[working paper; comments welcome at elise.muir@kuleuven.be]

The Court of Justice: A fundamental rights institution among others within the EU legal order.

Elise Muir[1]

Forthcoming in: M. Dawson, B. de Witte & E. Muir, *Revisiting Judicial Politics in the European Union* (Edward Elgar, 2023)

Introduction: the (not so) novel system for the protection of fundamental rights in the EU

The role of the Court of Justice of the European Union ('Court of Justice') for the protection of fundamental rights in the EU legal order is not a novel topic. It has been much discussed, and for many years. It is largely accepted that the Court asserted the constitutional importance of fundamental rights in the European Union ('EU') legal order despite the original reluctance of the Treaty makers. The Court confirmed its position as a guardian of the 'constitutionality' of EU acts, thereby enhancing its authority over other EU institutions. Perhaps even more importantly, it also asserted its centrality in a sophisticated novel legal order interacting with Member States, third States, and international organisations on matters of fundamental rights protection.

In an earlier version of this Chapter published in 2013, I identified three developments inviting us to rethink the role of the Court in matters of fundamental rights protection.[2] To start with, Treaty revisions had resulted in an ever-stronger assertion that the EU actually positively seeks to enhance the protection of fundamental rights, or at least some of them. Next, recent developments were characterized by the formalization of the rights protected at the EU level. A list of rights, in the form of the Charter of Fundamental Rights of the EU ('Charter' or 'CFEU'), was drafted within the EU legal order and given constitutional status by the Treaty of Lisbon.[3] The EU was also granted competence and even mandated to accede to the European Convention for the Protection of Human Rights ('ECHR').[4] The third and related point of interest was the politicization of fundamental rights matters at the EU level. The definition of rights and the mechanisms for their implementation have indeed largely been placed in the hands of political actors, in particular the legislator.[5] These three trends, which have emerged over several decades, have genuinely crystallized the shape of the new architecture for the protection of fundamental rights in the EU after the entry into force of the Treaty of Lisbon. As things currently stand the Court of Justice therefore operates in a more sophisticated inter-institutional context. The stronger mandate of the Court of Justice on

---

[1] Elise Muir is Professor of European Law at the Institute for European Law of KU Leuven and Principal Investigator of the RESHUFFLE project supported by the European Research Council (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621).

[2] Muir, The Court of Justice: A Fundamental Rights Institution Among Others in Dawson, De Witte, and Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013) pp. 76-101.

[3] Article 6(1) Treaty on European Union (TEU).

[4] Article 6(2) TEU.

[5] Eg. Articles 19(1) and 16(2) Treaty on the Functioning of the European Union (TFEU).

fundamental rights meets with that of other key players: it now interacts more intensely than before with domestic constitutional courts, the EU legislator, and the European Court of Human Rights ('ECtHR').

In the years that followed the entry into force of the Treaty of Lisbon, much attention has been paid to confrontations between the key players whose mandates closely interacted in this novel setting. Several examples illustrate how the Court engaged with national highest courts, EU political institutions, and the ECtHR. For instance in *Melloni* the Court requested the national constitutional court to disapply national constitutional standards of protection in areas fully harmonised at EU level.[6] In *Digital Rights Ireland* the Court of Justice declared a legislative act invalid in its entirety due to breaches of EU fundamental rights.[7] Finally, in *Opinion 2/13,* the Court prevented the entry into force of the draft agreement on the accession of the EU to the ECHR.[8]

Numerous writings have been devoted to *Opinion 2/13* and the subsequent interplay (or the lack thereof) between the case-law of the Court of Justice and that of the ECtHR, in particular on matters of mutual trust.[9] In contrast, less attention has been devoted to examining the way the Court of Justice has been seeking to structure its fundamental rights jurisdiction in interaction with national constitutional courts and the EU legislator *within* the EU legal order.[10] It is important to do so however precisely because the consolidation of the legal status of the Charter may be understood as justifying, and Opinion 2/13 as expressing, a 'turn inwards': the Court looks within EU law rather than to general international human rights law when defining and interpreting rights.[11] How then does the Court of Justice navigate the novel system for the protection of fundamental rights within the EU legal order?

Since the early 2010s, the interactions between these key players on matters of fundamental rights protection have been intensifying. Although not always explicit and consistent, the Court's case-law reveals a quest for methodological tools to support its growing engagement with fundamental rights matters and to demarcate its role from that of other key players in the fields. The Court is more explicitly and frequently invited to clarify the relationship between the main sources of protection of fundamental rights identified in Article 6 TEU: the Charter, national constitutional traditions, and the ECHR. In the aftermath of the Treaty of Lisbon, giving the Charter binding legal effects, several national systems of fundamental rights protection have been adjusted to give more voice to national constitutional courts on matters affecting fundamental rights where both the EU and the national layers of protection might be at stake. National constitutional courts are increasingly engaging with the Charter. In turn, the Court of

---

[6] C-399/11 *Melloni* EU:C:2013:107 para 60.

[7] Joined Cases C-293 and C-594/12 *Digital Rights Ireland* EU:C:2014:238.

[8] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:2014:2454.

[9] Eg. Prechal, 'Mutual Trust Before the Court of Justice of the European Union' 2(1) *European Papers* 75-92; Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM' 15(1) *EuConst* (2019) 17-47.

[10] Publications have instead tended to focus on specific developments in the case-law as referred to below.

[11] Dawson, 'What Does it Mean to Say that the Court of Justice is not a Human Rights Institution? A Critical Appraisal' *Journal of Human Rights Practice* (2022) 217.

Justice is refining its approach to competing claims of jurisdiction on fundamental right adjudication and seeks to position the Charter as both a source of protection and a source of cohesion at EU level (Part I).

The Court is also in the process of identifying adjudication techniques to better articulate its fundamental rights jurisdiction with enough distance – yet also in alliance – with the EU legislator. While the Court naturally ought to be able to asses the validity of EU legislation against fundamental right standards, and has in fact been doing so more often than in the past as illustrated earlier, the relationship between both institutions is not only conflictual. In many instances the Court leans on the legislator to gain support (Part II) for defining the scope of EU fundamental rights law, for identifying the suitable standard of protection, as well as for enhancing the effectiveness of fundamental rights at domestic level. The Court thereby consolidating the embedding of its fundamental rights jurisdiction.

It will be argued in this Chapter that, although still imperfect, hesitant, and fragmented, the modes of interaction between competing visions of fundamental rights in the EU are being refined. Tensions between institutional players and sources have not disappeared, yet they are articulated in less principled ways. The focus may indeed be shifting away from shocks between systems (although these may still occur) towards subtle games of interpretation and plays with layers of sources. As a result, divergences of views on the interpretation of EU fundamental rights are possibly becoming part of the ordinary functioning of the multi-layered legal system of the EU.

I. The Court of Justice to National Constitutional Courts: '*talk to me!*'

The first set of interlocutors of the Court of Justice when it comes to the identification and interpretation of EU fundamental rights are national constitutional courts. Before the Treaty of Lisbon, general principles of EU law were the main avenue for the identification of fundamental rights at EU level; they were inspired *inter alia* from constitutional traditions common to the Member States. Naturally, identifying and interpreting unwritten general principles of EU law remains a way for the Court to strengthen the EU level of norms for the protection of fundamental rights.[12] Yet, these general principles now exist next to a sophisticated list of EU fundamental rights enshrined in the Charter.

In this context, friction between the systems of protection of fundamental rights at the national level and binding written sources at the EU level are more likely to arise. In a legal order involving twenty seven Member States, with new EU competences in sensitive fields such as migration and criminal justice, the interplay between the Court of Justice and national constitutional courts is therefore both increasingly important and increasingly complex. National constitutional courts have been asserting their jurisdiction over fundamental rights concerns (A) and engaging directly with the Charter (B). This can be related to the enhanced call by the Court of Justice for the use of structured channels of communication between the national and EU layers of the judiciary (C).

[12] Article 6(3) TEU. See further: Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' *European Journal of Legal Studies* (2007) 137-152.

I.A. National constitutional courts' claims over fundamental rights within the EU legal order

In the last decade, a number of legal systems have evolved to enhance possibilities of preliminary controls of constitutionality, in particular in countries where individuals have no direct access to constitutional courts (as in Italy). This enables national constitutional courts to engage with national lower courts – next to the Court of Justice – on matters of fundamental rights. For instance, in its judgement 269/2017, the Italian Constitutional Court asked ordinary judges, in matters related to both EU and national constitutional law, to first refer questions to the Constitutional Court and only later to the CJEU. This move is similar to the one leading to the *Melki* saga,[13] although resulting from an adjudication technique rather than an organic law. The Italian Constitutional Court's main concern has been 'to ensure that it is consulted by ordinary courts when they are faced with a national measure that potentially violates both a domestic constitutional right and the Charter.'[14]

Next to these internal changes related to interlocutory procedures intended to enhance the involvement of constitutional courts, it shall be noted that these courts have also engaged more directly with the Court of Justice through the preliminary ruling procedure. An increasing number of national constitutional courts accept the Court's invitation to use the preliminary ruling procedure.[15] On matters of fundamental rights protection, examples include the Spanish Constitutional Court asking a question on the right to a fair trial and the rights of the defence in *Melloni,*[16] or the Italian Constitutional Court on the principle that offences and penalties must be defined by law in *Taricco II.*[17] Although not all national constitutional courts follow suit – the German Constitutional Court for instance has to date never referred a question on matters of fundamental rights protection –, the Belgian Constitutional Court is no longer alone in using that avenue to exchange with the Court of Justice.[18]

Most importantly, there is a growing trend among national constitutional courts towards 'embracing EU fundamental rights as (direct or indirect) standard of national constitutional review'.[19] This includes countries such as Germany and Italy, as will be further discussed below, as well as Austria for instance.[20] As aptly studied by Clara Rauchegger, the analysis of the case-law from national constitutional courts has shown

---

[13] See also: Joined Cases C-188 and 189/10 *Melki* EU:C:2010:363 paras 46-57.
[14] See further: Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments' *Cambridge Yearbook of European Legal Studies* (2020) 260.
[15] Eg. Cartabia, 'Europe as a space of Constitutional interdependence: New questions about the preliminary ruling' *German Law Journal* (2015) 1793.
[16] Above note 6.
[17] Case C-42/17 *M.A.S. and M.B.* ('Taricco II') EU:C:2017:936.
[18] See further Lambrecht, 'Belgium: The EU Charter in a Tradition of Openness' in Bobek and Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020) 87–108.
[19] Lenaerts, 'International and Supranational Catalogues of Human Rights in Theory and in Practice', *Human Rights Law Journal* (2021), 6.
[20] See further Fundamental Rights Agency, 'Fundamental Rights Report 2021' (June 2021) 46-47.

that although the Charter is often mentioned, it is not necessarily given any independent meaning.[21] While this may remain largely true, the interpretation of EU fundamental rights law by national constitutional courts is on the rise and triggers sensitive questions as explained in the next sections.

The trends identified above co-exist to various extents at national level, to the effect that national constitutional court's ability and willingness to have a say on the interpretation of fundamental rights may be channelled through interlocutory questions of constitutionality, and/or preliminary questions to the Court of Justice, and/or adoption by national constitutional courts of the Charter as a standard of review. What then are the implications of co-ownership of the interpretation of EU fundamental rights, and of the Charter in particular, for the Court of Justice?

I.B. National constitutional courts' claim to co-ownership of EU fundamental rights

National constitutional courts that are adopting EU fundamental rights, and the Charter in particular, as a standard of constitutional review have adopted different approaches to the matter, each approach resulting in different opportunities and challenges for the Court of Justice. Three of these approaches – friendly, constructive, and defiant – are illustrated here through examples known to many, as they relate to the interplay between national highest courts and the Court of Justice.[22] Yet, specific emphasis is placed here on the implications of these cases for EU fundamental rights law.

An overall 'friendly' approach to co-ownership is visible from the decision by the First Senate of the German Constitutional Court in the *Right to be forgotten II* case (2019).[23] Here, the First Senate uses EU fundamental rights as the only benchmark to review national measures in areas fully determined by EU law.[24] It further explains why there is no need to ask a question to the Court of Justice on the matter. Indeed, the interpretation of EU fundamental rights in the case at hand is sufficiently clear. The First Senate draws on the case-law of the ECtHR *'which, in the individual case, may also define the contents of the Charter*'.[25] The First Senate also acknowledges that '*caution should be exercised in this respect in light of the uniformity of EU law. In principle, the interpretation must be directly based on the fundamental rights of the Charter and the case-law of the European courts, and links back to the overall understanding of fundamental rights in the EU Member States*'.[26] Writing in an extra-

[21] Paraphrasing from Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments' *Cambridge Yearbook of European Legal Studies* (2020) 260.
[22] Mapping them out: Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in Chalmers and Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015) 1-29.
[23] German Constitutional Court, 1 BvR 276/17 ('Right to be forgotten II'). See further: Thym, 'Friendly Takeover, or: The Power of the 'First Word'. The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review' 16(2) *European Constitutional Law Review* (2020) 187-212.
[24] Paras 42-46.
[25] Para 70.
[26] Para 72; See also para 137.

judicial capacity, the President of the Court of Justice has praised the approach adopted by First Senate, stressing that the latter has truthfully recognized and applied the principles asserted by the Court of Justice in the field.[27]

The second approach to co-ownership, which could be described as 'constructive' can be illustrated with reference to the *Consob* case (2021). There, the Italian Constitutional Court seeks to reconcile the interpretation of the Charter with national constitutional law as well as the law of the ECHR. For that purpose, the Italian Constitutional Court asked a series of 'guiding' questions to the Court of Justice, explaining in very explicit terms how it would suggest that the Court of Justice interprets the relevant EU fundamental right based on a plurality of complementary sources of interpretation.[28] In response, the Court of Justice has been praised for adopting an interpretation of the relevant Charter right that addressed the concerns of the Italian Constitutional Court. The Italian Constitutional Court thus constructively engaged in steering the interpretation of EU fundamental rights in a suggested direction. This has been said to facilitate 'the bottom-up construction throughout the entire European legal space of a new understanding of a fundamental right and common constitutional tradition'.[29]

These approaches may be distinguished from that of the German Constitutional Court's Second Senate in the *European Arrest Warrant III* case (2020).[30] As the First Senate did in the *Right to be Forgotten II*, the Second Senate uses EU fundamental rights as a benchmark[31] to review national law in an area fully determined by EU law. The Second Senate further explains why there was no need to ask a preliminary question to the Court of Justice on the matter. Observers noted the importance of the shift in the approach of the Second Senate compared to earlier case-law on the European Arrest Warrant, due to the fact that the Senate limits its defensive identity review.[32] The approach is thus gentler towards EU law than earlier cases from the same Senate suggest.[33]

However, and more importantly for our purpose, the overall tone in the *European Arrest Warrant III* case illustrates a 'defiant' form of co-ownership. More specifically the Second Senate can be seen to shape its own interpretation of the CILFIT criteria, to be applied to exempt a court of last instance from the duty to refer a preliminary question to the Court of Justice.[34] The Second Senate notes that Article 6 TEU, which identifies

---

[27] Lenaerts, 'L'autonomie de l'ordre juridique de l'Union' in Lenaerts, Barrett, Rageade, Wallis, Weil (eds), *The Future of Legal Europe: Will We Trust in It ? Liber Amicorum in Honour of Wolfgang Heusel* (Springer, 2021) 563.

[28] Case C-481/19 *Consob* EU:C:2021:84, paras 19-27.

[29] Tega, 'The Italian Constitutional Court in its Context: A Narrative.' *European Constitutional Law Review* (2021) 389.

[30] German Constitutional Court, Second Senate, 1 December 2020, 2 BvR 1845/18 and 2 BvR 2100/18.

[31] Para 36.

[32] Yet, the Second Senate does not fully abandon it (see para 68): Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' *European Public Law* (2021) 491 et seq.

[33] German Constitutional Court, Second Senate, 5 May 2020 ('Weiss'), 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

[34] See also: Wendel, *Verfassungsblog* (1 January 2021) and Von David Preßlein, '« Grundgesetz vs. Grundrechtecharta? Zur „europäisierten Grundrechtsprüfung" des BVerfG nach den Beschlüssen zum „Recht auf Vergessen" und „Europäischer Haftbefehl III"' *Europarecht* (2021) 257. Examining a recent

the sources of protection of fundamental rights at EU level, includes not only the Charter, but also the ECHR, and constitutional traditions common to the Member States. As to the latter two sources, which are in fact external to the EU legal order and brought therein through the medium of Article 6(3) TEU, the Second Senate stresses that it has jurisdiction to interpret them itself.[35] It therefore comforts its ability to decide that the interpretation of the Charter is sufficiently clear, not to warrant a referral to the Court of Justice, by itself drawing on the case-law of the ECtHR or that of constitutional and supreme courts of the Member States with a view to interpreting the Charter.

The openness of Article 6 TEU to sources of protection of fundamental rights other than the Charter is thereby turned on its head: the clarity of the interpretation of the Charter may be made somewhat dependent on a national court's understanding of other sources external to the EU legal order, with much less calls for caution than in the ruling from the First Senate quoted above to illustrate a 'friendly' approach. The Second Senate has confirmed this defiant approach in a subsequent case on ecotoxicity (April 2021). Therein it explored the standards of protection that would apply considering first that the situation would *not* be fully determined by EU law – thereby identifying its own reading of the relevant fundamental right at national level –, *before* exploring the standards that would apply if the situation *was* fully determined by EU law. In this second hypothesis, the Second Senate extensively explored German constitutional standards and ECtHR case-law, before swiftly concluding that they were 'essentially congruent' with the Court of Justice's approach to Article 16 CFEU on the right to conduct a business, and without referring the question to the CJEU.[36]

I.C. The Court of Justice's call for reliance on structured channels of communication

The Court of Justice's response to the posture of national constitutional courts sketched out above is twofold. On the one hand, the Court firmly re-asserts the centrality of the preliminary ruling procedure for the sound functioning of EU law, and of fundamental rights law in particular. On the other hand, the Court sharpens its approach to the CILFIT criteria, specifying the circumstances in which national courts of last instance may be exempt from the duty to refer preliminary questions to the Court of Justice.

The Court of Justice indeed regularly recalls the importance of the preliminary ruling procedure. A procedure creating possibilities for national courts to ask questions of constitutionality to the national constitutional court is compatible with EU law *only if* national courts remain able, at whatever stage of the proceedings they consider appropriate: to refer any question which they consider necessary to the Court of Justice; to adopt any measure necessary to ensure provisional judicial protection of the rights

---

decision from the French Conseil d'Etat as a similar example of defiance through technical interpretation of the applicable law: Azoulai and Ritleng, '« L'État, c'est moi ». Le Conseil d'État, la sécurité et la conservation des données (CE, ass., 21 avr. 2021)' *Revue Trimestrielle de Droit Européen* (2021) 349.

[35] Paras 37 and 39.

[36] I am most grateful to Mattias Wendel for drawing my attention to that ruling. German Constitutional Court, Order of the Second Senate of 27 April 2021, 2BvR 206/14; see among others: paras 39, and 56-81 with specific emphasis on paras 56-57, 68, 71-72.

conferred under the EU legal order; and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.[37] The Court restates that national courts ought to be able to refer preliminary questions in accordance with Article 267 TFEU.[38] Furthermore, the Court does not accept attempts to subject the interpretation of EU law to other courts.[39]

More recently, the Court has also clarified the edges of its CILFIT doctrine. In the case now known as *CILFIT II* (October 2021),[40] the Court asserted the duty for national courts of last instance to state reasons when deciding *not* to refer questions on the interpretation of EU law to the Court of Justice.[41] This followed up on earlier case-law from the ECtHR along the same lines[42] and can be expected to give observers more insight into the decision not to refer.[43] According to the Court's research service, the approach taken by the courts adjudicating at last instance to date has been to simply find that the provision of EU law in question is clear and/or its interpretation or application in the case in question leaves no scope for any reasonable doubt, without specifying in any further detail the reasons for that finding.[44] The formalization of the Court's expectations as they result from the ruling in *CILFIT II* thus pressures national courts of last instance to spell out their reasoning as to when and how the interpretation of EU fundamental rights is clear.

The Court of Justice specified that the national court ought to identify one of the three settings in which the exemption from the duty to refer applies, namely the national court '*has established that the question raised is irrelevant* [i] *or that the EU law provision in question has already been interpreted by the Court* [ii - 'acte éclairé'] *or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt* [iii – 'acte clair']'.[45]

The national court ought to follow a given roadmap to conclude that the act is 'clair' or 'éclairé'. For that purpose, the Court of Justice identifies what appears to be an exhaustive methodology.[46] A national court or tribunal of last instance must show that

---

[37] Joined Cases C-188 and 189/10 *Melki* EU:C:2010:363, para 57.
[38] Joined Cases C-357, 379, 547, 811 and 840/19 *Euro Box Promotion* EU:C:2021:1034, para 260.
[39] Case C-741/19 *Komstroy* EU:C:2021:655, paras 42-46.
[40] Case C-561/19 *Consorzio Italian Management and Catania Multiservizi ('CILFIT II')* EU:C:2021:799.
[41] Broberg and Fenger, 'If you love somebody set them free: on the Court of Justice's revision of the Acte Clair doctrine' *Common Market Law Review* (2022) 711-732.
[42] See ECtHR, *Ullens de Schooten*, Applications No 3989/07 & 38353/07, CE:ECHR:2011:0920JUD000398907, para 60. Note that the ruling in CILFIT II also results in a slight relaxation of the duty to refer, to the extent that the focus is now more clearly on the clarity of the interpretation of EU law, rather than its application. See further: Broberg and Fenger, 'If you love somebody set them free: on the Court of Justice's revision of the Acte Clair doctrine' *Common Market Law Review* (2022) 735.
[43] For instance, this elaborated duty to state reasons for not referring could facilitate the process by which the Commission may initiate an infringement action against a Member State for failure by a national court of last instance to comply with EU law.
[44] Directorate-General for Library, Research and Documentation of the Court of Justice, 'Application of the CILFIT case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law' May 2019 para 69.
[45] *CILFIT II*, cited above note 40, paras 33 (emphasis and numbering added) and 51.
[46] See paras 40-46; and para. 47 in particular.

the interpretation of the EU law provision concerned is '*based on the Court's case-law*' or, '*in the absence of such case-law, that the interpretation of EU law was so obvious to the national court or tribunal of last instance as to leave no scope for any reasonable doubt*'.[47] The national court must furthermore be convinced that '*the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice'*.[48] This may sit uneasily with the position of a national constitutional court placing emphasis on its own reading of case-law of the ECtHR and of (other) national constitutional and supreme courts, without referring, as recently done by the Second Senate of the German Constitutional Court for instance.

Exchanges between national constitutional courts and the Court of Justice on matters of fundamental rights protection are thus unquestionably intensifying. There is much to gain for the Court of Justice in listening to the voice of national constitutional courts. One shall hope that divergences of views will indeed be addressed through exchanges between courts, rather than through defiance or ignorance. It is remarkable that tensions are often articulated in terms of claims to ultimate jurisdiction, rather than through in-depth engagement with the substance of the standards of protection. With each court clarifying or restating the scope of its jurisdiction by opposition to that of other courts, the nature of clashes is being displaced: the focus shifts from what is the appropriate standard of protection to who can decide what is the standard in the case at hand. Current divergences in the approaches as to who is to decide when the interpretation of EU fundamental rights law is clear, and how this shall be decided, illustrate this trend.

II. The Court of Justice Leaning on the EU Legislature

While for many years the EU, and therefore also the Court of Justice, was primarily focused on identifying fundamental rights that were to be protected at EU level, a key challenge is now to flesh out these rights: interpret them, identify their limits, and balance them with each other as well as with other important interests. This task is more and more often entrusted to the EU legislator. The Council and the European Parliament are now often empowered, and even expected, to incorporate fundamental rights protection in the fabric of legislative acts. As noted by the Court itself, 'numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU'.[49] This holds true in particular for fundamental rights.

What are the implications of the existence of acts of EU secondary law shaping both the scope and the substance of EU fundamental rights law for the Court of Justice? The answer to that question revolves around the nature of harmonisation techniques used by the EU legislature and the Court's reading thereof. The texture of the legislative acts now increasingly often provides a structure for fundamental rights' adjudication at EU level. The Court can lean on the legislator to define the scope of EU law (A), the standards of protection to be applied (B), and/or to push for an effective protection of

[47] Para 51.
[48] Para 40.
[49] Case C-156/21 *Hungary v European Parliament and Council (Conditionality Regulation)* EU:C:2022:97 para 159; see also para 168.

the said right (C). As this section will show, this impacts not only on the horizontal allocation of tasks (i.e. between EU institutions), but also on the vertical allocation of tasks (i.e. EU v Member States) on matters of fundamental rights protection in the EU legal order.

II.A. Legislative acts as guidance on the scope of EU fundamental rights law

EU lawyers are familiar with the never-ending debate on the question of the scope of EU law for the purpose of triggering fundamental rights protection. Certain situations fall within the scope of EU law through the mere application of provisions of the EU Treaties, such as the internal market freedoms. For instance, Member States ought to comply with EU fundamental rights when derogating from the four freedoms.[50] As is equally well known, many situations are also attracted within the scope of EU law by the existence of an EU legislative act. As a result, the more the EU legislates, the more situations – related to the implementation of said legislation at national level – are brought within the scope of EU law.

Nowadays, many EU legislative acts explicitly seek to balance EU objectives with fundamental rights.[51] The adoption of such acts makes the broad scope of EU fundamental rights law in the related field very visible. The emergence of legislation giving expression to EU fundamental rights has also resulted in these acts considerably enhancing the scope of application of the said fundamental rights in EU law. This is particularly clear in the areas of protection of the rights of individuals in the context of EU criminal law and data protection, as well as in the field of anti-discrimination.[52] In *Test-Achats* for instance, the Court of Justice reviewed the validity of a derogation from the prohibition of discrimination between men and women in access to insurance services in light of the Charter and found against the EU legislator.[53] The relevant derogatory provision was declared invalid, this resulted in enhancing the scope of the protection against discrimination between men and women in access to services afforded by EU law.

In the context of litigation concerning the interpretation of EU legislative acts, the Court of Justice has in recent years been invited to further clarify the obligations of the Member States to comply with EU fundamental rights law. The situation is fairly straightforward when a Member State implements an EU law obligation: then the Charter as well as general principles of EU law apply. Yet, more complex settings also exist. Three may be singled out by way of illustration.

Firstly, an EU legislative act may confer the Member States discretionary powers forming part of the EU law mechanism it establishes; in such case, the exercise of the

---

[50] Case 260/89 *ERT* EU:C:1991:254, para 43.
[51] For a recent example: Recital (2) of the preamble in Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022) 457 final).
[52] Further reflecting on the matter: Iglesias Sánchez, 'The Scope of EU Fundamental Rights in the Area of Freedom, Security and Justice' in Iglesias Sánchez and González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021) 36-37.
[53] Case C-236/09 *Test-Achats* EU:C:2011:100.

discretionary powers ought to comply with EU fundamental rights law. For instance, Article 3(2) of Regulation 343/2003 setting out rules to determine the Member State responsible for an asylum application under the Common European,[54] allowed Member States to examine an application for asylum, even if such examination is not its responsibility under the criteria laid down in the Regulation and to thereby become the Member State responsible. The exercise of such discretionary power must comply with EU fundamental rights.[55] Similarly, a legislative act may leave discretion for the Member States to further pursue an objective covered by EU law, and thereby fall within the scope of EU (fundamental rights) law.[56]

Secondly, and in contrast, a derogation from an EU act, the use of which is not an integral part of the regime established by that act, and/or that does not constitute an authorisation to adopt specific measures intended to contribute to the achievement of the objective of that act, falls outside the scope of EU (fundamental rights) law. The Court of Justice noted for instance in *KV,*[57] that a derogation from the prohibition of discrimination enshrined in a directive on third country nationals who are long-term residents in the EU[58] ought to be interpreted narrowly, and in light of EU fundamental rights,[59] yet it allows the Member State to act *outside* the scope of EU law if these conditions are fulfilled.[60]

For a third example, EU legislation giving expression to a fundamental right may itself set a threshold of harmonisation that is deemed by the Court of Justice to mark the outer boundary of EU law. For instance, in *TSN*, national measures being more protective than what is required by the Working Time Directive on the (fundamental) right to annual paid leave[61] is considered to be outside the scope of EU law.[62] This is due to the fact that the said Directive (only) establishes 'minimum requirements' which shall 'not prevent any Member State from maintaining or introducing more stringent protection measures' within the meaning of Article 153(2) and (4) TFEU on EU social policy.[63]

---

[54] Joined Cases C-411 and 493/10 *N.S.* EU:C:2011:865 paras 64-68.
[55] Para 68.
[56] For instance, in *Milkova*, the Court noted that 7(2) of Directive 2000/78 which allows for positive action in favour of disabled persons (Directive 2000/78 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000 16–22), read in light of the UN Convention on the Rights of Persons with Disabilities, authorises specific measures aimed at effectively eliminating or reducing actual instances of inequality affecting people with disabilities, paras 48-50 and 52-54.
[57] Case C-94/20 *KV* EU:C:2021:477, paras 45-47 and 61-62.
[58] Article 11(1)(d) of Directive 2003/109 provides '1. Long-term residents shall enjoy equal treatment with nationals as regards: (d) social security, social assistance and social protection as defined by national law; and its Article 11(4): 'Member States may limit equal treatment in respect of social assistance and social protection to core benefits'.
[59] More specifically, the derogation ought to be read in light of Art. 34 Charter of Fundamental Rights of the European Union (CFEU), according to which the European Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.
[60] *KV* cited above at note 57 paras 45-46.
[61] Articles 7(1) and 15 of Directive 2003/88 concerning certain aspects of the organisation of working time OJ L 299, 18.11.2003, p. 9–19.
[62] This holds as long as the national measure does not 'undermine the coherence of the EU's legislative action', See De Cecco, 'Minimum harmonization and the limits of Union fundamental rights review: TSN and AKT' *Common Market Law Review* (2021) 187-200.
[63] Joined cases C-609 and 610/17 *TSN* EU:C:2019:981.

As these examples illustrate, the precise contours of EU fundamental rights law depend much on a detailed, complex, and possibly unclear, analysis of the legislative text, its legal basis and relevant instruments of international law as performed by the Court of Justice. While this state of things may be partly inherent in the very fact that the EU legal order is finite, and its boundaries in need for constant redefinition, there may be space for improvement in both the quality of legislative drafting and methods of judicial interpretation to bring clarity to the field.

II.B. Legislative acts informing the choice of standards of protection within the EU legal order

Techniques of harmonisation not only inform the scope of EU fundamental rights law, they also inform the level of protection and the choice of standards of protection within the scope of EU law. This is particularly clear in cases of reliance on provisions of the Charter to address disputes brought within the scope of EU law by substantive provisions of EU directives, as in *Egenberger* or *Bauer and Willmeroth*.[64] In the relevant cases, the Court shaped its understanding of the fundamental rights at stake by reference to the substance of the directives on equal treatment and annual paid leave indeed.

There also exist many cases in which the Court of Justice imposes a specific reading of an EU legislative act to ensure its compliance with EU fundamental rights. In these settings, the Court balances the diversity of interests protected by the legislative act with EU fundamental rights and may accept a certain type and degree of restrictions to EU fundamental rights.[65] Alternatively, or simultaneously, the Court may also constrain the margin of manoeuvre of national authorities implementing a said EU legislative act, also for the sake of ensuring compliance with the Charter. For instance in *Ligue des droits humains* the Court stated that the provisions of the PNR Directive should be read as requiring that Member States lay down clear and precise rules capable of providing guidance and support for the analysis carried out by the agents in charge of the individual review, for the purposes of ensuring full respect of Articles 7, 8 and 21 CFEU.[66]

The Court of Justice has over the past few years been shaping a new line of cases in which it identifies several degrees of tolerance for diverging standards of fundamental rights protection at national level. For that purpose, the Court has been setting a sliding scale defined with reference to the content of the relevant legislative act. The focus is on situations that *do* fall within the scope of EU law, yet the density of the EU legislative act at hand varies, and so does the degree of scrutiny of the Court of Justice to ensure

---

[64] Case C-414/16 *Egenberger* EU:C:2018:257; Joined Cases C-569 and 570/16 *Bauer and Willmeroth* EU:C:2018:871. The Court has so far declined to extend this approach to provisions of the Charter the content of which may overlap with that of directives other than Articles 21, 31(2) and 47 CFEU; eg. Case C-261/20 *Thelen Technopark Berlin* EU:C:2022:33 (see analysis by De Witte, 'The *Thelen Technopark Berlin* judgment: the Court of Justice sticks to its guns on the horizontal effect of directives' *REALaw.blog* (May, 2022)).

[65] Eg. Case C-401/19 *Poland v Parliament and Council* EU:C:2022:297 paras 98-99.

[66] Eg. C-817/19 *Ligue des droits humains ASBL v Conseil des ministres* EU:C:2022:491, paras 205-213.

the 'primacy, unity and effectiveness of EU law'.[67] At the top of the scale, warranting heightened scrutiny from the Court of Justice, and little if no tolerance for diversity, are situations fully harmonised by EU secondary law. This was made clear in *Melloni* (2013). The Court of Justice noted that when a matter is fully harmonised by EU law, in compliance with EU fundamental rights, Member States are not allowed to apply higher levels of protection of the fundamental right at stake.[68]

At the other end of the spectrum, in cases such as *Taricco II* (2017), the matter is not harmonised at EU level and national authorities are granted leeway.[69] The Court noted that '*at the material time for the main proceedings, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature*'.[70] As a result, the Member State was '*at that time, free to provide that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby, like those rules, subject to the principle that offences and penalties must be defined by law*'.[71] The national authorities and courts thus remained '*free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*'.[72]

The Court of Justice is currently seeking to flesh out its approach to in-between situations, where *some* national leeway is carved out *within* EU legislative acts. For that purpose, in *Centraal Israëlitisch Consistorie van België* (2020), it is remarkable that the Court is adopting a new narrative inspired from the approach of the ECtHR, and referring to the absence of consensus at European level on specific matters.[73] The absence of such a consensus is identified with reference to the texture of the relevant EU legislative act.[74] As noted by Edouard Dubout[75] this makes it possible for the Court 'to trace *negatively* what the political power did *not* intend to do' with regard to the protection of fundamental rights. Having observed the absence of consensus the Court then acknowledges that Member States do have a margin of discretion to balance sensitive diverging interests within the scope of EU law and may apply their own standards, though 'with supervision, by the EU judicature' (*Wabe*, 2021).[76] The limits of the Member State's margin of discretion in such a context remain to be explored.

In this context, the bargain enshrined in the legislative act is used to mitigate conflict between the EU and the national layers of protection, and thus to organise constitutional

---

[67] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 29.
[68] *Mellon,* cited above note 6, paras 56-60. It shall be noted that the European Arrest Framework Decision, adopted before the entry into force of the Lisbon Treaty, does not constitute a 'legislative' act within the meaning of contemporary case-law of the Court of Justice.
[69] *Taricco II*, cited above note 17.
[70] Para 44.
[71] Para 45.
[72] Paras 46-47.
[73] C-336/19 *Centraal Israëlitisch Consistorie van België* EU:C:2020:1031 paras 67 et seq.
[74] Ibid. See also, Joined cases C-804/18 and C-341/19 *WABE* EU:C:2021:594, para 87.
[75] Dubout, 'Constitutionalizing EU Legislative Protection of Fundamental Rights. The Case of (Religious) Anti-discrimination Law' *EU Law Live WE Edition* 78 (2021) 9.
[76] *WABE*, cited above note 74, para 86.

pluralism.[77] Rather than focusing on a clash between competing visions of fundamental rights, the discussion is displaced towards what has been harmonised or not, and the extent to which harmonisation has taken place.[78] These questions are also very much at the core of the approach adopted by certain national constitutional courts, such as the Second Senate of the German Constitutional Court as noted in Part I, to define their own approaches to fundamental rights adjudication when EU law is at stake. In the aftermath of *Melloni* the Court of Justice has thus largely positioned EU legislative acts as a central axis to articulate exchanges between the Court of Justice and national constitutional courts on matters of fundamental rights adjudication.[79]

II.C. Legislative acts inducing constraints on national procedural law to enhance the effectiveness of EU fundamental rights

The existence of an EU legislative act is further used by the Court to articulate its jurisdiction over national procedural law. The Court may decide to protect the effectiveness of other interests over fundamental rights, or conversely, to protect the effectiveness of the fundamental right enshrined in EU legislation over other interests. Much depends on what the Court reads as prevailing in the legislative act. Although the first setting has attracted much attention in the past, it does happen that an effectiveness based reading of EU legislation plays in favour of fundamental rights. The Court often relies on the provisions of legislative acts concerned with the protection of a given fundamental right protected by the Charter, in conjunction with the latter, to further enhance the duties of national authorities to ensure their effective protection in the domestic sphere.

The existence of a legislative act indeed allows the Court to intensify the constraints that EU law imposes on national law for the purpose of ensuring the protection of a given fundamental right. For instance, in *CCOO* the Court of Justice interpreted the provisions of the Working Time Directive,[80] as well as of art. 31(2) CFEU also on working time, in light of the doctrine of effectiveness. This resulted in a far-reaching duty imposed on employers to actually set up a system enabling the duration of time worked each day by each worker to be measured.[81] The Court noted 'in order to ensure the effectiveness of those rights provided for in [the Working Time Directive] *and* of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must

---

[77] See how the President of the Court of Justice, acting in an extra-judicial capacity, himself assesses the relevance of the cases discussed in the previous paragraph: Lenaerts, 'Les rapports constitutionnels entre ordres juridiques et juridictions au sein de l'Union européenne', *Revue de l'Union européenne* (2022) 205-206.

[78] As noted in Muir and Lorans, ''Virtuous circles' in the Shadow of the Charter' *EU Law Live WE Edition* 78 **(**2021) 20.

[79] Arguing that this enables of form of 'constitutional trilogue': Aertgeerts, 'Between Unity and Diversity: EU Data Protection Legislation as a Catalyst for a Constitutional Trilogue' in Gasperin Wischhoff, Kos, Kukavica, Sahadzic, and Scholtes (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge, forthcoming)".

[80] Directive 2003/88 concerning certain aspects of the organisation of working time OJ L 299, 18.11.2003 9–19.

[81] Case C-55/18 *CCOO* EU:C:2019:402; The legislative act must be read in light of the corresponding provision of the Charter (paras 30-32); the legislative act ought to be read so as to ensure its full effectivity (paras 40 et seq).

require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured'.[82] Although such a system is not mentioned anywhere in the Working Time Directive, its creation can be expected to contribute to the realisation of the rights protected by EU law across the EU. A parallel has even been drawn between the effectiveness based reading of EU legislation giving expression to fundamental rights and forms of 'positive obligations'.[83]

This effectiveness based reading of EU legislation protecting fundamental rights is facilitated where the Court can rely on specific provisions enshrined in EU legislation to enhance the effective protection of the fundamental rights it seeks to protect. For instance, in *Braathens Regional Aviation,* the Court read jointly Articles 7 (on defence of rights) and 15 (on sanctions) of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in the light of Article 47 CFEU (right to effective judicial protection) to which they give specific expression.[84] This allowed the Court to rule against national law: a court that is seized of an action for compensation based on an allegation of discrimination may not be prevented from examining the claim seeking a declaration of the existence of that discrimination; even if the defendant agrees to pay the compensation claimed without recognizing the existence of that discrimination.

Surely, reliance on the effective protection of rights enshrined in EU legislation to constrain national procedural law is not new.[85] Yet, the emphasis on effective protection of rights in both legislation and the Charter, drives forward a powerful judicial narrative supporting the creation of important constraints on national procedural law. The relevance of this phenomenon for EU fundamental rights law is boosted by two contemporary developments. EU legislation itself increasingly often emphasizes the importance of procedural safeguards, and creates some of them, to ensure the effective protection of fundamental rights it seeks to protect.[86] Furthermore, the Court nowadays attaches considerable importance to the fundamental right to an effective judicial remedy now enshrined in Article 47 CFEU.[87] The combination of both trends currently leads to particularly fruitful developments on the right to an effective judicial remedy in the field of EU asylum and migration law for instance.[88]

---

[82] Para 60. Emphasis is added herein as it is remarkable that the Court of Justice seeks to ensure the effectiveness not only of EU legislation – whereby the EU exercises its competences – but also of the Charter itself.

[83] See de Witte, 'The Strange Absence of a Doctrine of Positive Obligations under the EU Charter of Rights' *Quaderni costituzionali* (2020) 854-857.

[84] Case C-30/19 *Braathens Regional Aviation* EU:C:2021:269 para 57.

[85] Case 222/84 *Johnston* EU:C:1986:206 paras 17-19.

[86] For a recent example: Commission Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final. See further Eliantonio and Muir, 'The Principle of Effectiveness: under Strain?', 13(2) *Review of European Administrative Law* (2020) 255 – 265.

[87] See for instance: Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' *Review of European Administrative Law* (2019) 42 et seq.

[88] As explored by: Cambien, 'Effective Remedies and Defence Rights in the Field of Asylum, Migration and Borders', in Iglesias Sánchez and González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021) 159 et seq.

What the second section of this paper sought to show is thus that the Court of Justice increasingly often articulates its fundamental rights jurisdiction with reference to the very texture of applicable EU legislation and the institutional context to which the latter belongs. Leaning on the EU legislator the Court thereby defined its ability – or inability – to answer questions on the interpretation of fundamental rights invoked at national level, the choice of the applicable standards of protection, as well as the level of expectations from national procedural law. While this has the advantage for the Court that its fundamental right's jurisdiction is thereby anchored in a stronger institutional setting,[89] this shall also resonate as a call to take EU fundamental rights highly seriously as from the very early stages of the legislative process.[90]

Conclusion

Although hesitant, fragmented, and imperfect, there is little doubt that the Court is seeking methodological tools to articulate its fundamental right mandate in relation to that of national constitutional courts and the EU legislator. The tools relied upon are not new: the mechanism of the preliminary ruling procedure (examined in Part I) and techniques of harmonisation (explored in Part II). These have constituted key features of EU law since its inception; both have always been prominent instruments to articulate the relationship between national courts and the Court of Justice as well as between national and EU authorities more generally. These techniques are now becoming key tools at the service of EU fundamental rights law.

It is remarkable that these methodological tools largely allow the Court to avoid tensions on the actual definition of the substance of standards of protection. Instead, the preliminary ruling procedure, as well as the texture of EU legislative acts, are most often used to articulate competing claims of jurisdiction on fundamental right matters. This is not to say that there exists no disagreement on the substance of standards of protection; the examples above simply show that it may be more interesting to channel disagreement by acknowledging the limits of one's jurisdiction or granting some margin of manoeuvre to another authority, rather than by facing clashes on the substance of standards. This recalls the importance of conciliation through dialogue.

In that respect, one should welcome and call for yet greater reliance on the preliminary ruling procedure by national constitutional courts, and a constructive approach thereof both by the said national courts and the Court of Justice. One ought also to call for heightened attention for the implications of the drafting of EU legislative acts for fundamental rights protection, as from the early stages of the decision-making process, to ensure that the Court can indeed soundly rely on these instruments to articulate its adjudication techniques in the field.

---

[89] Recalling the existence of concerns as to the heavy reliance of the Court of Justice on primary law, to the detriment of guidance provided in secondary law, in the fields of EU citizenship as well as digital rights: Iliopoulou-Penot, 'The Construction of a European Digital Citizenship in the case-law of the Court of Justice of the EU' *Common Market Law Review* (2022) 998.

[90] See further Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press, 2017).