



TEN YEARS ON: UNLOCKING THE CHARTER'S FULL POTENTIAL

FOCUS

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1

WHY THE CHARTER MATTERS AT NATIONAL AND LOCAL LEVELS



“The Charter is a great achievement. With the Charter, we agreed on a set of shared values and fundamental rights that serve as a compass to guide our actions. The Charter is a symbol of our shared European identity, the knowledge that we all belong to a community of values where fundamental rights are respected; where democracy and the rule of law prevail.”

Věra Jourová, Vice-President for Values and Transparency, European Commission, **speech** at Charter-anniversary conference ‘*Making the EU Charter a reality for all*’, organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

The EU Charter of Fundamental Rights provides persons living in the EU with specific rights. The Charter is the EU’s bill of rights. It binds EU institutions in all contexts. Member States are bound to respect the Charter only when they are “implementing Union law” (Article 51 of the Charter).¹ However, since EU legislation directly or indirectly influences much law- and policymaking at national and local levels, the Charter is a relevant tool for national judges, lawmakers and administrators in a wide array of contexts.

The Charter entered into force on 1 December 2009. It has revamped the fundamental rights culture within the EU institutions and increased the human rights momentum across the EU (see Box on ‘The EU and the Charter’). In contrast, Member States use the Charter far less. The reasons for this are manifold. **Chapter 3** analyses them.

Although it has been in force for a decade, over half of the respondents in a Eurobarometer survey had never heard of the Charter, let alone its relevance. In 2019, a large majority of the population (72 %) did not feel well informed about the Charter. Six in 10 (60 %) wanted more information about its contents.² More worryingly, exchanges with practitioners and consultations carried out for this focus reveal that the Charter’s added value appears to remain unclear to many legal professionals. These include lawyers, judges and representatives of national human rights institutions (NHRIs) and civil society organisations (CSOs) specialised in human rights.

This is a challenge, as the Charter, according to the European Commission, “is most effective, with a real impact on people’s lives, when the entire enforcement chain applies it.”³ The implementation of EU law is decentralised within the EU legal system. It heavily depends on the Member States, since, according to the EU treaties, they “shall take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”.⁴

National legal systems tend to put a considerable part of the burden of implementing EU law on regional and local authorities.⁵ There is thus a need for local and regional administrations to be well aware of the Charter and its implications. Already the official explanations of the Charter underline that the Charter “applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law”.⁶ Thus, local and regional administrations also need to take responsibility for implementing the Charter.

The EU and the Charter

This focus looks at the use of the Charter at national level, but the Charter equally addresses the EU itself. In fact, unlike the Member States, the Charter always and in all contexts binds the EU institutions, bodies, offices and agencies, even when they are acting outside the EU legal framework.*

In 2010, the European Commission presented a *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* (COM(2010) 573). Ten years later, after the Lisbon treaty came into force, all EU institutions took steps to reduce the risk that any EU legislation would have a negative impact on rights that the Charter guaranteed.

In parallel, the Court of Justice of the European Union (CJEU) developed a prominent fundamental rights profile. This became visible to a wide audience when in 2014 it struck down EU legislation, the EU Data Retention Directive, because some of its provisions violated the Charter.** Cases in which the CJEU refers to the Charter have increased dramatically – from 27 in 2010 to 371 in 2019.*** This shows that the Charter became a regularly used judicial standard. Through its increasing use before the EU court, it is also of increasing relevance to national courts.

The EU legislature also strengthened the protection of fundamental rights in EU legislation. The Victims’ Rights Directive, the Directive on combating the sexual abuse and sexual exploitation of children and child pornography, and the very recent Whistle-blower Directive are all examples. EU policy also more often referred explicitly to fundamental rights.

Examples include the EU Framework for National Roma Integration Strategies up to 2020 or the 2016 Code of conduct on countering hate speech online.

Moreover, a member of the European Commission was given explicit and specific responsibility for monitoring the application of the Charter. In the current Commission, Vice-President Věra Jourová has this task and reports annually on the Charter’s application. The Council of the EU’s Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons (FREMP) became permanent in 2009, and the 2019 Council conclusions on the Charter committed FREMP to holding an annual dialogue on the Charter. The Council also adopted ‘**Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council preparatory bodies**’.

More is to come. Internally, the Commission announced that it would revise its Charter strategy in 2020. Externally, an element that is still missing is the accession of the EU to the Council of Europe’s European Convention on Human Rights, which would submit the EU to external human rights scrutiny.

* CJEU, *Joined cases C-8/15 to C-10/15P, Ledra Advertising Ltd and Others v. European Commission and European Central Bank (ECB)*, 20 September 2016, para. 67.

** CJEU, *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others*, 8 April 2014.

*** According to the data provided by the CJEU to FRA, this figure includes references by the Court (123 judgments and 53 orders) and the General Court (155 judgments and 40 orders).

The EU's Committee of the Regions highlighted already in 2014 that EU values are best "upheld from the grassroots". It noted that "this is why it is important to strengthen the awareness and potential of [local and regional authorities] and civil society for preserving the rule of law and fundamental rights".⁷ Strengthening the contributions of local and regional actors to protecting rights in a joined up manner can maximise protection.⁸ Delivering rights at the local level will help "to close the gap between the fundamental rights framework in principle and fundamental rights outcomes in practice".⁹ Indeed, sometimes the Charter is referred to at local level. The city of Madrid's Human Rights Action Plan (2017-2019) is an example.¹⁰ Given that local and regional authorities deliver services related to many areas that directly affect the enjoyment of human rights by individuals, the Charter is also of major relevance for the local level.¹¹ Shared responsibilities in this field require close cooperation and coordination among authorities at national, regional and local level.

Therefore, this focus looks at how the Charter is used at national and local levels. It assesses its added value (**Chapter 2**) and examines current hindrances to fully exploring its potential (**Chapter 3**). The focus concludes with opinions on how to improve its use and application by law- and policymakers, judges and lawyers, as well as civil society actors across the EU.

FRA ACTIVITY

Providing assistance and expertise to EU Presidencies

In recent years, FRA has helped EU Presidencies apply the Charter. For example, it has organised informational events for civil servants of Member States' representations in Brussels in cooperation with the Legal Service of the Council of the EU, and large-scale training events for civil servants of all ministries in the capitals.

Under the Austrian Presidency, FREMP dedicated its first informal meeting to the implementation of the Charter. The agency provided input. It similarly did so at the second informal FREMP meeting under the Finnish Presidency. That meeting was dedicated to the fundamental rights dimension of hybrid threats – such as the manipulation of information, the targeting of logistical weakness of energy suppliers,

blackmailing with biotechnological threats, undermining democratic institutions, etc.

All EU Presidencies have used FRA data when drafting the annual Council conclusions on the Charter. In the 2019 conclusions, the Council "welcomes the Charter-specific work of the Agency". It also encourages FRA to "continue developing tools and training, including for legal professionals, and supporting Member States and EU institutions, bodies and agencies in the implementation of the Charter and in promoting a culture of compliance with fundamental rights across the Union".*

* *Council of the European Union, Conclusions on the Charter of Fundamental Rights after 10 years: State of play and future work adopted on 7.10.2019, para. 19.*

2

THE CHARTER'S ADDED VALUE AND ITS USE AT NATIONAL AND LOCAL LEVELS

The Charter is a new, strong human rights instrument. Part of EU primary law, it has “the same legal value as the [EU] Treaties”.¹² It enjoys wide and solid legitimacy, as it was drafted by a multipartite European Convention composed of 62 members, about two thirds of whom were members of the European and national parliaments. The approach was more open and transparent than the classical model of treaty change through intergovernmental conferences.¹³ The Charter “constitutes the expression, at the highest level, of a democratically established political consensus of what must today be considered as the catalogue of [the EU] fundamental rights guarantees”.¹⁴ It contributes to the overall promotion of human rights for at least four reasons:

- **It is supranational.** As a source of supranational, EU, law, the Charter has a more direct and stronger effect at national level than international human rights law. The principle of primacy means that national law may not be applied in the given case or context if it is not fully consistent with the Charter. National or local judges and civil servants in some sense become EU judges or EU civil servants when acting within the ever-increasing scope of EU law. They have to make sure that national law does not violate the application of the Charter.
- **It increases the visibility of fundamental rights.** Compared with the common principles of EU law, gradually derived since the 1960s from CJEU decisions, the Charter has the advantage of being a written catalogue of fundamental rights. That increases their visibility and accessibility. This can inspire legal practitioners at national level, especially in respect of rights that their national constitutions do not guarantee by explicit provisions.
- **Its wording is modern and more comprehensive than national and international law.** Given that the Charter is a young instrument, it took new developments into account. Certain Charter rights reflect this – for example, the right to consumer protection (Article 38) or the right to conduct a business (Article 16). The Charter combines civil and political rights with social and economic rights in a single legally binding text, which goes beyond the explicit wording of many of the Member States’ constitutions. National constitutional or international law already explicitly reflects some, but not all, of the obligations flowing from the Charter
- **It is EU-specific.** As the EU’s bill of rights, the Charter includes many rights that are specific to the EU. As such, they would not be included in national or international law. Examples include the right to petition the European Parliament (Article 44), the right to access EU documents (Article 42), the right to refer cases of maladministration to the European Ombudsman (Article 43) and the right to freedom of movement and residence (Article 45).

Against this background, the Charter has a role to play in national courts (Section 2.1), when they are deciding if national legislation is in conformity with constitutional law (Section 2.2) or interpreting national and EU law (Section 2.3); in national law- and policymaking (Section 2.4); and even in relationships between private parties (Section 2.5).

The cases and examples presented are taken from 2019. For earlier examples, see the chapters dedicated to the Charter in previous editions of FRA’s annual **Fundamental Rights Report**.

2.1 THE CHARTER AND THE ROLE OF NATIONAL COURTS

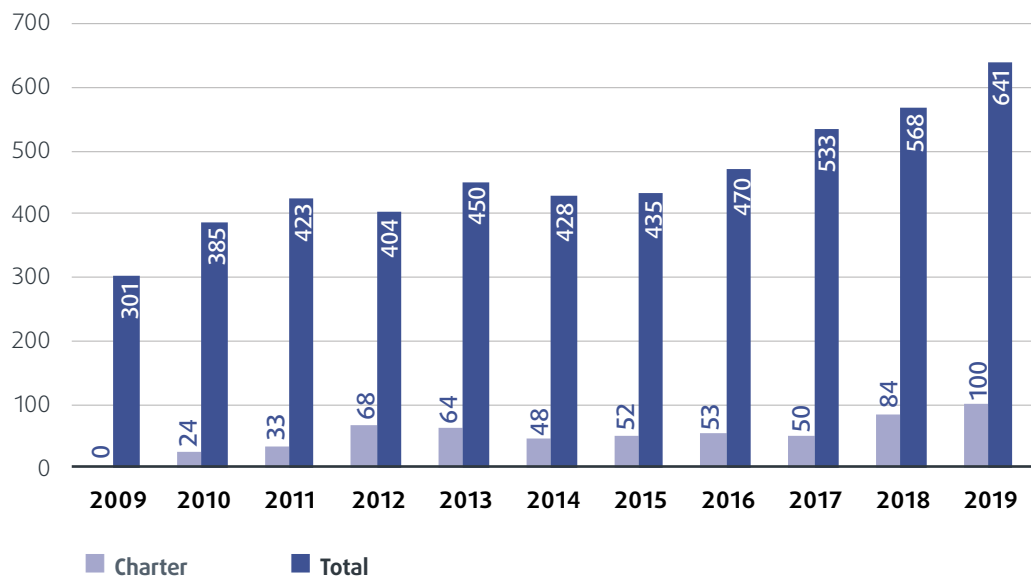
National courts increasingly use the Charter as a relevant legal source, according to data and evidence that FRA has collected over recent years (Figure 1). References to the Charter in national courts’ decisions are growing more frequent and less superficial.

In addition, national courts use the Charter when asking the CJEU for interpretation. Between 2009 and 2019, national courts sent the CJEU 5,038 requests for preliminary rulings. Of them, 576 (over 11 %) contained questions related to the Charter. This percentage has remained rather stable over the last decade.

The CJEU is deeming inadmissible fewer and fewer Charter-related requests sent to it for preliminary rulings.¹⁵ Among others, this signals a clear learning curve among national judges when it comes to determining whether or not the Charter is applicable in a given case. They are becoming increasingly familiar with the scope of the Charter. A more pronounced use of the Charter in the judiciary is also likely to influence the other two branches of governance, the administration and the legislature.

FIGURE 1: USE OF CHARTER IN REQUESTS FOR PRELIMINARY RULINGS SENT BY NATIONAL COURTS TO CJEU

Note: The percentages of requests for preliminary rulings that mention the Charter range from 6 % (2010) to 17 % (2012). On average, it was 12 % in 2010-2019.



Source: Data provided to FRA by the CJEU, 2020

National courts do not necessarily refer a case to the CJEU or a national higher court before applying the Charter. In fact, EU law requires all national judges to act as EU judges themselves. The national court, in collaboration with the Court of Justice, “fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed”.¹⁶ As the Regional Administrative Court in Wrocław in **Poland** put it: “The broad scope of application of the Charter [...] means that administrative courts gain the role of EU constitutional courts, examining the compliance of domestic law not only with EU law, but with fundamental rights recognised by the EU system as well.”¹⁷

Indeed, national courts frequently have to interpret national legislation or examine administrative decisions without the CJEU coming into play. For instance, in June 2019, the Constitutional Court in **Austria** found that an administrative asylum decision infringed Article 47 (2) of the Charter on fair trials.¹⁸ In **Finland**, the Supreme Court provided Charter-based advice to the government in a case concerning whether or not a person can be extradited to Turkey without the risk of violating human rights. It cited protection in the event of expulsion, as laid down in Article 19 of the Charter.¹⁹

2.2 THE CHARTER AND THE CONSTITUTIONAL REVIEW OF NATIONAL LEGISLATION

A prominent but less frequent use of the Charter before national courts is in constitutional reviews.²⁰ The Constitutional Court of **Germany** delivered a ground-breaking judgment in this regard on **6 November 2019**. For the first time it decided to use the Charter as the relevant standard for constitutional review in areas that are fully harmonised under EU law.²¹ The case concerned a manager who was interviewed in a TV show entitled ‘Dismissal: The dirty practices of employers’. The NDR broadcasting corporation aired a segment of the show and uploaded it under the same title. When one typed the complainant’s name into Google, the link to this content appeared among the top search results.

The search engine operator refused the complainant’s request to remove the site from the search results. The complainant lodged an action with the Higher Regional Court, which rejected it. She consequently submitted a constitutional complaint claiming a violation of her general personality rights and her right to informational self-determination. On the merits, the complaint was not successful. The Constitutional Court concluded that the lower court had undertaken the necessary balancing, taking into account both the protection of the complainant’s personality rights and the search engine operator’s freedom to conduct a business.

FRA ACTIVITY

What happens at national level? FRA’s regular data collection on the Charter’s use

Back in 2012, the European Commission asked Member States to report national cases that refer to the Charter. Of the 27 Member States, 15 replied. The Commission asked FRA to analyse the judgments. From 2013 onwards, the agency has been collecting Charter-related national cases decided by national high courts. This collection is done through FRANET, the agency’s multidisciplinary research network.

The analysis appears annually in a dedicated chapter of its annual fundamental rights report, which is one of the most often downloaded chapters of this report.* Alongside national case law, the chapter also deals with the use of the Charter in the legislative process (for instance examples how the Charter was used in impact assessments of bills) and parliamentary debates. It also refers to promising practices with regard to the use of the Charter at national level and relevant academic literature on the Charter.

FRA uses this evidence base in other activities, too. For instance, it has delivered an opinion on **‘Challenges and opportunities for the implementation of the Charter of Fundamental Rights’** at the request of the European Parliament.

** In the Fundamental Rights Report 2020, this focus – which is also being published as a chapter within this year’s main report – replaces the usual Charter chapter.*



“Citizens must be confident that wherever they are in the huge area without internal frontiers that is the European Union – an area of freedom, security and justice – their fundamental rights under EU law will be effectively protected. That is the role of the Charter. It acts as a ‘constitutional cement’, binding the EU legal order together in a sustainable way.”

Koen Lenaerts, President of the CJEU, interview with FRA at Charter-anniversary conference *‘Making the EU Charter a reality for all’*, organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

However, the case provided the court with an opportunity to specify its relevant standard of review in the context of EU law. Where an area is fully harmonised under EU law, the relevant standard of review derives not from German fundamental rights, but solely from EU fundamental rights.²² The **judgment** opens a new chapter, allowing the Constitutional Court to play an active role in the area of EU fundamental rights and allowing parties to raise Charter arguments before the court in Karlsruhe.²³

In a second decision rendered the same day, the Constitutional Court held that, in areas that are not fully harmonised under EU law, the national human rights form the standard of constitutional review. But at the same time it held that the national human rights should be interpreted in light of the Charter.²⁴

Constitutional courts from other Member States also occasionally use the Charter, in addition to national constitutional law, when reviewing national legislation. For instance, the Constitutional Court of **Croatia** referred to the Charter when asked to assess the constitutionality of provisions of the Public Procurement Act. The court acknowledged the Charter as a relevant standard by stressing that, since public procurement falls within the EU’s jurisdiction, “when applying the provisions governing it, either directly through EU acts or through national implementing legislation, there is an obligation to respect the fundamental rights guaranteed by the Charter”.²⁵

In **Portugal**, the Constitutional Court dealt with the procedure for special access to telecommunication and internet data by intelligence officers of the Portuguese Internal Intelligence Service and the Portuguese External Intelligence Service. While the court formally assessed the respective law against the Constitution, it also referred to the Charter, the relevant EU legislation and CJEU case law. The court stressed that it “must not fail to take into account the fundamental rights enshrined in the Charter” as well as the European Convention on Human Rights (ECHR) and “their interpretation by the competent authorities for their application, in particular the Court of Justice of the European Union and the European Court of Human Rights”.²⁶

2.3 THE CHARTER AND THE INTERPRETATION OF NATIONAL AND EUROPEAN LAW

As the cases above show, reviews of national legislation are often not done directly against the Charter but rather against EU secondary law as interpreted in light of the Charter. For instance, in **Ireland**, the High Court had to decide if the provisions of the Communications Retention of Data Act 2011 are consistent with Article 15 (1) of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, read in light of Articles 7, 8 and 52 (1) of the Charter.²⁷ Similarly, in **Slovenia**, the Supreme Court examined a provision in a national administrative act against the EU Procedures Directive as read in light of Articles 4 and 47 of the Charter.²⁸

In **Lithuania**, the Constitutional Court dealt with a case comparable to the *Coman* case, which the CJEU had decided in 2018.²⁹ It concerned whether or not same-sex marriages concluded in another Member State have to be recognised. A Belarusian citizen had married a Lithuanian citizen of the same sex in Denmark and applied for a temporary residence permit in Lithuania on the grounds of family reunification.³⁰ The Constitutional Court interpreted the Law on Legal Status of Aliens in light of the EU Free Movement Directive and thus took Articles 7 (respect for private and family life), 21 (non-discrimination) and 45 (freedom of movement) of the Charter into account.

Where national courts apply EU legislation or interpret national law in light of it, the Charter provides guidance for interpretation.

For instance, in the **Netherlands**, the Administrative Jurisdiction Division of the Council of State dealt with asylum claims in a case concerning a gay couple from Russia. The question arose whether or not the relevant EU directives require a second instance hearing of the case. Answering the Division's prejudicial questions to the CJEU, the CJEU found that neither Articles 47 nor 18 and 19 (2) of the Charter would require automatic suspensory effect for appeals against judgments delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return. The only requirement is that there must be a remedy before a judicial body. Based on this ruling by the CJEU, the Council of State confirmed that the Dutch practice conformed with EU law.³¹

In **Slovenia**, the Supreme Court clarified the time limit for lodging compensation claims under Regulation (EC) No. 889/2002 on air carrier liability in the event of accidents. It referred to Article 47 of the Charter.³²



“Many things in national legislation are unclear where we don’t know how far it should go or, you know, there are gaps in the law. [...] And we also have issues where the legislation is simply poor or inconsistent with the Charter, where we can actually also push back.”

Max Schrems, Data protection activist, interview with FRA at Charter-anniversary conference ‘*Making the EU Charter a reality for all*’, organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

FRA ACTIVITY

Charterpedia – a central hub for Charter-relevant information

Charterpedia is an online **database** of European (CJEU and ECtHR) and national case law that makes use of the Charter. It currently includes around 1,000 cases. The case law is searchable by various criteria, including Charter right and country. For every Charter right, it also outlines relevant provisions in EU Member State constitutions, as well as relevant EU legislation and international legal documents.

In addition, FRA collects **academic references** to the Charter, including in less commonly used languages, and references to the use of the Charter in **parliamentary debates**. In 2020, Charterpedia will include information on the use of the Charter in national legislative processes. FRANET, FRA’s multidisciplinary research network in all EU Member States, collects the data for Charterpedia.

2.4 THE CHARTER'S ROLE IN NATIONAL LAW- AND POLICYMAKING

National legislators and policymakers have a major responsibility when transposing EU legislation or when designing and implementing policies that give effect to EU policies. They need to ensure that national measures respect the obligations flowing from the Charter. If a national measure falls within the scope of EU law, they should assess its potential impact on rights guaranteed by the Charter, to avoid any risk of violating EU law. However, national procedural norms on impact assessments and provisions on legal scrutiny in the law-making process rarely explicitly mention the Charter as a relevant standard.³³ There are, however, exceptions, as the example of Finland shows (see Promising Practice Box).

Organisations that may use the Charter when assessing the impacts of legislative proposals include judicial or quasi-judicial bodies, parliamentary committees, legal departments in ministries or the parliaments' administration, ombudspersons, NHRIs and non-governmental organisations (NGOs). They can point to potential violations of the Charter and suggest how the legislation or policies could proactively promote the application of Charter rights in the given context.

In 2019, FRA conducted interviews with the NHRIs in the EU Member States to gather detailed information on the status of NHRIs and their work across the EU. Among other topics, it asked about how they use the Charter in their work. It emerged that they use the Charter most when advising governments.³⁴ Moreover, NGOs also use the Charter when commenting on legislative proposals.

For instance, in **Ireland**, the NGO Free Legal Advice Clinics cited the Charter at a parliamentary hearing of the Joint Oireachtas Committee on Justice and Equality. It expressed concern that draft legislation on statutory compensation for breaches of the right to a hearing within a reasonable time under Article 6 of the ECHR did not sufficiently consider Article 47 of the EU Charter of Fundamental Rights.³⁵

In **Austria**, Amnesty International used the same Charter article in a legal opinion on an act establishing the Federal Agency for Care and Support of Migrants.³⁶

In **Sweden**, a public inquiry assessed, among other things, if proposed legislation could make the public funding granted to CSOs dependent on whether or not they conform with "fundamental values of Swedish society".³⁷ The final report of the inquiry concluded that this form of conditionality cannot be considered an infringement of the right to freedom of association as formulated in Article 12 (1) of the Charter.³⁸

PROMISING PRACTICE

Memorandum on Charter's interpretation and application

In 2016, the Ministry of Justice in **Finland** drew up a memorandum on the *Interpretation and application of the EU Charter*. The memorandum was inspired by guidelines developed in the Netherlands.*

The purpose of the Finnish memorandum was to make the Charter better known among civil servants and to promote and mainstream its active use across the administration. However, since the original issuance of the memorandum in 2016, the case law of the EU courts on the Charter has developed alongside the growing awareness of the importance of EU fundamental rights.

Currently, the greatest need seems to be on more practical assistance in determining the Charter's scope of application and balancing diverse rights. The Ministry of Justice therefore updated the memorandum in 2019, to provide further assistance in dealing with the applicability of the Charter and justify limitations to the Charter.

* Note that, in 2020, the Dutch Ministry of the Interior will integrate the different Dutch guidelines into a comprehensive manual on constitutional review of draft legislation. All these instruments are available **online**.

In the **Netherlands**, the government asked the State Council to assess the feasibility of introducing the possibility, if a bank received state aid, to retrieve part of the fixed remuneration of system-relevant bank managers from three years earlier.³⁹ The State Council advised the government not to do so. It noted that such a deduction from the part of the remuneration that is not dependent on the manager's performance would conflict with the right to property, laid down in Article 17 of the Charter, and with the freedom to conduct a business, laid down in Article 16 of the Charter.

In **Lithuania**, the Department of European Law in the Ministry of Justice raised Charter-related concerns about a bill amending the law on election to the European Parliament.⁴⁰ The bill aimed to introduce a new provision stating that the same person can be elected as a member of the European Parliament no more than two times in a row. The Department of European Law stressed that the right of every European Union citizen to vote and be a candidate in the European Parliament elections is enshrined in Article 39 (1) of the Charter. According to the Department, it was not clear from the draft proposal why the proposed limitation should be considered necessary for protecting general interests recognised by the Union.

Such Charter checks at national level can make a real difference. In **Luxembourg**, the Council of State (*Conseil d'Etat*) assessed a bill amending a 2014 law on the procedure applicable to the transnational exchange of information in tax matters.⁴¹ The Council of State took the view that, to comply with Article 47 of the Charter, the judge from Luxembourg must have wider rights to review and must be able to decide on the formal validity of a request to exchange information on taxation. The bill was amended accordingly.

Another example comes from **Lithuania**. A draft law established that foreigners from countries where there was an outbreak of infectious disease would not be allowed to enter the country if they failed to prove that they had received prophylaxis for the disease.⁴² The Legal Department of the Office of the Parliament stressed that Article 45 of the Charter enshrines the right of every EU citizen to move and reside freely in the territory of the Member States. It underlined the need to consider the principle of proportionality when limiting Charter rights. That includes taking into account the nature and gravity of the disease, how infectious it is, and other factors. After the impact assessment, the bill was revised accordingly.

2.5 THE CHARTER'S DIRECT HORIZONTAL EFFECT

For many years it was open to discussion whether or not the Charter could generate legal effects between private parties (i.e. horizontally).⁴³ It was clear that the Charter can, like other EU law in general, have direct effects in the sense that it would preclude national legislation that is contrary to a Charter provision. But it was unclear if this would also apply in a dispute between two private parties.

In the 2018 *Bauer et al.* judgment, the CJEU affirmed that this is the case for some of the Charter's provisions. Building on its earlier judgment in *Egenberger* (on the effects of Article 21 of the Charter, non-discrimination),⁴⁴ the Grand Chamber judgment stated that the fact that "certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals".⁴⁵ In this light, the court recognised that the right to paid annual leave, as established in Article 31 (2) of the Charter, is horizontally applicable. Charter provisions that are both "unconditional and mandatory in nature" apply not only to the action of public authorities, but also in disputes between private parties.⁴⁶ The fact that a right is included in the Charter's Chapter IV, 'Solidarity', where most socio-economic provisions are, does as such not therefore imply that it is not horizontally applicable.

This is also of relevance to national courts. An example from **Malta** shows this. Previously the Charter had not played an important role before courts. The case concerned an evicted tenant.⁴⁷ A provisional measure to stop the eviction, after the tenant filed a constitutional case, was revoked on the day of the eviction without the tenant having the opportunity of a fair hearing. He claimed that the procedure had violated his fundamental rights protected by Article 47 (right to an effective remedy and fair trial) of the Charter. He argued that the Charter provisions have direct effect, implying that national norms conflicting with the Charter are rendered inapplicable. Moreover, he argued that the direct effect of the Charter can also lead to the recognition of rights that are not available in national law.



The court quoted extensively (in 11 pages of direct quotes) academic literature and a European Parliament study analysing the role of the Charter, including its (horizontal) direct effect. It then concluded that it "agrees with the applicant that the Charter today forms part of Maltese Law and that Maltese Courts should consider and apply it in the way they apply any other ordinary law that has direct effect".⁴⁸ The court established that this direct effect can also apply horizontally between two private parties.

2.6 THE CHARTER IN STRATEGIC LITIGATION

Civil society organisations (CSOs) and others active in the field of fundamental rights, such as NHRIs, NGOs or lawyers specialising in human rights and other human rights defenders, can use the Charter in all the different aspects of their daily work. This includes strategic litigation and advocacy, awareness raising, education, monitoring and research.⁴⁹ The Charter's supranational nature and its explicit wording make it an important tool for strategic litigation. The right to data protection, the right to consumer protection, and the right to a fair trial serve as examples.

Wherever EU law applies, arguments based on the Charter can be used before national courts. However, the degree to which third parties have access to courts depends on the respective legal system and the context. NGOs have used the Charter in *amicus curiae* submissions (opinions of the 'friend of the court') to national courts.⁵⁰ And even if the access for third parties to the CJEU is limited, the work of national human rights bodies has influenced various prominent cases that the CJEU has decided over the past few years.

For example, the Belgian Consumer Protection Association initiated the *Test Achats* case, which led in 2011 to the CJEU annulling parts of the Gender Equality Directive on Goods and Services (2004/113/EC).⁵¹ CSOs can also use the Charter in litigation. In the *Digital Rights Ireland* case, the NGO Digital Rights Ireland challenged the legality of national measures implementing the Data Retention Directive and, in the end, the CJEU annulled the directive.⁵² CSOs often provide attorneys to work on key cases. For example, in the *El Hassani* case (C-403/16), an attorney affiliated with the Helsinki Foundation for Human Rights represented the claimant.⁵³

NGOs and other bodies such as NHRIs have fewer opportunities to intervene before the CJEU than before the ECtHR. An NGO can submit written statements to the CJEU only where it is a party to national proceedings in the course of which a question has been referred for a preliminary ruling.⁵⁴ A particular situation exists in the area of data protection, where supervisory authorities can use the Charter to protect privacy rights.⁵⁵ Anyone who believes that an EU body has violated her or his data protection rights can make a complaint to the European Data Protection Supervisor.

If EU bodies violate the right to good administration (Article 41) or access to documents (Article 42), a complaint to the European Ombudsman can trigger an investigation. Moreover, any natural or legal person residing or having its registered office in a Member State has the right to address a petition to the European Parliament on a matter that comes within the EU's fields of activity and affects her, him or it directly.⁵⁶

Finally, infringement proceedings can also address violations of the Charter. Such proceedings have recently been deemed an efficient "fundamental rights tool".⁵⁷ Individuals or organisations can send complaints to the European Commission by using a specific form [available online](#). Based on such a complaint, the Commission may decide to make informal contact with the national authorities of the Member State concerned. A study has proposed collecting information, on a more systematic basis, on whether Member States comply with fundamental rights in the scope of application of EU law. "This could allow a more systematic and principled use of the powers of the Commission, as guardian of the Treaties, to file infringement proceedings, prioritising cases which raise issues related to fundamental rights."⁵⁸

FRA ACTIVITY

The Charter and strategic litigation

On 20 and 21 May 2019, the agency convened a meeting with 25 NGOs working on strategic litigation. The workshop aimed to explore the role of the Charter and strengthen strategic litigation on human rights in the EU. Participants exchanged knowledge and explored topics of shared interest, but also agreed that, so far, the Charter's potential for strategic litigation remains underused.



"European Union Law is a really powerful tool for citizens' rights. It gives judges in many countries more powers than they might have under national law to uphold those rights. It also allows citizens and NGOs to try and take their case to the Court of Justice of the European Union in Luxembourg."

Simon Cox, Barrister, interview with FRA at Charter-anniversary conference '*Making the EU Charter a reality for all*', organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

2.7 THE CHARTER'S USE IN RESEARCH, BY CIVIL SOCIETY, AND TO RAISE RIGHTS AWARENESS

NGOs, NHRIs and other relevant groups using the Charter in strategic litigation or in their other activities, such as human rights education, awareness raising or advisory functions, can benefit from academic research on the Charter. However, a lack of data often hampers research on the use of the Charter at national level.

Academic publications tend to address more general issues covering the Charter rather than its concrete use at national level. That was true in 2019: academic writing dealt with the Charter in general⁵⁹ or major aspects of the Charter, such as its scope of application⁶⁰ or its horizontal effect.⁶¹ In 2019, FRA asked the members of FRANET to identify factors that could improve tracking and evaluation of the use of the Charter at national level. Most responses favoured enhanced exchange between relevant actors (such as courts, etc) as well as more academic analysis in national languages. Some responses indicated the publication of all judgments by all courts, since judgments of local courts are often not accessible; and the establishment of fully searchable court databases.

Over the years, academic interest has extended towards the use of the Charter at national level. In 2019, academic writing analysed the use of the Charter as a yardstick for national legislation⁶² or its application by national courts.⁶³ Increasingly, studies examine more specific aspects or contexts. In 2019, various articles studied the Charter's relationship with the single market,⁶⁴ its impact on employment relationships,⁶⁵ the Charter and genome editing,⁶⁶ the Charter and the right to good administration,⁶⁷ Brexit and the Charter,⁶⁸ the Charter and digital privacy,⁶⁹ the Charter and hate speech,⁷⁰ the Charter and the right to housing,⁷¹ and the Charter's relationship with copyright law.⁷²

The reference year 2019 saw the finalisation of relevant international EU-funded research projects that had a very strong training component and aimed to bring together research and legal practitioners. The project e-learning National Active Charter Training (**eNACT**) is an example. It resulted in 16 training events, five thematic handbooks and a group of massive open online courses (MOOCs) on the **Charter and data protection**, the **application of the Charter**, **children's rights and the Charter**, **freedom of expression**, social rights and labour law, and asylum and immigration. At the same time, new projects were prepared that will also deal to a certain degree with the Charter, such as 'Trust, independence, impartiality and accountability of judges and arbitrators safeguarding the rule of law under the EU Charter' (**TRIIAL**). TRIIAL was launched at the beginning of 2020 and will lead to four transnational workshops, seven cross-border events and five national training events on the topic of independence, impartiality and accountability of legal professions.

New projects can build on ongoing projects, such as the Roadmap to European Effective Justice (**REJUS**, a judicial training project) or Fundamental Rights in Courts and Regulation (**FRICoRe**); as well as on past research and training projects, which have resulted in many relevant deliverables that legal practitioners can use. These projects include the following:

- Training for a European Area of Justice (**TrAJus**) resulted in, among other outputs, five **training manuals**, one of them specifically on the Charter (a short article-by-article commentary).
- Active Charter Training through Interaction of National Experiences (**ACTIONES**) focused on the vertical and horizontal interaction between courts. It resulted in a set of **handbooks** on how judges can interact in applying the Charter in four different thematic areas. The material provides case studies and ‘**Tips for trainers**’.
- Charterclick resulted in a **Charter tutorial** and an interactive **checklist**, both designed to help understand if the Charter applies to a given case. Both tools are now available on the European Commission’s e-justice portal.
- **Judging the Charter** resulted in a set of training events, a **manual** on the role of the Charter in asylum cases, and a **website** that brings together a large amount of Charter-related information. It includes exercises and training materials, case law and a selection of relevant EU legislation.
- Making the Charter of Fundamental Rights a Living Instrument resulted in a user-friendly **manual** on the Charter and **guidelines** for civil society on how to best use the Charter.
- The Charter **in Action** resulted in various workshops, a **best practices handbook** for Charter training sessions and a **training manual**.

Using research capacities to improve training opportunities in the area of the Charter appears key. Lack of awareness and of relevant training is one of the obstacles to fully using the potential of the Charter. It is therefore important that the results and materials from such EU-funded projects be regularly updated (databases that are not regularly maintained are not sustainable) and distributed to the relevant stakeholders to have the desired impact.

Academic research offers ideal tools to increase awareness of the Charter among legal practitioners. Article-by-article commentaries are especially important. These are well established in the German-speaking countries.⁷³ A new English-language commentary came out in 2019⁷⁴ and the second editions of a well-established English flagship commentary and a comparable French commentary will appear in 2020.⁷⁵ Such commentaries are also available in other languages such as Spanish⁷⁶ or Italian.⁷⁷ Recent examples show that academics are not only providing important expert know-how to legal practitioners but do sometimes also communicate with the wider public. This potential can also be used in the context of the Charter. Various formats can be used, ranging from briefing papers in simple language,⁷⁸ videoblogs,⁷⁹ interviews on radio and podcasts⁸⁰ to blogs dedicated to the Charter, such as the blog series **All EU-r rights**.⁸¹

In 2019, even public authorities used modern means to raise public awareness of the Charter. The Council of the EU presented a one-minute video entitled ‘**Sharing a peaceful future based on common values**’. The European Commission also launched a short video on the Charter in various languages.⁸² The European Parliament produced a more substantial **video on the genesis of the Charter**, including interviews with key players. Political groups⁸³ and individual Members of the European Parliament (MEPs)⁸⁴ used videos to raise awareness of the Charter. FRA produced a **five-minute video** that gives an overall view of the Charter’s content.

PROMISING PRACTICE

Citizens’ initiative: the Charter on the road

Citizens can also take the initiative to start public exchanges about the Charter, as the example of two artists from Germany shows. Stephan Köperl and Sylvia Winkler were curious about the Charter and wanted to know more – and they had an idea about how to engage the general public with the Charter.

In their art project ‘Galley Proof’ (*Druckfahnen*), they printed the Charter on large banners and put them into public spaces, confronting passers-by with the Charter’s full text and inviting them to propose how the text could be improved. They thus engaged citizens in discussions on how to use the Charter for a vision of a more sustainable and social European Union.

Citizens could propose changes to the Charter, which were added with red and green markers – like proof-readers edit a galley-proof before publishing. That is where the name of the project comes from. This exercise was repeated in various cities in Germany.

*More information is available on the **Galley Proof website**.*



FRA ACTIVITY

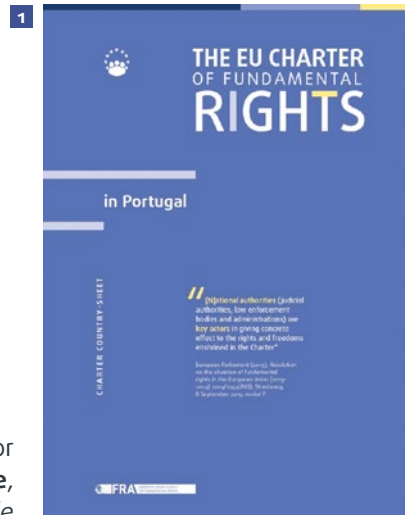
Raising awareness of the Charter: new tools

FRA has developed various tools to increase awareness of the Charter. These include:

- 1 Charter country sheets give information in the national language about the Charter, its role, and how it is used in the Member State. They are available on FRA's **website**, and can also be ordered from **the Publications Office of the EU**.
- 2 A five-minute video entitled '**Apply the Charter, deliver our Rights**'. Produced in 2019, it provides information on all six themes of the Charter. FRA presents these in separate 90-second videos (on **dignity, freedoms, equality, solidarity, citizens' rights** and **justice**) on its social-media channels.
- 3 FRA has compiled products focusing on the Charter in a "Charter box". FRA sent this, for instance, to all MEPs who serve on the fundamental rights and constitutional affairs committees. It will continue to disseminate its deliverables to relevant stakeholders.

At the national level, it would be natural for NHRIs to promote the Charter. In **France**, the *Commission consultative des droits de l'homme* (Consultative Commission on Human Rights) presented a **video** on the Charter. European Advocacy published the video '**The Charter of Fundamental Rights of the EU at 10**', which shows that CSOs also communicate about the Charter and its added value.

Connect Europe is an interesting example of a civil society project aimed at increasing awareness of the Charter. The project encourages citizens of various countries to get involved in the EU. It also increases public awareness of the values of the Union, especially the Charter. Seven NGOs organise it under the lead of New Europe (*Nyt Europa*), a Danish organisation that promotes civic engagement. They ran four events, with three more to come, in seven European cities, reflecting the themes of the Charter.⁸⁵



3

MAIN OBSTACLES TO MORE COMPREHENSIVE USE OF THE CHARTER

Despite the efforts and examples outlined above, the Charter's use at national level overall remains limited. There are hardly any national surveys or studies on the use of the Charter in the Member States. Where they have been carried out – such as in **Lithuania**, in 2019 – they confirm that countries do not use the Charter much.⁸⁶

To better understand why the Charter is often not taken into account, FRA in 2019 consulted with CSOs, NHRIs and national judicial training institutions, in cooperation with the European Judicial Training Network (EJTN). Moreover, the agency approached its own FRANET legal experts, who have for years been collecting data and analysis concerning the Charter's use at national level.

The reply of the FRANET partner in Spain is illustrative of the responses: “[T]here is a considerable under-utilisation of the Charter at the Spanish national level, due to the confluence of three persistent factors: ambiguity of the Charter, little or lack of awareness of the Charter and the absence of national policies to promote its implementation.” When asked who makes most use of the Charter, they clearly point to the judiciary as the branch of government that uses it most regularly. This confirms earlier agency findings. They did not perceive national or local governments as using the Charter.

Interviews with NHRIs and consultations with human rights CSOs confirm that the Charter is underused. Only four out of 30 NHRIs FRA interviewed in 2019 said that they are using the Charter sufficiently. All others indicated that they are not yet making full use of its potential. This is a remarkable finding given that NHRIs might be expected to be natural advocates of the Charter. A similar picture arose from the consultation with CSOs on the Fundamental Rights Platform, FRA's civil society network. About two thirds of the respondents believe that their organisation does not exploit the full potential of the Charter in its work (67 %); one out of four indicated that they use it often (26 %); and one in 10 indicated that their organisation never refers to the Charter (10 %).⁸⁷

On the main reasons for not making more use of the Charter, stakeholders say that it is unclear what value it adds to national and international legal sources, and its scope of application is limited.

“In general, the Charter is not well known in Sweden and is rarely referred to. When fundamental rights issues are discussed or processed, they are almost exclusively framed with the European Convention of Human Rights and the UN conventions. The standing of the Charter is also quite unclear. When is it applicable and when will referring to the Charter influence court rulings? If this was clearer, there is a possibility that different actors would see the point of referring to it as they do with the international conventions.”

Sweden, National FRANET expert, 2019

In the consultation with the CSOs, the Charter's scope of application came out as the third most important factor for the underuse of the Charter. Of the 153 respondents, 36 mentioned this. The consultation gave CSOs the opportunity to indicate another factor, namely "limited resources of the organisation (e.g. financial resources, expertise, etc.)". Most of the respondents (84) indicated this as relevant to the underuse of the Charter.

The Charter's language is concise and its content is attractive, but a closer look reveals complexities that make legal practitioners hesitate. It is "easy to read, but difficult to understand".⁸⁸ The following factors appear to limit the use of the Charter in legal practice:

- **Article 51 test:** In contrast to international and national human rights norms, the Charter binds Member States only when they are "implementing Union law", i.e. when they are acting within the scope of EU law (Article 51 of the Charter). Assessing whether or not a specific case falls within the scope of EU law requires good knowledge of the extensive case law of the CJEU.⁸⁹
- **Unspecified standing:** In contrast to international and national human rights norms, the legal standing of the Charter is not explicit in national law. The Charter is an act of EU primary law, so the Member States do not have to incorporate it into domestic law by specific legislation. That would draw the attention of the legal practitioners to its existence and explain its legal standing in domestic law.
- **Distinction between rights and principles:** The Charter contains not only rights but also principles. The Charter does not clarify whether a provision is a right or a principle. Principles, according to Article 52, paragraph 5, are "judicially cognisable" only when they have been implemented by "legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law". This can leave legal practitioners in doubt about the nature and legal value of many Charter provisions.
- **Lack of experience:** The Charter is a new instrument in a rather crowded field. Legal practitioners may question why they should add a third layer of rights to those in well-known national and international sources. At first sight and without specialised training, it may seem like more of the same.



3.1 EXTENDING THE CHARTER'S FIELD OF APPLICATION? A REALITY CHECK

The field of application of the Charter, as defined in Article 51, has provoked “perhaps, the most controversy”.⁹⁰ There was never any intention to oblige the Member States to respect the Charter provisions always and everywhere. The very first draft restricted the Charter’s field of application to the Member States to instances where they “transpose or apply” Union law.⁹¹ This first proposal also stressed that the Charter is not meant to create new powers and tasks for the EU.

Debates followed in the European Convention that drafted the Charter. They show that how far the Charter should bind the Member States – in addition to the EU – was a sensitive issue. It was argued that the Charter could develop a “competence absorbing effect” that could affect the Member States’ autonomy. The president of the convention aimed to rebut that concern.⁹²

The CJEU has interpreted Article 51 broadly as covering all situations where Member States are acting within the scope of EU law. However, the European Parliament expressed the view that the current interpretation of Article 51 “should be revised to meet EU citizens’ expectations in relation to their fundamental rights”.⁹³ It also welcomed statements by the former Vice-President of the European Commission, Viviane Reding, who called for the “deletion of Article 51”.⁹⁴

Legally it is doubtful if changing Article 51 would lead Member States to apply the Charter in all circumstances. Other provisions in the treaties would need to change as well, not least Article 6, paragraph 1, of the Treaty on European Union (TEU), but also key principles such as enumerated powers (Article 5 of the TEU).⁹⁵ However, enabling legal practitioners to ensure that the Charter is properly applied, when a matter does fall within its scope, would certainly improve its impact. This would require better targeting and a significant increase in the training available for legal practitioners, as well as civil servants, NHRIs and civil society.



“There’s still a lot of confusion about the application of the Charter. You can often see when this is being discussed that even judges and lawyers have difficulty sometimes sorting it out. This points to a real need for education of the judiciary and other actors in every member state and, of course, at EU level as well.”

Emily O’Reilly, EU Ombudswoman, interview with FRA at Charter-anniversary conference ‘*Making the EU Charter a reality for all*’ organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

FRA ACTIVITY

The complex scope of the Charter – providing practical guidance in all languages

In 2018, FRA published a handbook entitled *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*. It provides national law- and policymakers, legal practitioners and civil servants with practical guidance. In 2019, the handbook was downloaded 3,000 times, showing significant demand.

The first part provides a general overview. It explains how the Charter relates to national and international human and fundamental rights instruments, how to check when and how it applies, and how to apply it in practice.

The second part includes a practical checklist on the Charter’s applicability and a Charter compliance check for legal practitioners to use in their daily work. The handbook is currently available in English, Finnish, French and Swedish. Other language versions will follow in 2020. FRA will also develop an interactive online tool to help judges assess if the Charter applies to a case.

The Charter handbook is available on FRA’s [website](#).

FRA ACTIVITY

Charter workshops organised in cooperation with NHRIs

In 2019, the **Croatian** NHRI and FRA jointly organised two training sessions on the Charter. One was for civil servants, focusing on policy and the applicability of the Charter in legislative procedure. The other was for NGOs, focusing on how to use the Charter in strategic litigation and how to communicate about such cases. It addressed victims' reparation and women's rights in particular.

The **Finnish** NHRI organised similar training sessions with FRA on the use of the Charter in Finland. They were for ministries and ombudspersons' offices. The particular themes were data protection, privacy and health data.

Also in partnership with FRA, the **Polish** NHRI organised two seminars, one for lawyers and one for NGOs. They paid special attention to practical aspects of formulating preliminary references to the CJEU in cases where the Charter might be useful.

*See European Network of National Human Rights Institutions (2019), **Implementation of the EU Charter of Fundamental Rights**, p. 11*

3.2 LIMITED TRAINING ON THE CHARTER

The European Union has been enhancing national training for judges and lawyers over the past few years. In 2011, the European Commission set an ambitious target that half of all legal practitioners in the EU, around 800,000, should attend training on EU law or on the national law of another Member State by 2020. It already reached this goal in 2017. Between 2011 and 2018, more than 1 million legal practitioners took part in such training activities. The European Commission funds the training of at least 20,000 legal practitioners a year.

Nevertheless, only 7.6 % of the training activities on EU law or on the law of another Member State dealt mainly or exclusively with fundamental rights.⁹⁶ In the 2018 public consultation on the European Judicial Strategy, 67 % of respondents supported the idea of increased training on fundamental rights and the rule of law. According to the responses, the legal professions most in need of training on fundamental rights and the rule of law are judges (87 % of the responses), prosecutors (69 %) and lawyers (62 %).⁹⁷

Civil society also can benefit from such training. Very few CSOs dealing with human rights have had Charter training, FRA's consultation showed.⁹⁸

The agency also asked the EJTN's members about judicial training.⁹⁹ More than half of the 25 members, in 22 Member States, confirmed that providing Charter expertise is officially identified as an objective of the training provided in the Member States to judges and prosecutors. This applies to both initial and in-service training. However, fewer than half said that they provide regular training focused specifically on the Charter.

For initial judicial training, six respondents said such Charter training is part of a human rights module. Three respondents said it is part of an EU law module. Other legal modules also appear to teach jurisprudence on the Charter. For instance, for the initial training of judges, 13 of the 25 EJTN members said that the criminal law and procedure module also deals with such case law, and 12 said that the module on constitutional law does. Only seven, six and five members, respectively, said that the modules on private international law, on administrative law and procedure, and on asylum and migration law refer to the Charter.

However, these figures tend to be higher for in-service training. That suggests that it mainstreams the Charter rather than teaches it as a separate subject.

FRA asked EJTN members to describe any trend over the last 10 years in how important the Charter was in the judicial training of their country. Almost half of the respondents said more training was offered or there was greater awareness of the Charter.

3.3 LIMITED CHARTER POLICIES AND EXCHANGE OF CHARTER EXPERIENCES

According to Article 51 of the Charter, the EU and its Member States must both respect the Charter and “promote” the application of its provisions. That would require dedicated policies. As the agency has repeatedly stressed in recent years, these are rare. For example, of the 133 CSOs that responded to FRA’s consultation, only 12 % said they knew of any national, regional or local government policies to promote the Charter and its implementation.

The agency submitted an opinion on ‘Challenges and opportunities for the implementation of the Charter of Fundamental Rights’ in 2018.¹⁰⁰ It called for the establishment of an annual “Charter exchange” in FREMP to help improve the promotion of the Charter. Proper preparation would involve an expert seminar and/or a structured process collecting relevant data, evidence and good practice. It would use information on local, regional and national practices and experiences about implementing the Charter.

Such an exchange could help promote a common understanding of the Charter’s practical application and its needs. It would also help to generate more awareness of those few initiatives that exist.

On 12 November 2019, the European Commission, the Finnish Presidency of the Council of the EU, and FRA hosted a conference marking the 10th anniversary of the Charter becoming legally binding. The conference was about applying the Charter at national level. Participants identified ways to improve use and awareness of the Charter to make it more effective.¹⁰¹

It appears that the 10th anniversary has made policymakers more aware that they need to apply the Charter more proactively. Under the Finnish Presidency in 2019, the Council adopted conclusions that acknowledge three important ways for Member States to implement the Charter successfully:¹⁰²

- **Dedicated national policies to promote the Charter:** These would include strengthening Charter awareness and enhancing Charter training “for policy makers, civil servants and legal practitioners, as well as national human rights institutions, civil society organisations and other human rights defenders”. Moreover, the general public should have “accessible information about the rights enshrined in the Charter [...] in order to foster the citizens’ ownership of the Charter.” Finally, the Council “encourages Member States to ensure consistency with the Charter in their national procedural rules on legal scrutiny and impact assessments of national legislation that falls within the scope of EU law.”



- **Exchange of experiences between countries:** The Council acknowledges “the usefulness of exchanging good practices on the implementation of the Charter at national level and between Member States and having thematic discussions on the Charter. The Council recalls the exchange of views that took place in FREMP on this topic during the Finnish Presidency and commits itself to continuing such dialogue on an annual basis.”
- **Stronger NHRIs and CSOs:** The Council underlines “the necessity of safeguarding an enabling environment for independent national human rights institutions, equality bodies and other human rights mechanisms”. Moreover, it encourages Member States, as well as the Commission, FRA and other Union institutions, bodies and agencies, to further “enhance their cooperation with these mechanisms and to support them in their respective mandates, including the implementation and promotion of the Charter.” Finally, the Council recognises “the essential role of civil society organisations at local, regional, national and EU levels” and “recalls the importance of removing and refraining from any unnecessary, unlawful or arbitrary restrictions on the civil society space and acknowledges that transparent, sufficient and easily accessible funding is crucial for civil society organisations”.

The Council also invited the Commission to further develop the e-Justice Portal. It should create a dedicated page on the e-Justice Portal where Member States “could publish and update their good practices on awareness-raising on, and use of, the Charter”. In response, the Commission created questionnaires for Member States to share relevant initiatives with their peers, such as:

- government policies that promote the use and awareness of the Charter among the legislature, the administration, law enforcement bodies and the judiciary;
- tools that help people better understand the Charter and when it applies, such as checklists, awareness-raising and communication initiatives, online information tools/websites, handbooks, databases and training material;
- tools that other Member States or other stakeholders, such as CSOs, NHRIs, equality bodies, academia and EU bodies, have developed to help use and promote the Charter;
- cooperation between human rights defenders and national authorities, or between national authorities and academia, contributing to better awareness and use of the Charter;
- national non-governmental initiatives promoting use and awareness of the Charter.

FRA opinions

FRA OPINION 1.1

Following up on the 2019 Council conclusions on the Charter, EU Member States should consider launching initiatives and policies that aim to promote awareness and implementation of the Charter at national level. These should use the potential of all relevant national actors. The Charter-related initiatives and policies should be evidence based, building on regular assessments of the use and awareness of the Charter in each Member State. The evidence could be collected through structured multi-stakeholder dialogues on the use of the Charter at national and local levels.

The Member States could consider nominating 'Charter focal points' in their national administrations. Such focal points could facilitate coordination, information sharing and joint planning between national ministries. They could also serve as a link between the national administration and other bodies, including those with a human rights remit and civil society organisations, as well as between the EU and national levels. In addition, they could identify gaps in the system. The focal points could bundle relevant information on the use of the Charter and share these with national actors across all relevant sectors and, where appropriate, with the administrations of other Member States and the EU institutions.



Article 51 of the EU Charter of Fundamental requires the EU and Member States to promote the application of the Charter's provisions, but little has been done at national level in this regard. The Council conclusions on the Charter, adopted in October 2019, call on the Member States to increase awareness of the Charter and enhance training for policymakers, civil servants and legal practitioners, as well as national human rights institutions, civil society organisations and other human rights defenders. All of these can help fulfil the Charter's potential.

The provision of Charter-relevant information could improve. So far, there is no consolidated overview of initiatives and practical experiences in implementing the Charter at national, regional and local levels. Nor is there a single entry point in Member States' administrations for collecting information that refers to relevant experiences and links relevant bodies and individuals with each other so that they can promote promising practices and exchange experiences at national level.

The 2019 Charter conclusions of the Council encourage Member States to “ensure consistency with the Charter in their national procedural rules”. National legislators have a responsibility to ensure consistency with the Charter when they incorporate EU legislation into national law. However, national procedural norms on impact assessments and legal scrutiny – in contrast to those used by the EU – rarely mention the Charter.

Many of the civil society organisations that cooperate with FRA in its Fundamental Rights Platform call for increased funding for Charter training, and for the EU to revamp its efforts to collect information on how Member States apply the Charter. Some also call for practical implementing guidelines that can help national bodies to implement EU law in compliance with the Charter.

FRA’s research shows that National Human Rights Institutions (NHRIs) do not use the Charter’s full potential. The Council conclusions adopted in 2019 underline their “crucial role in the protection and promotion of fundamental rights and in ensuring compliance with the Charter”. This includes advising national lawmakers on upcoming law and policies in this regard. EU-level and national funding schemes can assist NHRIs and other bodies with a human rights remit in gaining expertise on the Charter.

Legal practitioners and public administration officials need specialised training to apply the Charter, a comparatively new instrument, effectively. For many legal practitioners who trained in the law many years ago, the Charter was not part of their educational curricula. The use of the Charter requires sound knowledge of the case law of the Court of Justice of the European Union (CJEU). Legal practitioners need to be familiar with it to understand when the Charter applies, whether a specific Charter provision is a right or a principle, and if it can apply between private parties (horizontal direct effect) in a given context.

Judicial training seldom focuses on fundamental rights. Moreover, how much use practitioners make of the available training varies widely from Member State to Member State. FRA’s research shows that human rights civil society organisations rarely offer or participate in training on the Charter. Fewer than half of the 25 national judicial training institutes that FRA consulted say that more Charter-relevant training was offered or more Charter awareness had been achieved over the last 10 years.



FRA OPINION 1.2

EU Member States should consider strengthening their national procedural rules on legal scrutiny and impact assessments of bills to improve consistency with the Charter. Such procedures should explicitly refer to the Charter in a similar way as to constitutional human rights and, in some cases, to the European Convention on Human Rights (ECHR).

National legislators should pay particular attention to ensuring that legislation that transposes EU law fully complies with the Charter.

The European Commission could consider more opportunities for funding of statutory human rights institutions, such as National Human Rights Institutions, equality bodies or ombuds institutions, to assist them in developing expertise on the Charter’s application at national level. This can facilitate their role in assisting Member States apply the Charter, including in law- and policymaking and when using European Structural and Investment Funds.



FRA OPINION 1.3

When revising the 2011-2020 European judicial training strategy, the EU should provide targeted and hands-on training on the application of the EU Charter of Fundamental Rights. Charter-related training opportunities should also be promoted in other EU policies and programmes to ensure that legal practitioners and civil servants, as well as experts working at national statutory human rights institutions, can also benefit from training schemes provided at EU and national levels.

EU Member States should offer their judges and other legal practitioners regular, targeted and needs-based training on the application of the Charter. National human rights institutions and their EU-level networks should be adequately resourced to train their staff on the application of the Charter.

Exchanging experiences made with the application of the Charter is crucial for two reasons. First, people still have limited experience in using the Charter. They are still pioneers. Second, many cases where the Charter plays a role have

a transnational dimension, for instance if they involve a European Arrest Warrant. This makes international exchanges of practices especially important.

FRA OPINION 1.4

The Council and the EU Member States should ensure regular updates of the newly introduced module on the e-justice platform that collects Charter-related experiences and activities. They should also raise awareness about this new tool among relevant national bodies, including National Human Rights Institutions, civil society actors, academia and professional associations. Evidence, such as that collected through the new platform, could form the basis for the new Charter exchange in the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP).

The EU institutions and the Member States should explore additional fora and opportunities for exchange to bring together judges, national parliaments and civil society across the EU. For example, national parliaments could use the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) as such a forum. Moreover, various networks could build on past experience and engage in regular Charter dialogues among the national judiciaries. These include the European Judicial Training Network (EJTN), the Judicial Network of the European Union (RJEU), and the Association of the Councils of State and Supreme Administrative Jurisdictions (ACA). Exchanges among relevant civil society organisations could be arranged through appropriate platforms. Non-judicial bodies could build on past examples and establish regular Charter exchanges through the European Network of Equality Bodies (Equinet) and the European Network of National Human Rights Institutions (ENNHRI). The results of such exchanges should be disseminated in the respective national languages to guarantee that the information reaches the relevant actors at national and local levels.

The Council has recently committed the Council Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) to conducting an annual dialogue on the Charter. That acknowledges the added value of such exchanges. The discussion would benefit from a solid evidence base.

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PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

This focus takes a closer look at the application of the Charter of Fundamental Rights of the European Union, which has been legally binding for 10 years. At EU level, it has gained visibility and sparked a new fundamental rights culture. At national level, awareness and use of the Charter are limited. Courts increasingly use the Charter, showing the impact of this modern instrument. But its use by governments and parliaments remains low. For instance, there is little indication of anyone regularly scrutinising national legislation that transposes EU law for compatibility with the Charter.

The Council of the EU has called on Member States to regularly exchange their experiences with the Charter and strengthen relevant national bodies. However, it is not easy to pinpoint exactly when the Charter applies at national level. This is a key hurdle to its fuller use. Low awareness of its added value compared with existing, long-established legal sources is another serious obstacle.

Legal practitioners who understand the Charter and can put it into practice at national and regional/local levels can help widen its use and improve its implementation. As this focus underscores, more specialised training of national actors on the use of the Charter is thus essential.



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