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a reality means...*

...ensuring the right to be guaranteed

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EU Charter of Fundamental Rights and its use by the Member States



In 2017, the Charter of Fundamental Rights of the European Union was in force as the EU's legally binding bill of rights for the eighth year. It complements national human rights documents and the European Convention on Human Rights (ECHR). As in previous years, the Charter's role and usage at national level was mixed: there appears to be no significant improvement in its use by the judiciary or in legislative processes; and it proved hard to identify government policies aimed at promoting the Charter. Instead, with references in national courts, parliaments and governments remaining limited in number and often superficial, the Charter's potential was once again not fully exploited.

The EU Charter of Fundamental Rights applies to the European Union itself, as well as to the EU Member States "when they are implementing Union law", that is, when they are acting within the scope of EU law.¹ While it is not always easy to draw the borders of the Charter's field of application, its role is central for a proper implementation of EU law. Given that EU law is predominantly implemented at national level, and not directly by the EU institutions themselves, national judges, parliamentarians and government officials are core 'Charter agents' that the EU system relies on.

"The Council acknowledges that the protection of fundamental rights is a horizontal issue which affects all fields of EU activity and can only be realised with the support and active cooperation of all stakeholders at EU as well as at national level. The Council recalls the importance of awareness-raising on the application of the Charter at national as well as at EU level among policymakers, legal practitioners and the rights holders themselves."

Council of the European Union, Conclusions on the application of the EU Charter of Fundamental Rights in 2016, adopted on 12 October 2017

Against this background, since 2013, the EU Agency for Fundamental Rights (FRA) has dedicated a chapter of its Fundamental Rights Report to the use of the Charter at national level. The agency asked its research network, Franet, to provide up to three specific and relevant examples under each of the following categories:

- court decisions where judges use the Charter in their reasoning;

- impact assessments/legal scrutiny that make references to the Charter in the context of legislative proposals;
- parliamentary debates referring to the Charter;
- national legislation referring to the Charter, as well as academic writings on the Charter, comprising, for instance, general articles on the Charter,² on the Charter's role and its impact at national level,³ or on specific Charter rights or the Charter's effect in specific policy areas.⁴

This methodology only provides a small sample that does not allow for a quantitative assessment. However, it brings to the fore those judicial and administrative decisions that national experts considered as most relevant for the use of the Charter in the given Member State. Based on this and additional information on national Charter-related policies requested from the agency's contact persons in national administrations – the National Liaison Officers (NLOs) – this chapter looks at the use of the Charter in national courts, in national parliamentary debates and in legislative procedures. Given that neither Franet nor the NLOs identified relevant national policies promoting the Charter, no section is dedicated to such policies. The necessity for such policies stems in particular from Article 51 of the Charter, which obliges the Member States to respect the rights it covers and to "promote the application thereof in accordance with their respective powers."

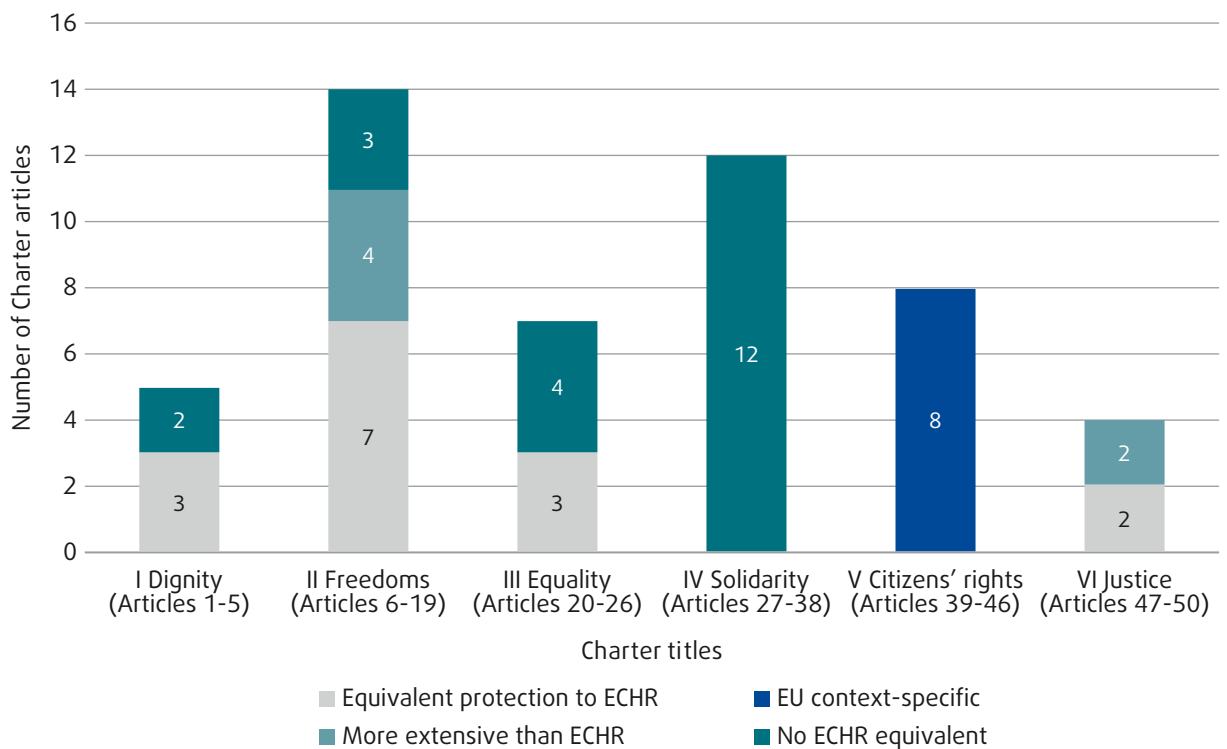
2.1. National (high) courts' use of the Charter: a mixed picture

The analysis below is based on 71 court decisions from 28 EU Member States. Fradet was to report three court decisions per Member State by selecting those where the Charter was most relevant to the reasoning of the court, giving preference to decisions from high courts, which handed down more than two thirds of the analysed decisions. In many Member States, the absolute numbers of court decisions using the Charter continue to be hard to identify – for example, because electronic databases covering all case law are lacking. Often, the frequency of Charter references varies from court to court within a country itself. By way of illustration: in **Austria**, the Supreme Court referred to the Charter 14 times, the Constitutional Court did so 34 times and the Supreme Administrative Court did so 140 times. The data collection considered only those court decisions where the judges used the Charter in their reasoning and did not merely report that the parties had referred to the Charter.

2.1.1. Charter's overall role in national case law: some trends emerge

Looking back five years, a mixed picture emerges on the role of the Charter in national legal systems. For many countries, it is difficult to identify three judgments a year in which a national court has made substantial use of the Charter. In the majority of judgments reported to FRA, the Charter did not have a decisive impact on the outcome. This might indicate that awareness of the Charter and its added value compared with other sources is still limited. This is despite the fact that the Charter offers great potential, which becomes obvious when we compare the fundamental rights protection provided by the Charter articles with those of the ECHR (see Figure 2.1). Just as in previous years, in 2017 there were court decisions where the Charter indeed played a decisive role. For instance, in the **United Kingdom**, the Supreme Court noted that fees introduced in 2013 by employment tribunals contravened EU law's guarantee of an effective remedy before a tribunal as enshrined in Article 47 of the Charter. Because the fees were unaffordable in practice, the Fees Order was deemed a disproportionate limitation on Article 47 in light of Article 52 (1) of the Charter.⁵

Figure 2.1: Number of Charter articles offering protection equivalent to or greater than the ECHR, by Charter title



Note: Based on a comparative analysis of articles of the EU Charter of Fundamental Rights and the ECHR.

Source: FRA, 2017

When national judges use the Charter, they refer to it alongside other legal sources. The ECHR is an especially prominent ‘twin source’ in this regard (see Figure 2.2). Like in the previous four years, in 2017 the ECHR, national constitutional provisions and relevant CJEU case law were the sources used most frequently in conjunction with the Charter.

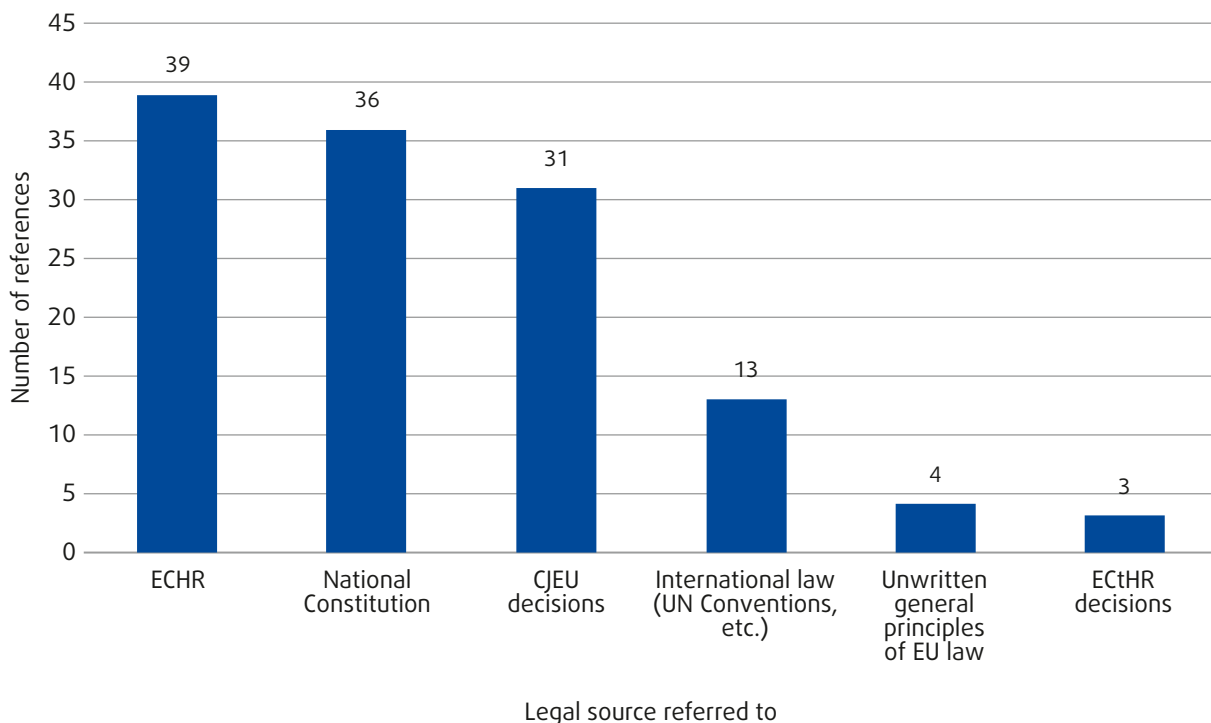
The continuing mixture of sources might signal that judges are aware of the existence of the Charter, but less aware of its scope and the potential value of individual Charter provisions, so they ‘package’ various human rights sources in order to ‘play it safe’. The agency has in previous years called for more emphasis on awareness raising. That judges are aware of the Charter is confirmed by the fact that national judges continued to raise Charter-related arguments on their own initiative in 45 % of the 71 cases analysed in 2017. In the other cases, the parties had already referred to the Charter.

Of the Charter-relevant court decisions reported in 2017, 30 % dealt with border checks, asylum and migration (Figure 2.3). This is in line with the previous four years, when this policy area was always among the four policy areas to which most of the reported Charter cases related.

The right to an effective remedy and to a fair trial (Article 47) remained the provision most often referred to. Indeed, in the past five years (2013–2017), this provision was always – aside from the general Charter provisions, such as the scope of guaranteed rights (Article 52) – the most frequently used Charter provision among the Charter relevant cases reported to the agency (Figure 2.4). This does not come as a surprise, as the provision is horizontal in nature and relevant in all policy contexts. Whereas the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) surfaced only in 2017 as a prominent substantial right in the national court decisions analysed, the right to respect for private and family life (Article 7) was often referred to in recent years. The right to good administration (Article 41) also featured prominently throughout the past five years in the national court decisions reported to the agency.

When it comes to the use of the Charter in the context of requests for CJEU preliminary rulings, diversity persists. In 2017, 50 such requests mentioned the Charter, including references to different articles of the Charter. The number of references to the Charter remained relatively stable in the past years. The most prominent article referred to is Article 47, followed by Article 21. Figure 2.5 shows the number of times Charter articles

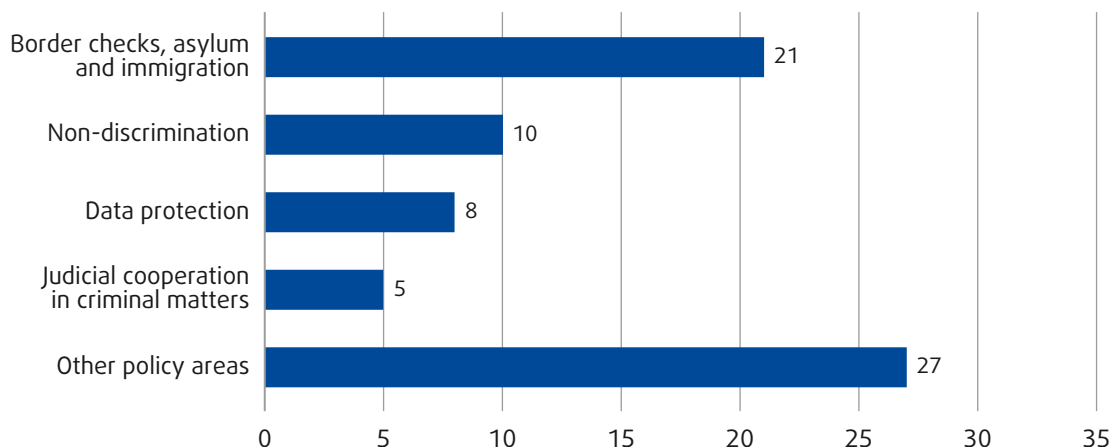
Figure 2.2: Number of references to other legal sources alongside the Charter in analysed court decisions, by legal source referred to



Notes: Based on 71 court decisions analysed by FRA. These were issued in 28 Member States in 2017. Up to three decisions were reported per Member State. More than one legal source can be referred to in one court decision.

Source: FRA, 2017

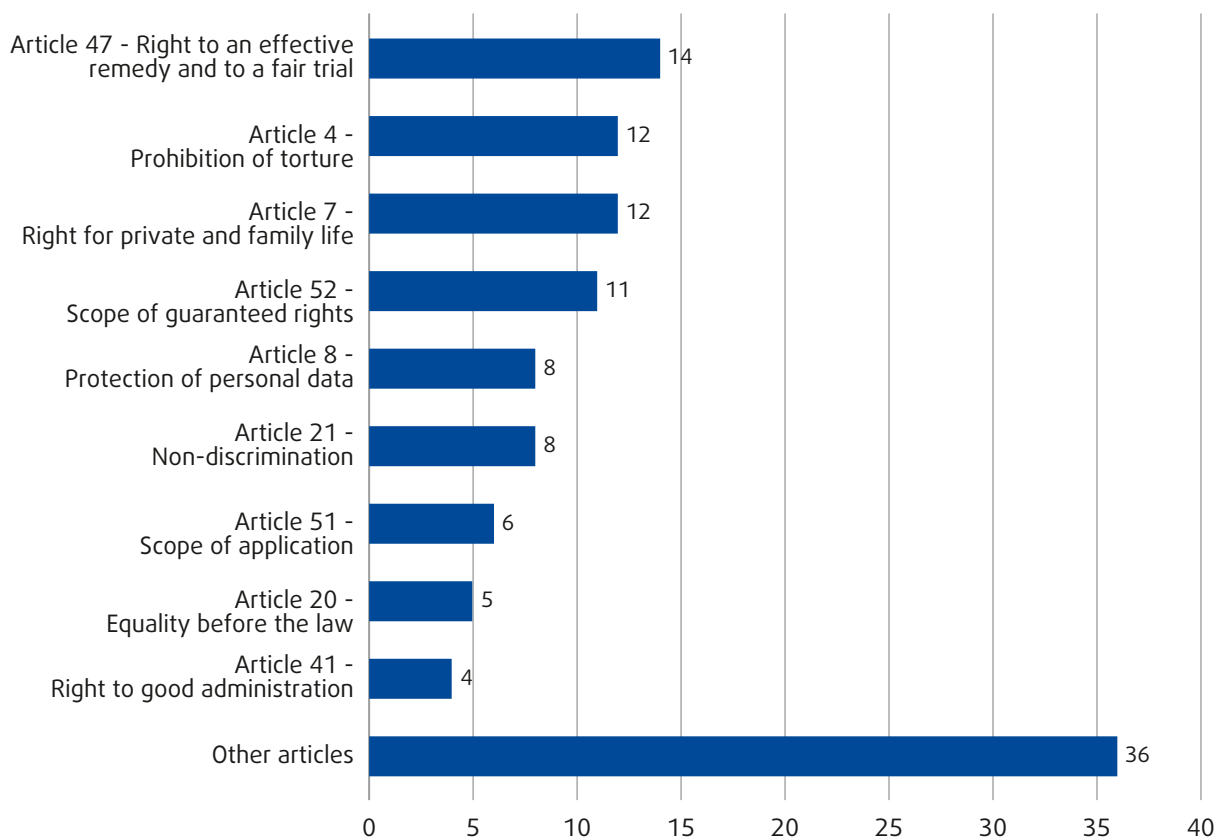
Figure 2.3: Policy areas addressed in analysed court decisions



Notes: Based on 71 court decisions analysed by FRA. These were issued in 28 Member States in 2017. Up to three decisions were reported per Member State. For every case, only the predominant policy area was taken into account. The category 'Other policy areas' includes policy areas that were referred to in fewer than three court decisions. The categories used in the graph are based on the subject matters used by EUR-Lex.

Source: FRA, 2017

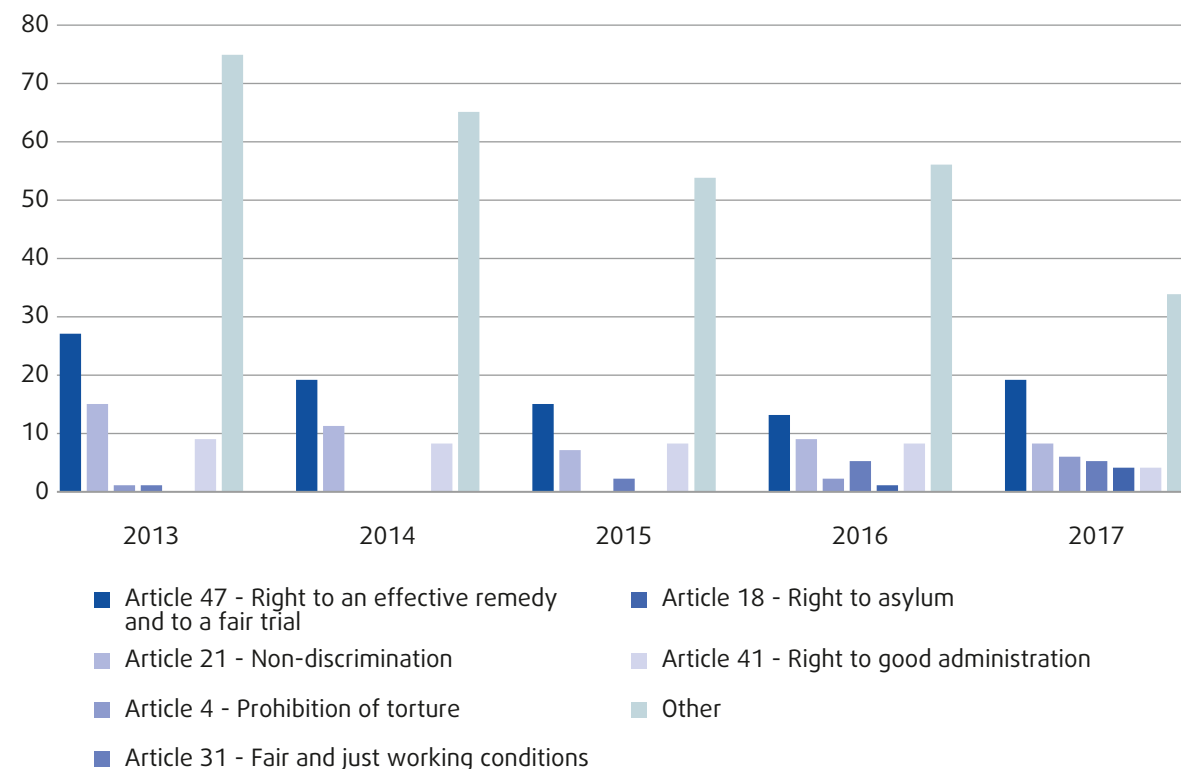
Figure 2.4: Number of references to Charter articles in the 2017 court decisions analysed, by article



Notes: Based on 71 court decisions analysed by FRA. These were issued in 28 Member States in 2017. Up to three decisions were reported per Member State. The category 'Other articles' includes articles that were referred to in fewer than four analysed court decisions. More than one article can be referred to in one court decision.

Source: FRA, 2017



Figure 2.5: Most prominent articles mentioned in preliminary ruling requests, 2013–2017

Source: FRA, 2017 (based on data provided by CJEU on all preliminary ruling requests mentioning the Charter between 2013 and 2017; statistical analysis prepared by FRA)

were mentioned in preliminary ruling requests between 2013 and 2017. In 2017, Article 47 was mentioned most often, in 19 requests; followed by Article 21 (8 times), Article 4 (6 times) and Article 31 (5 times). Most Charter-relevant requests for preliminary rulings in 2017 came from Italy (10), followed by Germany (8), Austria (6) and the Netherlands (6).

2.1.2. Scope of the Charter: still an often ignored question

Article 51 of the Charter defines its scope by stressing that it applies to Member States “only when they are implementing Union law”. CJEU case law interprets this widely as “acting within the scope of EU law”. However, the limits of the scope of EU law are not always easy to delineate. This might contribute to the fact that, just as in previous years, in the majority of the 2017 court decisions analysed, the questions of whether or not and why the Charter applied to the specific case in question remained unaddressed.

A case decided by a regional court in **Poland** serves as an example.⁶ It concerned an application to the local self-government authority for the ‘500+’ social benefit. This benefit is available to families who have at least two children. The applicant did not properly explain his family situation, so the local self-government

authority ordered a social interview. The applicant refused the interview and the authority therefore decided not to grant the benefit. The court held that the authority had not violated Article 7 (respect for private and family life) of the Charter. It did not first examine whether EU law applied to the case.

In 2017, courts continued to use the Charter to interpret national law in contexts where it does not appear to apply. This was especially obvious with Charter provisions that offer more specific wording than one would traditionally find in fundamental rights provisions, such as the right to good administration and the best interests of the child. In this context, the Charter is used to complement national law. For example, the Supreme Administrative Court of **Lithuania** used Article 41 of the Charter, the right to good administration before EU institutions and bodies, to interpret national law. In light of this Charter provision, the court obliged national authorities to re-examine requests to renew temporary residence permits because the applicants had no opportunity to provide explanations and information to dispel any doubts about the reason for their presence in Lithuania.⁷

In **Portugal**, a court of appeal dealt with a case in which the father of a child complained that the child’s mother had failed to comply with the parental responsibility

agreement.⁸ He claimed that the child's mother had decided to change the child's residence and school without his consent and that she had not complied with the court-ordered visiting arrangements. The court concluded that the mother had not breached parental responsibilities and had not violated any of the child's rights. The court made a rather detailed reference to the child's best interests and to Article 24 of the Charter, without explaining if and why the Charter would apply at all.

Article 1 (human dignity) of the Charter is also often referred to in cases beyond the scope of EU law. In a case concerning a supposed theft in a store in Rijeka and the subsequent behaviour of the security guards, the Constitutional Court of **Croatia** gave the Charter considerable prominence. A boy and his father went shopping and, when they left the store, the anti-theft alarm went off. The security guard started checking the boy in a manner causing fear and shame in front of a large group of people and continued even after the police had concluded that nothing had been stolen. The court of first instance granted him compensation for non-material damages in relation to the violation of the right to human dignity and reputation and for the violation of his personal rights. The county court confirmed the first, but decided to deny the second violation on the basis that a 12-year-old child could not develop a sense of personality. The Constitutional Court declared void the decisions of the lower courts. It emphasised, among other things, that "by joining the European Union, the Republic of Croatia has accepted the contents of the Charter, whose chapter I is titled Dignity [...]. In this way, by committing to the contents of the Charter, human dignity becomes a component of the human rights catalogue of the Croatian Constitution."⁹

Where courts are applying an act of EU secondary law, they are more likely to refer explicitly to the Charter's applicability. For instance, in **Bulgaria**, the Supreme Administrative Court had to decide on an appeal against the denial of family reunification. It stated that, "[a]s the right to family life of third country nationals is subject to regulation by EU law, the Charter of Fundamental Rights of the European Union (the Charter) is applicable to this right."¹⁰

Sometimes, when dealing with the applicability of the Charter, national courts simply repeat the wording of Article 51. In some cases, the court makes reference to earlier CJEU and national case law on the question of when the Charter applies. The federal Administrative Court in **Germany**, for instance, did this when it had to decide on the argument of a plaintiff who claimed that the fee for public service broadcasting violated the principle of equal burden. In addition, the plaintiff argued that the right to information also covers the right to escape from information for which fees are required. Hence, the plaintiff raised an issue under

Article 11 (1) of the Charter (freedom of expression and information). The Administrative Court referred to the case law of the Constitutional Court, stating that "the law of the Member States only needs to be assessed in the light of the fundamental rights guaranteed by the Charter if it is determined by the law of the Union. The law of the Union has to substantially determine national law; it especially has to state the obligation of transposition. Moreover, the Charter is applicable if fundamental freedoms of the Treaty on the Functioning of the European Union are at stake."¹¹

However, this year cases were also reported where the judges analysed the Charter's applicability in greater detail. For instance, in the **United Kingdom**, in a case concerning the rights of so-called 'Zambrano carers' (citizens of third countries taking care of their children who are EU citizens), the Supreme Court addressed the applicability of the Charter and Article 21 thereof in greater detail.¹² The Supreme Court in **Spain** also provided full-fledged argumentation about why the Charter did not apply in a case concerning the use of the national flag and emblem on envelopes used by the political party Vox in the Spanish elections. The Spanish Electoral Board declined to distribute the envelopes to the electorate. The Supreme Court made it clear that the Charter was not applicable and therefore could not be invoked against the decision of the Electoral Board. The court referred in detail to relevant case law of the CJEU and concluded: "The Spanish courts, in the same way as European Union judges, can and must apply the Charter; however, in this case there is no connection with any European legislation, so it is enough to take into consideration the constitutional provisions."¹³

"However, the Charter is considered to be ordinary law, as opposed to the Constitution, and is only applicable with respect to matters that fall within the competencies and duties of the European Union. This is not the situation in this case as it deals with matters that fall within national competence. Therefore, inasmuch as the plea is based on the Treaty, it will not be accepted due to the fact that the subject raised in front of this Court is not within Treaty competence."

Malta, First Hall Civil Court, Case 52/2016/LSO, decision of 28 March 2017

Another political case concerned a quota for women in **Cyprus**. Parliament voted for a law and the President of the Republic referred it to the Supreme Court for an opinion. The law introduced a quota of one third of women on the management boards of public organisations. The court unanimously concluded that the specific provision is not allowed under Cypriot law, as it is a measure of positive discrimination and affirmative action in favour of women, in breach of basic equality provisions of the Cypriot constitution, and cannot be defended with reference to EU law. In fact, the court stated explicitly that Article 23 (equality between men and women) "does not apply because



the issue at stake does not concern Union law, as per Article 51 of the Charter¹⁴. In **Malta**, a case brought before a civil court concerned the requirement for women, but not men, to include their marital status when, for instance, registering a contract of sale with the Public Registry. Although the administrative court found that the requirement violated the constitution and the ECHR, it clarified that the Charter did not apply.¹⁵

2.1.3. The Charter as legal standard: reviewing compatibility of national law with fundamental rights

National judges' use of the Charter was again manifold. They most frequently used it to interpret national law. Sometimes they used it to interpret EU law. Sometimes they also used the Charter to check the legality of national law. In **Austria**, since 2012, the Constitutional Court has used the Charter in the context of constitutional reviews, thereby granting the Charter a constitutional role. In a case concerning online booking platforms and whether or not 'vertical parity clauses', which oblige hotels to offer the same price on the platform as on their own online sale systems, were prohibited, the Constitutional Court confirmed its case law. It underlined that, "if a constitutionally guaranteed right [...] has the same scope as a right of the Charter of Fundamental Rights, the decision of the Constitutional Court is usually based on the Austrian constitutional situation".¹⁶ However, even where the Charter is not formally acknowledged as part of the standards for use in constitutional reviews, the Charter can play a role.

The Constitutional Court in **Bulgaria** referred to the Charter in the context of a constitutional review of a provision in the Judiciary Act (*Закон за съдебната власт*), which prohibits discharging judges or prosecutors from their duties when they resign, if there is a pending disciplinary procedure against them, until the closing of the procedure. The court concluded that the provision violated the principle of freedom of work, enshrined in Article 48 (3) of the Bulgarian Constitution. It then also prominently referred to the Charter, "in accordance with which everyone has the right to engage in work and to pursue a freely chosen or accepted occupation."¹⁷

The Supreme Administrative Court in **Finland** checked the Personal Data Act (523/1999) against the Charter and the ECHR. The case concerned the Finnish Embassy in Switzerland, which had rejected a passport application because the applicant had not agreed to have his fingerprints stored not only in the passport's data chip but also in the passport register. The court concluded that the provisions in the Passport Act concerning storage of fingerprint data in the passport

register and the limitations imposed on the right to private life and the protection of personal data are precise and defined in sufficient detail.¹⁸

Data protection was also at the centre of a case decided by a Higher Administrative Court in **Germany**. The court dealt with whether the relevant provisions of the Telecommunication Act, implementing the EU e-Privacy Directive (2002/58/EC), are compatible with various Charter provisions. The court deemed the limitation of the freedom to conduct business (Article 16 of the Charter) unjustified and hence incompatible with the Charter.¹⁹

2.1.4. The Charter as legal standard: interpreting national law in a fundamental rights-compliant manner

In the cases analysed, courts most frequently used the Charter in the context of interpreting national law. For instance, the Supreme Administrative Court of **Bulgaria** was the last instance court in litigation concerning a teacher who had refused to allow a pupil with a disability to join a school excursion – an alleged violation of the Protection against Discrimination Act (*Закон за защита от дискриминация*). The Supreme Administrative Court confirmed the lower court's decision and rejected the teacher's appeal. To reinforce its argument, the court referred to various rights under the Charter, including Article 1 (human dignity), Article 24 (rights of the child) and Article 26 (integration of persons with disabilities).²⁰

Another example is a case decided by the Supreme Court of **Croatia**, which dealt with a Finnish citizen arrested in Croatia pursuant to a Turkish international arrest warrant. The person had thrown a homemade Molotov cocktail at the Turkish Embassy in Helsinki, causing fire and material damage. A Finnish court had convicted the defendant of sabotage in 2009. The question arose of whether or not the Finnish final judgment could be considered equivalent to a domestic judgment in accordance with Croatian legislation. The court confirmed that the Dubrovnik County Court had correctly concluded that the term 'domestic court' in Article 35, paragraph 1, point 5, of the Act on International Legal Assistance in Criminal Matters (*Zakon o međunarodnoj pravnoj pomoći u kaznenim stvarima*) in this case covered not only the courts of the Republic of Croatia, but also of other EU Member States. The provision has to be interpreted in light of Article 50 of the Charter, according to which no one shall be tried or punished twice in criminal proceedings for the same criminal offence.²¹ Similarly, in **Denmark**, the Supreme Court found that the relevant provisions of the Danish Extradition Act

“should be interpreted in accordance with Article 4 of the EU Charter and Article 3 of the ECHR”.²²

2.1.5. The Charter as legal standard: interpreting EU law

National courts also refer to the Charter when interpreting EU law – typically secondary law, i.e. EU legislation. However, in certain cases, national courts may also interpret a provision of EU primary law in light of the Charter. In **Germany**, the Federal Court of Justice dealt with a case concerning a woman who had received in-vitro fertilisation (IVF) treatment as well as prolonged embryo cultivation (blastocyst transfer) in the Czech Republic.²³ She was charged around € 11,000 by the IVF centre and sought reimbursement from her German insurance company, arguing that, according to the general insurance conditions, treatments in other European countries are insured. She was refused reimbursement, which she believed violated the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union). The court, however, agreed with the insurance company that – since fertilisation by means of egg cell donation is prohibited under German law – the insurance did not cover the treatment in the Czech Republic, although egg cell donation is permitted there. The court did not find that the insurance conditions violated EU law. In any event, a possible restriction of the freedom to provide services in the event of disputes is to be considered justified by the insurance company’s freedom to conduct a business (Article 16 of the Charter).

2.2. National legislative processes and parliamentary debates: Charter of limited relevance

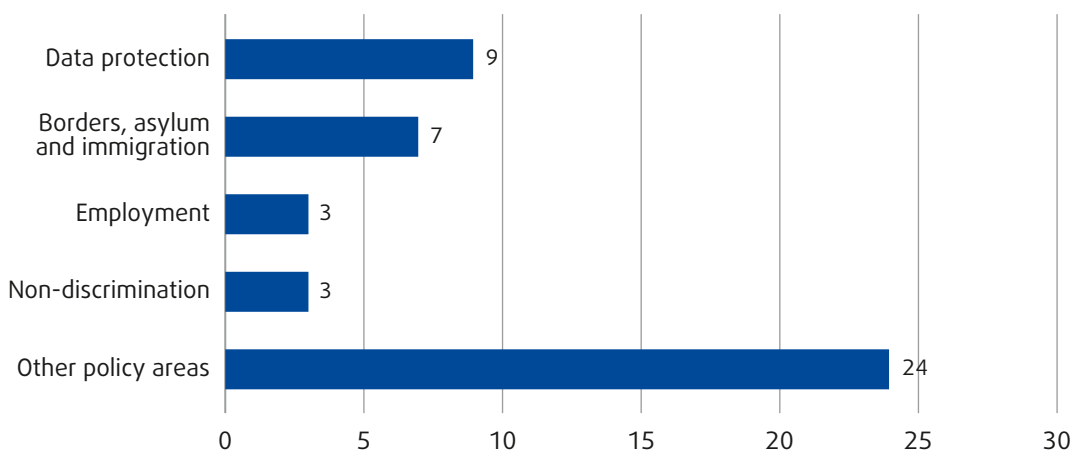
The Charter is sometimes referred to in the legislative process. Parliamentarians occasionally mention the Charter, and legislatures – be they government or parliaments – do use the Charter, even if only occasionally rather than consistently, when assessing bills or their impact. Sometimes references to the Charter are even incorporated in the text of national laws.²⁴ The following evidence, however, points to a rather limited significance of the Charter in these contexts.

2.2.1. Parliamentary debates

FRA collected information on 46 examples of Charter references registered in parliamentary debates of Member States, covering a wide spectrum of thematic areas. It asked Franet to select examples of such references where the Charter played a relevant role. Data protection and borders, asylum and immigration were the predominant topics (Figure 2.6).

Data protection was, for instance, a central topic in a parliamentary debate in **France**, where a legislative proposal raised concerns under Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter. A Member of Parliament expressed the view that systematically collecting personal data

Figure 2.6: Policy areas addressed in parliamentary debates identified as referring to the Charter in 2017



Notes: Based on 46 parliamentary debates analysed by FRA. These took place in 20 EU Member States in 2017. Up to three debates were reported per Member State; no parliamentary debates were reported for Bulgaria, Cyprus, the Czech Republic, Latvia, Lithuania, Malta, Romania and Slovenia. The category ‘Other policy areas’ includes policy areas that were referred to in fewer than three parliamentary debates analysed. The categories used in the graph are based on the subject matters used by EUR-Lex.

Source: FRA, 2017

of flight passengers who are not criminal suspects and being able to share those data with other countries would violate the right to respect for private life and data protection as enshrined in the Charter.²⁵

During a plenary debate in **Germany** on various traffic laws, a Member of Parliament invoked the Charter when criticising the working conditions of employees. The member pointed out that “Article 31 of the Charter of Fundamental Rights of the European Union states that every worker has the right to working conditions which respect his or her health, safety and dignity. The European road transport industry has now developed into a sector in which human dignity does not count much, not to mention the protection of safety and health.”²⁶

In light of judicial reforms in **Poland**, the importance of Article 47 (right to an effective remedy and to a fair trial) of the Charter was highlighted in a parliamentary debate on the separation of powers and the independence of the justice system. The Ombudsman expressed concern about a draft law that aimed, among other things, to introduce a retirement regime for Supreme Court judges and to widen political control over the process of appointing and dismissing them.

► For more information on this issue, see [Chapter 9](#).

“We can’t forget that Poland is an EU Member State and each of the Polish courts is also a court of the European Union which has to interpret and apply EU law. That’s why the standards set by Article 47 of the Charter are essential. It matters that the courts are independent from the executive.”

Poland, Adam Bodnar, Ombudsman, *Stenogram of the Sejm’s session*, 18 July 2017

Some debates that referred to the Charter did not necessarily deal with issues falling within the scope of EU law. For instance, a Member of Parliament in **Belgium** asked about the possibility of the Turkish population in Belgium participating on Belgian territory in a Turkish referendum on the death penalty. The Prime Minister replied that this would not be tolerated, citing the Charter as one of the sources from which the prohibition of capital punishment stems.²⁷

In **Spain**, the High Court of Catalonia prohibited the Catalan autonomous broadcaster from airing content that could enable the organisation or holding of a referendum on the self-determination of Catalonia. This prompted a Member of Parliament to ask if this decision violated Article 11 (freedom of expression and information) of the Charter.²⁸ Another reference to Article 11 of the Charter occurred in the **Danish** Parliament, where representatives of the Danish People’s Party made a motion for a parliamentary resolution requesting the government to announce to the Council of the European Union that it would

seek to repeal the EU’s Code of Conduct countering illegal hate speech online, which was developed by the European Commission, Facebook, Twitter, YouTube and Microsoft.²⁹

“The Government must remind the Council of the European Union and the Commission that Article 11 of the EU’s Charter on Fundamental Rights protects the freedom of expression and that it is a requirement that limitations of the freedom of expression are strictly necessary, measure up to the pursued aim and have a clear and transparent basis in national law. The Code of Conduct does not comply with these requirements.”

Members of Parliament, Danish People’s Party (2017), ‘Motion for a bill repealing the EU’s Code of Conduct countering illegal hate speech online’, 29 November 2017

Not all Charter-related statements in parliaments are necessarily restricted to the national territory. In **Portugal**, the Charter was referred to in a debate on amendments to the Hungarian Act on National Higher Education, which especially caused concern regarding its effects on Central European University in Budapest. The law was criticised in the parliamentary debate for violating Article 13 (freedom of the arts and sciences) of the Charter, which provides for freedom of academic and scientific research.³⁰ The Charter was also referred to in the context of the **United Kingdom’s** withdrawal from the EU, during a debate concerning the European Union (Withdrawal) Bill. A Member of Parliament stressed that the envisaged bill did not allow the rights enshrined in the Charter to be retained in British law, and called for an extensive discussion of the topic.³¹

“The hon. and learned Lady is ably illustrating why we need a debate about this. Despite the fact that the EU charter of fundamental rights will not be part of domestic law, she thinks that those rights will, nevertheless, still be protected. Let us have a debate about how we are going to do that. That is my point. On the face of the Bill, it looks like these rights will be lost.”

United Kingdom, UK Parliament, House of Commons (2017), ‘Emergency debate (Standing Order No. 24) – Volume 627’, 17 July 2017

A similar concern was raised during a debate in the **Irish** Parliament on the Good Friday Agreement in relation to Brexit. In response to a question about how equivalent human rights protection in Ireland and Northern Ireland could be ensured, Deputy Charles Flanagan referred to the Charter, underlining that “the Charter provides an important and effective common reference on rights across the island of Ireland, as it does across the EU as a whole. [...] The British Government expressly indicated that the provisions of the EU Charter of Fundamental Rights in Northern Ireland will not be applied as part of British law after the UK leaves the EU. This may require that a consideration may be given to alternative means of ensuring the coherence of rights frameworks across the island of Ireland.”³²

2.2.2. Legislative processes

A considerable part of national legislation is directly or indirectly influenced by EU law and is thus likely to fall within the scope of EU law. It is therefore advisable to check such legislation for potential effects on rights enshrined in the Charter. Fundamental rights considerations can be raised during the legislative process in different ways, including in impact assessments or when a bill comes under legal scrutiny. An impact assessment is an exercise evaluating potential impacts of upcoming legislation. It typically happens when a bill has not yet been fully defined, so that various legislative options can be compared. Member States have procedures that examine the potential impact of different aspects of legislative proposals. While these assessments predominantly focus on economic, environmental and social impacts of bills, many also consider effects on fundamental rights. As the exercise focuses on potential effects rather than on compatibility with higher ranking legal norms, the exercise is not necessarily legal in nature but employs social science, natural science, statistical and other methods.

Another avenue is for legislating bodies – units in the government or the parliament – or independent expert bodies to subject legislation to legal scrutiny. Contrary to impact assessments, which do not necessarily constitute a legal exercise, the legal scrutiny of a bill is a legal assessment based on the specific wording of a final bill, examining the

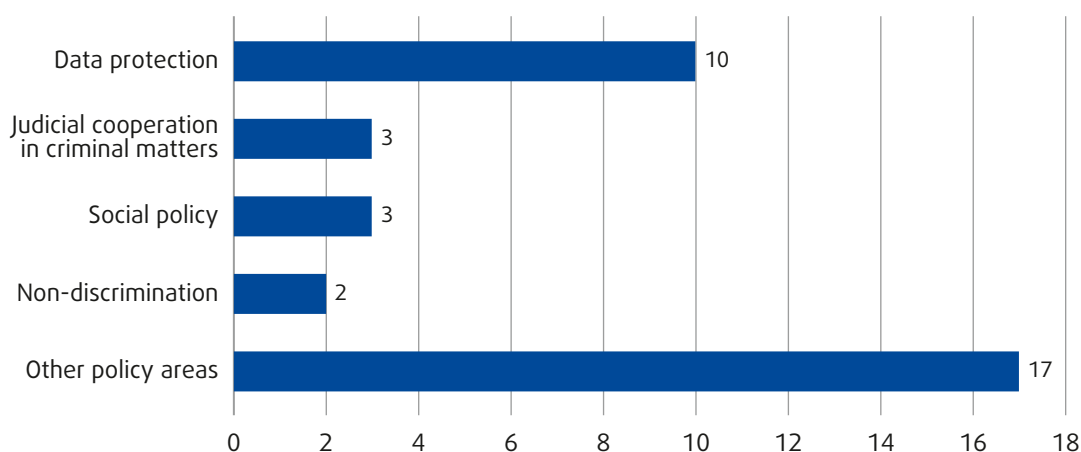
draft legislation’s compatibility with constitutional, supranational and international law. Since some national systems do not neatly differentiate between impact assessments and legal scrutiny, this section analyses both procedures together.

Looking at the 35 examples of impact assessments and legal scrutiny reported in 2017, it appears that the areas of data protection and judicial cooperation in criminal matters are most prone to raising Charter concerns – as was the case, for instance, in **Germany**,³³ **Portugal**³⁴ and **Romania**³⁵ (Figure 2.7).

Many of the references were general and only briefly mentioned the Charter without going into further detail – for example, in **Greece**³⁶ and **Poland**.³⁷ Others, however, were more explicit.

Latvia, for instance, amended its National Security Law in response to security concerns relating to radicalisation and extremism in Europe. The amendment introduces the right of the Minister of the Interior to issue a decision prohibiting an individual from leaving the country if there is sufficient ground to believe that he or she intends to engage in terrorist activities or join armed conflicts abroad. The legislative amendment was assessed to ensure its compliance with Article 45 of the Charter (freedom of movement), with the review pointing out that freedom of movement can be subject to certain restrictions imposed by law if the public interest of a democratic society prevails in the specific context.³⁸

Figure 2.7: Number of impact assessments and legal assessments referring to the Charter in 2017, by policy area



Notes: Based on 35 impact assessments and legal assessments (legal scrutiny) analysed by FRA. These took place in 18 EU Member States in 2017. Up to three examples were reported per Member State; none were reported for Cyprus, Estonia, Hungary, Lithuania, Malta, Romania, Slovakia, Slovenia, Spain and the United Kingdom. The category ‘Other policy areas’ includes policy areas that were referred to in only one assessment analysed. The categories used in the graph are based on the subject matters used by EUR-Lex.

Source: FRA, 2017

An assessment in **Denmark** provides an example in the area of data protection. The Ministry of Justice issued a report to ensure the correct implementation of the General Data Protection Regulation. The regulation formed the basis for the government's proposal for the Danish Act on Data Protection. The report emphasised Article 6 (right to liberty and security), Article 8 (protection of personal data) and Article 28 (right of collective bargaining and action) of the Charter.³⁹

Impact assessments and legal scrutiny often refer to the Charter alongside other international legal instruments, making it difficult to assess the relevance of the Charter itself. For instance, in **Belgium**, the Council of State stressed the need to find the right balance between animal rights and freedom of religion in the context of the implementation of Council Regulation 1099/2009 on the protection of animals at the time of killing and prohibiting ritual slaughter without stunning. The Council of State concluded in its impact assessment that the legislative proposal should be revised to include necessary adjustments ensuring respect for freedom of religion as laid down in, among others, Article 10 (freedom of thought, conscience and religion) of the Charter. The Walloon Parliament took this assessment into consideration by adding that it must be possible to purchase meat coming from a Member State that authorises ritual slaughter without prior stunning.⁴⁰

In **Belgium**, the Federal Migration Centre (Myria) concluded that Bills 2549/001 and 2548/001 of 22 June 2017 modifying the law of 15 December 1980 on removal and detention were not in line with Article 27 of the Dublin III Regulation (Remedies). Considering the latter in combination with Article 47 (right to an effective remedy and to a fair trial) of the Charter, Myria called for an effective remedy to have a suspensive effect on an asylum seeker's transfer where such transfer carried a serious risk of mistreatment. The legislature ultimately did not take this concern into account.⁴¹

2.2.3. National legislation

While the Charter does play somewhat of a role during the legislative process, the texts of adopted national legislation rarely mentions it. However, as the past five years have shown, some examples can be identified. The data collected from 2017 contain 12 examples of explicit references to the Charter in the legislation of seven EU Member States, covering a wide range of thematic areas. The references range from rather symbolic references in a law's preamble to references in operational provisions.

In Article 15 of the law incorporating Directive 2014/92/EU related to payment accounts, **Greece** refers to Article 21 (non-discrimination) of the Charter. The latter serves as a point of reference for the prohibited grounds of discrimination that credit institutions must be aware of when persons legally residing in the EU want to open or access a payment account in Greece.⁴² In **Germany**, paragraph 28 (2) No. 4 of the Federal Criminal Police Office Law, which comes into force on 25 May 2018, clarifies that the transmission of data to Member States of the EU and non-EU countries is precluded in cases where it would amount to a violation of the principles contained in the Charter.⁴³ In **Belgium**, a law on the execution of a European investigation order refers to the Charter as a possible ground for refusal to follow such an order in cases where the latter is incompatible with the rights enshrined in the Charter.⁴⁴

In some cases where the law itself did not mention the Charter, explanatory memoranda to bills mentioning it were reported, instead. An explanatory memorandum for a proposed bill regulating integrated prevention and protection services for people with Down syndrome in **Romania** emphasises Article 26 (integration of persons with disabilities) of the Charter, pointing out that Member States have to develop mechanisms that ensure the full integration of persons with disabilities and their independent living.⁴⁵

FRA opinions

According to the case law of the Court of Justice of the European Union (CJEU), the EU Charter of Fundamental Rights is binding on EU Member States when they act within the scope of EU law. The EU legislature affects, directly or indirectly, the lives of people living in the EU across almost all policy areas. In light of this, the EU Charter of Fundamental Rights should form a relevant standard when judges or civil servants in the Member States deliver on their day-to-day tasks. However, as in recent years (2012–2016), FRA's evidence suggests that judiciaries and administrations make only rather limited use of the Charter at national level. It appears that hardly any policies aim to promote the Charter although Member States are obliged not only to respect the rights covered by the Charter, but also to "promote the application thereof in accordance with their respective powers" (Article 51 of the Charter). Where the Charter is referred to in the legislative process or by the judiciary, its use often remains superficial.

FRA opinion 2.1

The EU and its Member States should encourage greater information exchange on experiences with and approaches to referencing and using the Charter – between judges, bar associations and administrations within the Member States, but also across national borders. In encouraging this information exchange, EU Member States should make best use of existing funding opportunities, such as those under the Justice programme.

EU Member States should promote awareness of the Charter rights and ensure that targeted training modules are offered for national judges and other legal practitioners.

According to Article 51 (field of application) of the EU Charter of Fundamental Rights, all national legislation implementing EU law has to conform to the Charter. As in previous years, the Charter's role in legislative processes at national level remained limited in 2017: the Charter is not a standard that is explicitly and regularly applied during procedures scrutinising the legality or assessing the impact of upcoming legislation – whereas national human rights instruments are systematically included in such procedures. Moreover, just as in previous years, many decisions by national courts that used the Charter did so without articulating a reasoned argument about why the Charter applied in the specific circumstances of the case.

FRA opinion 2.2

National courts, as well as governments and/or parliaments, could consider a more consistent 'Article 51 (field of application) screening' to assess at an early stage whether or not a judicial case or legislative file raises questions under the EU Charter of Fundamental Rights. The development of standardised handbooks on practical steps to check the Charter's applicability – so far the case only in very few EU Member States – could provide legal practitioners with a tool to assess the Charter's relevance in a particular case or legislative proposal. The FRA Handbook on the applicability of the Charter could serve as inspiration in this regard.



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