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THE SCOPE OF APPLICATION OF  
FUNDAMENTAL RIGHTS ON MEMBER STATES'  
ACTION:  
IN SEARCH OF CERTAINTY IN EU  
ADJUDICATION

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## **Abstract**

While one may understand that respect for EU fundamental rights is a condition of the legality of EU acts, the (legal) situation is not as straightforward regarding acts adopted by national authorities. Most EU lawyers would agree with the contention that it is not always clear when and whether national authorities are acting within the scope of application of EU law and many, probably, still wonder about the sense of this ambiguous concept elaborated by the Court of Justice of the European Union (CJEU).

The aim of this essay is to clarify the situations where EU fundamental rights bind national authorities following the entry into force of the Treaty of Lisbon and the legally binding status acquired by the Charter. The potential federal effect of the Charter will be assessed as it is sometimes alleged that the new legally binding status of the Charter may eventually convince the CJEU to enforce common standards applicable right across the EU regardless of whether national measures fall within or outside the scope of application of EU law.

Another important issue is the potential effect of the Charter on the application of EU fundamental rights in the context of legal proceedings between private parties. Accordingly, this article will also explore the potentiality for an increased “horizontal effect” of the EU fundamental rights set out in the Charter, that is, whether they may be more easily relied upon by a private party against another private party.

Finally, a classification or mapping of the various situations in which private parties may rely upon EU fundamental rights to challenge the legality of national measures will be offered. This framework for analysis of the CJEU case law is based on a broad reading of the ‘Wachauf’ and ‘ERT’ lines of cases. Such a novel classification appears in our view necessary in light of the latest judicial developments and the need to bring more certainty as to the scope of application of EU fundamental rights to Member States’ actions.

## **Keywords**

European Union Law - Scope (or field) of Application of European Union Law - Member State Action - Fundamental Rights - General Principles of Law - European Union Charter of Fundamental Rights - Treaty of Lisbon - Horizontal Direct Effect - Federalism

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# The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication

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## 1. Introduction

While one may understand that respect for EU fundamental rights is a condition of the legality of EU acts,<sup>1</sup> the (legal) situation is not as straightforward regarding acts adopted by national authorities. In fact, Member States are bound by EU fundamental rights, as guaranteed under EU law *only* where they act within the so-called scope or field of application of EU law.<sup>2</sup> In that respect, two main situations have been distinguished thus far in the pre-lisbon case law: on the one hand, national measures implementing or applying EU law (*Wachauf* line of cases)<sup>3</sup> and on the other hand, national measures derogating from EU law (*ERT* line of cases).<sup>4</sup> Most EU lawyers would, however, agree with the contention that it is not always clear when and whether national authorities are acting within the scope of application of EU law and many, probably, still wonder about the sense of this ambiguous concept elaborated by the Court of Justice of the European Union (CJEU). This problematic situation is perhaps caused by the absence of a specific test in order to assess

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<sup>1</sup> See e.g., Case 294/83 *Les Verts* [1986] ECR 1339, para. 23 and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat* [2008] ECR I-6351, para. 316. In the first case, the Court made clear that in a Union based on the rule of law, its Member States cannot avoid review of the conformity of their acts with the Union's "constitutional charter", at the time, the EC Treaty, or more generally, with all EU norms. In the second case, the Court considered that its jurisdiction to review the validity of any EU legally binding act "in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system".

<sup>2</sup> The scope of application of EU fundamental rights has thus been *equated* here with the scope of application of EU law. If the Member State measure falls outside the scope of EU law then the EU fundamental rights are not applicable. See e.g., Case 12/86 *Demirel* [1987] ECR 3719; Case C-159/90 *Grogan* [1991] ECR I-4685; Case C-299/95 *Kremzow* [1997] ECR I-2629; and Case C-328/04 *Attila Vajnai* [2005] ECR I-8577.

<sup>3</sup> Case 5/88 *Wachauf* [1989] ECR 2609.

<sup>4</sup> Case C-260/89 *Elliniki Radiophonia Tileorassi* [1993] ECR I-2925.

with predictability whether a national measure falls within the scope of application of EU law.<sup>5</sup>

On top of that, with the entry into force of the Lisbon Treaty, the EU Charter of Fundamental Rights (the ‘Charter’ or the ‘EUCFR’) has finally become a legally binding document, a core element of the Union’s legal order and, more importantly to us, the starting point for the CJEU judge for assessing the compatibility of a (Member State) measure with EU fundamental rights.<sup>6</sup> The general principles are, therefore, no longer the exclusive guiding norms to ensure the protection of fundamental rights within the EU.<sup>7</sup> It is obvious that this increase of normative sources does not bring more certainty as to the scope of application of EU fundamental rights post Lisbon. This point appears salient particularly when the scope of application of the Charter itself is not yet clearly defined by the CJEU.<sup>8</sup> Notably, the personal scope of the Charter’s rights is still very uncertain due to the very wording of Article 51 EUCFR – which states that its provisions are applicable to the Member States ‘only when they are implementing Union law’ – and the lack, at this time, of any helpful guidance by the CJEU on the reach of this so-called horizontal provision.<sup>9</sup>

The aim of this essay is to clarify the situations where EU fundamental rights bind national authorities following the entry into force of the Treaty of Lisbon and the legally binding status acquired by the Charter.<sup>10</sup> The potential federal effect of the Charter will be assessed as it is sometimes alleged that the new legally binding status of the Charter may eventually

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<sup>5</sup> See, *infra*, section 2.3. In practise, the Court generally focuses on the identification of any extraneous element in cases involving EU primary law. The Court, in order to establish whether EU fundamental rights are applicable, normally seeks to identify any cross-border element that would link or connect the litigious national measure with the EU legal order, and/or the subject-matter of the dispute. One may also think that the existence of EU secondary legislation applicable to the case at issue brings the case with the scope of EU law.

<sup>6</sup> Concerning the use of the Charter as a starting point in EU adjudication, see e.g., Opinion of AG Bot in Case C-108/10 *Ivana Skattolon* [2011] nyr. See also Joint Communication from Presidents Costa and Skouris, 24 January 2011, para. 1. From the earliest years of EU integration until very recently, the general principles of EU law were the core norms of human rights protection. However, Article 6(1) TEU, the Charter of Fundamental Rights of the European Union (EUCFR) became not only binding but also the key fundamental right standard of the EU legal order. The general principles of EU law, as they stem from Article 6(3) TEU, are only ancillary to the EUCFR. They may, however, be relied on by the European Court of Justice (ECJ) to expand the material scope of the Charter on the basis of external norms, i.e. the European Convention of Human Rights (ECHR) and the constitutional traditions common to the Member States. Hence, the general principles of EU law, in contrast to the EUCFR, do not constitute autonomous standards of protection.

<sup>7</sup> Article 6 (1) and (3) TEU provides for the Charter and general principles as Union norms ensuring the protection of fundamental rights in the EU.

<sup>8</sup> For instance at this stage and as it stems from the pending CJEU case law, it is unclear whether the Charter’s rights may have horizontal effect (see pending Case C-282/10 *Maribel Dominguez*, Opinion of AG Trstenjak delivered on 8 September 2011) or what is the exact scope of the British and Polish opt-out protocol to the Charter (see pending Joined Cases C-411/10 and C-193/10 *N.S.*, Opinion of AG Trstenjak delivered on 22 September 2011).

<sup>9</sup> See, e.g., C-400/10 PPU *McB* [2010] nyr; and, *ibid.*, Opinion of AG Trstenjak in Joined Cases C-411/10 and C-193/10 *N.S.*

<sup>10</sup> Article 6(1) TEU provides that the EU “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.

convince the CJEU to enforce common standards applicable right across the EU regardless of whether national measures fall within or outside the scope of application of EU law. Another important issue is the potential effect of the Charter on the application of EU fundamental rights in the context of legal proceedings between private parties. Accordingly, this article will also explore the potentiality for an increased “horizontal effect” of the EU fundamental rights set out in the Charter, that is, whether they may be more easily relied upon by a private party against another private party.

This paper will first examine the pre Lisbon Treaty application of EU fundamental rights to national measures before considering the potential federalising effect of the Charter as well as its horizontal effect post Lisbon Treaty. Finally, a classification or mapping of the various situations in which private parties may rely upon EU fundamental rights to challenge the legality of national measures will be offered. This framework for analysis of the CJEU case law is based on a broad reading of the *‘Wachauf’* and *‘ERT’* lines of cases. Such a novel classification appears in our view necessary in light of the latest judicial developments and the need to bring more certainty as to the scope of application of EU fundamental rights to Member States’ actions.

## **2. The Reach of EU Fundamental Rights on Member State Action pre Lisbon Treaty<sup>11</sup>**

As it is now well known, the European Court of Justice overruled itself in 1969 and held that fundamental (human) rights did form an integral part of the general principles of EU law whose observance the Court ensures.<sup>12</sup> From then onwards, the Court has regularly interpreted or reviewed the validity of measures adopted by the EU institutions in the light of fundamental rights as protected in the Union legal order. The Court has found it more difficult to clarify when national authorities are bound by EU fundamental rights standards and had recourse to the concept of scope (or field) of Union law. This concept itself is far from clear as will be shown below and most scholars would agree that the question of the applicability of EU fundamental rights at Member State level is particularly or at least more complex than the situation where EU fundamental rights are relied upon to review acts of the EU institutions.<sup>13</sup> There are, however, a significant number of judgments from which one can now easily draw the conclusion that Member States have been held to be bound by EU fundamental rights standards when acting as agents of EU law (by agents of EU law, we mean the situations where national authorities of the Member States implement or apply provisions of EU law, the notions of implementation and application being broadly understood here) or when seeking to derogate from EU law on public policy or other grounds as provided for by EU law itself.<sup>14</sup> An overview of the pre Lisbon Treaty case law is

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<sup>11</sup> Strictly speaking, this section addresses the reach of EC fundamental rights as general principles of law in the EC legal order. But as the Lisbon Treaty finally put to bed the confusing distinction between the EC and the EU by establishing the EU as a single legal entity that replaces and succeeds the EC, we decided, for clarity’s sake, to only refer to the EU and EU law. One should note also that the Lisbon Treaty renamed the Treaty establishing the EC (TEC), the Treaty on the Functioning of the EU (TFEU).

<sup>12</sup> Case 29/69 *Stauder* [1969] ECR-419.

<sup>13</sup> See e.g. A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Hart, 2010), p. 147.

<sup>14</sup> This distinction between two main categories of national measures is largely accepted. For a distinction between the situation where EU fundamental rights apply to acts of the Member States when they implement

thus necessary in order to offer a succinct taxonomy of the main situations where national measures can be subject to review by the European Court of Justice as regards their compatibility with EU fundamental rights. This taxonomy is also important in order to analyse in depth the arguments provided by the CJEU in determining the scope of EU law and assessing, more particularly, whether the Court relied on solid and consistent reasons.

## 2.1 *Member States' Obligation to Comply with EU Fundamental Rights when Acting as Agents of EU Law: Wachauf-type of review*

### 2.1.1 When Member States Implement EU Law

In the EU system of governance, as neatly observed by Weiler, the Member States “often act as, and indeed are, the executive branch”<sup>15</sup> of the Union, and they do so to an extent far greater than in any federal state. In other words, Member States are regularly required to adopt measures aimed at implementing or enforcing provisions of EU law. When acting as delegated authorities, as the Court of Justice made clear in 1979,<sup>16</sup> national authorities are bound by the general principles of EU law. This meant, for instance, that national authorities entrusted with the implementation of EU law dealing with the Common Agricultural Policy must comply with the principle of non-discrimination regardless of the fact that the relevant EU regulation itself left it to the Member States to decide between various methods of implementation.<sup>17</sup>

The Court further clarified in *Wachauf* that national authorities, when implementing EU measures, must indeed comply with EU fundamental rights as they form an integral part of the general principles of EU law protected by the Court.<sup>18</sup> Leaving aside the rather intricate facts of this case, the main legal issue was whether national authorities, when they implement Community rules, are required to respect fundamental rights as general principles of EU law. Before the relevant German court, the plaintiff argued that the national legislation implementing several EU regulations governing the organisation of the milk market, infringed his rights under the German Constitution. The Court of Justice, endorsing the position of Advocate General Jacobs, first reiterated that fundamental rights form an

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EU law and the situation where they apply to acts of the Member States because the Member States seek to limit the enjoyment of EU free movement rights on public policy ground or other grounds as provided for in EU law, see e.g. A. Arnall et al., *Wyatt & Dashwood's European Union Law* (Thomson, 5<sup>th</sup> ed., 2006), p. 261 et seq. Some marginal variations between legal scholars can nevertheless be found. For instance, P. Craig and G. de Búrca distinguish between three rather than two main situations in which EC fundamental rights have been held to bind Member States: (i) When Member States apply provisions of EC legislation based on protection for human rights; (ii) when Member States implement, enforce or interpret EC law; (iii) when Member States derogate from measures of EC law on public policy or other grounds. See P. Craig and G. de Búrca, *EU Law* (OUP, 4<sup>th</sup> ed., 2008), p. 395. The first category distinguished by the eminent authors essentially refers to the case of *Rutili* but one may object that *Rutili* is in fact merely about a national measure derogating from EU free movement law on grounds of public policy. For further discussion of this case, see *infra* Section 2.2.

<sup>15</sup> J.H.H. Weiler, “The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes”, *Harvard Jean Monnet Working Paper* No 2/96, p. 4.

<sup>16</sup> Case 230/78 *Eridania* [1979] ECR 2749, para 31.

<sup>17</sup> See e.g. Cases 201 and 202/85 *Klensch* [1986] ECR 3477, paras. 6-10.

<sup>18</sup> Case 5/88 *Wachauf*, *supra* n.3.

integral part of the general principles of the law protected by the Court before addressing the national court's concerns by holding that any EU rules having "the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the [EU] legal order."<sup>19</sup> More significantly, the Court declared for the first time that those "requirements" are also binding on Member States when they implement EU rules, which means that national authorities must, "as far as possible", apply EU rules in accordance with fundamental rights as recognised and guaranteed under EU law. In the present case, the Court was of the view that the contested regulations did not violate EU fundamental rights such as the right to property because the regulations at issue did not preclude national authorities from applying them "in a manner consistent with the requirements of the protection of fundamental rights".<sup>20</sup>

The principle that a national measure implementing EU law must observe EU standards as regards fundamental rights was restated in *Bostock*.<sup>21</sup> According to Advocate General Gulmann, the decisive question in that case was "whether a positive duty may be derived from [EU] law principles on the protection of the fundamental rights for Member States to protect the economic interests of tenants when a tenancy comes to an end."<sup>22</sup> With reference to *Wachauf*, the Court reaffirmed that national authorities had a duty to respect fundamental rights when they implement EU law with the result that Member States must, as far as possible, apply those rules in accordance with those requirements. The Court, however, and as it did in *Wachauf*, rejected the claimant's argument that the contested EU rules were incompatible with his fundamental rights guaranteed by the EU legal order such as the right to property and the principle of non-discrimination.

This far all the cases discussed above concerned the implementation of EU regulations. It is important, however, to note that national authorities were also found to be bound by EU fundamental rights standards when they implement directives.<sup>23</sup> For instance, in *Caballero*,<sup>24</sup> the Court of Justice recalled that "according to settled case-law fundamental rights form an integral part of the general principles of law whose observance the Court ensures and, second, that the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on Member States when they implement [EU] rules."<sup>25</sup> More significantly, the Court finally held that national legislation adopted to implement a EU Directive relating to the protection of employees in the event of the

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<sup>19</sup> *Ibid.*, para. 19.

<sup>20</sup> *Ibid.*, paras. 20 and 21.

<sup>21</sup> Case C-2/92 *Bostock* [1994] ECR I-955.

<sup>22</sup> Opinion of AG Gulmann in *Bostock*, para. 16.

<sup>23</sup> A similar conclusion was adopted by the Court as regards EU framework decisions, which, similarly to EC directives, were binding upon the Member States as to the result to be achieved but left to the national authorities the choice of form and methods. See e.g. Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. In this case, the applicant sought an annulment of the national measures implementing the Framework decision concerning the European arrest warrant. The Court of Justice confirmed that EU institutions are subject to review of the conformity of their acts with the European Treaties and the general principles of law "just like the Member States when they implement the law of the Union" (para. 45).

<sup>24</sup> Case C-442/00 *Caballero* [2002] ECR I-11915.

<sup>25</sup> *Ibid.*, para. 30.

insolvency of their employer to be in breach of the general principle of equality and non-discrimination, which is one of the fundamental rights protected by the Court. As a result, the national court was instructed to set aside the provisions of the national legislation.

At this stage, the personal scope of application of the *Wachauf* style of review was still uncertain since the case law merely focused on the narrow issue of implementation of EU secondary legislation. We should now turn our attention to later cases that suggest that the fundamental rights protected by the Court of Justice also bind national authorities when they “apply” national law that falls within the scope of EU law, either because the underlying national legislation at issue directly implements a directive or simply because its subject-matter is governed by a directive or any other legally-binding provision of EU law.

### 2.1.2 When Member States Apply EU Law

In two judgments issued in 2003 - *Rundfunk* and *Lindqvist*<sup>26</sup> - the Court found that Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was relevant despite the absence of any apparent cross-border elements in the context of two instances of national judicial proceedings. This meant, in the case of *Rundfunk*, that Austria had to prove that the *application* of the *national* legislation which enables a governmental audit body to collect, for purposes of publication, data on the income of persons employed by the bodies subject to that control, not only comply with the Directive 95/46 but also with EU fundamental rights, and in particular, the right to privacy, which, according to the traditional phrasing used by the Court of Justice, form an integral part of the general principles of law whose observance the Court ensures. Remarkably, Advocate General Tizzano opined that the Court did *not* have in fact jurisdiction to decide whether that Austrian legislation was compatible with the general principles of EU law as the audit activity prescribed by the national legislation at issue fell outside the scope of EU law. The Court disagreed and came to the conclusion, following a meticulous review of the case law of the European Court of Human Rights, that the interference with private life resulting from the application of the Austrian legislation may be justified under certain circumstances, an issue that was for the national court to examine.

The case of *Lindqvist* was slightly different to the extent that the national legislation at issue was expressly adopted to implement Directive 95/46 and the defendant was prosecuted for the unlawful processing of data within the meaning of Directive 95/46. Uncertain of whether the defendant’s activities were in fact covered by this directive, the relevant Swedish Court asked the Court of Justice for a preliminary ruling. Advocate General Tizzano once more argued that there were no substantive questions for the Court to answer as the processing of personal data of the type at issue did not fall within the scope of the Directive and more generally, within the scope of EU law.<sup>27</sup> The Court disagreed and went on to hold that reference to the state of health of an individual, as the defendant did on her website, amounts to processing of data within the meaning of Directive 95/46 regardless of the fact

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<sup>26</sup> Cases C-465/00, C-138/01 and 139/01 *Rundfunk* [2003] ECR I-4989; Case C-101/01 *Lindqvist* [2003] ECR I-12971.

<sup>27</sup> Opinion of AG Tizzano in *Lindqvist*, paras. 44-45.

that she set up the website solely as an ancillary activity to voluntary work as a catechist pursued in the parish community and outside the remit of any employment relationship. More importantly as regards our topic of inquiry, the Court, similarly to what it held in *Rundfunk*, ruled that the national authorities, including national courts, responsible for *applying* the national legislation implementing Directive 95/46 must not only interpret their national law in a manner consistent with its provisions but must also “make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the [EU] legal order or with the other general principles of [EU] law,”<sup>28</sup> when they apply the national implementing legislation in individual cases.

The two judgments mentioned above, which surprisingly do not contain a single reference to the *Wachauf* case, make clear at least one thing: EU fundamental rights bind Member States/National Authorities not only when they adopt administrative or legislative acts in order to implement EU rules but more generally, when they interpret or apply any domestic legal provision that falls within the scope of EU law. Nevertheless, as discussed above, the reasoning of the CJEU was, to say the least, terse. But the best – and perhaps one should say the most controversial – was yet to come in terms of intensifying the mist surrounding the scope of application of EU fundamental rights

## **2.2 Member State’s Obligation to Comply with EU Fundamental Rights when Derogating from EU Law: ERT-type of review**

In the wake of *Wachauf*, the Court of Justice finally ‘clarified’ in *ERT*<sup>29</sup> that it had the jurisdiction to review any national measure that negatively affects any of the individual rights guaranteed by EU law, in particular the EU citizens’ free movement rights. This clarification was significant as the Court’s jurisdiction necessarily implies that such a national measure, which Member States may seek to justify on the basis of one of the express derogation clauses contained in what was then the EC Treaty<sup>30</sup> or by relying on reasons of public interest recognised by the Court since *Cassis*,<sup>31</sup> must be compatible with EU fundamental rights. This jurisprudential development proved more controversial than *Wachauf*, notably because it significantly expanded the scope of EU law by allowing for the direct effect of fundamental rights in all those situations which have an even unclear link with EU law. Before reviewing the *ERT* judgment (aka the *Greek television* case) and some of the most controversial judgments applying that precedent, the rather chaotic jurisprudence that preceded *ERT* is worth exploring briefly if only to understand why the Court was

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<sup>28</sup> *Lindqvist*, para. 87.

<sup>29</sup> Case C-260/89 *Elliniki Radiophonia Tileorassi*, *supra* n. 4.

<sup>30</sup> See e.g. Article 52(1) TFEU (ex Article 46(1) TEC): “The provisions of this Chapter [on the right of establishment] and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

<sup>31</sup> Case 120/78 *Rewe Zentral* (Cassis) [1979] ECR 649. For instance, the European Court of Justice has accepted that a Member State can seek to justify national measures having a negative impact on EU economic free movement rights by arguing that they pursue the legitimate objectives of maintaining media pluralism or protecting fundamental rights. See respectively Case C-368/95 *Familiapress* [1997] ECR I-368 and Case C-112/00 *Schmidberger* [2003] ECR I-5659. Both cases are discussed *infra*.

initially reluctant to review national measures taken by Member States in the exercise of their residual powers.

The first case that needs to be mentioned is *Rutili* as it is frequently presented as the earliest example of a national measure derogating from EU rules on public policy ground which was subject to review by the Court of Justice for compliance with EU fundamental rights.<sup>32</sup> This judgment, however, concerned the application of a directive which explicitly compelled Member States to comply with certain fundamental rights when adopting measures on the basis of any of its provisions. As a result, it was hardly surprising that the Court referred to those rights when examining the compatibility with EU law of a French administrative decision which restricted the free movement rights of an Italian national living in France on account of his past political activities. For the Court of Justice, the directive at issue placed limitations on the powers of Member States in respect of control of aliens and these limitations “are a specific manifestation of the more general principle, enshrined in Articles 8, 9 and 10 and 11 of the [ECHR] ... which provide, in identical terms, that no restriction in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests ‘in a democratic society’.”<sup>33</sup> In the light of these principles, the Court concluded that the contested French measure was not compatible with EU law.

Contrary to some predictions,<sup>34</sup> *Rutili* did not lead to the adoption by the Court of Justice of a judgment similar to the *Gitlow* case decided by the U.S. Supreme Court in 1925,<sup>35</sup> whereby a provision of the US Bill of Rights, in this case, the First Amendment to the US Constitution, was, for the first time, held to be applicable in the context of a criminal conviction for dissemination of Communist pamphlets under a state anarchy law. On the contrary, ten years after *Rutili*, the Court, in *Cinéthèque*,<sup>36</sup> appeared to backtrack to the extent that the judgment seemed to indicate that Member States were not actually bound by EU fundamental rights when derogating from the application of EU rules. Indeed, the Court ruled that it lacked the power to review the national provision at issue, which prohibited the marketing of videocassettes of a film for a period of one year after its projection in a cinema, as it concerned, *in casu*, an area that fell within the jurisdiction of the national

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<sup>32</sup> Case 36/75 *Rutili* [1975] ECR 1219.

<sup>33</sup> *Ibid.*, para. 32.

<sup>34</sup> For further discussion, see J.H.H. Weiler, “Methods of Protection: Towards a Second and Third Generation of Protection” in A. Cassese, A. Clapham and J.H.H. Weiler (eds.), *Human Rights and the European Community: Methods of Protection* (volume II, EUI, 1991), p. 596 and F. Mancini, “The United States Supreme Court and the European Court of Justice” in F. Mancini, *Democracy and Constitutionalism in the European Union* (Hart, 2000), p. 173. Weiler saw, in the *Rutili* judgment, a caveat for the development of human rights principles binding on national authorities. These principles would be binding only if they fall within the framework of EU law. The author expected that the foreseeable consequences of *Rutili* would lead to a judgment similar to the US *Gitlow* case. With reference to Weiler’s analysis, Mancini suggested that Weiler may have “underestimated the exceptional political and human nature of the conflict which the Court had to consider” in *Rutili* and pointed out that the subsequent ruling in *Cinéthèque* seemed to contradict Weiler’s prediction. Mancini, “Safeguarding Human Rights: The Role of the European Court of Justice” in Mancini, *op. cit.*, p. 94.

<sup>35</sup> 268 U.S. 652 (1925).

<sup>36</sup> Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605.

legislature.<sup>37</sup> This was a surprising outcome as the French provision seemed to create an exception to the free movement of goods that may however be justified on public interests grounds. But as the Court found that the national legislation fell *outside* the scope of EU law, there was *no* need to examine the argument according to which the French provision was incompatible with EU law because it was allegedly in breach of the general principle of freedom of expression.<sup>38</sup> This was a rather surprising outcome because, as persuasively explained by Advocate General Slynn, *Rutili* should be understood as meaning that Member States must demonstrate that all national measures, which are found to restrict the free movement of goods, are compatible with EU fundamental rights when they seek to justify these measures on the basis of a derogation clause or by invoking one of the mandatory requirements recognised by the Court of Justice. Indeed, for Advocate General Slynn, these national measures, by definition, can be said to always fall within the scope of EU law.<sup>39</sup>

It was not until the *ERT* judgment that the Court finally accepted to follow Advocate General Slynn by holding that it had indeed jurisdiction to review a national measure derogating from a fundamental freedom – in this case, the freedom to provide services – for compliance with EU fundamental rights:

In particular, where a Member State relies on the combined provisions of Articles 56 and 66 [now 52 and 62 TFEU] in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.<sup>40</sup>

Before reaching this conclusion, the Court, citing *Wachauf*, recalled that the Union cannot obviously accept national measures that are not compatible with EU fundamental rights, provided that these measures do not fall outside the scope of EU law as provided in *Cinéthèque*.<sup>41</sup> However, where the Court of Justice holds that the national rules at issue do fall within the scope of EU law and reference is made to the Court for a preliminary ruling, it must then “provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.”<sup>42</sup> This meant in the *ERT* case that the Greek Government had first to prove that the national legislation at issue was not in breach of the general principle of freedom of expression in order to be able to rely on the Treaty provisions that allow each Member State, with respect to the EU’s right of establishment and freedom to provide

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<sup>37</sup> *Ibid.*, para. 26.

<sup>38</sup> See similarly Case 12/86 *Demirel*, *supra* n. 2 (national rules at issue governing the family reunification rights of Turkish workers lie outside the scope of EU law).

<sup>39</sup> Advocate General Slynn in *Cinéthèque*, *supra* n. 36, p. 2616.

<sup>40</sup> Case C-260/89 *Elliniki Radiophonia Tileorassi*, *supra* n. 4, para. 43.

<sup>41</sup> *Ibid.*, para. 41.

<sup>42</sup> *Ibid.*, para. 42.

services, to justify national measures “providing for special treatment for foreign nationals on grounds of public policy, public security or public health”.

While *ERT* clarified the Court’s stance as regards national measures that obstruct the exercise of any of the EU’s free movement rights and which Member States justify by reasons relating to public policy and other grounds explicitly provided for by the EC Treaty, the Court had yet to explicitly confirm that this type of national rules, when justified on the basis of the mandatory requirements test developed by the Court itself, ought also to be compatible with the fundamental rights recognised and guaranteed under EU law.

The case of *Cinéthèque* seemed to preclude such an evolution but the Court logically held in *Familiapress*,<sup>43</sup> decided six years after *ERT*, that where a Member State relies on mandatory requirements in order “to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights.”<sup>44</sup> This meant in this case that the Austrian government had to demonstrate that the contested national law on unfair competition which precluded publications to offer readers the chance to take part in prize games, was compatible with the right to freedom of expression. The Court readily accepted that the legislation pursued a legitimate aim – the maintenance of press diversity – perfectly capable of constituting a mandatory requirement that may justify a restriction on the free movement of goods.<sup>45</sup> It was however for the national court, on the basis of an analysis of the Austrian Press market, to determine whether a national prohibition such as that in issue in the main proceedings was also proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-EU trade and freedom of expression.<sup>46</sup> De Witte rightly observed that if the *Familiapress* judgment “is perfectly in line with the *ERT*-style review of Member State measures,” it is also quite significant to the extent that it requires “any national court to act as a constitutional court ensuring respect by the national authorities of the fundamental rights of [EU] law, which may even require them to disregard national constitutional rights, as they are normally understood.”<sup>47</sup>

Perhaps even more remarkable is the fact that the *Familiapress* judgment does not once address the question as to why the national rule at issue may be said to fall within the scope of EU law. It may be because there is no longer any need to doubt that any national measure derogating from EU free movement rights can be subject to an *ERT*-style review regardless of whether the Member State may seek to justify it by relying on a Treaty derogation clause

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<sup>43</sup> Case C-368/95 *Familiapress* [1997] ECR I-3689.

<sup>44</sup> *Ibid.*, para. 24.

<sup>45</sup> For further confirmation that the Member State must respect the fundamental human rights when they rely on the broad range of public interest justifications developed by the Court and that respect for fundamental rights may simultaneously constitute a mandatory requirement which could justify a national restriction on EU economic free movement rights, see Case C-112/00 *Schmidberger* [2003] ECR I-5659 and Case C-36/02 *Omega* [2004] ECR I-9609.

<sup>46</sup> *Familiapress*, *supra* n. 43, paras. 27-29.

<sup>47</sup> B. de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights” in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999), p. 873.

or by relying on reasons of public interest (“mandatory requirements”) recognised by the Court. As observed by Advocate General Tesouro, citing *ERT*, it is “firmly established by the case-law on the subject that the Court’s supervisory jurisdiction, in addition to the power to review measures adopted by the [EU] institutions in the exercise of their functions and measures adopted by the Member States in order to give effect to Community measures, or other acts or omissions by national authorities, include the power to review the justifications put forward by a Member State for a national measure which would otherwise be incompatible with [EU] law.”<sup>48</sup> Quite a sea change when compared to the previous position adopted by the Court in the 1985 case of *Cinéthèque*. The conclusion to which we are inescapably drawn is that the Court grew progressively convinced of the need to review any national measure which is liable to hamper or to render less attractive the exercise by EU nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty.<sup>49</sup> Some judgments have proved particularly controversial as the Court seemed to accept that any national measure restricting or merely regulating the free movement rights of an EU citizen, even where the facts of the case do *not* indicate any degree of extraneity, should fall within the scope of EU law and can therefore be subject to the Court of Justice’s review for compatibility with EU fundamental rights.

The *Carpenter* case offers a particularly striking example in that respect.<sup>50</sup> In this decision, the Court reiterated its trite position that EU free movement rules cannot be relied on in situations which do not present any link to any of the situations envisaged by EU law and ruled, contrarily to the position of the Commission,<sup>51</sup> that Mr Carpenter was covered by EU rules governing the freedom to provide services on the grounds that it was running a business selling advertising space, a significant proportion of which conducted with advertisers established in other Member States. More controversially, the Court then accepted that Mr Carpenter was likely to refrain from exercising his free movement rights if his wife may no longer accompany him abroad or ceases to be available to mind the children.<sup>52</sup> The national measure at issue, therefore, was an individual measure indirectly affecting a British/EU citizen and derogating from EU free movement rules. As such, the British government may justify it by reasons of public interest only if, as the Court already made clear in *ERT* and in *Familiapress*, “that measure is compatible with the fundamental rights whose observance the Court ensures.”<sup>53</sup> The Court then addressed the question of whether the decision to deport Mrs Carpenter infringed Mr Carpenter’s right to respect for his family life, which is amongst the fundamental rights protected in EU law, and concluded that the national measure was not compatible with EU law as it constituted an infringement which was not proportionate to the objective pursued by the British government, i.e. the maintenance of public order and public safety.

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<sup>48</sup> Opinion of AG Tesouro in *Familiapress*, *supra* n. 43, para. 26.

<sup>49</sup> See, e.g., Case C-19/92 *Kraus* [1993] ECR I-1663, para. 32.

<sup>50</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279.

<sup>51</sup> *Ibid.*, para. 27.

<sup>52</sup> *Ibid.*, para. 39.

<sup>53</sup> *Ibid.*, para. 40.

As previously noted, whilst the Court refers to the *ERT* and *Familapress* cases, no explicit reference is made to what was by then the traditional concept of scope of Union law in the *Carpenter* judgment. This might be explained by the fact that the legal debate focused on whether Mr Carpenter was entitled to rely on EU free movement law. Having positively answered that claim, the European judges must have considered that there was no need to further explain themselves as it was evident that the deportation measure fell within the scope of EU law or to put it differently, did not concern a purely internal situation as argued by the Commission. This lack of reasoning cumulated with a progressive finding is of no help for clarifying the scope of EU law and thus leads, once again, to legal uncertainty. Also, it is worth noting that in contrast with the *ERT* and *Familiapress* cases where the Court left the question of the proportionality of the national measures to the national courts, the Court *de facto* nullified the British deportation measure for violating the EU right to respect for one's private and family life.

The cases thus far examined show that any national measure that obstruct or merely negatively affects EU free movement rules can be said to fall within the scope of EU law. As such, the Member State may only justify it by reasons of public interest recognised by EU law if the said measure is compatible with the general principles of EU law, and in particular with fundamental rights as recognised and protected in the EU legal order. The Court's case law, however, only specifically addresses the situation of national measures derogating from EU free movement rules. One may nevertheless submit that the Court's *ERT*-style of review should logically apply to any national measure derogating from any provision of EU law where a Member State seeks to justify it by relying on one of the exceptions provided for by EU law itself and where the national measure affects the rights on natural or legal persons regardless of whether these rights are of an economic nature or not.<sup>54</sup> In other words, national measures derogating from non-economic Treaty provisions (e.g. Articles 18, 20, 21 and 157 TFEU) are and should indeed be treated in a similar fashion than national measures derogating from EU (economic) free movement rights.<sup>55</sup>

### 2.3 *Falling within or outside the scope of EU law: That is the question*

The pre Lisbon case law of the Court of Justice may appear at first unusually straightforward. Indeed, the essential question one must answer as regards the reach of EU fundamental rights is whether the relevant national measure or action falls within or outside the scope of EU law. Any national measure falling within the scope of EU law ought to be compatible with EU fundamental rights standards. It is then for the Court of Justice, on the basis of a reference for a preliminary ruling, to give the national court all the necessary guidance so as to enable it to review the compatibility of the national measure with EU fundamental rights. Logically and by contrast, a measure falling outside the scope of EU law cannot be subject to fundamental rights review by the Court of Justice, which means that the relevant Member State does not have to take into account EU fundamental rights.

The apparent simplicity of the test devised by the Court does not resist scrutiny. Firstly, any attempt to define once and for all the boundaries of the scope of EU law has proved

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<sup>54</sup> See e.g. Case C-413/99 *Baumbast* [2002] ECR I-7091.

<sup>55</sup> See *infra* sections 2.3 and 4.1.

unachievable as EU law is continually evolving.<sup>56</sup> Secondly, the notion of scope is not particularly self-explanatory and it is not an easy task to draw distinction between national rules which fall within the scope of Union law, on the one hand, and national measures which fall outside this scope, on the other.<sup>57</sup> As a result, national courts have found it frequently difficult to determine whether or not a particular national measure falls within or outside the scope of Union law and we have had examples of sharp disagreements between Advocates General and the Court of Justice on that particular issue.<sup>58</sup> This state of affairs reflects the casuistic nature of the scope of EU law and has arguably contributed to the lack of certainty surrounding this concept. Also, this unclear situation may explain the numerous attempts made by several Advocates General to link the Court of Justice's jurisdiction to give preliminary rulings with the scope of application of EU fundamental rights.<sup>59</sup>

In practise, the Court generally focuses on the identification of any extraneous element rather than questioning its jurisdiction to issue a judgment concerning the interpretation or the validity of a provision of EU law in the context of litigation pending before a national court. To put it differently, the Court, in order to establish whether EU fundamental rights are applicable, normally seeks to identify any cross-border element that would link or connect the litigious national measure with the EU legal order, and/or the subject-matter of the dispute: Is the dispute connected in any way with any of the situations governed by EU law? In the words of Advocate General Gulmann, the key question is whether the domestic legal provision under review is "so closely connected with EU law as to fall within its scope?"<sup>60</sup> Where the link or connection with EU law is not established, the national measures are said to pertain to an *internal situation*, which means inter alia that the Member States concerned do not have to prove that these measures are compatible with EU fundamental rights.<sup>61</sup>

Before reviewing the impact (or lack thereof) of the Lisbon Treaty on the Court of Justice's fundamental rights jurisdiction over Member State action, it may be useful to offer a succinct categorisation of the case law, that is, to specify the different situations where a national measure can be reviewed on the basis of its compliance with EU fundamental rights. Two main categories have been distinguished thus far in this essay:

- (i) National measures implementing or applying EU law (*Wachauf* line of cases): Member States are bound by EU fundamental rights when they adopt measures to implement regulations or transpose directives or more generally, when they apply national rules whose subject-matter is governed by provisions of EU primary and/or secondary legislation;

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<sup>56</sup> A.G. Toth, "Human Rights as General Principles of Law, Past and Future" in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (Kluwer, 2000), p. 84.

<sup>57</sup> A. Rosas and L. Armati, *EU Constitutional Law*, *supra* n. 13, p. 148.

<sup>58</sup> Compare for instance the opinion of AG van Gerven in Case C-159/90 *Grogan*, *supra* n. 2, paras. 31-34 with the Court's judgment.

<sup>59</sup> See e.g. Opinion of AG Cosmas in Case C-309/96 *Annibaldi* [1997] ECR I-7493.

<sup>60</sup> Case C-2/92 *Bostock* [1994] ECR I-955.

<sup>61</sup> See e.g. Case C-328/04 *Vajnai*, *supra* n. 2.

- (ii) National measures derogating from EU law (*ERT* line of cases): Member States are also bound by EU fundamental rights when they invoke reasons of public interest pursuant to EU law to justify a national measure which limits any of the Treaty rights and in particular when they adopt measures which obstruct or which are merely liable to hamper the exercise of EU free movement rights.

In an opinion delivered on 22 May 2008, Advocate General Sharpston identified a third category: A national measure may “otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation.”<sup>62</sup> In our view, however, the cases cited by the eminent Advocate General do not clearly demonstrate the existence of a third category as they deal with national rules that either implement EU law or derogate from it. For instance, in *Karner*, the Court had to consider whether an Austrian legislation laying down a restriction on advertising had to be reviewed in light of EU fundamental rights in a proceeding between private parties. In a few words, the plaintiff in this case argued that the national legal provision at issue constituted a selling arrangement, which fell outside the scope of EU law but the Court disagreed and found the Austrian restriction to fall within the scope of EU law and applied EU fundamental rights standards.<sup>63</sup> Regrettably, the Court did not clearly explain why. It might be that the Court must have considered that the mere existence of a piece of EU secondary legislation – Directive 84/450 – was enough to trigger the application of EU rules even though the national rules governing consumer protection in the event of sales of goods from an insolvent estate have not been harmonized. A more convincing and coherent explanation is that the Court views any national measure that restricts intra-EU trade as falling automatically within the scope of EU law.<sup>64</sup> Indeed, regardless of whether the Austrian legislation constituted a selling arrangement, it did restrict the applicant’s freedom to provide services. As a result, the Austrian legislation may be said to fall within the scope of the second category identified above. Unfortunately and once again, the Court did not provide an in-depth reasoning in order to explain the application of EU law in the complicated context of minimum harmonization and national standards imposing more stringent requirements and (potentially) breaching Treaty provisions on free movement.<sup>65</sup>

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<sup>62</sup> See Opinion of AG Sharpston in Case C-427/06 *Bartsch* [2008] ECR I-7245, para. 69, citing the following cases in support of this view: Case C-71/02 *Karner* [2004] ECR I-3025, paras. 48-53 (potential impediment to intra-EC trade); Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045, paras. 23-30 (Member States acting as trustees of the EC in an area of exclusive EC competence); Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paras. 45-48 (measures adopted by a Member State in the exercise of its competences relating to VAT).

<sup>63</sup> One may nevertheless wonder how could the Austrian legislation governing consumer protection in the event of sales of goods from an insolvent estate fall within the scope of EU law when the provisions on free movement of goods are not applicable and in the absence of EU harmonising legislation.

<sup>64</sup> K. Lenaerts and J.A. Gutiérrez-Fons speak of “potential impediments to interstate trade”, “The Constitutional Allocation of Powers and General Principles of EU Law” (2010) 47 *Common Market Law Review* 1629, p. 1639. See also S. Prechal, “Competence Creep and General Principles of Law” (2010) 3 *Review of European Administrative Law* 5, p. 9.

<sup>65</sup> The field of minimum harmonization has historically been marked by a chaotic jurisprudence when it comes to the application of the general principles of EU law. To oversimplify, the principle is that national measure implementing minimum requirement laid down by a directive must respect general principles of EU law but this principle is not applicable when the national measure goes beyond the minimum requirements

Suffice it to say here that the third category identified by Advocate General Sharpston would not appear warranted on the basis of the cases mentioned in her opinion.

One must finally mention an innovative and more radical proposal put forward by Advocate General Poiares Maduro and which also advocated the creation of an additional category to the two categories distinguished above.<sup>66</sup> Drawing a distinction between a “standard” violation of fundamental rights and a serious and persistent breach of fundamental rights, Maduro proposed to go beyond the Court’ traditional reliance on the notion of scope of Union law in the latter case. In other words, where serious and persistent violations highlight a problem of systemic nature as regards the protection of fundamental rights in a particular Member State, “making it impossible for that State to comply with many of its EU obligations and effectively limiting the possibility for individuals to benefit fully from the rights granted to them by EU law,”<sup>67</sup> the Court should not refrain from reviewing national measures for their conformity with fundamental rights even – and this is the revolutionary part – in situations where these measures do not fall within the scope of Union law as traditionally understood. A major problem with this proposal is that the Court does not possess the resources nor the expertise to decide when a “serious” and “persistent” breach of fundamental rights has occurred in a Member State, an issue that calls furthermore for a political rather than a legal judgment.<sup>68</sup> In any event, this pioneering view would open the door to a general fundamental right competence for the Court of Justice as it would extend the scope of application of EU fundamental rights to any national measure provided that a Member State is “guilty” of systemic shortcomings in the protection of fundamental rights. This was indeed one of the major concerns raised by those opposed to the ratification of the Treaty of Lisbon and who feared that the new legally binding status of the Charter would lead to an American-style legal revolution whereby the Court of Justice would have the jurisdiction to review national measures for their conformity with EU fundamental rights regardless of the absence of any link with Union law. As will now be shown, the impact of the Lisbon Treaty is more modest and limited.

### **3. The Reach of EU Fundamental Rights on Member State Action Post Lisbon Treaty**

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter has finally become a legally binding and core element of the Union’s legal order. This is not the sole major change – albeit undoubtedly the most controversial – as the Lisbon Treaty also

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laid down by a Community directive in the sphere of the environment provided however that no other provisions of the Treaty are not involved. For further discussion, see F. De Cecco, “Room to Move? Minimum Harmonization and Fundamental Rights” (2006) 43 *Common Market Law Review* 9, 13 et seq.

<sup>66</sup> Case C-380/05 *Centro Europa 7* [2008] ECR I-349.

<sup>67</sup> *Ibid.*, para. 21.

<sup>68</sup> Since the entry into force of the Amsterdam Treaty, Article 7 TEU enables the Council to take measures against any EU Member State guilty of “a serious and persistent breach” of the values mentioned in what is now Article 2 TEU and which include respect for fundamental rights. Preventive sanctions are also possible in situations where there is a clear risk of a serious breach. The fact that the Court of Justice has never been given any direct role to play is a not so subtle indication that the Member States understand these mechanisms as political ones and whose value is essentially if not exclusively symbolic. See L. Pech, “A Union Founded on the Rule of Law’: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law” (2010) 6 *European Constitutional Law Review* 359, pp. 384-385.

empowers the EU to seek accession to the ECHR.<sup>69</sup> Leaving aside this latter reform as it has no direct bearing on the reach of EU fundamental rights on Member State action, this paper will now focus on the potential “federalising effect” of the Charter as well as the possible impact of its new legally binding status as regards the “horizontal” application of EU fundamental rights. Before addressing these two contentious issues, let us make clear that the Treaty of Lisbon, by ending the previous patchwork of confusing restrictions imposed on the jurisdiction of the Court of Justice and marginally reforming the law of legal standing for individuals in annulment actions, offers a series of positive changes as regards the system of remedies and procedures established by the European Treaties.<sup>70</sup> In themselves, however, these jurisdictional and procedural changes have not affected the scope of application of EU fundamental rights as regards measures adopted by Member States, which is not surprising considering the fact that they were essentially motivated by the need to ensure that EU legally binding measures, save some limited exceptions, could not escape judicial review. It is worth remarking that nothing in the Lisbon Treaty can be said to bring more certainty as to the understanding of the scope of EU law. All the contrary and as argued before, the Treaty of Lisbon brings an additional normative instrument, i.e. the Charter, in addition to the general principles of EU law. This new situation brings in our view even more legal uncertainty as to the scope of application of EU fundamental rights since there might be, and in fact there is, a complex overlapping between these two norms.

### *3.1 Towards a “Federal Application” of EU Fundamental Rights?*

Legal critics of the Lisbon Treaty often argued against its ratification on the grounds that the transformation of the Charter into a legally binding document would have a “federalising effect” which might eventually lead to a situation where the Charter becomes a “federal standard”. In other words, the Charter, like the Federal Bill of Rights in the US, would eventually apply “irrespective of the subject-matter at issue, that is to say irrespective of whether it falls within federal or State competence.”<sup>71</sup> Koen Lenaerts, now a judge at the European Court of Justice, observed that such a degree of coherence or harmonisation could only be achieved if the Member States would agree “to entrust to the Court of Justice the task performed by the US Supreme Court, that of protecting any individual citizen, on the basis of a ‘federal’ standard of respect for fundamental rights, against any public authority of any kind and in any area of substantive law”.<sup>72</sup> Article 51(1) of the Charter, however, clearly precludes such a “federal” evolution as it unmistakably implies that the EU Courts still lack the power to review the compatibility with EU fundamental rights of national rules which fall outside the scope of Union law.

It is well established in the pre Lisbon case law that the jurisdiction of the Court to review national acts for their conformity with EU fundamental rights is limited to situations where the Member States are acting within the scope of Community/Union law. The purpose of

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<sup>69</sup> For a general overview on the impact of the Lisbon Treaty as regards fundamental rights protection in the EU, see e.g. X. Groussot and L. Pech, “Fundamental Rights Protection in the EU post Lisbon Treaty”, *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010.

<sup>70</sup> For further analysis, see Pech, *supra* n. 68, p. 389 et seq.

<sup>71</sup> K. Lenaerts, “Respect for Fundamental Rights as a Constitutional Principle of the European Union” (2000) 6 *Columbia Journal of European Law* 1, p. 21.

<sup>72</sup> *Ibid.*, p. 24.

Article 51(1) of the Charter, according to its drafters, was to codify this line of cases.<sup>73</sup> And indeed it provides that

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law* [our emphasis]. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.<sup>74</sup>

Article 51 contains a second paragraph, which further provides that “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.” In a similar vein, Article 6(1) TEU further reiterates that the Charter’s provision “shall not extend in any way” EU competences “as defined in the Treaties.” These provisions mostly confirm beyond any doubt that the Charter cannot, *in itself*, offer a legal basis for the EU to legislate and thereby extend, according to the awkward formulation used in the Explanations, “the range of Member State action considered to be ‘implementation of Union law’.”<sup>75</sup> Because Article 51(2) is essentially concerned with the legislative competence of the EU, it will not be subject to further analysis. However, it is important to point out that “a prohibited national action may be interpreted by the ECJ as falling within the scope of application of EC law without the Community necessarily having legislative power to act in that field.”<sup>76</sup>

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<sup>73</sup> See Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, p. 32.

<sup>74</sup> For the successive versions of this provision before the adoption of the Charter in 2000, see G. de Búrca, “The drafting of the European Union Charter of fundamental rights” (2001) 26 *European Law Review* 126, p. 137 (author judiciously observes that the “somewhat tedious tracing of the convoluted path taken by what might seem like a fairly innocuous “horizontal” clause, from its earliest and reasonably strict interpretation by the secretariat’s guideline, through several broader intermediate formulations, and reverting ultimately to an even stricter version, illustrates an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy”). One should also note that the 2000 text of Article 51(1) has been subject to additional amendments initiated by some and agreed by all the Member States in the context of the two intergovernmental conferences that took place before the signing of the Constitutional Treaty and its successor, the Treaty of Lisbon. Some were minor: “agencies” and “offices” were added to the list of EU authorities subject to the Charter; some were purely stylistic (“the Treaties” logically replaced in 2007 the previous reference to “the Constitution”). In fact, the only significant change was the insertion of the following phrase before the signing of the Constitutional Treaty: “and respecting the limits of the powers of the Union as conferred on it in the other parts of the Constitution.” No substantive amendment to Article 51(1) was tabled before the signing of the Lisbon Treaty, which would seem to suggest that Member States were happy with the rather strict albeit relatively ambiguous phrasing used regarding the reach of EU fundamental rights on Member State action.

<sup>75</sup> Explanations, *supra* n. 73, p. 32.

<sup>76</sup> G. De Búrca, “The Principle of Subsidiarity and the Court of Justice as an Institutional Actor” (1999) 36 *Journal of Common Market Studies* 217, p. 221. This view is clearly backed up by the Court of Justice’s case law, which has constantly rejected any correspondence between legislative competence and judicial competence (the “interpretative authority” of the Court). In other words, EU fundamental rights may bind national authorities even in areas where the EU lacks the positive power to legislate and the scope of EU law should not therefore be conflated with the areas where the EU has been given permission to act. For an interesting

Before returning to Article 51(1), one should perhaps explain why most national governments were keen to have such a provision inserted in the Charter in the first place. To put it concisely and at the risk of oversimplification, national representatives from some influential countries such as the UK were concerned that the European Court of Justice might be tempted to emulate the US Supreme Court.<sup>77</sup> Indeed, in the first half of the 20th century, the US Supreme Court decided, on its own initiative, to “incorporate” the federal Bill of Rights through an expansive interpretation of the Fourteenth Amendment to the US Constitution.<sup>78</sup> To refer to a single American judgment previously mentioned when examining the European *Rutili* case, in the 1925 case of *Gitlow v. New York*, the US Supreme Court finally decided that through the Fourteenth Amendment, a plaintiff is entitled to rely on the right to free speech protected by the First Amendment to challenge the constitutionality of a state law which made it a crime to advocate the violent overthrow of government.<sup>79</sup> This came as a relative surprise as the Supreme Court initially held the Bill of Rights to apply only to the Federal Government, which meant that the Federal courts could not prevent enforcement of state laws restricting the rights guaranteed in the Bill of Rights.<sup>80</sup> The most important point here is that since *Gitlow*, the Supreme Court has allowed, on the basis of the Fourteenth Amendment, for the progressive expansion of the federal Bill of Rights’ scope of application to all state norms even when the states act within their *own* sphere of competence. Thanks to this arguably radical reinterpretation of the federal constitutional text, the US Supreme Court has built a unified constitutional order as regards respect for fundamental rights.

Irrespective of the merits of such “federal” harmonisation in the field of fundamental rights, Article 51(1) of the Charter would appear to prohibit the European Court of Justice from conferring upon itself the power to review Member States’ actions on the basis of a federal standard of respect for fundamental rights in areas *outside* the scope of EU law. An “American” evolution to be achieved by judicial activism seems, therefore, virtually impossible. As a matter of fact, Article 51(1) appears to narrow the pre Lisbon reach of EU

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discussion of how the Court may at times undermine the principle of allocated powers through a flexible definition of the reach of EU law, see S. Prechal, “The Principle of Attributed Powers and the ‘Scope of EU’” in L. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of the Legality Principle in the European Union* (Kluwer, 2011), p. 213 et seq.

<sup>77</sup> See e.g. Lord Goldsmith, “The Charter of Rights - a brake not an accelerator” (2004) 5 *European Human Rights Law Review* 473 (author welcomes Article 51(1) as it makes clear that Member States are only affected when they act to implement Union law and that as a result, the Charter does not impose new obligations on them when they act within national competence).

<sup>78</sup> Particularly important is the first paragraph of the fourteenth amendment, which was passed in 1868 after the conclusion of the Civil War. It reads as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>79</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>80</sup> For further analysis and references, see the highly critical and by now classic study of the Supreme Court’s judicial activism by R. Berger, *Government by Judiciary - The Transformation of the Fourteenth Amendment* (Liberty Fund, 2<sup>nd</sup> ed., 1997).

fundamental rights as it explicitly provides that the Member States must respect these rights *only* when they are implementing Union law.<sup>81</sup>

One may wonder, however, whether this is one of the various drafting deficiencies pointed out by numerous scholars.<sup>82</sup> Indeed, the formula cited above contradicts the well-established principle since *ERT* that EU fundamental rights bind the Member States whenever they act within the scope of EU law, which includes situations where the Member States seek to justify national measures derogating from EU law by reasons of public interest.<sup>83</sup> One swift look at the so-called explanations seems to suggest that the drafting deficiency thesis is accurate but also suggests that those who drafted Article 51(1) did not fully understand the arguably opaque case law of the Court as regards its jurisdiction to review national acts for their conformity with EU fundamental rights:

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.<sup>84</sup>

Without being excessively harsh, it seems fair to say that these explanations reflect a "concoction of formulations",<sup>85</sup> as they offer a mixture of various formulas used by the Court of Justice and not only refer to situations where the Member States "act in the scope of Union law", "implement Community rules" but also to the obligation to respect fundamental rights "in the context of the Union".

The unclear and one may add, not perfectly accurate nature of the explanations is highly unfortunate. Article 6(1) TEU, as amended by the Lisbon Treaty, provides indeed that "due regard" is to be had to the explanations relating to the Charter, and referred to in the Charter itself, when interpreting the rights, freedoms and principles laid down in the

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<sup>81</sup> G. de Búrca, "The drafting of the European Union Charter of fundamental rights" (2001) 26 *European Law Review* 126, p. 137.

<sup>82</sup> For a neat overview, see M. Dougan, "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" 45 *Common Market Law Review* 617, p. 663.

<sup>83</sup> B. de Witte, "The Legal Status of the Charter: Vital question or non-issue?" (2001) 8 *Maastricht Journal of European and Comparative Law* 81, p. 85.

<sup>84</sup> OJ 2007 C 303/17, p. 32.

<sup>85</sup> L. Besselink, "The Member States, the National Constitutions, and the Scope of the Charter" (2001) 8 *Maastricht Journal of European and Comparative Law* 68, p. 76.

Charter. This Treaty provision, which was not particularly imperative as Article 52(7) of the Charter had been amended by the Member States in 2004 to provide that the explanations “shall be given due regard by the courts of the Union and of the Member States,” suggests that the EU courts as well as national courts must rely on them when interpreting any of the rights, freedoms and principles protected by the Charter even though they do *not* as such have the status of law. With respect to Article 51(1) of the Charter, this means that the Court of Justice ought to rely on relatively ambiguous explanations that yet seem to suggest that this provision does not mean what it actually says because it does not reflect the intent of its drafters. It will therefore be for the Court of Justice to eventually remedy what we also consider to constitute an “inadvertent omission”.<sup>86</sup> And even if one is of the view that the narrow and inaccurate formulation used in Article 51(1) does in fact reflect the deliberate intention of its drafters to reduce the Court of Justice’s scope of review of national measures on fundamental rights grounds,<sup>87</sup> we submit that the explanations demonstrate at the very least that this was not a goal entertained by most members of the body which adopted the explanations and the text of Charter in October and December 2000 respectively.

In any event, the pre Lisbon case law of the Court shows that the Court is not inclined to limit the scope of its jurisdiction over Member State measure for compliance with EU fundamental rights, and in particular, that the Court has shown no particular restraint when referring to provisions of the Charter in *ERT*-type situations.<sup>88</sup> The post Lisbon case law of the Court also offers at least one significant judgment concerning Article 51(1). In *DEB*, national legal provisions, which made it impossible for legal persons to avail themselves of legal aid, were held not to be compatible with the principle of effective judicial protection, as enshrined in Article 47 of the Charter. In the context of this case, the Court noted that “Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States when they are implementing EU law.”<sup>89</sup> As noted above, Article 51(1) actually provides that provisions of the Charter are addressed to the Member States *only* when they are implementing EU law. It is too early to say if this is another example of inadvertent omission. The Court did not further discuss Article 51(1) as the dispute clearly fell within the scope of this provision to the extent that the plaintiff alleged that it has suffered a loss on account of the delayed transposition in Germany of two directives 98/30/EC (3) and was therefore pursuing a claim before a national court, by which it is seeking to establish State liability for infringement of EU law. Another remarkable but not surprising aspect of that judgment is that the Court, when faced with explanations that did not “provide any clarification”<sup>90</sup> as regards whether the word “person” used in the first two paragraphs of Article 47 of the Charter, decided that legal persons are not excluded from the scope of that article on the basis of its own interpretation of several provisions of the Charter and its examination of the case law of the European Court of Human Rights.

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<sup>86</sup> F. G. Jacobs, “Human Rights in the European Union: The Role of the Court of Justice” (2001) 26 *European Law Review* 331, p. 338.

<sup>87</sup> See B. de Witte, *supra* n. 83, p. 86, fn.15.

<sup>88</sup> Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 43 and Case C-341/05 *Laval* [2007] ECR I-11767, para. 90.

<sup>89</sup> C-279/09 *DEB* [2010] nyr, para. 30.

<sup>90</sup> *Ibid.*, para. 39.

Lastly, a recent and controversial judgment must be mentioned although it does not directly address the scope of application of the Charter but rather the impact of Article 20 TFEU, which confers the status of citizen of the Union on every person holding the nationality of a Member State. In the case of *Zambrano*,<sup>91</sup> the main issue was whether two married asylum seekers from Columbia residing in Belgium could be granted residence and work rights under EU law once they became parents of two children who acquired Belgian nationality. All the Member States that submitted observations defended the view that the applicant's situation could not trigger the application of EU law because the children never left Belgium. In other words, since there was no identifiable cross-border element, it was argued that this situation should be considered as falling outside the scope of Union law even though no one denied that the applicant's children enjoy the status of EU citizens. In line with the recommendation of Advocate General Sharpston, the Court disagreed: It first held that Article 20 TFEU precludes *national* measures which have the *effect* of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as EU citizens. Because a refusal to grant a right of residence and a work permit to a third country national with dependent minor children in the Member State where those children are nationals and reside has such an effect, the Court decided that it was irrelevant that the children never exercised his right to free movement within the territory of the Member States. Belgium's decision therefore fell within the scope of Union law.

More than the outcome, which is in fact very progressive,<sup>92</sup> this case is particularly significant because it raises the question of the scope of application of EU citizenship/fundamental rights that are not constrained by Article 51(1) of the Charter because they are guaranteed by other provisions of EU law or are recognised as general principles of law. In a particularly remarkable opinion, Advocate General Sharpston meticulously addresses the question of whether EU fundamental rights can be invoked as free-standing rights against a Member State. The Advocate General was certainly aware that the case law of the Court clearly indicates that private parties cannot rely on EU fundamental rights when the facts of the relevant case do not trigger the application of other provisions of EU law. In the absence of "some link" with EU law, the relevant national measure cannot be said to fall within the scope of Union law or to paraphrase Article 51(1), to be implementing Union law. For the Advocate General, however and in the name of legal certainty, the time has come to clearly spell out what 'the scope of Union law' means for the purposes of EU fundamental rights protection and her own suggestion is to make:

the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence. To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised.<sup>93</sup>

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<sup>91</sup> Case C-34/09 *Ruiz-Zambrano* [2011] nyr.

<sup>92</sup> Compare with Case C-200/02 *Chen* [2004] ECR I-9925.

<sup>93</sup> Opinion of AG Sharpston in Case C-34/09 *Ruiz-Zambrano*, delivered on 30 September 2010, para. 163.

After reviewing the advantages of such an approach, Sharpston nonetheless concludes that

[m]aking the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence would involve introducing an overtly federal element into the structure of the EU's legal and political system. Simply put, a change of the kind would be analogous to that experienced in US constitutional law after the decision in *Gitlow v New York* ... A change of that kind would alter, in legal and political terms, the very nature of fundamental rights under EU law. It therefore requires both an evolution in the case-law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU.<sup>94</sup>

The judgment of the Court, however, does not address this fundamental issue since it merely focus on the first question put by the national court. In any event, it seems difficult to believe, in light of the text of the Charter, that the Lisbon Treaty has now transformed EU fundamental rights into free-standing rights that can be invoked in any situation to challenge national measures depending on the mere existence of exclusive or shared EU competence.<sup>95</sup>

This last point brings us to the issue of the CJEU's competence in deciding the scope of EU law and its (uneasy) relationship with legislative competence. Indeed, one should now determine whether the Lisbon Treaty and its binding Charter may affect this type of judicial or negative competence. In our view and in contrast to the Opinion of Sharpston in *Ruiz-Zambrano*, a clear distinction must still be realized between the Court's interpretative role in fixing the scope of EU law and the exercise of legislative powers by the Union institutions.<sup>96</sup> As a result, "a prohibited national action may be interpreted by the ECJ as falling within the scope of application of EC law without the Community necessarily having legislative power to act in that field".<sup>97</sup> This view is clearly backed up by the Court of Justice case law. In *Bosman*,<sup>98</sup> for example, the German government argued for correspondence between legislative competence and judicial competence ('interpretative authority'). Similarly, in *Laval* and *Viking*,<sup>99</sup> the Swedish and Danish governments respectively argued that the scope of EU law should equate with Union's power to legislate. Yet the Court of Justice has consistently rejected those views given that it is evident that the

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<sup>94</sup> *Ibid.*, paras. 172-173.

<sup>95</sup> See also D. Anderson and C. Murphy, "The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe, EUI Working Paper Law 2011/08, at p.16. As put by these authors "[i]f Sharpston's solution were adopted it appears that the Charter [fundamental rights] would be applicable in a case such as *Carpenter*, even if the applicant's husband had never exercised a free movement right"

<sup>96</sup> Cf. A. Dashwood, "The Limits of European Community Powers", 1996, *European Law Review*, Vol 21, No 2, pp.113-128. Since TEU, the Court has been sensitive to the limits on Community legislative powers. Distinction between matters on which the Community is given power to legislate, and other matters which merely fall 'within the scope of Application of Community law.

<sup>97</sup> G. De Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor", *JCMS*, Vol. 36, No 2, June 1999, p. 217 at p. 221. E.g. national law restricting the sale of foreign lottery tickets.

<sup>98</sup> Case C-415/93 *Bosman* [1995] ECR I-4921.

<sup>99</sup> See Cases *Laval* and *Viking*, *supra* n. 88.

principle of subsidiarity does not apply in the context of judicial competence. Though the Court of Justice should be receptive as to matters of subsidiarity when reviewing the exercise of the institutions' legislative powers under the Treaty, the same is not automatically true when it comes to its own interpretation of the scope of Treaty provisions. The Amsterdam Protocol seems to exclude the Court from a role in interpreting the scope of the Treaty from the application of the principle of subsidiarity.<sup>100</sup> A comparable conclusion should be drawn in the wake of the Lisbon Treaty's entry into force and its Protocol No 2 on the application of subsidiarity and proportionality. To put it differently, the Lisbon Treaty still allows for a dichotomy between the power to legislate and the *interpretative authority* of the Court of Justice in determining the scope of EU law.

To conclude on the alleged federal effect of the Charter, a cursory reading of the Charter easily confirms that it has not empowered the Court of Justice to review any provision of national law in the light of the fundamental rights it lays down.<sup>101</sup> Even in areas where the EU can legislate, the reach of the fundamental rights enshrined in the Charter is not boundless. As explained above, Article 51(1) confirms beyond any doubt that national authorities, when acting *outside* the scope of EU law, are *not* bound by its provisions. In other words, it is still a condition for EU courts in exercising their jurisdiction that the relevant national measure falls within the scope of Union law. While this notion of "scope" may be viewed as a fairly ambiguous, it is simply wrong to affirm that natural and legal persons, following the entry into force of the Lisbon Treaty, have gained the right to institute judicial proceedings on the basis of any provision of the Charter, in any situation, against any national (or EU) public authorities. If anything, the Charter may be criticised for apparently narrowing the pre Lisbon reach of EU fundamental rights law as it includes a provision which appears to suggest that the national authorities must respect EU fundamental rights *only* when they are implementing Union law. One may only hope that the Court will eventually remedy the drafting deficiencies of the Charter on this point. What is nevertheless crystal-clear is that the Charter cannot enable the European Court of Justice to function in a way similar to operation of the US Supreme Court, that is, to define a "federal" standard against which *all* national rules may be evaluated and eventually set aside. Viewed in this light, the so-called "opt-out" Protocol<sup>102</sup> secured by the UK and Poland

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<sup>100</sup>G. De Búrca, *supra* n. 97.

<sup>101</sup> "[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties." As a result, it seems ludicrous to equate legally binding status with an enlargement of the EU's powers through the backdoor. The Charter cannot offer, *in itself*, a legal basis for the EU to legislate. The fact that certain Charter rights concern areas in which the EU has little or no legislative power to act – for instance, the right to strike – is no contradiction but merely illustrates the drafters' wish to make clear that the EU must avoid indirect interference with such rights. In practice, this means, for instance, that Member States may in fact be able to more easily justify national measures that constitute restrictions on the EU's "four freedoms" such as the freedom to provide services, by reference to the Charter's rights or principles over which the EU has no competence.

<sup>102</sup> Protocol No. 30 was devised in order to satisfy the British government's "wish ... to clarify certain aspects of the application of the Charter" (Recital 8 of the Protocol). However, Protocol No. 30 does not render the Charter wholly inapplicable in those countries – it does not preclude individuals from invoking the Charter's provisions before British and Polish courts – and is not therefore, strictly speaking, an "opt-out" protocol but rather a *de facto* interpretative declaration. For a recent confirmation of this view by the Court of Appeal in England and Wales: See *R v Secretary of State for the Home Department*, 12 July 2010 (the fundamental rights

serves no useful legal purpose as the Charter already made clear that it does not in itself “extend the ability” of the Court of Justice, or any British or Polish court “to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”<sup>103</sup> The crucial and final point is that fundamental rights guaranteed by national constitutions and/or the ECHR are complemented, not superseded by the Charter. Whilst one may legitimately express some concerns over to the possibility of future judicial activism and a federal interpretation of the Charter, the Court of Justice, if only for “diplomatic” reasons,<sup>104</sup> is unlikely to let the fundamental rights “genie” get out of the bottle.

### 3.2 *Towards an Increased Application of EU Fundamental Rights in “Horizontal” Situations?*

The legally binding status of the Charter has reinitiated interest in question of whether its provisions, similarly to the general principles of EU law, are capable of affecting legal relations between private parties.<sup>105</sup> The so-called horizontal effect of certain EU law provisions – the right to rely on these provisions in the context of legal proceedings between private parties – was made clear in *Defrenne II* where the Court held that the Treaty principle of equal pay for male and female workers for equal work, now laid down in Article 157 TFEU, applies not only to the action of public authorities, but also extends to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals.<sup>106</sup> The ability to invoke the principle of equal pay means that in proceedings between private parties national courts must declare void any contractual agreements or collective regulations which have an element of discrimination based on sex. The *Defrenne II* ruling has generally been welcomed if only because it ensures respect for the principle of

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set out in the Charter can be relied on as against the United Kingdom and the first-instance judge erred in holding otherwise). Interestingly, the Master of Rolls subsequently made a reference to the Court of Justice (see pending Case C-411/10) asking *inter alia* whether a decision made by a Member State under the relevant regulation fall within the scope of EU law for the purposes of Article 6 TEU and/or Article 51 of the Charter, and assuming that such a decision falls within the scope of EU law, whether Protocol No. 30 has any effect in respect of the duty of the UK to observe EU fundamental rights when implementing EU law. The forthcoming judgment in this case is likely therefore to prove extremely significant.

<sup>103</sup> Article 1(1) of the Protocol. It must be said that this provision only restates the obvious as the Charter itself provides that it does not and cannot be relied on to extend the powers of EU institutions, including the Court of Justice, but it does so in an incredibly awkward manner by referring in particular to the puzzling notion of ability rather than the traditional notion of jurisdiction. And generally speaking, this provision will *not* preclude the Court of Justice from ruling that UK or Polish rules or practices are contrary to EU fundamental rights which are guaranteed as general principles of Union law or which are further developed by other provisions of EU law.

<sup>104</sup> It must be remembered that the US Supreme Court’s “legal coup” took place in rather unique historical circumstances—the persistent segregationist practices in Southern States—which required, in turn, a revolutionary expansion of the scope of the US Bill of Rights.

<sup>105</sup> For more developments on the concept of direct and indirect horizontal effects of EU fundamental rights, see M. Safjan and P. Miklaszewicz, “Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law” (2010) 18 *European Review of Private Law* 475.

<sup>106</sup> Case 43/75 *Defrenne II* [1975] ECR-455, para. 39. See also Case C-281/98 *Angonese* [2000] ECR I-4139, para. 36 and the analysis offered by AG Bot in Case C-555/07 *Kücükdeveci* [2010] nyr, para 85.

hierarchy of norms and is consistent with the Court's role as the guardian of the rule of law.<sup>107</sup>

The question we shall now focus on is whether the legally binding status of the Charter may increase the opportunities for individuals to invoke EU fundamental rights in the context of legal proceedings between private parties. Advocate General Bot, in the conclusive paragraph of his Opinion in *Kücükdeveci*, offered an interesting prediction:

[G]iven the ever increasing intervention of Community law in relations between private persons, the Court will, in my view, be inevitably confronted with other situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights. Those situations will probably increase in number if the Charter of Fundamental Rights of the European Union becomes legally binding in the future, since among the fundamental rights contained in that charter are a number which are already part of the existing body of Community law in the form of directives.<sup>108</sup>

The Advocate General, unfortunately, does not further explain why one should expect the number of instances of horizontal applications of EU fundamental rights to increase post Lisbon Treaty. The sole argument proposed would appear to be that some of the Charter's rights have been further specified by a series of directives. One may wonder if this is not also true of most general principles of EU law. However, the Charter does increase the visibility of the rights it contains and may therefore lead more applicants and their counsels to seek to rely on them or at the very least, to test their cognizability. Yet it remains to be seen whether they will do so in the context of proceedings between private persons. But let us return to the issue of the immediate impact of the *Kücükdeveci* case in relation to the horizontal application of the fundamental rights enshrined in provisions of the Charter. This judgment may not however be understood without first considering its immediate predecessor: the *Mangold* case, in which the Court was asked to clarify the horizontal application of rights laid down in directives.

In *Mangold*, the main legal issue was the fixed-term contract concluded under German law by a 56 year-old man with a private employer was incompatible with the principle of non-discrimination on grounds of age as laid down in Directive 2000/78 because it authorised, without restrictions, the conclusion of fixed-term employment contracts for all workers over the age of 52. An important aspect of the case is that the period prescribed for transposition of that directive had not yet expired as far as Germany was concerned. Yet it was already clear by then that a Member State to which a directive is addressed may not, during the period prescribed for transposition, adopt measures that may seriously compromise the attainment of the result prescribed by the directive.<sup>109</sup> But it was far from certain whether this reasoning could be applied in the context of horizontal situations such

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<sup>107</sup> D. Simon, "Sabena is dead, Gabrielle Defrenne's case is still alive: the old lady's testament..." in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty* (Hart, 2010), p. 269.

<sup>108</sup> Opinion of AG Bot in *Kücükdeveci*, *supra* n. 106, para. 90.

<sup>109</sup> Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para. 45.

as the one in *Mangold*. After noting that Directive 2000/78 does *not* itself lay down the principle of equal treatment in the field of employment and occupation, the Court ruled that the principle of non-discrimination on grounds of age, which the Directive promotes by laying down a general framework for combating discrimination on that basis, must instead be regarded as a general principle of EU law derived from various international instruments and the constitutional traditions common to the Member States. As a result, for the Court, there is no need to further discuss the absence of transposition in Germany as the “observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition”<sup>110</sup> of this directive. The question rather becomes whether the contested German provision falls within the scope of Union law. Provided that it does and that a reference is made to the Court for a preliminary ruling, it is well established that the Court must provide all the criteria of interpretation needed by the national court to determine whether the German provision is compatible with this general principle of law. In this case, the Court did accept that the national legislation at issue aimed to implement Directive 1999/70.<sup>111</sup> Therefore, it was reasonable to conclude that the national measure fell within the scope of EU law in accordance with the *Wachauf* line of cases. But *Mangold* could arguably also be read as an *ERT*-style derogation case as the controversial national measure constituted an exception to the principle of non-discrimination on grounds of age. National derogations from this principle are however permitted by the Directive itself as long as the Member State shows that the national legislation is objectively justified under EU law.<sup>112</sup>

In any event, the Court was not convinced that the German legislation was objectively justified as Germany failed to show that fixing an age threshold is objectively necessary to favour the integration into working life of unemployed older workers and held that EU law precludes any provision of national law, such as the one at issue, that authorises the conclusion of the fixed-term employment contracts. With respect to our topic of inquiry, the most significant aspect of this case is that it clearly spells out that the general principles of Union law, including fundamental rights, can be relied in the context of legal disputes between private parties when they are further developed in directives regardless of whether the deadline for transposition of the directives had passed or not. This has an important practical consequence as the Court of Justice also indicated that it is the responsibility of the national court hearing a dispute involving the principle of non-discrimination in respect of age, to provide the legal protection which individuals derive from rules of Union law to ensure that those rules are fully effective, even if this means setting aside any provision of national law which may conflict with EU law.<sup>113</sup>

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<sup>110</sup> Case C-144/04 *Mangold* [2005] ECR I-9981, para. 76.

<sup>111</sup> *Ibid.*, para. 75.

<sup>112</sup> See Article 6(1) of the Directive: “Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

<sup>113</sup> Case C-144/04 *Mangold*, *supra* n. 110, para. 77. See, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, para. 21.

This reasoning has been subject to severe criticism essentially because it would undermine the coherence of the doctrine of direct effect by allowing for the horizontal direct effect of provisions of non-implemented directives whereas the Court has consistently ruled that a directive, being formally addressed to Member States, cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.<sup>114</sup> Some scholars have nonetheless welcomed the *Mangold* decision. To oversimplify, the argument is that general principles of EU law, if only because of their constitutional status, can be relied upon in relationships of a purely civil nature.<sup>115</sup> Moreover, the Court did not suggest that the principle of non-discrimination in respect of age, as a general principle of Union law, had “real” horizontal direct effect.<sup>116</sup> In other words, “a national court, hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive.”<sup>117</sup> The Court of Justice merely indicated that a private party may rely on the principle of non-discrimination on grounds of age – a general principle of EU law – whenever the national legislation falls within the scope of EU law due to its close tie with EU secondary legislation. As such and not as a self-sufficient norm, the general principle can be relied upon before a national court in order to challenge the validity of national legislation conflicting with it. Where the challenge is found well founded and the national legislation cannot be interpreted so as to conform with the general principles of EU law, the national court must set aside the provision of national law at issue so as to guarantee the full effectiveness of the general principle. *Mangold* is therefore about *invocabilité d'exclusion*.<sup>118</sup> The “coherence” of the doctrine of direct effect or rather, the rule whereby a directive cannot be relied on as such against an individual remains unaffected as in *Mangold*, the directive disappears behind the general principle of EU law that the directive merely, if we dare say, implements.

We will not discuss whether the Court was right to regard the principle of non-discrimination on grounds of age as a general principle of EU law given that it would be difficult to derive it from the constitutional traditions common to the Member States.<sup>119</sup> One may simply point out that the Charter explicitly prohibits discrimination on this ground.<sup>120</sup> More importantly, the potential for increased horizontal application of Charter rights in the light of *Kücükdeveci* should now be considered.

In *Kücükdeveci*, the Court of Justice had first to determine whether national rules regarding calculation of the notice period for dismissal from work fell within the scope of Union law and, were this the case, whether they were compatible with the general principle of non-discrimination on grounds of age. As regards the first problem, the Court noted that in

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<sup>114</sup> See e.g. Editorial Comments, “Horizontal Direct Effect – A Law of Diminishing Coherence” (2006) 43 *Common Market Law Review* 1.

<sup>115</sup> J. Jans, “The Effect in national Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law” (2007) 34 *Legal Issues of Economic Integration* 53, p. 66.

<sup>116</sup> *Ibid.*, p. 62. The Court merely held that this general principle of EU law may be relied on before a national court in order to challenge the validity of national legislation conflicting with it.

<sup>117</sup> A.G. Tizzano in Case C-144/04 *Mangold*, *supra* n. 110, para. 122.

<sup>118</sup> See Jans, *supra* n. 115, p. 62.

<sup>119</sup> For some critical views, see Opinion of AG Mazák in Case C-411/05 *Palacios de la Villa* [2007] I-8531.

<sup>120</sup> Article 21(1): “Any discrimination based on any ground such as age or sexual orientation shall be prohibited.”

contrast to the situation in *Bartsch*,<sup>121</sup> the allegedly discriminatory conduct occurred after the expiry of the transposition deadline of Directive 2000/78: “On that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.”<sup>122</sup>

The Court does not even seem to require that the disputed national rules should constitute a measure specifically adopted to implement Directive 2000/78. Rather, the mere expiry of the transposition deadline is enough to bring within the scope of Union law any national measure that has a bearing on the area(s) governed by the Directive. This means that while the national rule at issue does not explicitly seek to implement Directive 2000/78, because it affects the conditions of dismissal of employees, it must therefore be regarded as a measure falling within the (material) scope of the Directive and therefore of Union Law. What is also striking in *Kücükdeveci* is that there is no reference to *Wachauf*. It might be “that the Court albeit silently and thus not terribly helpfully still conceived the situation in *Kücükdeveci* as being of implementation, albeit in a rather broader manner than in *Bartsch*.”<sup>123</sup> If this view correct, it would confirm the view defended in this paper that the *Wachauf*-style review of national measures may be applied in a large number of situations, including horizontal national proceedings where their subject-matter fall within the scope of Union law by virtue of a piece of EU secondary legislation.<sup>124</sup>

It is not surprising that the Court of Justice in *Kücükdeveci* established a clear distinction between the situation at issue and the *Bartsch* case since the latter decision importantly addressed the negative scope of application of EU law in relation to private parties. In *Bartsch*, a case that once again deals with social policy and the (non-implemented) Directive 2000/78 in Germany, the CJEU established limits as to the scope of application of EU law. The Court made clear that in the circumstances of the case, the national guidelines do not constitute a measure implementing Directive 2000/78 and a crucial factual element of the

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<sup>121</sup> Case C-427/06 *Bartsch*, *supra* n. 62. This judgment deals once again with social policy and the (non-implemented) Directive 2000/78 in Germany. The Court accepted to hold that in the circumstances of the case, the national guidelines at issue did *not* constitute a measure implementing Directive 2000/78. In other words, the matter fell outside the scope of EU law and, therefore, the general principle of EU law could not be relied upon to review the national legislation since, to paraphrase Advocate General Sharpston, the general principles do not apply in abstract. In other words, a close link is required between the national legislation and the general principle enshrined in the Directive.

<sup>122</sup> See *Kücükdeveci*, *supra* n. 106, para. 25.

<sup>123</sup> Editorial Comments, “The Scope of Application of the General Principles of Union Law: An Ever Expanding Union” (2010) 47 *Common Market Law Review* 1589, p. 1593 (note 26).

<sup>124</sup> The approach taken by the Court of Justice as regards the scope of application of Union law in *Mangold*, *Bartsch* and *Kücükdeveci* has been recently reaffirmed in *Römer* (Case C-147/08), a Grand Chamber judgment delivered on 10 May 2011 and which concerns the application of the principle of non-discrimination on ground of sexual orientation in the context of social policy. The applicant claimed that, for the calculation of his pension under the relevant national rules, he ought to be treated in the same manner as a married, not permanently separated, pensioner. However, the Court was not convinced that EU law governed the applicant’s situation and with reference to *Bartsch* and *Kücükdeveci*, the Court held that neither (ex) Article 13 EC (now Article 19 TFEU) nor Directive 2000/78 allow a situation such as that at issue in the proceedings before the Court to be brought within the scope of Union law in respect of the period *prior* to the expiry of the deadline for transposing that directive

case (i.e the death of Mr Bartsch, occurred before the time-limit allowed to the Member State concerned for transposing the directive had expired).<sup>125</sup> In other words, the matter fell outside the scope of EU law and, therefore, the general principle of EU law could not be used by the CJEU to review the national legislation since, using the words of Advocate General Sharpston, the general principles do not apply in abstract. The approach taken by the CJEU as to the 'scope of application of EU law' in *Mangold*, *Bartsch* and *Kücükdeveci* have recently been confirmed in *Römer*, a Grand Chamber case delivered on 10 May 2011, that concerns the application of the principle of non-discrimination on the ground of sexual orientation in the social policy context.<sup>126</sup>

In the wake of *Kücükdeveci* and to summarize, one should distinguish between two main situations where national legislation may fall within the scope of EU law as regards Directive 2000/78: Before and after the expiry of the transposition deadline. In the latter scenario, any national measure that concerns a matter governed by the Directive falls within the scope of Union law (*Kücükdeveci*). In the former scenario, to fall within the scope of Union law, the relevant national measure must either specifically implement the directive (*Bartsch*) or fall within the scope of EU law by virtue of another piece of EU law (*Mangold*). It follows from this line of case law that the application of the general principles of EU law is closely tied to EU secondary legislation.<sup>127</sup> Furthermore, it is quite evident that the general principles of EU law are never applied in abstract and that the Court has not viewed directives as mere "decorative rules". In other words, the Court has been extremely cautious when applying directives and general principles of law simultaneously.<sup>128</sup>

One additional important related issue to address is whether this line of cases (*Wachauf*-style horizontal situations) should only be limited to non-discrimination on grounds of age or may also apply to other general principles of EU law and in particular the fundamental rights that may be simultaneously enshrined in the Charter.<sup>129</sup> In the words of Advocate General Kokott, "it remains to be seen whether the Court will extend such horizontal direct effect to other general legal principles."<sup>130</sup> One may wisely suggest the Court to think twice

<sup>125</sup> Case C-427/06 *Bartsch*, supra n. 62, para 17.

<sup>126</sup> Case C-147/08 *Römer* [2011] nyr. The applicant claimed that, for the calculation of his pension under Paragraph 10(6)(1) of the First RGG, he is entitled to be treated in the same manner as a married, not permanently separated, pensioner. The CJEU considered that for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings that case must fall within the scope of European Union law. Yet, relying on *Bartsch* and *Kücükdeveci*, the Court made clear that neither Article 13 EC nor Directive 2000/78 enables a situation such as that at issue in the main proceedings to be brought within the scope of European Union law in respect of the period *prior* to the time-limit for transposing that directive.

<sup>127</sup> E. Muir, "Of Ages in – And Edges of – EU Law", (2011) 48 *Common Market Law Review* 39, p. 56

<sup>128</sup> A significant number of Advocates General have criticised the reasoning adopted in *Mangold* and urged the Court to be extremely cautious when dealing with directives enshrining general principles. Any other approach might lead, as Advocate General Ruiz-Jarabo Colomer in *Michaeler* put it, to a situation where the directives constitute mere "decorative rules" (Joined Cases C-55/07 and C-56/07 *Michaeler and Others* [2008] ECR I-3135, para 21 et seq). See also Opinion of Advocate General Mázak in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, para. 133 et seq.

<sup>129</sup> See Case C-73/07 *Satamedia* [2008] ECR I-9831. In this case, the European Commission relied on the general principle protecting the right to privacy in relation to a non-implemented directive.

<sup>130</sup> Advocate General Kokott in Case C-104/09 *Roca-Álvarez* [2010] nyr, para 55.

before extending the *Küçükdeveci* approach to areas beyond those governed by EU anti-discrimination law where the (general) principle of equal treatment naturally logically enjoys a special standing.<sup>131</sup> This would however suggest that the principle of equal treatment is in a preferred position amongst fundamental rights and this is not a position we would advocate. Similarly, we submit that most, if not all provisions of the Charter, whilst they are primarily aimed at protecting individuals against public authorities, are also capable of being directly effective in the context of judicial proceedings between individuals.<sup>132</sup> If anything, the case law of the European Court of Human Rights indicates that many of the rights guaranteed by the European Convention on Human Rights can affect relations between private individuals.<sup>133</sup> By contrast with the legal position of the European Convention in the national legal systems, one cannot usefully invoke provisions of the Charter where the national measure or action being challenged falls outside the scope of Union law as this paper has made clear.<sup>134</sup> To put it differently, the scope *ratione personae* of the rights contained in the Charter is similar to the general principles of EU law. However, the material scope of application of the Charter is broader. When one adds this to the more highly visible nature of the Charter, one cannot exclude that claimants and their counsels may not seek on a more regular basis to test the applicability of the Charter's rights in the context of "horizontal" litigations.

#### **4. A New Classification of the Main Situations in which EU Fundamental Rights Bind the Member States**

The potential for an increased horizontal applicability of EU fundamental rights, following the new status of EU primary law acquired by the Charter post Lisbon Treaty, would seem to justify a new classification with respect to the main situations in which EU fundamental rights bind the Member States. The traditional assumption is that EU fundamental rights cannot bind private parties but are only applicable in vertical situations, that is, in the context of litigation between a private party and a public authority. As previously explained and as suggested by most EU law scholars, we believe that two main vertical situations can be distinguished: Member States are bound by EU fundamental rights either when they implement or derogate from provisions of EU law, the notions of implementation and derogation having been broadly understood by the Court of Justice. We further submit that the horizontal effect of EU fundamental rights ought to be taken into account and assessed in the light of the *Wachauf* and *ERT* lines of cases. Accordingly and as will be explained below, it would appear appropriate to distinguish between two further situations: a

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<sup>131</sup> See E. Muir, "Of Ages in – And Edges of – EU Law", *supra* n. 127, p. 56.

<sup>132</sup> An alternative approach would be to deny the horizontal application of the Charter's rights as its Article 51 provides that they are only addressed to the EU institutions and the Member States (when they implement EU law) and instead, recognise the horizontal direct effect of the general principles of EU law as in the *Küçükdeveci* case.

<sup>133</sup> For further discussion of the *Drittwirkung* effect of the provisions of the ECHR, see e.g. P. van Dijk et al., *Theory and Practice of the European Convention on Human Right* (Intersentia, 2006), p. 15 et seq.

<sup>134</sup> For a recent example, see Case C-434/09 *McCarthy* [2011] nyr (the sole status of EU citizen is not sufficient to trigger the application of EU law where the EU citizen has not exercised his right of free movement and is not subject to measures having the effect of depriving him of the genuine enjoyment of the substance of the rights associated with his status as a Union citizen, or of impeding the exercise of his right to move and reside freely within the territory of the Member States).

situation of *Wachauf à l'horizontale* and a situation of *ERT à l'horizontale*. This interpretation brings more clarity as to (the understanding of) the scope of application of EU fundamental rights.

	<b>National measures implementing EU law</b>	<b>National (including private) measures derogating from EU law</b>
	<i>Category 1: Wachauf-type situations</i>	<i>Category 2: ERT-type situations</i>
<b>Vertical situation:</b> Dispute between a private party and a state authority	<ul style="list-style-type: none"> <li>■ <i>Wachauf</i> [1989]</li> <li>■ <i>Klensch</i> [1986]</li> <li>■ <i>Bosphorus</i> [1996]</li> <li>■ <i>Molenheide</i> [1997]</li> <li>■ <i>Lindqvist</i> [2003]</li> <li>■ <i>Rundfunk</i> [2003]</li> <li>■ <i>Booker Aquaculture</i> [2003]</li> <li>■ <i>Steffensen</i> [2003]</li> <li>■ <i>Eiterköpfe</i> [2005]</li> <li>■ <i>DEB</i> [2010]</li> </ul>	<ul style="list-style-type: none"> <li>■ <i>ERT</i> [1993]</li> <li>■ <i>Familiapress</i> [1997]</li> <li>■ <i>Carpenter</i> [2002]</li> <li>■ <i>Baumbast</i> [2002]</li> <li>■ <i>Schmidberger</i> [2003]</li> <li>■ <i>Omega</i> [2004]</li> <li>■ <i>Sayn-Wittgenstein</i> [2010]</li> <li>■ <i>Ruiz-Zambrano</i> [2011]</li> </ul>
	<i>Category 3: Wachauf à l'horizontale</i>	<i>Category 4: ERT à l'horizontale</i>
<b>Horizontal situation:</b> Dispute between private parties	<ul style="list-style-type: none"> <li>■ <i>Mangold</i> [2005]</li> <li>■ <i>Küçükdeveci</i> [2010]</li> </ul>	<ul style="list-style-type: none"> <li>■ <i>Defrenne II</i> [1975]</li> <li>■ <i>Bosman</i> [1995]</li> <li>■ <i>Angonese</i> [2000]</li> <li>■ <i>Karner</i> [2004]</li> <li>■ <i>Viking</i> [2007]</li> <li>■ <i>Laval</i> [2007]</li> </ul>

#### 4.1 Reliance on EU Fundamental Rights against National State Authorities (Categories 1 and 2)

Traditionally, the various situations in which EU fundamental rights may be relied upon to challenge national measures have been regrouped into two broad categories. The first category concerns the review of national measures implementing EU law by the European Court of Justice (previously referred to as the *Wachauf*-style review of Member State measures). It is submitted that this category covers all national measures that concern the implementation – broadly understood – of EU secondary legislation let it directives<sup>135</sup> or regulations.<sup>136</sup> In other words, a national measure should fall within the scope of Union law wherever it is linked to the application, enforcement or even the sole interpretation of EU secondary legislation.<sup>137</sup> If so, the national measure must be compatible with the requirements of the protection of fundamental rights in the Union legal order.

<sup>135</sup> Case C-101/01 *Lindqvist*, *supra* n. 26, paras. 84-87.

<sup>136</sup> Case C-84/95 *Bosphorus* [1996] ECR I-3953 para. 19.

<sup>137</sup> In our view, the cases of *Booker Aquaculture* (Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411) and *Steffensen* (Case C-276/01 [2003] ECR I-3735) should also be understood in the light of *Wachauf*. This judgment is in fact quoted in both cases though the cases do not deal in the strict sense with the implementation of directives but rather with their application. In *Booker Aquaculture*, the Court of Justice had to assess the breach of the right to property in connection with to the absence of compensation

Where national measures derogate from EU free movement rules, including the specific EU citizenship provisions of the TFEU, the Court of Justice has also jurisdiction to review their compatibility with EU fundamental rights. This has been referred to as the *ERT*-style review of Member State measures as the Court held in *ERT* that where the Member States rely upon the derogations provided for in what is now the TFEU, to justify national rules which affect the exercise of any of the EU's fundamental freedoms, the national rule at issue must be *interpreted* in the light of the general principles of Union law and in particular of fundamental rights, and must obviously be compatible with them.<sup>138</sup> This was clearly confirmed in the *Familiapress* judgment where the Court made clear that *ERT*-style review of national measures also apply where Member States rely upon the range of the so-called public interest justifications or mandatory requirements developed through the case law of the Court to justify non-discriminatory measures derogating from provisions of EU law.<sup>139</sup>

In *Schmidberger*,<sup>140</sup> the Court addressed a different hypothesis: Faced with a national measure derogating from EU rules on the free movement of goods but justified by the need to protect freedom of assembly, the Court agreed that national authorities may seek to justify a measure derogating from an EU economic fundamental freedom on the ground that it is necessary to protect fundamental rights guaranteed in the Union legal order. For the Court, since both the Union and its Member States are required to respect fundamental rights, the protection of those rights may also be understood as an overriding requirement relating to the public interest "which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."<sup>141</sup> In other words, not only do EU fundamental rights constitute limits on the Member States' regulatory autonomy, Member States may also seek to rely on them against other EU law norms and in particular, when they need to justify national measures interfering with EU free movement rights.<sup>142</sup>

In any event, the most important point regarding the *ERT* line of cases is that any national measure which negatively affects one of the four EU's fundamental freedoms – free movement of goods, persons, services and capital – automatically falls within the scope of Union law and as such, it must be compatible with EU fundamental rights or be justified with reference to EU fundamental rights. The recent case of *Sayn-Wittgenstein* also confirms the validity of an additional point made above: national measures derogating from EU (non-

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concerning an implemented Directive whereas the Court of Justice emphasised that procedural safeguards concerning rights of the defence should be respected when implementing a Directive in *Steffensen*.

<sup>138</sup> See *ERT*, *supra* n. 4, paras. 43-44.

<sup>139</sup> See *Familiapress*, *supra* n. 43.

<sup>140</sup> See *Schmidberger*, *supra* n. 31.

<sup>141</sup> *Ibid.*, para 77.

<sup>142</sup> This approach was confirmed in *Omega*, *supra* n. 45. There is, however, a minor difference with the case of *Schmidberger* to the extent that the Court decided that the fundamental right at stake, the principle of respect for human dignity, should be treated as being part of the public policy exception already provided for in the EC Treaty. The end result was nonetheless the same: Respect for human dignity can justify a restriction of EU free movement rights and in *Omega*, the national restrictive measure was found compatible with EU law because it did not go beyond what was necessary to attain the objective pursued by the competent authorities, i.e. the objective of protecting human dignity.

economic) citizenship provisions must be treated similarly to national measures derogating from EU (economic) free movement rights. In this rather entertaining case opposing the Austrian Princess of Sayn-Wittgenstein to the Austrian State regarding the Austrian Law on the abolition of the nobility, the Court nevertheless concluded the dispute fell “within the substantive scope of EU law as it involved EU primary law, i.e., Article 21 TFEU, thanks to the Princess made also use of the freedom to move to and reside in another Member State (Germany), albeit the Court did confirm that the rules governing a person’s surname and the use of titles of nobility are matters within the competence of the Member States.<sup>143</sup> What is particularly worth noting about this case is that the Court confirms that any national measure interfering with EU citizenship rights can be treated as a “standard” national restriction on EU economic free movement rules.<sup>144</sup> In other words, in both situations, they may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to secure and only if those objectives cannot be attained by less restrictive measures.<sup>145</sup> In the end, this case reflects the thin dividing line between economic (Article 56 TFEU) and non-economic provisions (Article 21 TFEU) of the TFEU.<sup>146</sup> For the Court, although the rules governing a person’s surname and the use of titles of nobility are matters within the competence of the Member States, the matter nevertheless fell within the scope of EU law because the litigious national measure affected rights guaranteed by Article 21 TFEU.

#### 4.2 *Wachauf à l’horizontale and ERT à l’horizontale (Categories 3 and 4)*

Provided that the contested national measure falls within the scope of Union law, a private party may seek to rely on EU fundamental rights against another private party. Cases such as *Mangold*,<sup>147</sup> *Bartsch*<sup>148</sup> and *Kücükdeveci*<sup>149</sup> may be said to apply the *Wachauf*-style review of Member State measures in the context of “horizontal” judicial proceedings. In all of these cases, EU law was relevant because the national measures at issue were concerned with the implementation of EU secondary legislation and the private plaintiffs all sought to obtain from courts that they set aside the national measures on the grounds that their EU fundamental rights in the context of legal proceedings against private employers. The extension of the *Wachauf*-style review to horizontal situations requires us to look beyond a narrow definition of the State as individuals are not responsible for the implementation – broadly understood – of EU law. However, proceedings between private parties can in fact

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<sup>143</sup> Case C-208/09 *Sayn-Wittgenstein* [2010] nyr, delivered on 22 December 2010.

<sup>144</sup> *Ibid.*, paras. 37-40. The Court noted that the Princess engages in a professional activity in Germany providing services to recipients in one or more other Member States and she was therefore in a position to also argue a violation of the freedom to provide services (Article 56 TFEU).

<sup>145</sup> The Court found the Austrian legislation to comply with these requirements. Indeed, and similarly to the situation in *Schmidberger*, the Austrian refusal to recognise on public policy grounds the surname of a national which has been obtained in another Member State and contains a title of nobility is essentially justified in the name of the principle of equality before the law of all Austrian citizens, a principle which the EU legal system strives to protect as well as a general principle of law which is also enshrined in Article 20 of the Charter of Fundamental Right (paras. 88-89).

<sup>146</sup> Case C-208/09 *Sayn-Wittgenstein*, *supra* n. 143.

<sup>147</sup> *Supra* n. 110.

<sup>148</sup> *Supra* n. 62.

<sup>149</sup> *Supra* n. 106.

create a situation that concerns in essence the same question, that is, the (correct) application of EU legislation.

In the fourth and final category distinguished above (*ERT à l'horizontale*), cases such as *Viking Line* and *Laval* and also *Bosman* have been included. These cases oppose natural or legal persons (regulatory bodies, trade unions, economic operators) and offer striking examples where free movement claims conflict with defences grounded in fundamental rights. In other words, these cases call for an eminently difficult reconciliation between EU fundamental rights and EU fundamental freedoms. In *Bosman*, the Court went as far as to accept that private parties themselves can rely on EU derogatory clauses to justify national measures derogating from EU free movement rules and the issue of the public v. private nature of the litigious national rules is irrelevant with respect to the scope and content of the justifications put forward before the Court of Justice.<sup>150</sup> However, it goes without saying that private parties are unlikely to put forward “public order” justifications as national authorities retain “exclusive competence as regards the maintenance of public order and the safeguarding of internal security”.<sup>151</sup>

Whilst one may reasonably contend that the *Viking* and *Laval* judgments are no models of clarity, they strongly indicate that the Court of Justice has firmly put the right to take collective action, enshrined in Article 28 of the Charter and invoked by trade unions in these two cases, within the “methodology of justifications” already quite well honed in the case law of the Court in respect of vertical relations. Unsurprisingly, the Court also confirmed that for the restrictions on the freedom to provide services of the relevant undertakings, following threatened or actual boycott actions undertaken by the trade unions, to be compatible with EU law, they must be justified by overriding reasons of public interest such as the protection of the workers of the host State against possible social dumping, and must not go beyond what is necessary in order to attain the objective being pursued by the trade unions. Therefore, it appears that there is nothing in principle preventing a private party from invoking any of the justification already provided for in EU primary law or recognised by the case law of the Court as reasons of public interest.

## 5. Conclusion

To sum up, EU fundamental rights bind the Member States when their measures or actions can be said to fall within the scope of EU law. This is normally the case whenever they enact measures to implement EU law (*Wachauf* line of cases) or adopt measures that constitute derogations from provisions of EU law (*ERT* line of cases). In this latter situation, EU fundamental rights may either be relied upon to interpret and review the legality of the national derogating measure or, by contrast, to justify it when it conflicts, for instance, with EU economic and non-economic free movement rights. We suggested above that two parallel categories can also be usefully distinguished: EU fundamental rights may indeed become relevant in “horizontal” situations, that is, in the context of judicial disputes

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<sup>150</sup> Case C-415/93 *Bosman*, *supra* n. 98, para. 86.

<sup>151</sup> Case C-265/95 [1997] ECR I-6959, para. 33. See also C. Barnard “Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?” in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), p. 278.

between private parties. It would be therefore appropriate to make a distinction between four main scenarios as regards the European Court of Justice's jurisdiction to review national measures for compliance with EU fundamental rights.

It is argued that this mapping of the CJEU case law offers a better grip of understanding the scope of application of EU fundamental rights. But, unfortunately, the uncertainties will still remain due to the casuistic approach of the CJEU where the availability of EU fundamental rights protection dependent on whether a Treaty provision was directly applicable or whether secondary legislation had been enacted. As we discussed before, Advocate General Sharpston in *Ruiz Zambrano* gives us an alluring alternative to the chaotic jurisprudence of the CJEU. To her, the availability of EU fundamental rights protection should not dependent on whether a Treaty provision was directly applicable or on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence. In other words, this new test (rule) would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised. If this rule means that EU law is applicable in all types of internal situation, clarity would be achieved without any doubt but at the cost of transforming the EU into an overt federal system. This solution is obviously impossible within the framework of the Treaty of Lisbon since, dixit Sharpston, it "necessitates an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU". However, if the proposal is in fact more modest and circumscribed to the potential existence of EU material competence; then this rule will solve the problem of the scope of application in relation to the implementation and application of EU secondary law. Yet in the non-harmonized area, a case-by-case evaluation would always be necessary and would have to be realised by the CJEU. This rule will bring us back to where we started.

At the end of the day, it seems that we are stuck with the *Wachauf* and *ERT* lines of cases – and its related inconsistencies which are clearly visible in both the pre and post Lisbon case law – at least until a Treaty amendment. If this is true, the CJEU in the future should focus on providing us with intelligible and well developed reasons in the cases dealing with the scope of application of EU fundamental rights. This duty of transparency is necessary if one wish to lessen the 'uncertainties' inherent to the 'scope of EU law'.