C-466/11, *Currà and others*, paras 22-23; judgment of 6 October 2016, case C-218/15, *Paoletti and others*, para. 40.

¹¹⁶ Court of Justice, judgment of 18 December 1997, case C-129/96, *Inter-Environnement Wallonie*, paras 44-45; judgment of 22 November 2005, case C-144/04, *Mangold*, para. 67. See, however, on measures that do not implement a directive *Bartsch*, cit., paras 24-25.

fundamental rights as a benchmark if the relevant directive encompasses the realization of EU fundamental rights among its goals.¹¹⁷

Sometimes, directives may contain provisions that are applicable to factual situations that emerged after the entry into force of a directive, but before the end of its implementation period, insofar as national implementing measures have been taken before the end of the implementation period. In such a case, EU fundamental rights apply to the implementing measures.¹¹⁸ For the Court of Justice, the perspective of the individual seems to be the main concern in these cases. The protection of an individual should be ensured whether national law has been adopted to implement a directive at the exact moment of the end of the implementation period or not.¹¹⁹

A last question related to the character of a rule of national law arises where national law outside the scope of EU law refers to EU law, namely EU fundamental rights, to achieve a parallel interpretation of national law.¹²⁰ Thus, internal situations of national law ought to be treated in the same way as situations e.g. with a cross-border element where EU law would be applicable. The Court held that in these situations EU fundamental rights apply. It emphasized, however, that there had to be a very clear, unambiguous reference to EU fundamental rights in the national rules at issue that led to the displacement of national law for the relevant situation.¹²¹

VI. THE CRITERION OF THE CONVERGENCE OF OBJECTIVES

As another criterion, the Court of Justice insists on a certain degree of convergence between the objectives pursued by EU law and the national rules at issue. As shown above, this does not mean that national law must have been adopted expressly to implement EU law.¹²² For the purpose of this criterion, the Court appears to compare the goals of national law and potentially relevant EU law rather than to examine whether national law pursues one particular goal of EU law.¹²³

In *Annibaldi*, the Court held that EU fundamental rights were not applicable to a national law for a number of reasons. One of them was that the national law at issue pursued the objectives of protecting the environment and cultural heritage of a particular region, and not the objectives of the common organization of agricultural markets under

¹¹⁷ Court of Justice, judgment of 27 October 2016, case C-439/16 PPU, *Milev*, para. 35.

¹¹⁸ *Cordero Alonso*, cit., para. 32; Court of Justice, judgment of 17 January 2008, case C-246/06, *Velasco Navarro*, paras 28-29.

¹¹⁹ M. BLECKMANN, *Nationale Grundrechte im Anwendungsbereich des Rechts der Europäischen Union*, cit., p. 51; B. MAIER, *Grundrechtsschutz bei der Durchführung von Richtlinien*, cit., p. 131.

¹²⁰ See Court of Justice, judgment of 16 March 2006, case C-3/04, *Poseidon Chartering*, para. 15.

¹²¹ *Cicala*, cit., para. 28; Court of Justice, judgment of 7 November 2013, case C-313/12, *Romeo*, paras 32-33.

¹²² See *supra*, section V.

¹²³ See *supra*, section IV.3.

the applicable rules of EU law.¹²⁴ A very limited overlap in objectives is also not sufficient. In *Siragusa*, the Court found that EU fundamental rights did not apply to a national law aiming at the protection of the landscape. Landscape protection was only one factor for the relevant rules of EU law at issue; the latter focused on environmental impact assessments, so that the Court saw no sufficient overlap of objectives.¹²⁵

It remains, however, difficult to clearly determine the content of the criterion. There is to date no decision in favour of the application of EU fundamental rights based on the criterion.¹²⁶ Moreover, its contours remain vague. For example, in *Hernández* the Court discussed the differing objectives of EU and national law, but then resolved the case based on the criterion of density of EU regulation without explaining its approach.¹²⁷ Lastly, there appears to be a very close, but nonetheless blurry relationship with the criterion of the impact on EU law that national rules must have, as is examined in the subsequent section.

VII. THE CRITERION OF THE IMPACT ON EU LAW

In a further number of cases, the Court of Justice judged EU fundamental rights as not applicable on the basis of the lack of an impact on EU law caused by national rules. The Court thus rejected to apply EU fundamental rights when there were simply matters “closely related” or having an “indirect impact” on each other regulated in EU and national law¹²⁸ or merely hypothetical connections to rights regulated in EU law.¹²⁹

A number of vague features of the criterion gives rise to concern. First, in the absence of a positive decision applying EU fundamental rights it remains unclear under what circumstances the Court will find the criterion to be fulfilled. Moreover, in some cases the Court seems to mix its assessment with another question, namely whether the protection of national fundamental rights based on a level of protection different from EU law might undermine the unity, primacy and effectiveness of EU law.¹³⁰ This unduly conflates two distinct questions; the applicability of EU fundamental rights should be established in the first place before the problem of different standards of fundamental rights protection in EU law and national law is addressed.¹³¹

Second, there is a somewhat blurry relationship between the criterion of convergence of objectives and the one of the impact on EU law. Although it is not explicitly set

¹²⁴ *Annibaldi*, cit., para. 21. See also *Hernández*, cit., paras 38-41.

¹²⁵ *Siragusa*, cit., para. 28.

¹²⁶ See also M. DOUGAN, *Judicial Review of Member State Action under the General Principles and the Charter*, cit., p. 1235.

¹²⁷ *Hernández*, cit.

¹²⁸ *Hernández*, cit., para. 34; *Liivimaa Lihaveis*, cit., para. 62.

¹²⁹ *Kremzow*, cit., para. 16; *Iida*, cit., paras 76-77.

¹³⁰ As set briefly at the end of section II.

¹³¹ See also M. DOUGAN, *Judicial Review of Member State Action under the General Principles and the Charter*, cit., p. 1242 *et seq.*

out in the Court's jurisprudence, the most convincing reading appears to be that there is a balancing exercise between the two criteria. The result is that if one criterion is clearly not fulfilled, even partial fulfilment of the second criterion will not render EU fundamental rights applicable. In *Siragusa*, the Court seemed to see a close connection between the two criteria. It found that the objectives between EU law and national law did not sufficiently overlap and seamlessly added that an indirect impact on EU law was not sufficient to establish the applicability of EU fundamental rights.¹³² In *Annibaldi*, the Court made its views somewhat clearer. It held that even if the national law at issue was able to indirectly affect the operation of EU rules, the law nonetheless pursued different objectives from EU law.¹³³ It thus appears that for the Court, a certain impact on EU rules is irrelevant if the national rules at issue pursue objectives substantially different from those of the relevant rules of EU law.¹³⁴

Summing up, the two criteria of the convergence of objectives and the impact on EU law are perhaps best understood as a *safety valve*. The Court may have taken this road as it was uncertain whether the criterion of the density of EU regulation would be sufficient to convincingly categorize all the various situations where EU fundamental rights apply to the Member States. To date, the Court has not yet activated the safety valve to trigger the applicability of EU fundamental rights. Its underlying motive is thus understandable. However, the Court fails to adequately explain the doctrinal underpinnings of this line of case law and leaves too many loose ends, as set out above.

In conclusion, the two criteria examined in the present and the previous section may effectively blur the picture more than they actually help. It can thus arguably be suggested that the Court may need to reconsider their usefulness.

VIII. CONCLUSION

An overview over the Court's case law on the scope of application of EU fundamental rights shows that a fairly convincing case law has emerged. There may be a large amount of decisions that have been handed down. Nonetheless, the resulting jurisprudence can be grouped in a mostly coherent manner. Contrary to existing suggestions on how to categorize the Court's relevant case law, the present paper argued in favour of deliberately identifying a larger number of constellations and creating clusters of typical situations in which EU fundamental rights apply rather than seemingly clear categories. The overall aim is exhaustiveness rather than absolute precision. In this vein, a particular interpretation has been suggested for the four criteria that the Court has announced in its case law to create a typology of the case law. The most important and convincing criterion is the density of EU regulation of a particular area. Under this section, the Court of Justice

¹³² *Siragusa*, cit., para. 29.

¹³³ *Annibaldi*, cit., para. 22.

¹³⁴ See with a similar view H. JARASS, *Charta der Grundrechte der Europäischen Union*, cit., para. 25.

applies a fine-grained analytical scheme to justify the application of EU fundamental rights to the Member States. Nonetheless, there remain some loose ends. For example, it is rather unfortunate, although perhaps understandable in light of future unpredictable cases, that the Court insisted that the criteria it applies are non-exhaustive.¹³⁵ The criteria of convergence of objectives between national and EU law and the impact on EU law remain difficult to grasp and potentially overstep the line between examining the applicability of EU fundamental rights and the consequences of their applicability. Moreover, the relationship between the criteria also remains unclear, e.g. whether all of them need to be fulfilled or to what extent one criterion must be fulfilled.¹³⁶ It will thus be up to the Court to continue to adhere to its own jurisprudential *acquis* where it has reached coherence and to continue to refine it where it lacks such coherence. Nonetheless, there seems to be no reason at present for fatalistic assessments that in the past have expressed the view that the applicability of EU fundamental rights should simply be assumed wherever there is any link of any nature to EU law.¹³⁷

Post scriptum. Between the drafting and the publication of this piece, the Court handed down its decision in *Associação Sindical dos Juizes Portugueses*. The Court found that it could scrutinize the application of general salary-reduction measures to a Member State's judiciary, a seemingly purely internal situation, using the benchmark of the principle of judicial independence.¹³⁸ While the decision is ground-breaking with regard to its result, one might at a first glance wonder whether the Court has left behind the constraints of looking for situations of "implementation" of EU law under Art. 51, para. 1, of the Charter. In particular, the Court strongly relies on the principle of effective judicial protection of individual's rights under EU law, derived as a general principle of EU law from Art. 6 and 13 of the European Convention on Human Rights and reaffirmed in Art. 47 of the Charter.¹³⁹ As the essence of the decision, the Court can scrutinize whether "courts or tribunals" of the Member States meet the EU law requirements of effective judicial protection if they are operating in "fields covered by" EU law, i.e. in situations of a much looser link between national and EU law than under Art. 51, para. 1, of the Charter.¹⁴⁰ However, at a closer look, what the Court is doing with regard to the scope of EU law and EU fundamental rights appears to be much closer to what it did in the context of EU citizenship in *Zambrano*. There, it held that under certain circumstances Art. 20 TFEU

¹³⁵ *Siragusa*, cit., para. 25. The Court seems to not have resorted to other criteria to date.

¹³⁶ M. HOLOUBEK, U. LECHNER, M. OSWALD, *Artikel 51*, cit., para. 31; see also S. BUCHER, *Die Bindung der Mitgliedstaaten an die EU-Grundrechtecharta bei Ermessensspielräumen, insbesondere in Fällen der Richtlinienumsetzung und unter Berücksichtigung der Folgerechtsprechung zu "Åkerberg Fransson"*, cit., p. 223.

¹³⁷ See, referring to a recommendation of the Scientific Service of the German *Bundestag*, M. BOROWSKY, *Artikel 51 Anwendungsbereich*, cit., para. 30b.

¹³⁸ Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*, paras 34 and 37.

¹³⁹ *Ibid.*, para. 35.

¹⁴⁰ *Ibid.*, para. 37.

could be applicable even in an *a priori* internal situation.¹⁴¹ Similarly, the Court seems to establish an autonomous scope of application for Art. 19, para. 1, TFEU that covers certain *a priori* internal situations,¹⁴² while distinguishing the situation from that of Member States “implementing” EU law under Art. 51, para. 1, of the Charter.¹⁴³ It remains to be seen whether in subsequent decisions the Court will interpret the scope of application of Art. 19, para. 1, TFEU as restrictively as it did in the *Zambrano* constellation.¹⁴⁴ For the scope of application of EU fundamental rights, like in *Zambrano*, this jurisprudential development only produces an indirect effect. The Court has simply interpreted the scope of EU law to be somewhat broader, so that EU law and with it EU fundamental rights also apply in the particular situation defined in *Associação Sindical dos Juizes Portugueses*. Nonetheless, the fundamental *dictum* of the Court that the scope of application of EU fundamental rights is dependent on and follows the scope of EU law remains valid.¹⁴⁵

¹⁴¹ Court of Justice, judgment of 8 March 2011, case C-34/09, *Zambrano*, para. 42.

¹⁴² The Advocate General in his conclusions speaks of situations where national courts are “likely” to exercise their judicial activity in areas covered by EU law, see Opinion of AG Saugmandsgaard Øe delivered on 18 May 2017, case C-64/16, *Associação Sindical dos Juizes Portugueses*, para. 41. Note, nonetheless, that in contrast to the Court the Advocate General found that the national measures also fell within the scope of application of EU fundamental rights, see para. 53.

¹⁴³ *Associação Sindical dos Juizes Portugueses*, cit., para. 29.

¹⁴⁴ Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci*; judgment of 5 May 2011, case C-434/09, *McCarthy*.

¹⁴⁵ *Åkerberg Fransson*, cit., para. 22.