2

EU Charter of Fundamental Rights and its use by Member States

In 2018, the Charter of Fundamental Rights of the European Union was in force as the EU's legally binding bill of rights for the ninth year. It complements national constitutions and international human rights instruments, in particular the European Convention on Human Rights (ECHR). As in previous years, the Charter's role and usage at national level remained ambivalent. National courts did use the Charter. Although many references to the Charter were superficial, various court decisions show that the Charter can add value and make a difference. Impact assessments and legislative scrutiny procedures in a number of Member States also used the Charter. This was, however, far from systematic and appeared to be the exception rather than the rule. Moreover, governmental policies aimed at promoting application of the Charter appeared to remain very rare exceptions, even though Article 51 of the Charter obliges states to proactively "promote" the application of its provisions. The Charter's tenth anniversary in 2019 provides an opportunity to inject more political momentum into unfolding the Charter's potential.

At the end of 2019, it will be 10 years since the EU was first equipped with a legally binding catalogue of fundamental rights. The prospect of the tenth anniversary of the Charter led to a flurry of reflections in academia, as publications in 2018 on various aspects of the Charter show. Academic articles dealt with the Charter in general[1] or focused on the Charter's field of application, including its impact at national level;[2] the Charter's effect in specific policy areas, such as data protection,[3] criminal law,[4] foreign policy,[5] customs,[6] the environment[7], employment,[8] migration and asylum;[9] or other specific aspects, such as its relationship with the judiciary,[10] the ECHR,[11] Brexit[12] or its role in harmonisation.[13]

As in previous years, the Charter's scope of application remained the issue that raised most questions and hence attracted most interest. Whereas the Charter's Article 51 (field of application) is very clear in binding all the institutions, bodies, offices and agencies of the Union, the Charter legally binds Member States "only when they are implementing Union law".

More importantly, also at the level of EU politics, the Charter received marked interest, as developments in the European Parliament (EP) showed. The Committee on Constitutional Affairs of the EP drafted a report on the 'Implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework' assessing the use of the Charter and formulating a set of recommendations, including the call to strengthen the integration of the Charter into the legislative and decision-making processes.[14]

FRA ACTIVITY

FRA Opinion looks at challenges and opportunities for implementation of the Charter

At the request of the EP, the agency delivered an Opinion on 'Challenges and opportunities for the implementation of the Charter of Fundamental Rights' in September 2018 (Opinion 4/2018). The first part of the Opinion addresses the use of the Charter at the level of the EU, by focusing on EU agencies. FRA sent a questionnaire to all EU agencies. It received replies from 42 agencies, which the Opinion uses to analyse the actual and potential use of the Charter. In addition, FRA carried out telephone interviews with agencies active in the field of justice and home affairs.

The second part of the Opinion deals with the use of the Charter at national level. For this purpose, the agency consulted its National Liaison Officers (NLOs) in the Member States and sent a questionnaire to the participants in the agency's Fundamental Rights Platform (FRP), which brings together over 700 civil society organisations. The third part of the opinion deals with cooperation between the EU and the national levels. It points to areas where the EU level can better assist national actors in implementing the Charter. The Opinion concludes with eight recommendations.

Opinion 4/2018 is available on FRA's website.

The approach of the Charter's tenth anniversary prompted first assessments of the Charter's role in its first decade as a legally binding instrument. The President of the Court of Justice of the European Union (CJEU) underlined in a speech at the European Court of Human Rights that the "EU's 'Bill of Rights' [...] has made a significant contribution to improving the EU system of fundamental rights protection, by giving more visibility to those rights".[15] At the same time, others stressed that, especially at national level and outside courtrooms, the Charter remains underused. An EP report on the situation of fundamental rights in the European Union in 2017 underlined that the Charter, being applicable in the Member States only when they implement EU law (Article 51 of the Charter), "is perceived as insufficient and unsatisfactory for many citizens".[16] Another EP report that is being drafted at the moment of writing states, "Despite clarifications made by the CJEU, national practices show that it is still difficult to assess whether and how the Charter applies in concrete" at the national level.[17]

> *"Since the Charter has a big Achilles heel in its article 51 (Field of application), practitioners have to face a legal instrument with vague borders."*
>
> *Respondent to anonymous survey on use of Charter carried out among participants in FRA's Fundamental Rights Platform in 2018*

Against this background, FRA published a handbook providing guidance – based on the case law of the CJEU – on when the Charter is (or is not) applicable in the context of national law- and policymaking.[18]

FRA ACTIVITY

New handbook on Charter's field of application

FRA's handbook aims to foster better understanding of the Charter among law- and policymakers, especially the limits of its field of application. The handbook argues that carrying out a detailed check of the Charter's applicability will always pay off. Even when the conclusion is that it does not apply, performing a 'Charter check' emphasises the relevance of human rights to law- and policymaking. That in itself helps strengthen awareness.

To provide hands-on guidance, the handbook also contains practical tools:

- A checklist to assess the applicability of the Charter to national law- and policymaking. It primarily focuses on national legislative and policy processes, and approaches the applicability of the Charter through a series of situations where the Charter typically applies, to provide practical guidance.
- A checklist to gain an initial understanding of whether or not a (draft) national act is in line with the Charter. It provides users with a pre-established list of questions, thereby guiding them through key elements established in the case law of the CJEU.

As the handbook is strictly based on case law, it also offers an index with all the cited judgments. Finally, an annex sets the Charter provisions in the context of provisions of the ECHR and equivalent provisions in other human rights instruments, thereby complementing the Explanations to the Charter which were adopted back in 2000 by the Presidium of the European Convention that drafted the Charter.

For more information, see FRA's website.

Given that EU law is predominantly implemented at national level, and not directly by the EU institutions themselves, national judges, parliamentarians and government officials are prime movers of the Charter. The EU system relies on them. This chapter draws on information provided by FRANET,[19] FRA's multidisciplinary research network. The experts selected up to three examples for each of the following categories: parliamentary debates, national legislation and case law. Experience shows that sometimes it is difficult in a given Member State to identify three examples of relevant Charter use under these categories. Where more examples could be found, the examples were limited to the three most relevant ones. Given the limited sample size, the analysis is qualitative. It focuses on judicial and administrative decisions that the national experts assessed as most relevant to the use of the Charter in the given Member State.

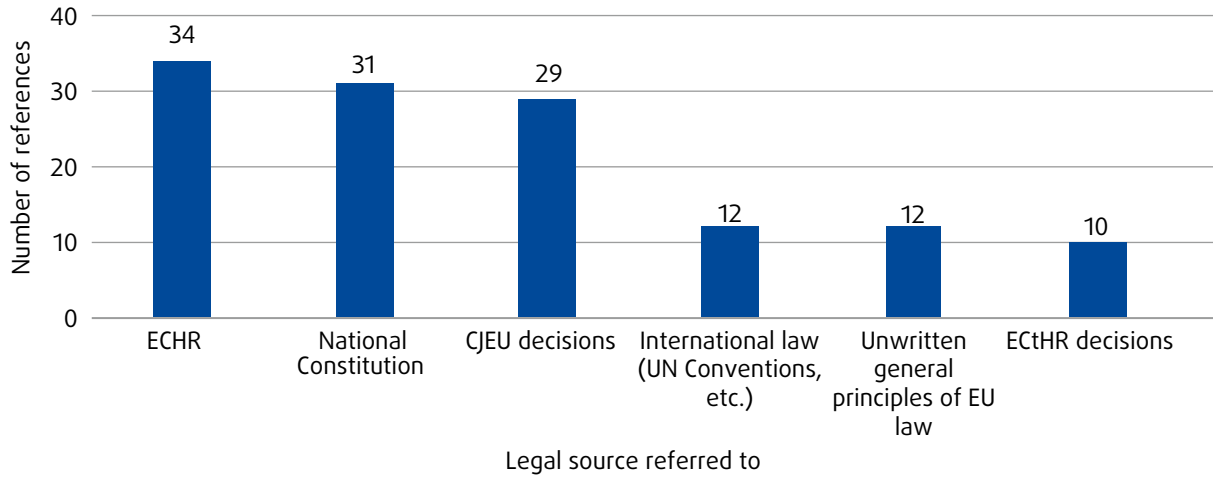
2.1. National courts' use of the Charter: a mixed picture

The following analysis largely confirms patterns identified in earlier reports. It is based on 72 court decisions (mainly from high courts) from 27 EU Member States. We considered only decisions where the judges used the Charter in their reasoning and did not merely report that the parties had referred to the Charter. A continuing pattern is, for instance, that national judges refer to the Charter alongside other legal sources. The ECHR is an especially prominent 'twin source' (see Figure 2.1). As in the previous five years, in 2018 the ECHR, national constitutional provisions and relevant CJEU case law were the sources national judges used most frequently in conjunction with the Charter in the court decisions that FRA analysed.

Of the Charter-relevant court decisions reported to FRA in 2018, 22 (around a third of all cases analysed) dealt with border checks, asylum and migration (Figure 2.2). This is in line with the previous four years, when the area of freedom, security and justice (of which these policy areas are part) had always been among the areas to which most of the reported Charter cases related.

The right to an effective remedy and to a fair trial (Article 47) remained the Charter provision most often referred to in the sample of national court decisions that FRA analysed (Figure 2.3). Indeed, in the last six years (2013–2018), this provision was the most frequently used Charter provision among the cases reported to the agency. This reflects the fact that the provision is cross-cutting and relevant in all policy contexts. The right to respect for private and family life (Article 7) and the right to the protection of personal data (Article 8) were also often referred to in recent years. The right to good administration (Article 41) – which actually addresses only institutions, bodies, offices and agencies of the EU – also featured prominently throughout the last six years in the national court decisions reported to the agency.

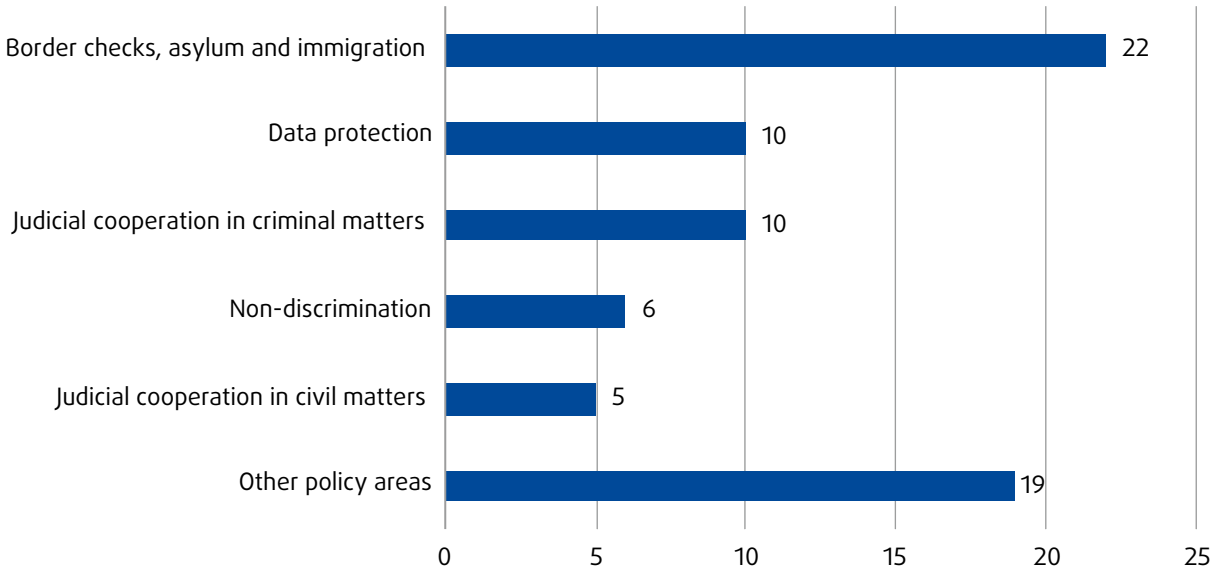
Figure 2.1: Number of references to other legal sources alongside the Charter in analysed court decisions, by legal source referred to



Notes: *Based on 72 court decisions that FRA analysed. These were issued in 27 Member States in 2018. Up to three decisions were reported per Member State. No court decisions were reported for Malta. One court decision can refer to more than one legal source.*

Source: *FRA, 2018*

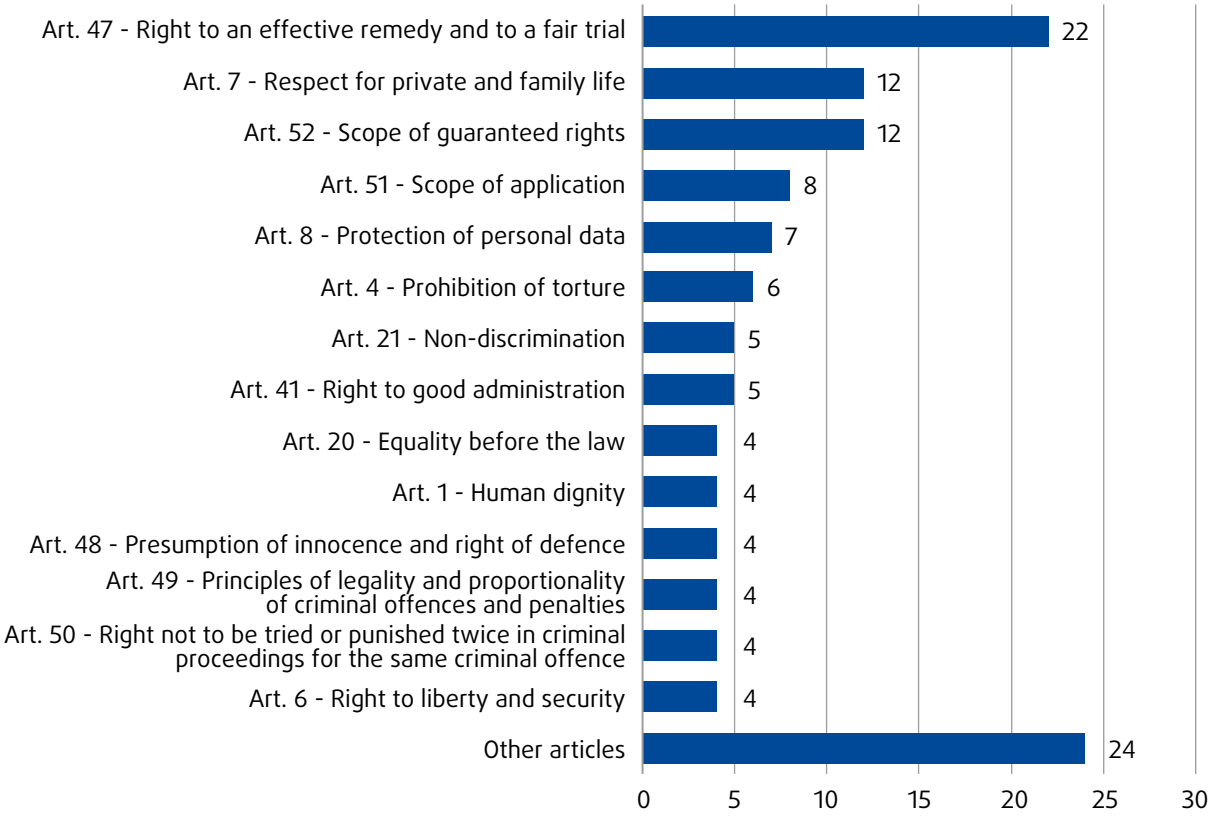
Figure 2.2: Main policy areas addressed in court decisions analysed



Notes: *Based on 72 court decisions that FRA analysed. These were issued in 27 Member States in 2018. Up to three decisions were reported per Member State. No court decisions were reported for Malta. For every case, only the predominant policy area was taken into account. The category 'Other policy areas' includes policy areas that fewer than three court decisions referred to. The categories used in the graph are based on the subject-matter categories used by EUR-Lex.*

Source: *FRA, 2018*

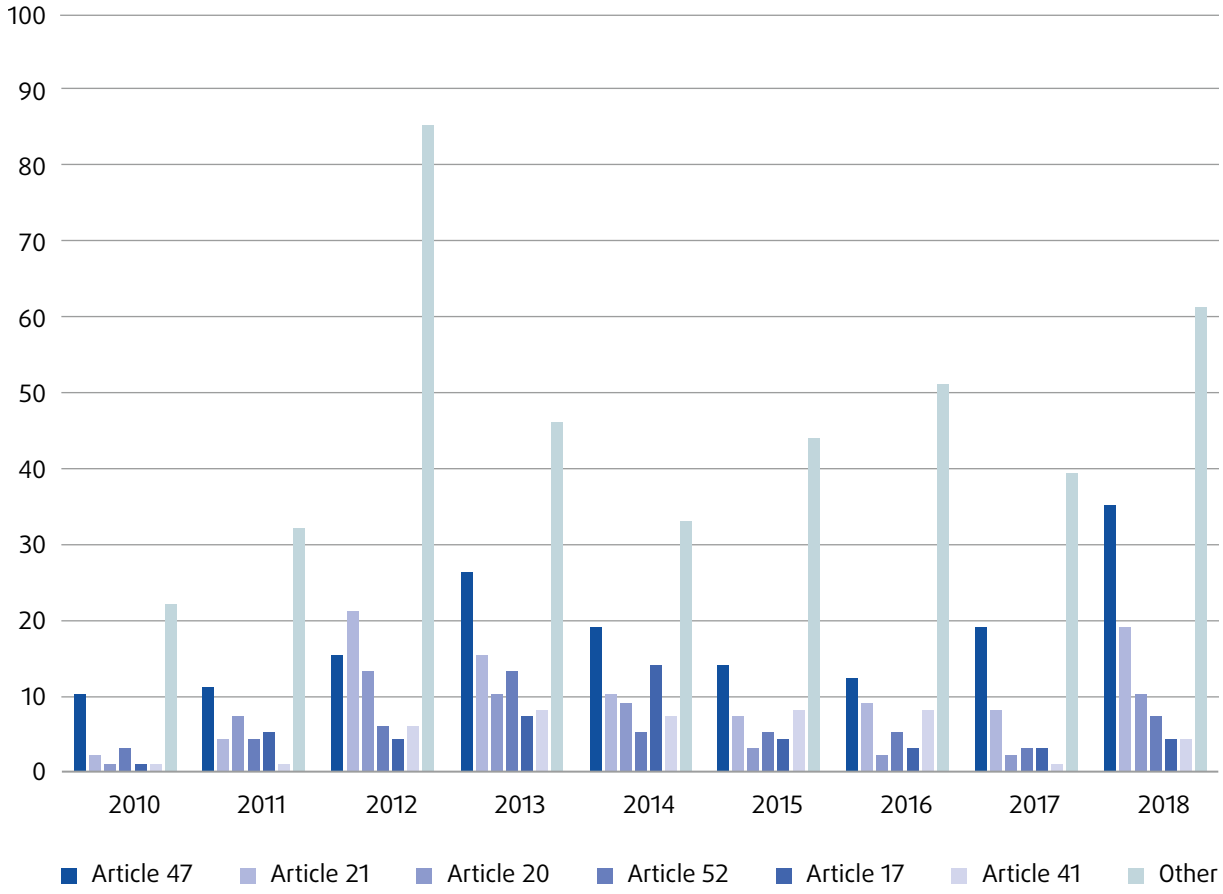
Figure 2.3: Number of references to Charter articles in the 2018 court decisions analysed, by article



Notes: *Based on 72 court decisions that FRA analysed. These were issued in 27 Member States in 2018. Up to three decisions were reported per Member State. No court decisions were reported for Malta. The category 'Other articles' includes articles that fewer than four court decisions analysed referred to. One court decision can refer to more than one article.*

Source: *FRA, 2018*

Figure 2.4: Most prominent articles mentioned in preliminary ruling requests analysed, 2010-2018



Source: FRA, 2019 [based on CJEU data on all preliminary ruling requests mentioning the Charter between 2010-2018; statistical analysis prepared by FRA]

These findings can be compared with a more extensive sample, namely all requests for preliminary rulings that refer to the Charter – in this context, all relevant national judicial decisions can be identified. In 2018, a total of 568 requests for preliminary rulings were registered at the CJEU. Out of these, 15 per cent – 84 – referred to the Charter. Therefore, compared to 2017 when 50 requests (a relative share of around 9 per cent) mentioned the Charter, a clear increase in requests for preliminary ruling mentioning the Charter can be observed. The increase was especially noticeable in **Spain** (14 requests), **Poland** (8 requests), and **Hungary** (7 requests). As in past years, the Charter articles most often referred to in these requests are Article 47 and Article 21 (non-discrimination). References to both increased considerably in 2018.

2.1.1. Scope of the Charter: a question that often remains unaddressed

Sometimes, the court decisions deal with the applicability of the Charter in some detail (as was the case with the decision by the Supreme Court in **Denmark** described in Section 2.1.2). However, just as in previous years, the question of whether or not and why the Charter applied to the specific case in question remained unaddressed in the majority of the 2018 court decisions analysed.

By way of illustration, in **Greece**,[20] the Athens Pharmaceutical Association lodged a petition with the Council of State to annul ministerial decrees enabling military pharmacies to sell medicines at a reduced price and exempting them from the minimum standards applying to private pharmacies. The Pharmaceutical Association considered this special treatment to be discriminatory and to violate the freedom of private pharmacies to provide services. The petitioners also claimed a violation of Article 35 (health care) of the Charter, especially as non-pharmacists are not forbidden to work in military pharmacies. The Council of State referred to Article 35 of the Charter as a ground to contest the regulatory framework applying to military pharmacies, but did not elaborate on its applicability and rejected the complaint.

In **Slovakia**, the Supreme Court referred in detail to Article 41 (right to good administration) of the Charter,

in a case concerning the removal of a car from the official registry of vehicles. Without analysing the applicability of the Charter, the judges referred to the Council of Europe's recommendations and resolutions of the Committee of Ministers as well as Article 41 of the Charter, which form the basis of a "spirit of European standards on general requirements of the quality of procedures and actions of the public administration called principles of 'good administration'".[21]

There were also examples that did clearly address the applicability of the Charter. In **Cyprus**,[22] an appellant had been convicted under the Law on the actions of persons in possession of confidential information and on actions of market manipulation, which incorporated Directive 2003/6/EC (the Market Abuse Directive) into national law. This legislation provided stricter criminal provisions than those introduced by Directive 2014/57/EU (Market Abuse Directive II), so the appellant claimed the application of the lighter penalty. The Supreme Court explicitly stated that the Charter was applicable, since the legal act was incorporating EU legislation into national law. The judges referred to Article 49 (principles of legality and proportionality of criminal offences and penalties) of the Charter and held that the "legislation aimed at fulfilling obligations arising from EU law and, consequently, [...] Article 49 of the Charter is applicable".

2.1.2. The Charter as a relevant legal standard when applying national law

As in previous years, FRA identified relevant cases in which national courts check the compatibility of national legislation against Charter provisions. However, it has not noted a significant upward trend. In **Czechia**,[23] the Supreme Administrative Court ruled that paragraph 171 (a) of the Act on the Residence of Foreign Nationals, according to which the refusal to grant a visa cannot be challenged before a court, violates Article 47 (right to an effective remedy and to a fair trial) of the Charter. In a case dealing with the application of Directive 2013/33/EU (the Reception Directive), the Supreme Court of the Republic of **Slovenia**[24] ruled that Article 78 of the International Protection Act violated Article 1 (human dignity) of the Charter, insofar as it prescribes that the rights to which a person seeking international protection is entitled cease when the transfer decision becomes enforceable and not with the actual transfer to another Member State.

The Supreme Court of **Denmark**[25] dealt with a case concerning a religious organisation that appealed against the prohibition to import ayahuasca wine. Whereas the organisation wanted to import the wine for consumption as part of a religious rite, the wine contains a psychedelic drug. The claimant considered the prohibition to be a violation of Article 10 (freedom of thought, conscience and religion) of the Charter. However, according to the court, the Charter did not apply in the case at hand and the import restriction was justified by reasons of general interest and did not as such constitute a violation of the freedom of religion.

When constitutional courts analyse the compatibility of national legislation with the constitution, references to the Charter sometimes emerge. In **Portugal**,[26] the Constitutional Court reviewed Article 7 (3) of Law 34/2004 governing the access to courts, which establishes a blank prohibition on granting legal aid to entities operating for profit. The Constitutional Court declared the rule unconstitutional insofar as it refuses the granting of legal aid to legal persons operating for profit with no regard for the particular economic situation of the applicant entity. The court stressed that the right to effective judicial protection that Article 47 of the Charter guarantees may require the granting of legal aid for profit-making legal persons.

> *"Although the Constitution constitutes the decision parameter for the Constitutional Court [...], the Court should consider, in light of a systemic view of the legal system applicable in Portugal and its importance for the interpretation of precepts relating to fundamental rights, the case-law of the European Court of Human Rights in relation to Article 6(1) of the European Convention on Human Rights, as well the interpretation of the Court of Justice in the DEB case, concerning Article 47 of the Charter [...]. The right to effective judicial protection guaranteed by Article 47 of the Charter may require, depending on the circumstances of the specific case, the granting of legal aid to legal persons operating for profit, without this being considered a dysfunctional competition rule in an efficient market".*
>
> *Portugal, Constitutional Court, Case 242/2018, 8 May 2018, paras. 12 and 16*

A case from **Poland**[27] asked if the Law on the Supreme Court lowering the retirement age of judges was compatible with Article 47 (right to an effective remedy and to a fair trial) of the Charter. The case concerned a self-employed Polish citizen who runs a wedding fashion salon in Slovakia and questioned if he has to pay social insurance in Poland while he works in Slovakia. In 2018, the case reached the Supreme Court, which decided that a bench of seven judges should hear the case. Against the background of the judicial reforms in Poland, the Supreme Court raised questions concerning judicial independence and the impartiality of judges and decided to suspend the proceedings to ask the CJEU for a preliminary ruling concerning the compatibility of the new Law on the Supreme Court with EU law. The case was pending before the CJEU at the end of 2018.[28]

"According to the Supreme Court, due to the fundamental nature of the values referred to in Article 2 TEU and the rules for their implementation under Article 19.1 TEU and Article 47 CFR, Article 4.3 TEU should be interpreted in such a way that the national court should be able to take safeguard measures consisting in the suspension of the application of national provisions undermining the independence of national courts and the impartiality of judges, in particular the irremovability of judges [...]. According to the position confirmed in C-64/16 [...] the principle of effective judicial protection of the rights of individuals [...] is a general principle of EU law resulting from the constitutional traditions common to the Member States, now confirmed in Article 47 CFR. [...]When the national court considers that national provisions violate the principle of effective judicial protection by violating the principle of irremovability of judges [...], the protection of individual rights stemming directly or indirectly from EU law requires national courts to take provisional measures [...]."

Poland, Supreme Court, Case III UZP 4/18, 2 August 2018

National Courts often refer to the Charter as a basis for interpreting national law. In **Denmark**,[29] a citizen's driving licence was suspended after he drove a car while over the alcohol limit in Germany. Germany had already suspended his licence for that offence. The claimant argued that the suspension of his licence by the Danish authorities violated Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter. The Supreme Court thus interpreted Article 11 of the Danish Criminal Code in light of Article 52 (scope and interpretation of rights and principles) of the Charter. The court decided that it was not contrary to Article 50 to file a case on the suspension of his driving licence in Denmark. It underlined that the judgment of the Danish court "only concerns a geographic extension of the German suspension, and the Danish judgment on suspension takes into consideration the protection of Danish road users, and thus has a different protection interest from the German suspension. It can therefore not be considered a new criminal case within the meaning of Article 50".

In **Finland**,[30] the immigration service rejected an asylum application based on persecution on grounds of sexual orientation. It held that the applicant's testimony, supported by the recording of sexual acts, was not credible. The Supreme Administrative Court noted that the applicant's own testimony is the primary source of evidence when assessing the credibility of a claim related to sexual orientation. It cannot require applicants to provide photographs or video recordings of intimate acts in support of their claim, as such evidence would infringe the right to human dignity (Article 1 of the Charter) and the right to private life (Article 7 of the Charter). However, the Supreme Administrative Court refused to prohibit the evaluation of such evidence, as the principle of free evaluation governs Finnish administrative law.

"The CJEU (Grand Chamber) found, in the joined cases A et al. (C-148/13, C-149/13 and C-150/13) [...], that Article 4 of the former Qualification Directive 2004/83/EC read in light of Article 1 of the Charter, must be interpreted as precluding [...] the acceptance by the authorities of evidence such as the performance [...] of homosexual acts [...]. The Supreme Administrative Court notes that, in the national administrative procedure, free evaluation of evidence is the general rule. The way evidence is presented has not been restricted and there are no detailed rules concerning the analysis of the probative value of evidence. However, [...] showing intimate details of the private life of persons and submitting such material as evidence could be problematic with regard to the fundamental rights of human dignity and the right to private life [...]. The Supreme Administrative Court finds that, because of the principle of free evaluation of evidence and the protection of the procedural rights of the applicant, it cannot be concluded that the Supreme Administrative Court could completely refuse to accept such evidence, when submitted on the applicant's own initiative and in order to support his claim for international protection."

Finland, Supreme Administrative Court, Case 3891/4/17, 13 April 2018

2.2. National legislative processes and parliamentary debates: rare use of the Charter

Governments, Members of Parliament, parliamentary committees or independent institutions may refer to the Charter at different stages of the legislative process. References to the Charter may happen in impact assessments or the process of scrutinising legislative drafts. In some rare cases, the text of national laws incorporates references to the Charter.[31] And, though perhaps of less importance, the Charter is also referred to in parliamentary debates.

2.2.1. The Charter in the context of the national legislative process

Fundamental rights come up in different ways in the context of the legislative process. An impact assessment typically happens when a bill has not yet been fully defined, so that various legislative options can be compared. Most Member States have procedures on impact assessments. These predominantly focus on economic, environmental and social impacts of bills. As the exercise focuses on potential impacts rather than on compatibility with legal standards, it is not so much legal in nature but employs social science, natural science, statistical and other methods.

Another avenue is legal scrutiny. Legislating bodies – units in government or parliament – or independent expert bodies can scrutinise draft legislation. Unlike

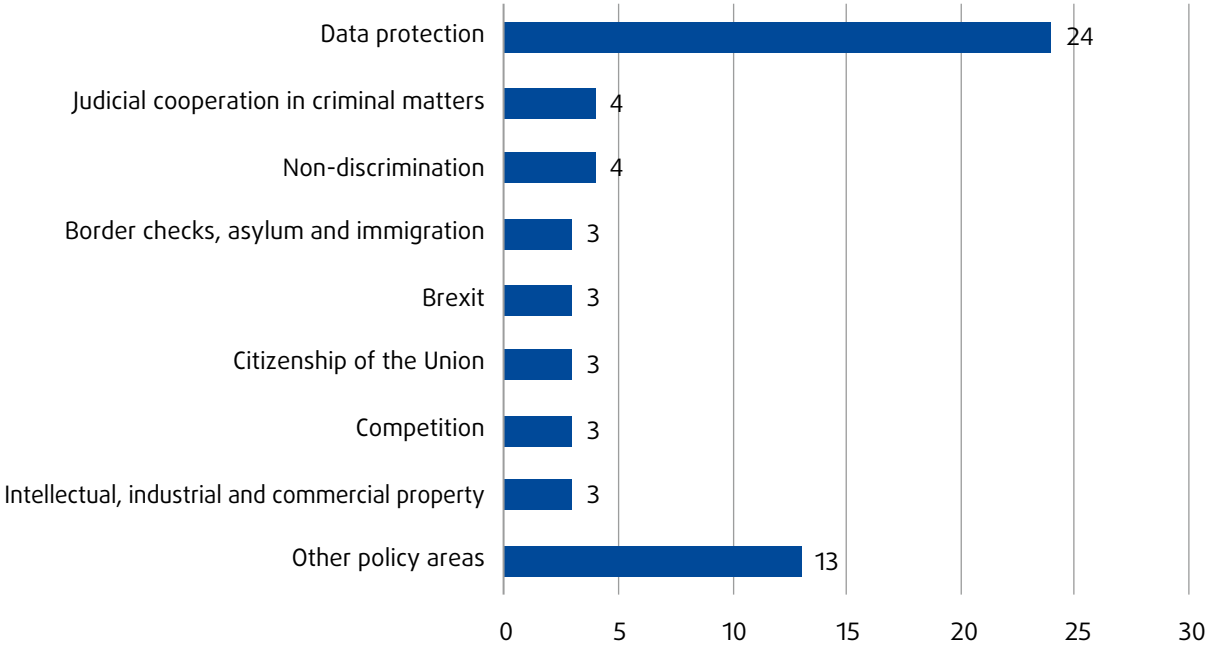
impact assessments, legal scrutiny of a bill is a legal assessment based on the specific wording of a final bill, examining its compatibility with constitutional, supranational and international law. Since some national systems do not neatly differentiate between impact assessment and legal scrutiny, this section covers both procedures.

FRANET reported 60 examples of impact assessments and legal scrutiny to FRA in 2018. These examples are not representative of the overall situation in the Member States, but they suggest – as in earlier years – that the areas of data protection and judicial cooperation in criminal matters appear most likely to raise Charter-relevant concerns. Examples include bills from **Austria**,[32] **Belgium**,[33] **Bulgaria**,[34] **Czechia**[35] and **Slovenia**[36] (Figure 2.6). In **Belgium**, for instance, Article 29 of the draft Act concerning the processing of personal data establishes an exception to data protection when journalistic, academic, artistic or literary forms of expression are at stake. In an opinion on the draft Act, the Council of State underlined that the exceptions in its Article 29 lead to a more restrictive definition of the freedom of expression than Article 11 (freedom of expression and information) of the Charter would allow. The law was ultimately adopted without taking the Council of State's opinion into account.

Many of the references were general and only briefly mentioned the Charter without going into further detail, such as examples from **Slovenia**,[37] **Poland**[38] and **Portugal**.[39] Others, however, were more explicit. For instance, in **Cyprus**,[40] legal scrutiny of the draft law concerning the free circulation of personal data led to the suppression of a provision allowing the processing of personal data by insurance companies prior to the conclusion of an insurance agreement. The final version of the law omitted this provision, as it was deemed to violate Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter.

Of course, concerns raised in legal scrutiny do not necessarily lead to the modification of a bill. By way of illustration, Article 31 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection allows a maximum period of 21 months for the review of asylum applications. In **Slovakia**,[41] a draft act amending the legislation incorporating the directive introduced an additional exception to the time limit. The United Nations High Commissioner for Refugees challenged this exception on the basis of Article 18 of the Charter (right to asylum), maintaining that "introducing another additional derogation which allows Member States to postpone [...] the examination procedure [...] due to an uncertain

Figure 2.5: Number of impact assessments and instances of legal scrutiny analysed referring to the Charter in 2018, by policy area



Notes: *Based on 60 impact assessments and legal scrutiny that FRA analysed. These were carried out in 24 EU Member States in 2018 (FRANET was asked to identify three relevant examples per Member State; in four Member States, no such examples were reported). The category 'Other policy areas' includes policy areas that fewer than three assessments analysed referred to. The categories used in the graph are based on the subject-matter categories used by EUR-Lex.*

Source: *FRA, 2018*

situation in the country of origin which is expected to be temporary [...] may be problematic in terms both of international refugee law and EU fundamental rights. Indeed, uncertainty is an inherent feature of most or all modern conflicts [...]. The Charter enshrines a positive obligation for Member States to provide international protection. Hence such postponement of the enjoyment of the right to asylum would potentially be at variance with the Charter".[42] Nevertheless, the law was adopted without changes in that respect on 20 July 2018.

Like other procedures, impact assessments and legal scrutiny also often refer to the Charter alongside other international legal instruments. In **Belgium**, for instance, the Council of State issued an opinion on the draft law establishing the Information Security Committee and amending legislation concerning the implementation of Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons related to the processing of personal data and on the free movement of such data. According to the opinion, some provisions related to the processing of personal data by the federal finance service did not meet the foreseeability requirements mandated by Article 7 (respect for private and family life) of the Charter, Article 8 (protection of personal data) of the Charter, Article 22 of the Constitution, Article 8 of the ECHR and Article 17 of the International Covenant on Civil and Political Rights.[43]

The Charter is not necessarily used only when contesting new legislation. Explanatory memoranda also use it to make a human rights link. For instance, in **Czechia**[44] the legislative proposal introducing same-sex marriage referred to Article 9 (right to marry and right to found a family) of the Charter providing that "[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". Whereas Article 12 of the ECHR specifies that marriage is the union of a woman and a man, the wording of the Charter is gender neutral. This highlights the fact that the Charter is a new instrument taking into account more recent societal developments and challenges, as well.

The legislative process at national level may on occasion also bring to the fore the remaining debate about the added value and the nature of the Charter as a unique source of fundamental rights. This happened prominently in the **United Kingdom** in context of Brexit. Whereas the House of Lords introduced an amendment to the European Union Withdrawal Act in order to keep the Charter as part of British law after Brexit, the House of Commons overturned the amendment. It did not acknowledge that the Charter added any value alongside other legal documents as its purpose was to reaffirm rights which already exist in EU law.[45] The Parliament's Human Rights Committee said that excluding the Charter "would appear to be contrary to the Government's intent",[46] namely "to maximise certainty and minimise complexity and not remove any substantive rights that UK citizens currently enjoy".[47] According to the Human Rights Committee, "the exclusion of the Charter from domestic law results in a complex human rights landscape which is uncertain. Legal uncertainty is likely to undermine the protection of rights." The committee identified "various reasons why rights may be diminished owing to the exclusion of the Charter".[48] Moreover, the Scottish Parliament enacted the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, according to which "the general principles of EU law and the Charter of Fundamental Rights are part of Scots law on or after exit day".[49] On 17 April 2018, the bill was referred to the Supreme Court to determine whether or not it fell within devolved legislative powers. The court considered that "the Scottish Bill as a whole would not be outside the legislative competence of the Scottish Parliament because it does not relate to reserved matters"; however, as a result of the enactment of the UK Withdrawal Act, the provision dealing with the Charter "would at least in part be outside the legislative competence of the Scottish Parliament".[50]

2.2.2. The Charter and national legislation

As previous FRA fundamental rights reports have shown, adopted national legislation sometimes explicitly refers to the Charter. In 2018, FRANET reported 20 examples of such references in the legislation of 16 EU Member States. While these examples are not representative of the overall situation in the Member States, they suggest that such Charter references in national legislation cover a wide range of thematic areas. Judicial cooperation in criminal matters has the most references. The types of references range from general to specific provisions.[51]

In **Bulgaria**,[52] Article 16 (1) of the European Investigation Order Act provides the legal basis for the refusal of the recognition or execution of a European Investigation Order if "there are substantial reasons to think that the execution of the investigative action or other procedural actions would not be compliant with observing the rights and freedoms, guaranteed by the ECHR and the Charter of Fundamental Rights of the European Union". Legislation in **Czechia**[53] and in **Slovenia**[54] also made general references to the Charter related to the execution of a European Investigation Order.

In **France**,[55] Article L. 151-8 of the law on the protection of business confidentiality made specific reference to Article 11 (freedom of expression and information) of the Charter, providing certain limitations to the protection of business data. Similar references to Article 11 of the Charter were made in **Lithuania**[56] and in the **Netherlands**.[57]

In **Denmark**,[58] the Act on supplementing provisions for a regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data states in section 3 that the Act is not applicable if its application would imply a violation of Article 10 (freedom of thought, conscience and religion) or Article 11 (freedom of expression and information). This reference might well be an incentive for national courts to review the application of the Act in contexts where fundamental rights are put at risk. More generally, references to the Charter might favour a Charter-compatible interpretation of national legislation.

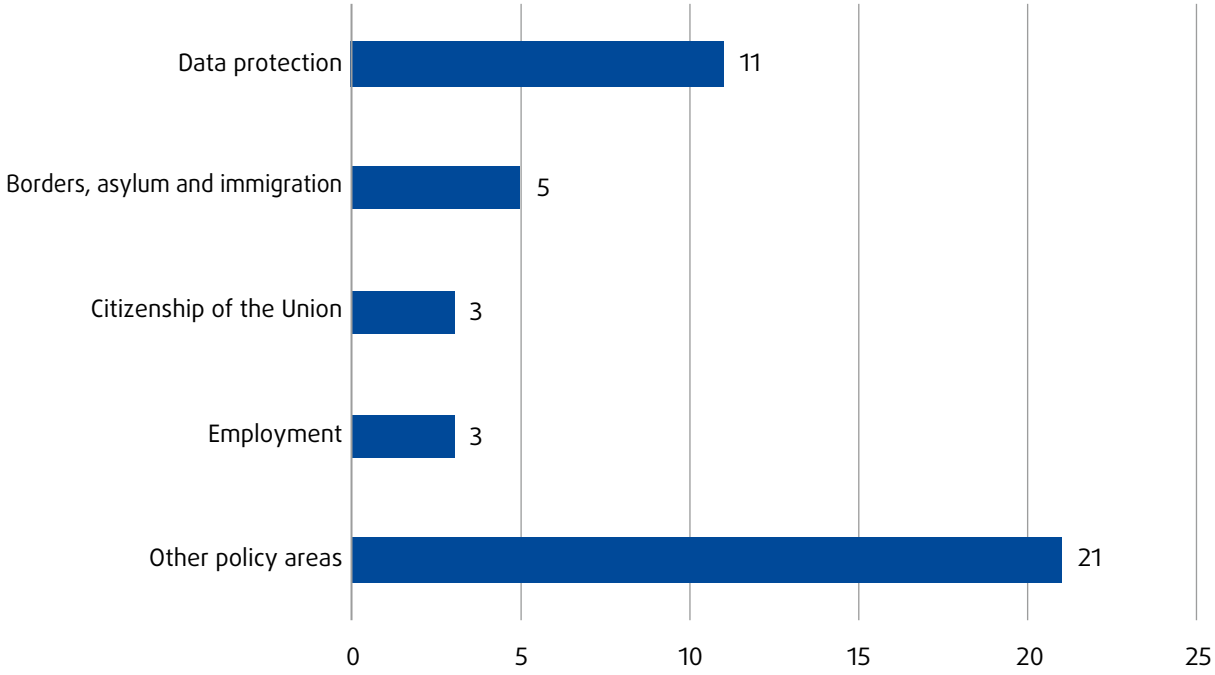
2.2.3. The Charter in parliamentary debates

In 2018, FRANET reported 43 parliamentary debates in 20 Member States that referred to the Charter. While these examples are not representative of the overall situation in the Member States, they suggest that such Charter references cover a broad spectrum of thematic areas. Just as in recent years, data protection was the most prominent policy area, followed by borders, asylum and immigration. In all these areas, the EU has in recent years adopted numerous instruments that had to be incorporated into national law (Figure 2.6).

Data protection was, for instance, a central topic in a parliamentary debate in **France**,[59] on a legislative proposal implementing Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data. A Member of Parliament raised the challenge of data protection in relation to the increasing use of data by companies.

> *"The protection of personal data is a fundamental right enshrined in Article 8 of the EU Charter of Fundamental Rights. The issue is of growing concern to citizens, particularly in terms of the right to privacy. On the other hand, personal data are now essential parts of companies' business models, even more so with the rise of IT and big data."*
>
> *France, Philippe Latombe, Member of Parliament, Proceedings, 23 January 2018*

Figure 2.6: Most prominent policy areas identified in analysed parliamentary debates referring to the Charter in 2018



Notes: *Based on 43 parliamentary debates that FRA analysed. These took place in 20 EU Member States in 2018. Up to three debates were reported per Member State; no parliamentary debates were reported for Belgium, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Portugal and Sweden. The category 'Other policy areas' includes policy areas that fewer than three parliamentary debates analysed referred to. Only one policy area per parliamentary debate has been selected. The categories used in the graph are based on the subject-matter categories used by EUR-Lex.*

Source: *FRA, 2018*

During a parliamentary debate in **Italy** on the possibility of establishing a parliamentary commission for the protection and promotion of human rights, a Member of Parliament underlined the necessity to create a commission to monitor the compliance of national legislation with fundamental rights.[60]

2.3. National policies promoting the Charter's application: lack of engagement

In 2018, FRA sent a questionnaire on the Charter to the organisations registered in its Fundamental Rights Platform, composed of civil society organisations active in the field of fundamental rights across the EU. A total of 114 organisations completed the whole questionnaire. Of them, 91 said that human rights civil society bodies in their country were not sufficiently aware of the Charter and its added value. In the view of the respondents, these bodies do not sufficiently use the Charter in their activities. They also said that national courts, educational institutions, and local and national governments use the Charter even less. Three quarters of the respondents were not aware of any government policies promoting the Charter.

> *"[Policies to assist better implementation of the Charter should include] training and awareness raising campaigns regarding the importance of the Charter, its added value and relationship to other legal instruments of human rights protection."*
>
> *Respondent to anonymous survey on use of Charter carried out among participants in FRA's Fundamental Rights Platform in 2018*

In 2018, FRA contacted the national liaison officers in the 28 EU Member State governments to identify policies aimed at promoting the application of the Charter. More than a third of them replied that either such policies did not exist or they were not aware of them. The others referred to minor activities, mainly in the area of professional training, or did not provide information at all. This confirms findings in previous reports that Member State policies promoting the Charter are rare.

However, there are notable exceptions. For instance, in **Sweden**, the government's human rights strategy also involved a review of the Charter's application. At the request of the government, the University of Uppsala studied how the courts applied the Charter, and potential reasons for when the Charter is used to a greater or lesser extent, or not at all. It also identified good examples of how other Member States and EU institutions, organs and agencies secure the Charter's application. The study acknowledges that one reason why the use of the Charter is still rather limited is that it is still a young instrument. It also took a while until the ECHR was known and used in legal practice.

FRA opinions

The EU Charter of Fundamental Rights entered into force only nine years ago. EU Member States are obliged to both respect the Charter's rights and "promote the application thereof in accordance with their respective powers" (Article 51 of the Charter). However, available evidence and FRA's consultations suggest that there is a lack of national policies that promote awareness and implementation of the Charter. Legal practitioners – including those in national administrations, the judiciary and national parliaments – have a central role to play in implementing the Charter. Although the judiciary uses the Charter, it appears less well known in the other branches of government. Based on the evidence collected in this report and in line with its Opinion 4/2018 on 'Challenges and opportunities for the implementation of the Charter of Fundamental Rights', FRA formulates the opinions that follow.

FRA opinion 2.1

EU Member States should launch initiatives and policies aimed at promoting awareness and implementation of the Charter at national level, so that the Charter can play a significant role wherever it applies. Such initiatives and policies should be evidence based, ideally by building on regular assessments of the use and awareness of the Charter in the national landscape.

More specifically, Member States should ensure that targeted and needs-based training modules on the Charter and its application are offered regularly to national judges and other legal practitioners in a manner that meets demand and guarantees 'buy-in'.

FRA opinion 2.2

EU Member States should aim to track the Charter's actual use in national case law and legislative and regulatory procedures, with a view to identifying shortcomings and concrete needs for better implementation of the Charter at national level. For instance, EU Member States should review their national procedural rules on legal scrutiny and impact assessments of bills from the perspective of the Charter. Such procedures should explicitly refer to the Charter, just as they do to national human rights instruments, to minimise the risk that the Charter is overlooked.

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