Articles
The Revised Draft Agreement on the Accession of the EU to the ECHR
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Ten Years On: The Charter of Fundamental Rights in the Jurisprudence of the Court of Justice of the European Union Since *Opinion 2/13*

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Abstract: Ten years ago, when the Court of Justice delivered Opinion 2/13, the author of the present *Article*, together with Ramses A Wessel, argued that one of the consequences of the deferral of accession to the ECHR was that the Court of Justice gained extra time to develop case law based on the Charter of Fundamental Rights without being fully exposed to the direct influence of the European Court of Human Rights. This *Article* provides a tour d'horizon of the existing jurisprudence, showing the key patterns and tendencies, which can be characterised as development by continuity, with the biggest milestones being the application of the Charter in rule of law cases, the gradual determination of the essence of rights, and the application of the key tenets of primacy and direct effect to the Charter.

Keywords: Charter of Fundamental Rights – European Convention on Human Rights – *Opinion 2/13* – validity of EU law – interpretation of EU law in the light of the Charter – direct effect of the Charter.

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I. Introduction

18 December 2024 marks ten years since the Court of Justice issued its *Opinion 2/13*.[1] As is well known and well documented in the academic literature, this Opinion effectively blocked, at least for now, the accession of the European Union to the European Convention on Human Rights.[2] In contrast to its previous Opinion on the matter,[3] this time around the Court of Justice provided a comprehensive and, at least in many places, robust argumentation as to why the Draft Accession Treaty had failed to cut the mustard. Yet, as it often is the case with judicial decisions, there is more to it than meets the eye. In a commentary to *Opinion 2/13*, the present author, together with Ramses A. Wessel, argued that this was precisely the case here.[4] The argument that we put forward was that by delaying accession of the European Union to the ECHR, the Court of Justice gave itself time "to build sufficient case law on the Charter of Fundamental Rights and not be directly exposed to the Strasbourg Court's case law".[5] We claimed the existence of a rule of thumb: "The less-developed the Charter is, the more its interpretation would be influenced by the Strasbourg rulings".[6] With this in mind, the present article aims to juxtapose that yesteryear argument with the jurisprudence of the CJEU post-18 December 2014. It argues that over the past ten years the jurisprudence of the CJEU in dealing with the Charter of Fundamental Rights may be best described as development by continuity.[7] While, on the one hand, the judges proceeded on the trajectory established well before *Opinion 2/13* was delivered, on the other they introduced important novelties, in particu-

[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[2] Not surprisingly, Opinion 2/13 has triggered a flurry of academic commentary. See, *e.g.*, D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) German Law Journal 105; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) German Law Journal 147; S Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) German Law Journal 169; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) German Law Journal 213; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) FordhamIntlLJ 955; B de Witte and S Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) ELR 683; BH Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy: Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) Cambridge Yearbook of European Legal Studies 168. More generally on the accession of the EU to the ECHR see, *inter alia*, P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

[3] Opinion 2/94 *Accession of the European Union to the ECHR* ECLI:EU:C:1996:140.

[4] A Łazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) German Law Journal 179.

[5] *Ibid*. 190.

[6] *Ibid*.

[7] For a comprehensive assessment of the period 2009–2014 see 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 2025).

lar the extension of fundamental tenets governing the enforcement of EU law (direct effect and primacy) to the Charter and its application in rule of law cases. As far as the present analysis is concerned, though, two caveats are fitting. To begin with, given the limited space, the analysis that follows does not have the ambition of serving as a comprehensive guide to existing case law. It would be a task of gargantuan proportions more fitting for a book, than a wordcount-restricted journal article.[8] From this, the second caveat inevitably emerges. In order to sketch the main trends and patterns in the case law of the CJEU, the author had to resort to sampling and follow Cervantes's law of statistics – that by a small selection of examples, one may judge the whole piece.[9]

II. Seeing the wood for the trees: the background

Before the contemporary jurisprudence of the CJEU is put under the microscope, it is essential to set the scene. As the starting point, I should like to step back to the genesis of the Charter of Fundamental Rights and the *raison d'être* of its appearance in the EU legal order. The story goes back many decades and has been inextricably linked to the clash of Titans: the battle over the primacy of EU law. Without rehashing the familiar details, it suffices to return briefly to the *Solange* saga and the famous words of the German *Bundesverfassungsgericht* that, as long as the then EEC had no bill of rights of its own, the German Constitution would be the supreme law of the land.[10] Like a red rag to a bull, it triggered the reaction from the Court of Justice, which has been, since then – albeit incrementally – developing the general principles of EC law, building on and using as sources of inspiration the constitutional traditions of the Member States as well as international treaties, in particular the European Convention on Human Rights (ECHR).[11] This judicial gap-filling served its purpose, yet with the ever-increasing competences of the European Communities and the emergence of the European Union, it became clear that a bill of

[8] For comprehensive coverage of the Charter, including the voluminous case law of the Court of Justice of the European Union see, *inter alia*, S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2021).

[9] See H Rawson, *The Unwritten Laws of Life* (Carbolic Smoke Ball 2008) 55.

[10] [1974] 2 CMLR 540. This stood in stark contrast to the CJEU's take on primacy in case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114. For a detailed account of the historical jurisprudence see, *inter alia*, J Kokott, 'Report on Germany' in A-M Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Courts & National Courts. Doctrine and Jurisprudence* (Hart Publishing 1998).

[11] See, for instance, case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* ECLI:EU:C:1974:51; case 228/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206; case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECLI:EU:C:1991:254; case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434; case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333.

rights of sorts was required.[12] As already noted at the beginning of the present contribution, the option of joining the ECHR was taken out of the equation by the Court of Justice in *Opinion 2/94*. Subsequently, the development of the EU's own bill of rights became the talk of the town. Despite the good intentions, it did not materialise without political fireworks. Out of many bones of contention, two stood out. Firstly, the then Member States were quite divided as to the suite of fundamental rights to be included in the Charter, as well as the caveats necessary to ensure that the bill of rights would not serve as a vehicle for the expansion of EU competences and for its federalisation.[13] The adoption of the Charter in 2001 as a non-binding instrument was a necessary compromise, yet, in hindsight, it was merely a stepping stone on a long journey that culminated in the Treaty of Lisbon, which gave the Charter of Fundamental Rights binding force and status equivalent to EU primary law.[14] The rest, as they say, is history.

Be this as it may, it is unquestionable that the Charter has evolved since then. It had already made a firm mark during its first years of existence as soft law on steroids.[15] Since 1 December 2009 – that is, when it gained binding force – it has travelled a long way in the case law of the CJEU: from the modest beginnings of the *en passant* appearance in *Kücükdeveci*[16] to serving in hundreds of cases as a tool for the interpretation of EU law and a yardstick for the verification of legality of the EU's or Member States' actions. While several key decisions had been rendered prior to *Opinion 2/13*, many more have been delivered since. Arguably, in such decisions as *Åkerberg Fransson*,[17] *Test-Achat*,[18] and *Melloni*,[19] the Court of Justice elucidated not only its vision of the scope of application of the Charter to the Member States and the level of protection guaranteed by the Charter but also its capability to serve as a yardstick for the legality of EU actions. By the same token, the Court has set out navigation beacons for future case law. As the present author and Ramses A Wessel argued shortly after *Opinion 2/13* was delivered, the delay in the EU's accession to the ECHR indeed gave the CJEU extra time to build more jurisprudence and

[12] For a comprehensive analysis of how the human rights-related case law of the CJEU has evolved see E Frantziou, 'Human Rights as an Example of Cooperative Federalism? A Chronology of the Use of the Preliminary Reference Procedure in Human Rights Cases between 1957 and 2023' (2023) European Journal of Legal Studies 189.

[13] See, *inter alia*, G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) ELR 126.

[14] See, *inter alia*, M Borowski, 'The Charter of Fundamental Rights in the Treaty on European Union' in M Trybus and L Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012); D Anderson and CC Murphy, 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012)

[15] See, *inter alia*, S Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) CMLRev 1565, 1569-1573.

[16] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21.

[17] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

[18] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* ECLI:EU:C:2011:100.

[19] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

to construct an autonomous human rights regime. In doing so, the Court was of course constrained by the horizontal rules laid down in the Charter of Fundamental Rights, including the desideratum to interpret provisions deriving from the ECHR in a way that is compatible with the jurisprudence of the European Court of Human Rights.

III. How did the Court of Justice of the European Union use the extra time?

As the starting point, it is essential to reflect on the main factors determining the application of the EU's bill of rights and, in turn, on the key principles underpinning the jurisdiction of the CJEU. To begin with, the Charter applies, as per its art. 51(1), "to the institutions, bodies, offices and agencies of the Union". In other words, it is there to ensure that all actors forming the institutional fabric of the European Union act in a manner that is Charter compliant. Of course, this is not where it ends. The Charter applies also to the Member States of the European Union. However, in this respect, art. 51(1) of the Charter is the gatekeeper. It provides that the Charter applies only to the extent that the Member States "are implementing EU law". The latter notion has proven to be particularly problematic for a host of reasons. Firstly, there are considerable differences between various language versions of the Charter. Secondly, art. 51(1) suffers from an unfortunate lack of coherence between the text of the Charter itself and the Explanatory Notes which serve as navigation beacons when it comes to its application in practice.[20] Not surprisingly, starting from the judgment in *Åkerberg Fransson*, the Court of Justice has been busy interpreting art. 51(1) of the Charter. As argued by Sara Iglesias Sánchez, the case law is far from clear as the Court "captured in a formula of beautiful simplicity the enormous complexity of the matter".[21] Here, the Court has had to balance a number of factors. On the one hand, it has had to consider the linguistic cacophony explained above and, on the other hand, the judges have had to follow the horizontal rules underpinning the application of the Charter, in particular the crucial caveat that it does not expand EU competences. Still, the *Åkerberg Fransson* formula has meant that the Charter applies extensively to the Member States and, in the past ten years, the Court has had many opportunities to deal with the matter in question. In this respect, a good exemplar are cases on VAT fraud.[22]

For the application of the Charter, the main rules governing the jurisdiction of the CJEU are of pivotal importance. The legality of actions of EU institutions and other organs may be determined *qua* two main procedural vehicles: the annulment procedure (art.

[20] Explanations relating to the Charter of Fundamental Rights [2007].

[21] S Iglesias Sánchez, 'Article 51: The Scope of Application of the Charter' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 401, 401.

[22] Good examples. See, for instance, cases on breach of VAT obligations. See, *inter alia*, case C-310/16 *Criminal proceedings against Petar Dzivev and Others* ECLI:EU:C:2019:30; joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal proceedings against PM and Others* ECLI:EU:C:2021:1034.

263 TFEU) and references for a preliminary ruling from national courts on the validity of EU secondary legislation (art. 267 TFEU).[23] As the *Gascogne* litigation has shown, action for damages for a serious breach of EU law attributable to an EU institution, including the CJEU itself, may be of use, too.[24] In the realm of the external relations of the European Union, the procedure for *ex ante* verification of the compliance of international treaties with the EU Founding Treaties also has a role to play.[25] Be that as it may, such cases constitute only a small percentage of litigation reaching the CJEU which, of course, translates into a number of instances in which the Charter, in the past ten years, has made its appearance. It stands in stark contrast to the number of preliminary rulings on the interpretation of EU law coming from domestic courts (art. 267 TFEU). Year by year, they occupy a large share of the Court's docket.[26] Bearing in mind that many of them touch upon the Charter of Fundamental Rights, it is reasonable to argue that since its adoption, and – in particular – since it has gained binding force, it has been making its way into domestic litigation in the Member States.

When it comes to the jurisdiction of the CJEU, one last general point is fitting as it is highly relevant for the analysis that follows. Irrespective of the Court procedure employed, the Court of Justice of the European Union – unlike courts sitting at the apex of domestic judiciaries – does not dine *à la carte*. Without a generally applicable filtering system in place, it proceeds on the presumption of admissibility, which means that if the applicants in direct actions or national courts in preliminary rulings raise arguments based on the Charter, we are likely to see the Court's engagement with the EU's bill of rights.[27] Yet, as further elaborated upon in this *Article*, the judges do indeed have some room for manoeuvre. Under the circumstances, they may opt not to touch upon the Charter or, to the extent that acts *ex officio* are permitted, they may draw it into the equation.

[23] See, for instance, case C-13/23 *cdVet Naturprodukte GmbH. v Niedersächsisches Landesamt für Verbraucherschutz und Lebensmittelsicherheit (LA-VES)* ECLI:EU:C:2024:175.

[24] Art. 340 TFEU. See, for instance, case T-577/14 *Gascogne Sack Deutschland GmbH and Gascogne v European Union* ECLI:EU:T:2017:1 para. 78.

[25] Art. 218(11) TFEU. For an academic appraisal see, *inter alia*, G Butler, 'Pre-Ratification Judicial Review of International Agreements to be Concluded by the European Union' in M Derlén and J Lindholm (eds), *The Court of Justice of the European Union. Multidisciplinary Perspectives* (Hart Publishing 2018).

[26] See M Broberg and N Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Oxford University Press 2021).

[27] As is well-established in the case law of the Court, references for a preliminary ruling are admissible only if the national court is able to prove that the answer of the CJEU is necessary to enable the domestic judges to adjudicate in the case at hand. This caveat has proven to be critical in several rule of law cases where the national courts of affected Member States, in particular Poland, submitted numerous references touching upon art. 47 of the Charter (and art. 19(2) TEU) that had been rejected as inadmissible by the Court of Justice, as the domestic judges had failed to explain such links. See, for instance, joined cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others* ECLI:EU:C:2020:234.

Another important factor determining the extent to which the Charter is employed by the CJEU is its actual content. As is well known, the rights, freedoms, and principles contained in the Charter hardly constitute an original amalgam: it is, subject to a few exceptions, a patchwork of the ECHR and of rights pre-existing in the EU Founding Treaties. With this in mind, it is scarcely surprising that some of the rights, freedoms, and principles are frequently invoked by the CJEU, while others are highly unlikely to play any practical role whatsoever. A good example of the former is art. 47 of the Charter, which provides for the principle of effective judicial protection. There is a constant flow of cases unlocking the meaning of art. 47 and its scope.[28] This has not always come easy – the rules on the application of the Charter to the Member States have proven to be particularly problematic in a series of rule of law cases where the Court of Justice, with the precision of a surgeon, has had to draw the line between the scope of application of art. 47 of the Charter, on the one hand, and the scope of application of art. 19(1) TEU on the other.[29] At the other end of the equilibrium we find, for example, art. 45 (1) of the Charter. It is a carbon copy of art. 21 TFEU, vesting EU citizens with the right to move and reside in other Member States. Apart from purely decorative purposes, it is hard to imagine why national courts or the CJEU would add the Charter to the mix.

So, bearing in mind the above, how did the Court of the Justice of the European Union use the extra time gained by the rejection of the terms of accession to the ECHR? It may be a fair and straight-forward question, yet, at the same time, one that is notoriously difficult to respond to with a bulletproof answer. One thing seems certain, though. Whatever the answer, it ought to be couched in a long list of ifs and buts.

Perhaps one of the most useful methods to begin with is a quantitative assessment: the determination of a number of judgments of the CJEU in which the Charter of Fundamental Rights has made its appearance. Statistical data are indeed a convenient point of reference, yet one needs to remember the limited power of bare numbers. In the words of M Bobek and J Adams-Prassl, "numbers in and of themselves do not tell much of a story, of course, especially in the law".[30] Thanks to technological advances, the days of laboriously ploughing through voluminous European Court Reports belong now to history (unless, of course, one is an *afficionado* of such exercises). The required data are

[28] See, *inter alia*, case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117; joined cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* ECLI:EU:C:2019:982; case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others* ECLI:EU:C:2021:153. For an academic appraisal see, *inter alia*, M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection. Volume 1. The Court of Justice's Perspective* (Hart Publishing 2022).

[29] See, *inter alia*, S Prechal, 'Article 19 and National Courts: A New Role for the Principle of Effective Judicial Protection?' in M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection* cit. 28.

[30] M Bober and J Adams-Prassl, 'Conclusions' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* cit. 560.

available with a few clicks of a computer mouse, all served on platter by the database of the Court of Justice of the European Union. For the purpose of the present exercise, the initial search covered the period from 18 December 2014 (the date *Opinion 2/13* was handed down) to 7 July 2024 (the cut-off date). It encompasses the jurisprudence of both - the Court of Justice and the General Court.[31] Furthermore, it was limited to cases that were closed at the cut-off date. The documents sifted through included judgments and orders of both courts,[32] *ex ante* opinions of the Court of Justice on the legality of international treaties as well as opinions of advocates general at the Court of Justice. By applying these basic parameters, the number stood at 2,441 documents in which the Charter of Fundamental Rights was mentioned in the grounds of the judgment/opinion and/or in their operative parts.[33] What does this tell us? Arguably, relatively little, as this figure includes cases where the Charter was of paramount importance for the solution in the issue at hand,[34] as well as instances where it was mentioned *en passant* and therefore had no real impact on the reasoning and/or the outcome of the case.[35] It surely did not cover judgments where the Charter was not explicitly mentioned, yet, the members of the Court may have been inspired by it but – during the *délibéré* – agreed that this should not be trumpeted. Overall, such a basic quantitative test is a good indicative first step, but without an in-depth analysis of every single document, it is not terribly insightful. One thing, though, merits attention even at this stage. While, *prima facie*, the figure provided may look considerable, the early assessment changes when one juxtaposes it with the sheer number of cases handled by the CJEU in the same period.[36] This sows a seed of doubt: perhaps the Charter of Fundamental Rights is not as frequent a visitor in Kirchberg courtrooms as one would have initially anticipated. But then again, what figure would satisfy someone eager to prove that the CJEU is making good use of the Charter or, perhaps, claiming the opposite, that the Charter is not used often enough? Is it quantity over quality, or the other way around?

Leaving such subjective assessments aside, for the purposes of this contribution it will suffice to identify the main trends emerging from the case law of the CJEU and juxtapose them with the already discussed *raison d'être* of the Charter. Analysis of the jurisprudence shows that the objectives behind the Charter are being gradually achieved and

[31] This included judgments and orders.

[32] Procedural and reasoned orders of both courts.

[33] This number should be treated as indicative. For reasons which are beyond the present author's knowledge and comprehension, repeated checks using the same criteria, kept on giving different results. Man v. technology is not the kind of battle that can be easily won by humans.

[34] See, for instance, case C-235/17 *European Commission v Hungary* ECLI:EU:C:2019:432.

[35] See, for instance, case C-25/23 *AL v Princess Holdings Ltd* ECLI:EU:C:2023:786.

[36] For instance, in the period 2014–2024, the Court of Justice received 5284 new references for preliminary ruling. This number includes references that, in one way or another, were processed by the Court. It should be noted that even if references are withdrawn or declared inadmissible, they keep *juge rapporteur* and designated advocate general busy.

the case law of the CJEU in the period following *Opinion 2/13* is largely a continuation of previously established patterns with new elements brought into the equation. To begin with, it has been used as a yardstick for verification of the legality of EU legal acts. This has included not only EU regulations and directives[37] but also decisions on the conclusion of international agreements[38] and international agreements themselves.[39] The Charter has also been employed to ensure the accountability of bodies forming the institutional fabric of the EU for breaches of the Charter. As already alluded to, this has extended to the non-contractual liability of the EU for breach of art. 47 of the Charter attributable to the General Court itself.[40] Bearing in mind that the Charter also applies to the Member States (albeit subject to the caveats noted above), it has also been used as a yardstick for the verification of the compliance of domestic law with EU law.[41] While reliance on the Charter by the European Commission in infringement cases is relatively scarce,[42] a recent judgment finding that Hungary, a recidivist rule of law breaker, had failed to comply with a previous decision of the CJEU is worth noting. The fact that the breach extended to several provisions of the Charter of Fundamental Rights has contributed to the choice of a coefficient for the seriousness of a breach and thus to the calculation of the penalties imposed by the Court.[43] From the procedural point of view, references for a preliminary ruling have served as vehicles for the verification of the compliance of national law with the Charter. What stands out are many instances in which the Charter has been used as

[37] See, for instance, *Association Belge des Consommateurs Test-Achats* cit. para. 18.

[38] See case C-716/22 *EP v Préfet du Gers, Institut national de la statistique et des études économiques (INSEE)* ECLI:EU:C:2024:339; case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems* ECLI:EU:C:2020:559. In the former case, the CJEU ruled that the contested decision on the conclusion of the EU-UK Withdrawal Agreement was compliant with the Charter (decision 2020/135 of the European Council of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community). However, in the latter ruling, the CJEU declared as invalid Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Parliament and Council Directive 95/46/EC on the adequacy of the protection provided by the EU-US Privacy Shield.

[39] Opinion 1/15 *Draft Agreement between Canada and the European Union on Transfer of Passenger Data* ECLI:EU:C:2017:592.

[40] *Gascogne Sack Deutschland GmbH and Gascogne* cit. para. 24.

[41] See, *e.g.*, case C-53/23 *Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor' v Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Procurorul General al României* ECLI:EU:C:2024:388.

[42] See, for instance, *European Commission v Hungary* cit. para. 34; case C-78/18 *European Commission v Hungary* ECLI:EU:C:2020:476; case C-66/18 *European Commission v Hungary* ECLI:EU:C:2020:792. For a commentary focusing on the European Commission's reluctance see A Łazowski, 'Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and Infringement Proceedings' (2013) ERA Forum 573.

[43] Case C-123/22 *Commission v Hungary (Accueil des demandeurs de protection internationale II)* ECLI:EU:C:2024:493.

a tool for the interpretation of secondary legislation.[44] Not surprisingly, it has spread to many areas of EU law, starting with the groundbreaking rule of law cases already mentioned and ending with EU criminal law. In this respect, voluminous jurisprudence on the essence of rights listed in the Charter is also worthy of particular interest. Thus far, the Court has dived into provisions of the Charter concerning privacy, freedom of expression, the principle of *ne bis in idem*, or the right to asylum.[45] Furthermore, by extending the application of the doctrines of primacy and direct effect to the Charter, the Court of Justice has also given additional thrust to its enforcement at the national level. Not surprisingly, the application of horizontal direct effect to the Charter has attracted the attention of academic commentators.[46] Yet, this does not mean that judges are willing to extend the application of direct effect to all provisions of the Charter. *Au contraire*, as the judgment in *AMS* shows, the standard direct effect test applies also to the Charter and, should its provisions fail to meet any limbs of the test, they cannot be directly invoked by individuals in national courts.[47]

Regardless of the *AMS* case, this brief *tour d'horizon* could give the impression that the CJEU might be using every opportunity to employ the Charter and to increase its prominence as a foundation of EU law. Indeed, the analysis conducted for the purposes of this short contribution proves that instances can be found when the Charter is not mentioned by a national court in a reference, but is added to the mix *ex officio* by the Court of Justice.[48] Yet, case law also reveals other scenarios. For instance, a group of cases may be distinguished where the Charter of Fundamental Rights has been mentioned in the questions

[44] See, *e.g.*, case C-1/23 PPU *X, Y, A, legally represented by X and Y, B, legally represented by X and Y v État belge* ECLI:EU:C:2023:296; case C-638/22 *T.C., Rzecznik Praw Dziecka, Prokurator Generalny interested parties: M.C., Prokurator Prokuratury Okręgowej we Wrocławiu* ECLI:EU:C:2023:103; case C-636/22 *PY v Procura della Repubblica presso il Tribunale di Lecce* ECLI:EU:C:2023:899; case C-15/24 *Criminal proceedings against CH* ECLI:EU:C:2024:399; case C-299/23 *Criminal proceedings against HYA, IP, DD, ZI, SS* ECLI:EU:C:2024:505.

[45] See, for example, case C-362/14 *Maximillian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650. For an academic appraisal see, *inter alia*, T Tridimas, 'What the Essence of a Right?' in C Barnard, A Łazowski and D Sarmiento (eds), *Pursuit of Harmony in Turbulent Europe. Essays in Honour of Eleanor Sharpston* (Hart Publishing 2024).

[46] See, for example, case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:257. See further, *inter alia*, E Frantztiou, *The Horizontal Effect of Fundamental Rights in the European Union. A Constitutional Analysis* (Oxford University Press 2019); S Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) Revista de Derecho Comunitario Europeo 407; D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) ELR 479; M Szpunar, 'Horizontality of the Charter: Imposing Rights on Individuals or Making Directives Directly Applicable?' in C Barnard, A Łazowski and D Sarmiento (eds), *The Pursuit of Legal Harmony In a Turbulent Europe: Essays in Honor of Eleanor Sharpston* (Hart Publishing 2024) 45.

[47] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2.

[48] See, *e.g.*, case C-722/22 *Sofiyski gradski sad* ECLI:EU:C:2024:80 paras 28–29; case C-25/23 *AL v Princess Holdings Ltd* ECLI:EU:C:2023:786 para. 34; case C-656/22 *Askos Properties EOOD v Zamestnik izpalnitelen direktor na Darzhaven fond 'Zemedelie'* ECLI:EU:C:2024:56 paras 57–60.

submitted by national courts but that part of the reference has been declared inadmissible. It can therefore be said that the Charter has not been dealt with by the Court. Case C-222/23 *'Toplofikatsia Sofia' EAD* is a good example. While two pieces of EU secondary legislation were duly interpreted by the Court of Justice, it held that the part of the reference dealing with art. 47 of the Charter was not admissible as the national court had failed to prove that it was required to adjudicate in the case at hand.[49] Analysis of the jurisprudence also shows that in some instances the Court tends to rule on other grounds, quietly leaving the Charter behind, even though it had been mentioned by a referring court. A recent example is case C-116/23 *XXXX* where the Court of Justice focused on the interpret action of Regulation 883/2004, tacitly staying away from the interpretation of art. 7 of the Charter (and, for that matter, also art. 18 TFEU).[50] In several instances the Court has opted for a similar move, but it has made it clear that it could provide a useful interpretation of EU law without the need to resort to the Charter of Fundamental Rights.[51]

IV. Conclusions

The ten-year period since the CJEU delivered *Opinion 2/13* has given it ample opportunities to build case law and to cement the already established function of the Charter as a pillar and a constitutional foundation of EU law. This is an opportunity that the Court has used gladly, though, as the examples provided in this article show, the judges have shied away from employing the Charter at every opportunity. The typology of judgments indicates that the EU's bill of rights serves the two main objectives it had initially been created for: it applies to the bodies forming the institutional fabric of the European Union, on the one hand, and to the Member States when they apply EU law, on the other. Looking at the procedural apparatus governing the jurisdiction of the CJEU, it can be easily seen that the vast majority of cases where the Charter plays a role are preliminary rulings from national courts. This proves that the Charter is gradually making its way into domestic courtrooms. As for the Court of Justice of the European Union, its engagement with the Charter of Fundamental Rights, is indeed one of development by continuity.

[49] Case C-222/23 *'Toplofikatsia Sofia' EAD* ECLI:EU:C:2024:405. Similarly, see case C-649/22 *XXX v Randstad Empleo ETT SAU, Serveo Servicios SAU, formerly Ferrovial Servicios SA, Axa Seguros Generales SA de Seguros y Reaseguros* ECLI:EU:C:2024:156.

[50] Case C-116/23 *XXXX* ECLI:EU:C:2024:292. See also case C-746/22 *Slovenské Energetické Strojárne a.s. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* ECLI:EU:C:2024:403.

[51] See, for instance, case C-770/22 OSTP *Italy Srl v Agenzia delle Dogane e dei Monopoli, Ufficio delle Dogane di Genova 1, Agenzia delle Dogane e dei Monopoli, Ufficio delle Dogane di Genova 2, Agenzia delle Entrate – Riscossione – Genova* ECLI:EU:C:2024:299.