ON THE CRITERIA USED FOR THE INTERPRETATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: SOME SHORT REMARKS AFTER TWENTY YEARS FROM ITS PROCLAMATION

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Abstract

This article examines the case-law of the CJEU to assess the criteria used in the interpretation of the Charter of fundamental rights of the European Union. In particular, it highlights that the traditional criteria applied by the judge of Luxembourg in the interpretation of the other sources of EU law are scarcely used in relation to the Charter. In the author's view, this is because of the *sui generis* character of the Charter and the need for dynamic interpretation of the individual rights provided by it.

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1. Introduction

More than twenty years have passed since the proclamation of the Charter of fundamental rights of the EU (the Charter)[1], and more than twelve since the entry into force of the Lisbon Treaty, which resolved the issue of the Charter's legal status by attributing to it the same legal value as the Treaties. Although the Charter has progressively gained a central role in the interpretive activity of the Court of Justice of the European Union (hereinafter simply the Court or the CJEU), the hermeneutic criteria guiding the Court

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[1] The Charter was proclaimed at the Nice European Council on 7 December 2000.

when called to interpret the legal source of EU law remain largely unclear.

Article 52, dedicated to the "scope and interpretation of rights and principles", gives some indications on the interpretation of the Charter. Paragraph 3, for example, requires that in the case of correspondence of the rights of the Charter with those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), their meaning and scope shall be the same as those laid down by the Convention. Paragraph 4 states that the rights under the Charter resulting from the constitutional traditions common to the Member States shall be interpreted in harmony with those traditions. Paragraph 2 provides that the rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. However, the Article does not clarify the criteria to be used in the interpretation of the Charter's provisions.

This is an element that the Charter shares with the other sources of EU law[2]. Both the Rome Treaties and the subsequent modification treaties do not specify the criteria that should direct their interpretation and EU secondary law provides no guidance either.

The Court of Justice generally refrains from explicitly defining the hermeneutic criteria used to interpret both primary and secondary law[3] and when it has, it has done so sporadically, demonstrating a desire to avoid being bound by the interpretative scheme used[4], "on the basis of the characteristic features of Community law and the particular difficulties to which its

[2] The reasons behind the choice not to indicate the methods to interpret EU law are unknown, since the *travaux préparatoires* of the founding Treaties have not been published.

[3] International agreements of the EU are subject to the rules of interpretation codified in the Vienna Convention on the Law of Treaties Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S*. 331; 8 *I.L.M*. 679 (1969).

[4] See G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (2012): "In its case law the Court rarely expressly mentions that it has followed a particular so-called method of interpretation, such as the literal, historical or teleological (purposive) method, although it readily refers to the 'wording', 'context', 'general scheme' or indeed the precise words and provision in question, and the 'purposes, objectives and spirit' of the EU Treaties and legislation adopted under it".

interpretation gives rise"[5]. As far as we know, the CJEU has not made explicit the interpretative criteria that it uses with regard of the Charter. The choice is probably due to the peculiar nature of the Charter among the sources of EU law, since it is a *sui generis* source that has the same legal value as the Treaties, but it is, nonetheless, an external legal instrument to the Treaties which is incorporated by the reference contained in Article 6(1) TEU. At the same time, the Charter, like EU secondary law, was "adopted" by the European institutions.

The lack of clear interpretative rules of the Charter can be explained by the fact that the latter is hardly ever the object of an autonomous process of interpretation of the Court, as interpretation of its provisions typically arises only in combination with other EU norms[6].

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[5] Case 283/81 *Cilfit* ECLI:EU:C:1982:335, para. 17. In this judgment the Court stated that (para. 20) "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

[6] It has been observed that the fundamental rights enshrined in the Charter are themselves a sort of interpretative criteria in the interpretation process of all EU law: see H.C.K. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011). On the scope of application of the Charter see, in particular, G. Biagioni, *The EU Charter of Fundamental Rights: In Bad Need of Instructions for Use?*, in A.M. Mancaleoni & E. Poillot (eds.), *National Judges and the Case Law of the Court of Justice of the European Union* (2021); M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018); N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione* (2018); J. Ziller, *Articolo 51*, in R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo & O. Razzolini (eds.), *Carta dei Diritti Fondamentali dell'Unione Europea* (2017); B. Nascimbene, *Il principio di attribuzione e l'applicabilità della Carta dei diritti fondamentali: l'orientamento della giurisprudenza*, 98 *RDI* 49 (2015); A. Tizzano, *L'application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe* 1, 19 *DUE* 429 (2014); H. Kaila, *The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States*, in Vv. Aa. *Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh* (2012); S. Iglesias Sánchez, *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49 *Comm. Mkt. L. Rev.* 1565 (2012); X. Groussot, L. Pech & G.T. Petursson, *The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication*, *Eric Stein Working Paper* 1/2011 www.eracomm.eu/charter_of_fundamental_rights/kiosk/pdf/EU_Adjudication.pdf; A. Rosas & H. Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice – un premier bilan*, 16 *DUE* 1 (2011); J.

The subsequent analysis will examine whether the Court resorts to the traditional interpretative canons when the Charter of fundamental rights is at stake and, if it does, how they are applied in relation to this source of EU law.

2. Textual interpretation

It has been correctly summarised that "three broad techniques of interpretative argumentation […] – based on i. semantic or linguistic, ii. systematic and iii. purposive (i.e. teleological, functional or consequentialist) criteria – […] provide the general doctrinal framework and accepted judicial canon followed by the Court of Justice of the EU"[7]. According to the International Law Commission, which codified the rules of interpretation in the 1969 Vienna Convention on the law of treaties, these principles and maxims of interpretation "are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document"[8]. These rules are, in most cases, common to many juridical systems and are frequently applied by national judges.

As regards the textual canon of interpretation, the Court of Justice has in some cases emphasized linguistic elements of the Charter's provisions.

In *AMS* the Court was asked to rule whether Article 27 of the Charter produces horizontal effects in a dispute between private parties concerning a French law considered to be in breach of Directive 2002/14/EC[9] for excluding certain categories of

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Kokott & C. Sobotta, *The Charter of Fundamental Rights of the European Union after Lisbon*, *EUI Working Papers*, Academy of European Law, n. 6, 2010 available at http://cadmus.eui.eu/bitstream/handle/ 1814/15208/AEL_WP_2010_06.pdf; A. Egger, *EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited*, 25 *Yearbook of European Law* 515 (2006); R. Alonso García, *The General Provisions of the Charter of Fundamental Rights of the European Union*, 8 *ELJ* 492 (2002); P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 *Comm. Mkt. L. Rev.* 945 (2002)

[7] G. Beck, cit. at 4, 187, referring to J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (1993).

[8] *Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, *Yearbook of the International Law Commission* vol. II, 218 *(*1966), para. 4.

[9] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting

employees from the calculation of staff numbers. The Court concluded that Article 27 of the Charter is not a source of obligations for private parties, and textual interpretation played a central role since the Court stressed that "[i]t must also be observed that Article 27 of the Charter […] provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices" and that "[i]t is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law"[10].

The cases of *Bauer et al*.[11] focused once again on the direct effects of the Charter. It concerned a German law that restricted an employees' ability to claim compensation for days of leave not taken prior to the termination of the contract. The German law clearly contravened the Directive concerning certain aspects of the organisation of working time[12]. However, the act of secondary law could not be invoked directly as the main proceedings concerned a dispute between a worker and his employer, i.e. in a horizontal situation. The Court, distancing itself from *AMS*, made use of the text of the provision at stake and concluded that "it follows, first, from the wording of Article 31(2) of the Charter that that provision enshrines the 'right' of all workers to an 'annual period of paid

employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

[10] Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, paras 44 and 45. For some early comments on the conclusions of the Court, see F. Dorssemont, *The Right to Information and Consultation in Article 27 of the Charter of Fundamental Rights of the European Union,* 21 *Maastricht J. Eur. Comp. Law* 704 (2014); E. Dubout, *Principes, droits et devoirs dans la Charte des droits fondamentaux de l'Union européenne*, 23 *RTDeur* 409 (2014); E. Frantziou, *Case C-176/12 Association de Mediation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union*, 10 *Eur. Const. Law Rev.* 332 (2014); N. Lazzerini, *(Some of) the Fundamental Rights Granted by the Charter may be a Source of Obligations for Private Parties*, 51 *Comm. Mkt. L. Rev.* 907 (2014).

[11] Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871. For early comments on the judgment see, in particular, E. Frantziou, *(Most of) the Charter of Fundamental Rights is Horizontally Applicable*, 15 *Eur. Const. Law Rev.* 306 (2019); M.A. Panascì, *The Right to Paid Annual Leave as an EU Fundamental Social Right. Comment on Bauer et al.*, 26 *Maastricht J. Eur. and Comp. Law* 441 (2019).

[12] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

leave'"[13]. The Court thus found Article 31(2) of the Charter to be directly effective.

Similarly, in *Garlsson Real Estate e a*. the Court examined whether a national legislation which permitted administrative proceedings against a person in respect of unlawful conduct (market manipulation) for which they had already been finally convicted was contrary to the *ne bis in idem* principle enshrined in Article 50 of the Charter[14]. In its evaluation, the Court determined that "[i]t follows from the very wording of Article 50 of the Charter that it prohibits the prosecution or the imposition of criminal penalties on the same person more than once for the same offence"[15].

In *Di Puma* e *Zecca*[16] the Court applied a textual interpretation of the Charter to produce a different result. The issue at stake was whether Article 14(1) of Directive 2003/6[17], read in the light of Article 50 of the Charter, precluded national legislation denying proceedings for administrative fines of a criminal nature to be brought following a final criminal judgment of acquittal concerning acts capable of amounting to insider dealing. The Court observed that "[t]he interpretation [under which Article 14(1) of Directive 2003/6 does not preclude national legislation such as that at issue in the main proceedings], is confirmed by Article 50 of the Charter"[18] and that "[i]t must be added that, according to the wording itself of Article 50 of the Charter, the protection conferred by the ne bis in idem principle is not limited to situations in which the person concerned has been subject to a criminal conviction, but extends also to those in which that person is finally acquitted"[19].

These cases demonstrate that the Court of Justice is rarely persuaded by the mere textual element in its interpretative process. This is understandable since the interpretative activity cannot be exhausted in the mere textual interpretation[20]. This is even more

[13] *Bauer*, para. 54.
[14] Case C-537/16 *Garlsson Real Estate e a*. ECLI:EU:C:2018:193.
[15] *Ivi*, para. 36.
[16] Joined cases C-596/16 e C-597/16, *Di Puma* e *Zecca* ECLI:EU:C:2018:192.
[17] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96/16.
[18] *Garlsson Real Estate e a*., para. 37.
[19] *Di Puma* e *Zecca*, para. 39.
[20] Case C-133/00 *Bowden* ECLI:EU:C:2001:254, Opinion of AG Tizzano, para. 30 "It is often the case, however, that a literal interpretation of the text is not by itself

true for a judge when called to interpret a text which has "a very general formulation, sometimes even generic like the Charter"[21]. After all, one should recall that "[i]n the context of fundamental rights protection the role of textual interpretation in the case-law of the CJEU was virtually non-existent until very recently […] since no binding legal text containing a catalogue of fundamental rights existed in the EU context"[22].

3. Systemic and comparative interpretation

The contextual or systemic criterion is frequently used by the Court in the interpretation of both primary and secondary law. According to this interpretative canon a provision is considered in the light of the different Treaties or European acts, and of EU law as a whole, with the aim of strengthening the unity of the EU system through the coherence of the legal texts from which it derives[23]. Therefore, and depending on the case, the context of a provision of the Charter of fundamental rights consists of: the recitals in the preamble; other provisions of the text; primary law provisions; other relevant secondary legislation; and, general principles of EU law.

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always sufficient to resolve a problem of interpretation; help is then provided by the further interpretative criteria normally used by the Court. In particular, in accordance with settled case-law of the Court of Justice, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

[21] Author's free translation of A. Tizzano, *Sui rapporti tra giurisdizioni in Europa*, 13 *DUE* 21 (2019). On the linguistic vagueness of the Charter, see also G. Beck, cit. at 4, 167, stressing that: "Even the less abstract, seemingly more specific fundamental rights such as some of the solidarity rights listed in Title IV of the EU Charter […] are open-ended, imprecise and/or context-dependent; the relevant definitions in the Charter are often so vague as to raise doubts as to their core meaning, substance and justiciability in the absence of further legislation designed to provide specific protection".

[22] It has been observed that (H.C.K. Senden, cit. at 6, 54) "The EU Charter on Fundamental Rights became binding only in December 2009. As a result of this, textual interpretation might take on a more prominent role in the interpretation of fundamental rights".

[23] V. H. Kutscher, *Alcune tesi sui metodi d'interpretazione del diritto comunitario dal punto di vista d'un giudice*, in Vv. Aa., *Convegno di studio per magistrati e professori universitari, 27-28 settembre 1976* (1976).

However, when the Charter is at stake, reference to provisions of EU law *other* than those directly at stake in the case is not as common as one would expect. With regard to contextual interpretation of human rights provisions, it has been noted that "systemic interpretation makes little sense in legal systems that do not rely on codification, ... [because] judge made law cannot aim to be systematic, since there is no theoretical reference point to which interpretation could turn"[24]. In effect, until recently, fundamental rights protection within the EU legal order was mainly based upon judge-made law. However, it seems that the incorporation of the Charter into the EU system has rapidly changed the interpreter's approach such that systemic interpretation is progressively increasing.

Though sometimes conflated[25], contextual interpretation should be distinguished from comparative interpretation – i.e. the recourse to provisions of *other legal systems* in case of incompleteness of the normative framework to decide the case. While the Court of Justice, when it interprets EU law, has been reluctant to draw comparisons with concepts and provisions of other legal systems, mainly those of the Member States[26], when it

[24] N. Reich, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (2005).

[25] On the use of the comparative method in EU law, see, *ex multis*, P. Pescatore, *Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres*, 32 *Rev. Intern. Droit Comparé* 337 (1980); M. Hilf, *The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities*, in A.E.C. De Mestral (ed.), *The Limitation of Human Rights in Comparative Constitutional Law* (1986); J. Mertens De Wilmars, *Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes*, 7 *Ch. Droit Eur.* 37 (1991); C.N. Kakouris, *L'utilisation de la méthode comparative par la Cour de Justice des Communautés européennes*, in U. Drobnig & S. Van Erp (eds.), *The Use of Comparative Law by Courts* (1999); K. Lenaerts, *Le droit comparé dans le travail du juge communautaire*, 37 *Rev. Trim. Droit Eur.* 487 (2001); Id., *Interlocking Legal Orders in the European Union and Comparative Law*, 52 *Int'l & Comp. L.Q.* 873 (2003).

[26] Reference is mainly to earlier cases, when the Community was composed of six Member States: see joined cases 7/56 and 3/57 to 7/57 *Algera and Others v Assemblée commune* ECLI:EU:C:1957:7. It should be recalled, moreover, that usually the comparative activity with national law is exercised by Advocate generals. For example, in the *Leitner* case, dealing with compensation for damage arising out of a ruined holiday, AG Tizzano made a long reference to the legislation and the case-law of the Member States recalling that, in certain Member States the developments of this type of compensation were formally sanctioned by legal provision, whilst in others they were elucidated essentially

deals with human rights, it is not unusual for it to resort to provisions of international law, mainly those of human rights conventions.

Comparative interpretation of the EU Charter is required by the Charter itself when provisions refer to legal documents which constitute their sources of inspiration[27] or represent their normative framework[28].

The *Max-Planck* judgment[29], for example, concerned allowances in lieu of paid annual leave not being taken before the termination of employment. In this case, the Court interpreted Article 31(2) of the Charter and recalled that "the right to paid annual leave constitutes an essential principle of EU social law" and that this derives "both from instruments drawn up by the Member

by case-law (see case C-168/00, *Leitner*, Opinion of AG Tizzano, ECLI:EU:C:2001:476, paras 40-42). This analysis induced the AG to observe the existence of "the existence of a widespread trend, which has made varied progress in the different legal systems, towards a wider concept of liability for this type of damage and, more specifically, for damage arising out of a ruined holiday" (para. 43).

[27] On the relations between the Charter and international conventions on human rights protection see G. Gaja, *The Charter of Fundamental Rights in the Context of International Instruments for the Protection of Human Rights*, 1 *European Papers* 796 (2016): "When the explanations state that a certain provision in the Charter 'is based' or 'draws' on a certain international instrument, they implicitly consider that the right conferred by the Charter corresponds to that guaranteed by the instrument. This points to an interpretation which reflects that of the provision of the relevant international instrument. Such a conclusion is not prevented by the absence in the Charter of a provision parallel to Art. 52, para. 3, which requires to align the meaning and scope of rights protected by the Charter with the corresponding rights under the ECHR". See also A. Adinolfi, *Qualche riflessione sulla rilevanza nell'ordinamento dell'Unione europea dei trattati sui diritti umani diversi dalla CEDU*, in Vv. Aa., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci* 133 (2019).

[28] G. Gaja, cit. at 28, 796: "With regard to international instruments for the protection of human rights other than the European Convention, the Charter does not include any provision indicating that these instruments may also be relevant in the interpretation of the Charter. However, the instruments in question, when they bind all the Member States or a substantial number of them, are part of the normative context surrounding the Charter and therefore are relevant for the interpretation of the latter. The provisions of the Charter cannot be interpreted in total isolation from the meaning given to rights guaranteed by these international instruments. This is also in view of the fact that these instruments had an influence on the drafting of the Charter which is only partly reflected in the explanations".

[29] Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874.

States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter […]. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which […] sets out principles of that organisation which recital 6 of Directive 2003/88 states must be taken account of"[30].

Comparative interpretation is also required by the reference in the Charter to the level of protection guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 52(3) provides that, in case of correspondence, the meaning and scope of the rights contained in the Charter shall be the same as those laid down by the ECHR[31]. In addition, Article 53 of the Charter imposes a level of protection that

[30] Paras 69 and 70 of the judgment. See also the judgment in *Bauer* (joined cases C-569/16 and C-570/16 ECLI:EU:C:2018:871) delivered on the same day, paras 80 and 81. The Court therefore concluded that the right to paid annual leave is "both mandatory and unconditional in nature", and "not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter" (para. 85). On the case-law on paid annual leave and on the direct efficacy of the Charter see, within the Italian doctrine, M. Condinanzi, *Le direttive in materia sociale e la Carta dei diritti fondamentali dell'Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti dell'effetto diretto. Il caso della giurisprudenza "sulle ferie"*, 10 *Federalismi.it* (2019); F. Ferraro, *Vecchi e nuovi problemi in tema di efficacia diretta orizzontale della Carta*, 10 *Federalismi.it* (2019); L.S. Rossi, *La relazione fra Carta dei Diritti Fondamentali dell'Unione Europea e direttive nelle controversie orizzontali*, 10 *Federalismi.it* (2019) and S. Sciarra, *Diritti sociali fondamentali nazionali e europei. A proposito di diritto alle ferie retribuite*, 10 *Federalismi.it* (2019). On the direct efficacy of the Charter, among the most recent works, see D. Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (2018); E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (2019).

[31] The list of the rights which may be regarded as corresponding to rights in the ECHR is contained in the Explanation on Article 52 of the Charter. It shall be recalled that the Explanations relating to the Charter of Fundamental Rights shall be given "due regard" by the courts of the Union and of the Member States under Art. 6(1) TEU and Art. 52(7) of the Charter.

cannot restrict or affect that recognised by Union law, international law – including international agreements to which the Union or all the Member States are party – and by the Member States' constitutions.

4. Teleological interpretation

The teleological criterion, with its corollary the *effet utile* principle[32], is the typical interpretative canon applied by the Court of Justice to accelerate the European Union integration process[33]. It is usually enumerated as one of the three criteria used by the Court of Justice of the EU in its interpretative activity.

Many authors have expressed the need for a teleological interpretation of the Charter[34]. But the Court of Justice makes sporadic use of this criterion when fundamental rights are at stake.

The Court alluded to teleological arguments, for example, in the *Internationale Handelsgesellschaft* judgment, which preceded the entry into force of the Charter. In this case, the Court affirmed that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice" and that "[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"[35]. It has been highlighted that "[t]he objectives of the Community can

[32] Though there are authors averse to the linking of the *effet utile* principle to the teleological criterion, the major legal literature supports this assumption. See H. Kutscher, *cit*. at 24, I-40; R. Ormand, *L'utilisation particulière de la méthode d'interprétation des traités selon leur «effet utile» par la Cour de Justice des Communautés Européennes,* 1 *Rev. Trim. Droit Eur.* 625 (1976); T. Tridimas, *The Court of Justice and Judicial Activism*, 21 *Eur. Law Rev.* 208 (1996); J. Joussen, *L'interpretazione (teleologica) del diritto comunitario*, 12 *Riv. Critica Diritto Priv.* 519 (2001).

[33] But see I. Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (2017) demonstrating a minor use of the *effet utile* principle in the more recent phase of the integration process.

[34] V. J. Kühling, *Fundamental Rights*, in A. Von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law* (2006); H.-J. Blanke, *Protection of Fundamental Rights Afforded by the European Court of Justice in Luxembourg*, in H.-J. Blanke & S. Mangiameli (eds.), *Governing Europe under a Constitution* (2006).

[35] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermitte*l ECLI:EU:C:1970:114, para. 4. Emphasis added.

therefore be regarded as one of the elements that play a role in determining the scope of fundamental rights"[36].

However, the adoption of the Charter has not substantially altered the Court's attitude towards the teleological criterion for the interpretation of fundamental rights, to which the Luxembourg judge still scarcely resorts.

One of the cases in which the objectives of the Charter have been clearly mentioned is the *Parliament v. Council* case, decided on 27 June 2006. Though not at the time a binding instrument, the Court considered that "the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'"[37].

In the *CCOO* case the need to guarantee the *effet utile* of a Charter's provision was similarly stressed[38]. This case concerned the obligation of an employer to set up a system for recording the time worked each day by its members of staff, in order to make it possible to verify compliance with the working times stipulated and the obligation to provide union representatives with information on overtime worked each month. The obligation found its basis in a number of sources including, in particular, the Workers' Statute – as interpreted in the light of Article 31(2) of the Charter – and several articles of Directive 2003/88[39]. Here the Court of Justice observed that "a national law which does not provide for an obligation to have recourse to an instrument that enables the objective and reliable determination of the number of hours worked

[36] K.C.K. Senden, cit. at 6, 368.

[37] Case C-540/03 *Parliament v. Council* ECLI:EU:C:2006:429, para. 38. The cited statement was later recalled by the Court of Justice in Opinion 2/2013 ECLI:EU:C:2014:2454, para. 39 and often mentioned also by the Civil Service Tribunal (see for example case F-1/05, *Landgren v. ETF* ECLI:EU:F:2006:112, para. 71; case F-51/07, *Bui Van v. Commission* ECLI:EU:F:2008:112, para. 75). However, the objective of the Charter, though sometimes evoked by the Court, has not been concretely applied to resolve the case at issue.

[38] Case C-55/18 *CCOO* ECLI:EU:C:2019:402.

[39] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

each day and each week is not capable of guaranteeing […] the *effectiveness of the rights* conferred by Article 31(2) of the Charter and by this directive, since it deprives both employers and workers of the possibility of verifying whether those rights are complied with and is therefore liable to compromise the objective of that directive, which is to ensure better protection of the safety and health of workers". Hence it was considered that "to *ensure the effectiveness of those rights* provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured"[40].

When analysing the Court's case-law, it is evident that there are some areas in which teleological arguments are more frequently used. Among them are cases concerning the non-discrimination principle, incorporated in Article 20 of the Charter, and those relating to the application of the *ne bis in idem* principle[41].

The *Vernaza Ayovi* case represents a clear illustration of the recourse to teleological arguments in the application of the non-discrimination principle[42]. Here the Court was asked to determine whether the principle is violated by a national legislation which provides that when the wrongful disciplinary dismissal of a permanent worker in the service of a public authority, the worker must be reinstated. In contrast, a worker employed under a temporary contract (or a temporary contract of indefinite duration) performing the same duties as a permanent worker cannot be reinstated but may receive compensation.

The Court of Justice recalled that the right under Article 20 of the Charter has been applied for workers employed under a temporary contract by Clause 4(1) of the Framework Agreement on fixed-term work concluded on 18 March 1999[43]. It noted that "one of the objectives of that agreement is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination", "to improve the quality of fixed-term work by setting out minimum requirements in order to ensure the

[40] Paras 50 and 60, respectively. Emphasis added.
[41] See H.C.K. Senden, cit. at 6, 369 ff.
[42] Case C-96/17 *Vernaza Ayovi* ECLI:EU:C:2018:603.
[43] It is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43.

application of the principle of non-discrimination" and "to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers' rights which are recognised for permanent workers"[44]. Hence it was concluded that "[h]aving regard to the objectives which the Framework Agreement pursues, Clause 4 thereof must be understood as expressing a principle of EU social law which cannot be interpreted restrictively"[45].

Regarding the *ne bis in idem* principle, the *Kossowski* case is a significant example of the resort to teleological arguments[46]. This case concerned the interpretation of Articles 54 and 55 of the Convention Implementing the Schengen Agreement of 14 June 1985 (CISA)[47] and of Articles 50 and 52(1) of the Charter of Fundamental Rights.

Here the Court of Justice recalled the need to "take into account both the objective of the rules of which Article 54 of the CISA forms part and the context in which it occurs"[48]. It stated that "whilst Article 54 of the CISA aims to ensure that a person, once he has been found guilty and served his sentence, or, as the case may be, been acquitted by a final judgment in a Contracting State, may travel within the Schengen area without fear of being prosecuted in another Contracting State for the same acts, it is not intended to protect a suspect from having to submit to investigations that may be undertaken successively, in respect of the same acts, in several Contracting States"[49]. Finally, interpreting the provision in the light of Article 3(2) TEU, it concluded that "the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice"[50].

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[44] Paras 21 and 22.

[45] Para. 23.

[46] Case C-486/14 *Kossowski* ECLI:EU:C:2016:483.

[47] The Schengen *acquis* - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

[48] Para. 43 of the judgment.

[49] *Ivi*, para. 45.

[50] *Ivi*, para. 47. In the light of those considerations the Court has thus concluded that the *ne bis in idem* principle under Art. 54 of the CISA, read in the light of Art.

Arguments of a teleological nature, though rarely used directly with reference to the Charter, are far from being irrelevant when EU acts are interpreted in light of the rights enshrined in the Charter.

5. Subjective interpretation

Interpretative arguments, being of a subjective character, are almost absent in the interpretation of the Charter, even if their use is not infrequent in Advocates General's Opinions[51].

This is unsurprising considering the Court's reluctance to make use of interpretative techniques and emphasis on the original intentions of the drafters of the EU legal sources. While in more recent times the Court of Justice has progressively enhanced subjective interpretation[52], the peculiarity of the Charter within the EU legal system undoubtedly increases the interpreter's difficulties towards considerations of a subjective character.

The Charter is a source of EU primary law, but it is not the result of the will of the parties to the Treaties. As is well known, the Charter has been drafted within a Convention similar to the one that brought to the Constitutional Treaty (and then, indirectly, to the Lisbon Treaty)[53], but it was proclaimed by the three political institutions – the Parliament, the Council and the Commission – on

50 of the Charter, implies that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out.

[51] See, for example, in the context of the already cited *AMS* case, the paragraphs of the Opinion of AG Cruz Villalón where attention was paid to the distinction between "rights" and "principles", through a detailed analysis of the will of the authors of the Charter (Case 176/12 *Association de médiation sociale* ECLI:EU:C:2013:491, esp. paras 47 ff.).

[52] See G. D'Agnone, *L'interpretazione soggettiva nella giurisprudenza della Corte di giustizia dell'Unione europea* (2020).

[53] D. Castiglione, J. Schönlau, C. Longman, E. Lombardo, N. Pérez-Solórzano & M. Aziz, *Constitutional Politics in the European Union: The Convention Moment and its Aftermath* (2007).

the sidelines of the Nice European Council. It is the outcome of an inter-institutional process[54].

The final scheme which led to its inclusion in the Treaty on European Union is not unlike the one adopted in occasion of the Constitutional Treaty and of the Lisbon Treaty. However, contrary to these models, no negotiations regarding the Charter's content took place during the Lisbon intergovernmental Conference since the latter simply shared content from the product of the Charter's original Convention[55]. The consequence is that the Charter is not formally imputable to the contracting parties to the Treaties. Therefore it is extremely difficult to trace the original intentions and thus to apply a subjective interpretation of the Charter's provisions.

Nonetheless, reference to the intentions of the institutions which proclaimed the Charter is not completely absent in the case-law of the Court of Justice. This has been functional in stressing the importance of the Charter before the formal recognition of its binding legal value by Article 6(3) TEU.

For example, in some judgments of the former European Union Civil Service Tribunal concerning the Staff Regulations of officials of the European Communities, it has been recognized that "by solemnly proclaiming the Charter of Fundamental Rights of the European Union, the Parliament, the Council and the Commission necessarily intended to give it particular significance, account of which must be taken in this case in interpreting the provisions of the Staff Regulations and the Conditions of Employment"[56].

While prior to the entry into force of the Lisbon Treaty subjective arguments were occasionally used to emphasize the legal value of the Charter, recently they have been substantially set aside.

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[54] See R. Adam, *Da Colonia a Nizza: la Carta dei diritti fondamentali dell'Unione europea*, 19 *DUE* 881 (2000); D. Anderson & C.C. Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*, 8 *EUI Working Papers* 15 (2011); N. Coghlan & M. Steiert, *The Charter of Fundamental Rights of the European Union: The Travaux Préparatoires and Selected Documents* (2020).

[55] Indeed, the debate on the content of the Charter was far from absent, both during the Herzog Convention and during the D'Estaing Convention, which amended the final provisions of the Charter devoted to its interpretation. For some insights see, for example, G. Braibant, *La Charte des droits fondamentaux de l'Union européenne* (2001); E. Pagano, *Dalla Carta di Nizza alla Carta di Strasburgo dei diritti fondamentali*, 14 *Dir. Pub. Comp. Eur.* 94 (2008) and, more recently, G. Amato, *La Convenzione sul futuro dell'Europa e la Carta di Nizza*, 42 *Quad. cost.* 631 (2020).

[56] See case F-51/07, cit., para. 76 and case F-1/05, cit., para. 72.

6. Conclusions

The previous analysis demonstrates the difficulties of identifying the criteria used by the Court of Justice to interpret the Charter of fundamental rights of the European Union and the interpretative differences from the other sources of European Union law.

Mainly, this appears to be because of the peculiar nature of the Charter and of the fact that its provisions are rarely the primary object of the legal issues presented before the Court.

Moreover, the notion that for a long time the protection of fundamental rights has been guaranteed not by a written text but by principles and by the constitutional traditions common to the Member States, has meant that still today the Court is not totally at ease with the application of the traditional interpretative criteria to the Charter of fundamental rights. At the same time, that the case-law discussed in this paper, while being far from exhaustive, is relatively recent demonstrates that the Court is becoming progressively accustomed to a written text and, as a consequence, to the application of the criteria which usually guide the interpreter in its activity.

Consequently, far from affirming the autonomy of the Charter within the EU legal sources, this article has highlighted how the peculiar nature of the Charter of fundamental rights of the European Union, and the diversity of the objectives that animate it, affect its interpretation. Meanwhile, the Court of Justice has become increasingly acquainted with the application of the traditional interpretative criteria to the Charter.

The absence of a rigid and predetermined application of the canons of interpretation generally used by the Court, is conducive to a dynamic interpretation of the Charter which, being a living instrument, needs flexibility in its interpretation[57]. This serves as a contrast to the Treaties, which are the expression of attributed competences[58], and secondary law, which cannot be interpreted in

[57] In this respect it was noted that "he ECJ must refrain from rewriting secondary EU law, even if the latter is outdated or no longer fulfills the objectives it pursues. The role of the ECJ is indeed neither to anticipate nor to pre-empt policy choices that fall within the purview of the EU legislator". See K. Lenaerts, *How the ECJ Thinks: A Study on Judicial Legitimacy*, 36 *Fordham Intern. Law Journ.* 1323 (2013).

[58] Of course, as long as the Member States are part to this legal order, they are no more the "masters of the treaties".

violation of the principle of separation of powers under which political choices should be left to the European legislator.

The interpretation of the Charter requires the use of interpretative criteria which are best able to guarantee protection of the rights which the Charter enshrines.