
The Variations of Judicial Enforcement of EU Charter of Fundamental Rights vis-à-vis Union Institutions and Bodies

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Summary: The aim of this paper is to offer overview of the potential judicial instruments and mechanisms which are available in the current state of EU legal system and which are thinkable as means of the enforcement of rights included in the EU Charter in relation to acts and omissions of the EU bodies. The paper deals with theoretical options and practical examples of using the Charter as the source of review within different types of proceedings before General Court and Court of Justice.

Keywords: EU Charter – EU institutions and agencies – CJEU – General Court – Enforcement – Remedies – Supervision

1. Introduction

Even though we are very close to the end of first decade of having the legally binding EU Bill of Rights, there is still a wide space for discussions and elaboration of potential ways of its enforcement in legal practice. The EU Charter itself offers the space for analyses, “demanding” and proposing the potential options in this regards. It opens the space for mentioned discussions by the way of quietness about the instruments of its enforcement.

While looking at the contents of the Charter, it is clear that guidelines on its enforcement in practice (i.e. procedural chapter) are missing. Unlike other international human rights instruments, which introduce the judicial¹ or administrative

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¹ The most developed and comprehensive is the system of European Convention on Human Rights and Fundamental Freedoms, which introduced the judicial mechanisms of its enforcement represented by the European Court of Human Rights.

and quasi-judicial² means of enforcement³, the EU Charter does not define any special procedures and tools for the execution of guaranteed rights. In this respect, it recalls national catalogues of human rights (such as the Czech Charter of Fundamental Rights and Freedoms), which in the same way only anchor material (protected) rights and leave protection procedures to other existing enforcement systems (general courts, constitutional courts).

The aim of this paper is to offer overview of the potential judicial instruments and mechanisms which are available in the current state of EU legal system and which are thinkable as means of the enforcement of rights included in the EU Charter. In this paper the impetus will be given to judicial remedies for EU Charter enforcement particularly in relation to acts and omissions of the EU bodies.

2. Note on Intricate Sum of Mechanisms Related to the Enforcement of EU Charter

When discussing the available and potential instruments of the enforcement of the EU Charter in practice, we necessary need to distinguish the categories of entities, which are obliged to respect and protect the rights encoded in the EU catalogue. The key provision here is article 51(1) of the Charter, which defines the addressees of that obligation⁴. There are two categories of addressees which have an obligation to respect the Charter:

- **EU bodies.** Firstly and in general it is about the institutions, bodies, offices and agencies of the Union. Here the Charter serves as the tool for strengthening the rule of law and the democratic legitimacy of supranational governance.⁵ It is the goal of a long path on which the Communities and Union were

² Here we could mention the system of enforcement of European Social Charters (original – 1961 as well as revised – 1996) in a form of collective complaints mechanisms (introduced by Additional Protocol of 1995), which is giving the special control power to European Committee of Social Rights. See further BENELHOCINE, C. *The European Social Charter*. Strasbourg: Council of Europe Publishing, 2012, see also FALALIEVA, L. The Fundamental Instruments of Social Rights Protection: the European dimension, further in this volume.

³ For further details and comparison of particular systems see TOMUSCHAT, Ch. *Human Rights – Between Idealism and Realism*. 3rd edition. Oxford: Oxford University Press, 2014 or BARTOŇ, M. et al. *Základní práva* [The Fundamental Rights]. Prague: Leges, 2016.

⁴ See further WARD, A. Commentary on Article 51 – Field of Application. In: Peers, S., Hervey, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 1415–1454; LENAERTS, K., GUTIÉRREZ-FONS, J. A. The place of the charter in the EU constitutional edifice. In: Peers, S., Hervey, T. (eds.). *The EU Charter of Fundamental Rights. A Commentary*. Oxford: Hart Publishing, 2014, p. 16.0–1637.

⁵ LENAERTS, K., CAMBIEN, N. The democratic legitimacy of the EU after the Treaty of Lisbon. In: Wouters, J. (ed.). *European constitutionalism beyond Lisbon*. Intersentia, 2008, p. 185–207 or

seeking the ideal tool for the protection of fundamental rights.⁶ Institutions of the EU are responsible for respecting rights protected by the Charter generally in all activities that could touch upon individuals' rights.

- **Member States.** The second category of addressees is represented by the Member States. Here the Charter brings the federalisation question onto the scene. The question of the existence of a common (central) standard of fundamental rights protection binding upon all Member States (peripheries) is clearly interconnected with the emancipation and dominance of EU law.⁷ And it deepens the scope of protection of individuals within the whole system of application of EU law. What is worth to mention here, is the fact that not all activities of Member States falls under the Charter conformity test. It is clear from the wording of article 51(1) that the Charter is applicable vis-à-vis Member States 'only when they are implementing Union law'.

The Charter (unlike for example the European Convention for the Protection of Human Rights and Fundamental Freedoms) is not universally applicable. Its applicability occurs, roughly speaking, where the conduct of a Member State has some EU dimension. The question of boundaries of Charter applicability vis-à-vis the Member States was among the most discussed issues in relation to the negotiation of the Charter⁸ and brought a significant case law of the Court of Justice in recent years related to the extent of term "implementation" and determining the scope of application of the Charter in relation to Member States' conduct.⁹ To sum up, the notion of 'implementation of EU law' covers a wide

DE BÚRCA, G. After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2013, vol. 20, p. 168–184.

⁶ See KERIKMÄE, T. et al. *Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights*. Springer, 2014 or ŠIŠKOVÁ, N. (ed.). *The process of constitutionalisation of the EU and related issues*. Europa Law Publishing, 2008.

⁷ On this issues see e.g. SARMIENTO, D. Who's afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe. *Common Market Law Review*, 2013, vol. 50, p. 1267–1304; HAMULÁK, O. *National Sovereignty in the European Union – View from the Czech Perspective*. Cham: Springer, 2016 or more generally MARTINICO, G. *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*. New York: Routledge, 2012.

⁸ SCHÖNLAU, J. *Drafting the EU Charter – Rights, legitimacy and process*. Palgrave Macmillan, 2005.

⁹ See HAMULÁK, O., MAZÁK, J. The Charter of Fundamental Rights of the European Union vis-à-vis the Member States – Scope of its Application in the View of the CJEU. *Czech Yearbook of Public & Private International Law*, 2017, vol. 8, p. 161–172 or FONTANELLI, F. The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights. *Columbia Journal of European Law*, 2014, vol. 20, p. 194–247.

range of situations, i.e. the direct application of EU rules and the application and interpretation of national rules that serves as transposition of EU sources; moreover, it regulates the application of national rules which could lead to derogation of EU-based entitlements (most in the internal market) and, finally, it covers the application/interpretation of national rules that relate to specific areas of Union competence settled by concrete EU law provisions in national situations which are in close relation (exact proximity¹⁰) with the EU rules.

The article 51 (1) represents a double-meaning gateway in relation to Member states conduct.

Firstly it's the doorway for EU supervisory capacity over conformity of the Member state action with the EU Charter requirements. It's quite clear from the wording of article 51 (1) that potential application of EU Charter within the infringement procedure (art. 258–260 TFEU)¹¹ could cover only actions of the Member state which appears within the scope of EU law.¹² On the other side broad understanding of this scope, which has been described above, is giving EU (i.e. Commission) a wide potential to using the EU Charter to supervise the states. The most visible examples from last period are infringement actions related to the EU Charter addressed to Hungary and Poland.¹³

Secondly, article 51 (1) is introducing the EU Charter into the national practice of fundamental rights protection. From substantive point of view, the new source of fundamental rights review at national level occurs here. The scope, limits and interpretation of particular EU Charter rights must follow the unified rules and national authorities must take due account of the authority of the case law of the Court of Justice. Conversely, from a procedural point of view, Member States are free to apply their internal procedures and instruments for human rights review. In this context, we must count on the great diversity and differences in

¹⁰ SPAVENTA, E. *The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures*. European Parliament, 2016, p. 21.

¹¹ See further DE SCHUTTER, O. *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Open Society European Policy Institute, 2017.

¹² See Opinion of AG Tanchev in C-619/18, *Commission v Poland*, ECLI:EU:C:2019:325.

¹³ See C-286/12, *Commission v Hungary*, ECLI:EU:C:2012:687; or Action brought on 2 October 2018 – European Commission v Republic of Poland (Case C-619/18). See ŠIŠKOVÁ, N. European Union Legal Instruments to Strengthen the Rule of Law, their Actual Reflections and Future Prospects. In: Šišková, N. *The European Union – What is Next? A Legal Analysis and the Political Visions on the Future of the Union*. Koln: Wolters Kluwer Deutschland, 2018, p. 136–162 or CIRCOLO, A. Il Rispetto Dei Valori Fondanti Dell'Unione e l'Attivazione Della Procedura Di Controllo Alla Luce Delle Recenti Vicende Di Polonia e Ungheria. *DPCE Online*, 2019, vol. 38, no. 1, p. 19–39.

approach of the national authorities.¹⁴ Differences already appear in the very understanding of Article 51 and the extent of applicability of the Charter.¹⁵ There are differences in procedural instruments and even theoretical disputes about which national authorities should deal with the Charter in their case law.¹⁶ States have a relatively wide discretion in the choice of instruments to apply the Charter in their practice. Here again, however, they must respect the principles regulating national procedural autonomy, namely the principle of effectiveness and equal treatment, and in addition they must adhere to the principle of effective judicial protection under Art. 19 (1) TEU.¹⁷

It is clear from previous paragraphs that scope of application of Charter in relation to Union and the Member States differs. Following this difference there are also distinct tools of enforcement of the Charter connected to one or another object. It's worth to mention at this stage, that there is no single universal instrument applicable on the cases related to both mentioned categories of addresses. In connection with the application/enforcement of the Charter, one could consider also another variable that is related to question whether the Charter is invoked by individuals for the sake of their specific rights, or whether it is invoked in some abstract review (with no direct involvement of the individual as holder of some protected fundamental right). Here we may distinct some incidental mechanisms – direct remedies – by which individual directly seeks the protection of bestowed rights and some supervisory mechanisms, connected to mentioned abstract control launched by body different to holder of the rights. Last distinction is connected to the variable of using judicial or non-judicial mechanisms of enforcement (and promotion) of EU Charter, which are available both in connection to the Union as well as Member States. Further in this paper we shall focus on

¹⁴ See in particular BURGORGUE-LARSEN, L. *The EU Charter of Fundamental Rights seized by the national judges*. Paris: Pedone, 2017. For some national reports see MAZÁK, J., JÁNOŠIKOVÁ, M. et al. *The Charter of Fundamental Rights of the European Union in Proceedings Before Courts of the Slovak Republic*. Košice: Pavol Jozef Šafárik University, 2016; JENEY, P. The scope of the EU Charter and its application by the Hungarian courts. *Acta Juridica Hungarica*, 2016, vol. 57, no. 1, p. 59–75; HAMUEÁK, O. Listina základních práv Evropské unie jako okolí ústavního pořádku České republiky. *Acta Iuridica Olomucensia*, 2015, Vol. 10, No. 3, s. 7–30 or SVOBODOVA, M. Působnost Listiny základních práv EU v kontextu judikatury Ústavního soudu ČR. *Acta Universitatis Carolinae – Iuridica*, 2018, vol. 64, no. 4, p. 53–63.

¹⁵ See e.g. *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level. Guidance*. European Union Agency for Fundamental Rights, 2018. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

¹⁶ See KOMÁREK, J. Why National Constitutional Courts Should Not Embrace EU Fundamental Rights. In: Weatherill, S., de Vries, S., Bernitz, U. *The EU Charter of Fundamental Rights as a Binding Instrument*. Oxford: Hart Publishing, 2015, p. 75–92.

¹⁷ See C-64/16 *Associação Sindical dos Juizes Portugueses*, ECLI: EU:C:2018:117.

only one of the mentioned variabilities – the direct judicial remedies applicable against alleged breached of fundamental rights by EU bodies and institutions.

3. Options and Tools of Enforcement of the EU Charter in Relation to EU Bodies

Since December 2009, EU Charter is a fully-fledged part of the EU legal system with the same legal value as the Treaties¹⁸ therefore it must be understood, applied and interpreted by using the same tools and in the same extent, like the other sources of primary law. It's a new "Materia" embedded into an existing procedural framework¹⁹, which does not lead to elevation of any new remedies or instruments of judicial enforceability of fundamental rights within the EU legal system.²⁰ The existing system of procedural tools offer us a wide variety of instruments thinkable (and already being used) as means of Charter enforcement vis-à-vis Union institutions and bodies. Those are bound by the EU Charter in most thinkable wide sense, even in situations when "they act outside the EU legal framework."²¹ In following text I'll try to summarize the potential instruments available for judicial enforcement of the Charter vis-à-vis EU bodies and to determine the practical impact of those remedies.

As was already mentioned, by the category of incidental tools of Charter enforcement, I mean the actions/ claims (judicial) brought before the courts by individual seeking the protection of its concrete individual right(s) in particular case. The logic and importance of this kind of enforcement is the protection of individual against the encroachments into conferred rights for which public (EU) bodies are responsible. Here, the most efficient tool, the one with the widest potential of use in the practice, is the direct action for annulment according to article 263 TFEU. But will discuss also other tools available and applicable for sake of protection of rights included into the Charter.

¹⁸ See art. 6 para 1 TEU.

¹⁹ For general (tough very comprehensive) overview of procedural law instruments within the EU constitutional edifice see LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford: Oxford University Press, 2014.

²⁰ See WARD, A. Remedies under the EU Charter of Fundamental Rights. In: Douglas-Scott, S., Hatzis, N. (eds.). *Research Handbook on EU Law and Human Rights*. Cheltenham: Edward Elgar, 2017, p. 162–185.

²¹ See C-8/15 P *Ledra Advertising v Commission and ECB*, ECLI:EU:C:2016:701, p. 67.

3.1. Action for annulment under art. 263 TFEU

This direct action is a perfect tool for Charter enforcement against activities of EU bodies that potentially breach the individuals' fundamental rights. It can be used against wide diversity of EU bodies and offers a full judicial review, with primary challenge against decision or an act of Union bodies before the General Court and later possibility of appealing to the Court of Justice. Charter – as a source with the same value and effects as the Treaties – could serve here as the general standard of legality (constitutionality) review of all acts of EU institutions reviewable under art. 263 TFEU.

Of course it's the Treaty, that defines the cases and conditions under which an individual may initiate this proceeding. And here we must mention one of the most discussed problems in EU constitutional law, particularly the limited locus standi of individual in relation to action for annulment. There is no space and no need to analyse this never-ending story of EU law scholarly discussions.²² Even sometimes criticised, it is a constitutional choice of Treaty founders and Court of Justice as constitutional interpreter, not to grant individuals the general right to sue all EU acts. I am not going to contend this choice at this stage. For the purpose of seeking the tools of Charter enforcement, we must conclude, that action of annulment is (due to the limited locus standi of individuals) only relative, but still available and potentially effective tool of enforcement of the EU Charter. In connection to the protection of the rights conferred by the Charter, the consequences of abovementioned restriction may not be so dramatic. The inability to sue the abstract (non-addressed) EU law acts is to a great extent a hypothetical problem. Such an act is brought to the sphere of an individual mostly in the form of application by Union (or national authorities), within which certain individual – addressed – acts/decisions are regularly created. In these circumstances, consistency with rights protected by the Charter is thereof open to challenge before the Union Courts.²³

According to the statistical comparison, the action for annulment is the far most frequent direct action before Union courts, by which breaches of rights protected by Charter are challenged. The most visible example of cases where applicants claim (also successfully) the breaches of their rights are cases against EU restrictive measures connected to economic sanctions and fights against

²² See (among others) ARNULL, A. Private Applicants and the Action for Annulment since *Codorniu*. *Common Market Law Review*, 2001, vol. 38, no. 1, p. 7–52 or WARD, A. Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a 'Wobbly Polity'. *Yearbook of European Law*, 2003, vol. 22, no. 1, p. 45–77.

²³ Or before the courts of the Member States respectively, with potential raise of preliminary question on legality of EU acts. See further section 3.4 Preliminary questions claiming the breach of EU Charter.

global terrorism. Mostly it goes about disputes on retention, listing, de-listing and re-listing of individuals on the lists of the subjects covered by restrictions. It's worth so say, that majority of challenges is not successful.²⁴ But there are some cases where the EU courts annulled the restrictive measures concerning concrete individuals with reference to violations of the provisions of the Charter, in particular and mostly the right to a fair trial.²⁵

3.2. Action for failure to act under article 265 TFEU

Another thinkable, or rather hypothetical instrument is the action for failure to act under article 265 TFEU, whereby an individual could oppose the omissions of EU institutions. According to article 265/3 TFEU any natural or legal person has a right to complain against Union bodies which failed to adopt the act addressed to those individuals. The wording of this provision is very limiting and reduces the options of individuals only to possibility to challenge the omissions to adopt individual measures.²⁶ It's worth to note here, that action for failure to act does not cover the claims demanding certain decision of concrete content, but only the case of total absence of any measure adopted.²⁷ The key question here is the understanding of notion of an “act addressed to individual other than recommendation and opinion”, which is textually challengeable by the action for failure to act (article 265 para 3). The most simplicist interpretation is that action covers only binding acts (*a contrario* to non-binding recommendations and opinions) and only acts directly addressed to applicant. The development of case-law, nevertheless, brought a significant broadening of this narrow textual interpretation. Court of Justice (with the argument of principle of unity between action for annulment and action for failure to act) accepted the right of applicant

²⁴ See <https://europeansanctions.com/category/european-court-cases/>

²⁵ T-208/11 *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union*, ECLI:EU:T:2014:885; T-384/11 *Safa Nicu Sepahan v Council*, ECLI:EU:T:2014:986; T-316/14 *Kurdistan Workers' Party v Council of the European Union*, ECLI:EU:T:2018:788; T-240/16 *Klyuyev v Council*, ECLI:EU:T:2018:433; C-530/17 P *Azarov v Council*, ECLI:EU:C:2018:1031; AG Opinion in case C-225/17 P *Islamic Republic of Iran Shipping Lines and Others v Council*, ECLI:EU:C:2018:720.

²⁶ See WOODS, L. et al. *Steiner & Woods EU Law*. 13th ed., Oxford: Oxford University Press, p. 296–297.

²⁷ Obviously in case of disagreement with the content of decision and demand of certain decision of different content, the applicant must use the action for annulment under article 263 TFEU. See C-10 & 18/68 *Eridania v Commission*, ECLI:EU:C:1969:66; C-15/91 *Buckl and Others v Commission*, ECLI:EU:C:1992:454; C-196/12 *Commission v Council*, ECLI:EU:C:2013:753. For analyses of this limitation of the action for annulment See DAUKŠIENĖ, I., BUDNIKAS, A. Has the Action for Failure to Act in the European Union Lost its Purpose? *Baltic Journal of Law & Politics*, 2014, vol. 7, no. 2, p. 209–226.

to challenge also the omissions of adoption of acts addressed to someone else, if applicant would have been directly and individually concerned by omitted act.²⁸ Another development came with the broader understanding of challengeable acts. In some competition cases²⁹, cases related to public procurement and in connection to enforcement of certain procedural rights³⁰, Court of Justice accepted the admissibility of the action for failure to act even in connection to the non-binding acts (e.g. letters) as a consequence of certain specified obligations of EU Institutions prescribed by EU law.³¹

In relation to the Charter, it's necessary to determine, whether there are some protected rights which prescribe (or at least indirectly presuppose) the adoption of such "acts addressed to individuals" in the meaning of article 265 TFEU? In other words, whether there are some provisions, giving individual the right to request some active conduct on a side of EU bodies. The few possible examples are right of individual to access to data which has been collected concerning him or her (article 8/2 EU Charter), right of every person to have access to his or her file (article 41/2 b) EU Charter), right to address the EU institutions the written demand and right to answer (article 41/4 EU Charter) and right of access to documents (article 42 EU Charter). In connection to all these rights, the demanded action of EU bodies might have a form of some individual addressed measure and could be determined as the act of institution. In case of omission of issuing such an act, and given the fulfilment of other admissibility criteria of action for failure to act (pre-litigation call to act, time limit of two months) we could assume the enforcement of those rights by action for failure to act.

Above I've mentioned, that this instrument of enforcement of the Charter is rather hypothetical or theoretical. The reasons for this judgement are twofold. First of all, the practice of EU bodies in responding the requests for some actions could be determined as "active". In majority of situations, there is at least negative reaction refusing the claim (e.g. the access to requested information). In this situation, the individual has option to use the action for annulment (article 263/4 TFEU) of such a negative act addressed to it.³² Second reason is the absence of any case law so far, which shall confirm the possibility of using this tool in practice. Notwithstanding all of these problems, I still assume the action for failure to act as a possible instrument of the enforcement of Charter, especially in connection with those rights which preclude some active duty of EU institutions.

²⁸ C-68/95 *T. Port v Bundesanstalt für Landwirtschaft und Ernährung*, ECLI:EU:C:1996:452.

²⁹ T-24/90 *Automec Srl v Commission*, ECLI:EU:T:1992:97.

³⁰ C-191/82 *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission*, ECLI:EU:C:1983:259.

³¹ See T-24/90 *Automec Srl v Commission*, ECLI:EU:T:1992:97, p. 72.

³² See case T-590/10 *Thesing a Bloomberg Finance v. ECB*, ECLI:EU:T:2012:635.

3.3. Action for damages under article 268 TFEU

Another conceivable instrument by which an individual may (indirectly) claim an infringement of particular right protected by the Charter is an action for damages under Article 268 TFEU.³³ Even though this action represent predominantly a judicial tool of reaching the reparation of damages caused by illegal action or negligence of EU institutions, it may serve as the litigation path pointing on breaches of Charter and therefore lead to its enforcement. There are several thinkable examples of connection of damage reparation claims with fundamental rights assertions. If, for instance, some Union's action adversely affects the right to protection of property or the right to a fair trial and simultaneously this action also cause some financial damage on the side of individual. In addition to damages, the applicant will also claim infringement of his/her fundamental right. This action, likewise the direct action mentioned above, can be used against wide diversity of EU bodies and offers a full judicial review, with primary challenge against decision or an act of Union bodies before the General Court and later possibility of appealing to the Court of Justice.

Actually, in the context of this action, quite a settled case-law of the EU Courts has occurred in past period, which deals primarily with the problem of delays in court proceedings. Here the Court of Justice has acknowledged that protection of the right to a fair trial can be claimed by the individual in order to assist his/her claims for damages against the Union's judicial bodies (the General Court). There is a set of cases in which the excessive length of proceedings has been found as a serious violation of the right to a fair trial protected by the Charter and action for damages was upheld as an effective (and presupposed) remedy and appropriate sanction in those situations.³⁴

3.4. Preliminary questions testing the conformity of EU measures with the rights protected by EU Charter

Indirectly, an individual may claim his/her rights protected by the Charter against the activities of the Union institutions even in proceedings before national courts. In a cases where national court would apply (or concern) – directly or indirectly

³³ Here, obviously, the analysis is given to the notion of liability of EU (and its institutions). The question of damage remedies in relation to the behaviour of Member States is different and depends on national liability arrangements. The EU Charter once again has no provisions related directly to this particular claim. See further WARD, A. Damages under the EU Charter of Fundamental Rights. *ERA Forum*, 2012, vol. 12, No. 4, p. 589–611.

³⁴ C-150/17 P *European Union v Kendrion*, ECLI:EU:C:2018:1014, C-411/15 P *Timab Industries a CFPR v. Komise*, ECLI:EU:C:2017:11; C-603/13 P, *Galp Energía España a další v. Komise*, ECLI:EU:C:2016:38.

– EU legal acts in proceedings before it and some doubts as to their compatibility with the EU Charter (mostly on the initiative of the party to the proceedings) will occur, the national court will have to refer a question to the Court of Justice on the legality of such an act. The decisions of the Court of Justice on a reference for a preliminary ruling under Article 267 TFEU are then binding on national courts.

The initiation of the preliminary ruling in the case of doubts on validity of EU measure is generally understood as compulsory.³⁵ It is connected with the established monopoly of the Court of Justice to review the validity of EU law acts.³⁶ The unique responsibility of the Court of Justice for delimitation of validity of EU law is general and in connection with the EU Charter, there is no space for revising of the Foto-Frost doctrine. The possibility to refer on the EU Charter by national court within described initiation of preliminary ruling procedure questioning the validity of EU measure seems as much broader than in the cases of direct application of the EU Charter in domestic cases questioning the conformity of national measures with the Union’s fundamental rights catalogue. In this type of proceedings, the national court is not obliged to provide and satisfy the “scope” test of art. 51 (1).³⁷ Of course on the first sight, it is the national judge who is using the EU Charter here, but only in some indirect way³⁸, as the point of reference – the reason for staying the procedure an referring the preliminary question to CJEU. EU Charter is not applied against the Member state, but against the EU institution, and therefore we must count with its general applicability without any conditions. Notwithstanding this wider space for application of the Charter, the practice has not brought so many examples of preliminary references questioning the validity of EU measures based on the conflict with the rights protected by the Charter.³⁹ But it’s worth to mention here, that modest number of such references is not surprising and is fully in line with the general statistic, where preliminary questions on interpretation exceed several times the validity questions brought before the CJEU by national judges. On the other side, we must mention, that several examples of the preliminary references questioning the conformity of EU measures with the Charter (or fundamental rights generally), represent the significant “hard” cases. The most visible and discussed was the

³⁵ LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford: Oxford University Press, 2014.

³⁶ 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost.*, ECLI:EU:C:1987:452.

³⁷ As described above in section 2.

³⁸ See also WARD, A. Remedies under the EU Charter of Fundamental Rights. In: Douglas-Scott, S., Hatzis, N. (eds.). *Research Handbook on EU Law and Human Rights*. Cheltenham: Edward Elgar, 2017, p. 162–185.

³⁹ To mention the most significant, we could refer to the cases: C-236/09 *Test-Achats*, ECLI:EU:C:2011:100; C-293/12 *Digital Rights Ireland*, ECLI:EU:C:2014:238; C-362/14 *Maximilian Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650.

decision of preliminary question in *Digital Rights Ireland*⁴⁰ case. Here the court of Justice declared invalid the long discussed directive on data retention.⁴¹ It is not the purpose of this paper to deal in detail with the (in)famous data retention saga.⁴² But what is important for our analysis is the scope, or better said impact of the judgement of the CJEU. The court invalidated the data retention directive, which was adopted in 2006, so in the time, where the EU Charter was not legally binding. Nonetheless this fact, the CJEU declared directive as invalid *ab initio*. With regard to this “retro-active” use of the EU Charter and in connection to no time limitation on validity control initiated via preliminary ruling procedure⁴³, we must count seriously with the potential of this variable of enforcement of supranational fundamental rights catalogue.

4. Conclusions

The purpose of this article was to define and address the potential of the various instruments of enforcement of the Charter in relation to the activities of the Union authorities. Here we must conclude, that system of EU procedural tools offers the wide range of applicable remedies, which (in combination) could lead to the establishing the functioning system of human rights review within the European Union.

Although the adoption of the Charter has not brought any formal changes to the system of procedural instruments for the enforcement of EU law, it is observable from the judicial practice during first decade after adoption of Treaty of Lisbon, that the presence of the Union fundamental rights catalogue in the context of judicial review has brought about some partial qualitative changes (e.g. in the area of liability regimes or in the control of inactivity of Union intentions), but also has brought significant quantitative shifts, in the form of an increased

⁴⁰ C-293/12 *Digital Rights Ireland*, ECLI:EU:C:2014:238.

⁴¹ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

⁴² See e.g. LYNKEY, O. The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: *Digital Rights Ireland*. *Common Market Law Review*, 2014, vol. 51, no. 6, p. 1789–1811 or VEDASCHI, A., LUBELLO, V. Data Retention and its Implications for the Fundamental Right to Privacy: A European Perspective. *Tilburg Law Review*, 2015, vol. 20, no. 1, p. 14–34.

⁴³ See further HAMULÁK, O., STEHLÍK, V. *European Union Constitutional Law: Revealing the Complex Constitutional System of the European Union*. Olomouc: VUP, 2013; LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford: Oxford University Press, 2014.

number of fundamental rights cases (mainly in the context of a direct action for annulment) before Union courts.

Even though, before the Charter was adopted, and at the time of its creation and reception, concrete calls for a specific instrument to enforce fundamental (constitutional) rights before the EU courts has been occurring⁴⁴, we could summarize that existing framework of instruments and judicial remedies and their use in practice has proven the efficiency and functioning of the system. One may always open some doubts about full access of individual to the justice and every single case may open such reservations. But when we are looking on the system of available remedies from complex point of view, we must admit, that Charter could be (and is being) enforced in effective and wide sense.

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⁴⁴ The most of them were based on the claim of existing deficits in the options of individual to access to justice. See Opinion of AG Jacobs in case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union*, ECLI: ECLI:EU:C:2002:197; Opinion AG Jacobs in case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA*, ECLI:EU:C:2003:410; or ARNULL, A. A constitutional court for Europe? *Cambridge Yearbook of European Legal Studies* 2004, vol. 6, p. 1–34; or VESTERDORF, Bo. A constitutional court for the EU? *International Journal of Constitutional Law*, 2006, vol. 4, no. 4, p. 607–617.

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