

● Application of the Charter
of Fundamental Rights in the course
of implementation of projects
financed by EU funds

Handbook and practical guidance for national bodies



**COMMISSIONER
FOR HUMAN RIGHTS**

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Introduction

The Charter of Fundamental Rights of the European Union (hereinafter: the CFR) protects our rights and freedoms. It is a fairly new instrument of EU law (2009) which enshrines a broad catalogue of civil, political, social, economic, and cultural rights and freedoms. The EU institutions and the Member States are under the obligation to apply and respect it when acting pursuant to EU law. The EU CFR is applicable at the stages of enacting, exercising and interpreting EU law and national legislation implementing it. It ensures protection to individuals in all proceedings and cases before European and national bodies where EU law is applied - either directly or indirectly through national laws ensuring effective implementation of EU law. Therefore, the CFR should also be applied and respected in the course of implementation of programmes and projects financed by EU funds. Within this framework, too, it is aimed to provide protection for individuals against actions of European and national bodies, which would limit the exercise of fundamental rights granted to individuals under the CFR.

The purpose of this Handbook is to support staff of national bodies involved in the implementation of EU-funded programmes and projects in applying the CFR and in assessing compliance with the CFR by other entities. The Handbook is intended to facilitate the determination of whether the CFR is effectively applied and complied with by national bodies when implementing EU-funded projects, or whether a limitation of the fundamental rights enshrined therein has occurred in the cases under examination. Finding that a detected limitation of a fundamental right was inconsistent with the CFR (unacceptable or disproportionate) means that a violation of the CHR has occurred and should be eliminated.

The Handbook consists of two chapters. The **first chapter** of the Handbook is of introductory nature. It provides information on the role of the CFR within the system of protection of fundamental rights of individuals as established by EU law and national law. The chapter explains the scope of application of the CFR. It discusses who is entitled to exercise the fundamental rights set forth in the CFR and who is under the obligation to apply and respect it. It also indicates the ways in which the meaning of the fundamental rights enshrined in the CFR is determined and the conditions under which the limitation of the rights is permitted. At the end of the chapter, the consequences of violations of the CFR, that may occur at the level of individuals, Member States and EU institutions, are presented. The **second chapter** of the Handbook is practical in nature. It contains a **checklist** which, as an instrument for assessing the application of and compliance with the CFR in the implementation of EU-funded projects,

is intended to support staff of national bodies involved in the implementation of EU-funded projects in conducting such assessments. The checklist is to provide assistance in conducting independent examinations and assessments and in identifying potential violations of fundamental rights. Such findings do not always lead to a clear determination of whether the CFR is being complied with in the case under examination. The Handbook aims to present and explain the process of arriving at such a determination and to facilitate the detection of the most common and widespread types of fundamental rights violations. As publicly available training material, it may serve as an instructional document and a reference point for assessing compliance with and application of the CFR in the course of implementation of EU projects.¹

¹ It shall be noted that the original text of the Handbook was written in Polish with the purpose of serving Polish national bodies. Thus, it contained certain mentions to the Polish legislative acts relevant in the process of implementation of programmes and projects financed with EU funds as well as certain examples of cases from Poland. Some of these mentions have been changed in the English version of the Handbook to fit the context of any Member State, while others have been left to serve as examples easily translatable into other national contexts.

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Definitions

act or omission of a national body - drafting and application of laws and practical actions, e.g. inspections

application of the law - activity of EU or national bodies involving issuing individual decisions or taking other actions pursuant to laws and supplementary regulations against an individually designated entity or group of entities.

beneficiary – a beneficiary of EU funds, e.g. an entrepreneur utilising EU funds, or a subcontractor in a project financed with EU funds

checklist - an instrument for assessing compliance of actions of a national body with the Charter of Fundamental Rights in the implementation of projects financed by EU funds; see Chapter 2 of the Handbook

CJEU – Court of Justice of the European Union

direct discrimination - unequal and unfavourable treatment of a person on the basis of a prohibited differentiating criterion, i.e. a characteristic of that person, such as gender (including gender identity), race, colour, ethnic or social origin, genetic features, language, religion, or belief, political or other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation

EAFRD - European Agricultural Fund for Rural Development

EAGF – European Agricultural Guarantee Fund

ECHR – European Convention on Human Rights

ESC – European Social Charter

EU budget - a short-term plan of the EU, drawn up for a period of one year, on the basis of the Multiannual Financial Framework, which sets out and authorises the amounts of revenue (EU own resources) and expenditure considered necessary for the functioning of the EU. The Treaty basis for the EU budget is provided in Articles 310-325 of the Treaty on the Functioning of the European Union (TFEU).

EU funds – European Regional Development Fund, European Social Fund Plus, Cohesion Fund, Just Transition Fund, European Maritime, Fisheries and Aquaculture Fund, Asylum, Migration and Integration Fund, Internal Security Fund, Border Management and Visa Instrument, Recovery and Resilience Facility

EU institutions – EU institutions (European Council, Council of the EU, European Commission, European Parliament, Court of Justice of the European Union, European Central Bank, European Court of Auditors), EU bodies (e.g. European Economic and Social Committee, European Committee of the Regions, European Ombudsman, European Data Protection Supervisor, European External Action Service), EU decentralised agencies (e.g. European Union Fundamental Rights Agency (FRA), the European Union Agency for Cybersecurity (ENISA), the European Environment Agency (EEA), Frontex, the European Public Prosecutor’s Office (EPPO) or other individuals operating within EU structures

EU regulation / law – acts of primary and secondary EU law

Explanations relating to the CFR – Explanations relating to the Charter of Fundamental Rights (Official Journal of the European Union C 303, 14 December 2007, p. 17) – an official EU interpretation document adopted by the Convention drafting the CFR, used for the purposes of interpreting the provisions of the CFR (Article 52 (7) of the CFR and Article 6 (1)(3) of the TEU)

fundamental right – a right or freedom granted by the Charter of Fundamental Rights

General Court of the EU – The General Court of the European Union, one of two main judicial bodies, alongside the Court of Justice of the European Union, in the structure of the EU institutions

harassment/sexual harassment – undesirable behaviour related to gender (including gender identity), race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other views, membership of a national minority, property, birth, disability, age or sexual orientation or/including behaviour of sexual nature, the objective or result of which is infringing the person’s dignity and/or creating intimidating, hostile, degrading, humiliating or offensive environment

implementation of EU projects – all stages of implementation of projects financed by EU funds

indirect discrimination - unequal and unfavourable treatment of a person on the basis of a prohibited differentiating criterion in a situation where an apparently neutral provision, criterion, or practice (which does not explicitly refer to a prohibited differentiating criterion) puts that person at a disadvantage compared to others (e.g. discrimination against foreigners by requiring knowledge of the national language)

individual - a natural person, a legal person or any other entity enjoying the rights and freedoms set forth in the EU Charter of Fundamental Rights; the term usually refers to the final beneficiaries, but sometimes also to the beneficiaries of funding in the context of their rights

irregularity – any violation of applicable law, which has been caused by an individual’s action or omission and which has, or may have, a detrimental impact on EU budget by encumbering it with an unjustified expense (see Article 2 (33) of Regulation 2021/1060)

limitation of a fundamental right - a situation when, as a result of application of an EU or domestic law, or of action taken by a European or domestic institution, an individual cannot exercise its fundamental right (see Chapter 2.1). This notion is not the same as the notion of violation of a fundamental right.

national body – a public or non-public entity performing tasks ordered by a public entity (e.g. specialized agencies)

national regulation / law – acts of universally applicable law and regulations without universal binding force adopted by national authorities for the purposes of implementing projects financed by EU funds, such as regulations of competitions, provisions of agreements on project funding, guidelines

personal data - data allowing a person to be identified, including indirectly through the combination of several data points

personal data processing - an action involving organizing, storing, adapting, modifying, retrieving, viewing, using, disclosing, distributing, or sharing, matching, combining, limiting, deleting, or destroying personal data

Recovery and Resilience Facility - a fund financing grants and loans to Member States for the purpose of supporting their reforms and investments. It serves to finance measures designed to mitigate economic and social impact of the COVID-19 coronavirus pandemic, so as to ensure that Member States are more resilient to the challenges and opportunities stemming from green and digital transition, and to facilitate their achievement of climate neutrality by 2050 while boosting economic growth

regulations governing EU funds - regulations setting forth rules for disbursement of individual EU funds, e.g., Regulation 2021/1058 for ERDF and CF, Regulation 2021/1057 for ESF Plus, Regulation 2021/1056 for JTF, Regulation 2021/1139 for EMFAF, and Regulation 2021/1059 for Interreg

rule of law – a value of EU law denoting a transparent, accountable, democratic and pluralistic law-making process, based on fundamental principles of law, such as the principle of legal certainty; the prohibition of arbitrariness in executive action; the principle of effective judicial protection, including access to justice, ensured by independent and impartial courts, including with regard to fundamental rights; the principle of separation of powers and non-discrimination and equality before the law (Article 2a of Regulation 2020/2092 establishing the conditionality mechanism)

TEU – Treaty on the European Union (EU Treaty)

TFEU - Treaty on the Functioning of the European Union

the CFR, the Charter –the Charter of Fundamental Rights of the European Union

the Handbook – this document

violation of a fundamental right – a situation in which, as a result of application of an EU or domestic law, or of action taken by a European or domestic institution, a fundamental right has been limited in an unacceptable (see Chapter 2.2) and disproportionate (see Chapter 2.3) manner

Acts of law

EU law –Regulations

- [Regulation 2988/1955 on the protection of the European Communities financial interests](#) – Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (Official Journal of the EU L 312, 23.12.1995, p. 1)
- [GDPR](#) - Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Official Journal of the EU L 119 of 4.05.2016 p. 1)
- [Financial Regulation 2018/1046](#) - Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (Official Journal of the EU L 193 of 30.7.2018, p. 1)
- [Regulation 2020/2092 on conditionality](#) - Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (Official Journal of the EU L 433I of 22.12.2020, p. 1)
- [Regulation 2021/241](#) establishing the Recovery and Resilience Facility - Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (Official Journal of the EU L 57 z 18.02.2021, p. 17)
- [Regulation 2021/1056 on JTF](#) - Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (Official Journal of the EU L 231, 30.06.2021, p. 1)
- [Regulation 2021/1057 on ESF Plus](#) - Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013 (Official Journal of the EU L 231, 30.06.2021, p. 21)
- [Regulation 2021/1058 on ERDF and CF](#) - Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund (Official Journal of the EU L 231, 30.06.2021, p. 60)
- [Regulation 2021/1059 on Interreg](#) - Regulation (EU) 2021/1059 of the European Parliament and of the Council of 24 June 2021 on specific provisions for the European territorial coop-

eration goal (Interreg) supported by the European Regional Development Fund and external financing instruments (Official Journal of the EU L 231 of 30.06.2021, p. 94)

- [Regulation 2021/1060 on EU funds](#) - Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (Official Journal of the EU L 231, 30.6.2021, p. 159).
- [Regulation 2021/1139 on EMFAF](#) - Regulation (EU) 2021/1139 of the European Parliament and of the Council of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004 (Official Journal of the EU L 247 of 13.07.2021, p. 1)

Directives

- [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303 of 2 December 2000, p. 16)
- [Directive \(EU\) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law](#) (Official Journal of the EU L 198 of 28.07.2017, p. 29)

Other acts of EU law

- [Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds](#) (2016/C 269/01) (Official Journal of the EU C 269, 23.07.2016, p. 1)
- [Strategy to strengthen the application of the Charter of Fundamental Rights in the EU](#) - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Strategy to strengthen the application of the Charter of Fundamental Rights in the EU (COM/2020/711 final), 2.12.2020

Polish law²

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² As an example of relevant national legislation.

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- EU Charter App (a mobile app): <https://fra.europa.eu/en/charterapp>
- European Union Agency for Fundamental Rights and Council of Europe, Handbook on European non-discrimination law, 2018 online: https://www.echr.coe.int/documents/d/echr/Handbook_non_discr_law_ENG
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[C-92/09 and C-93/09 - Volker und Markus Schecke and Eifert](#) - Judgment of the Court (Grand Chamber), of 9 November 2010, in joined cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert vs Land Hessen

[C-135/13 - Szatmári Malom](#) - Judgment of the Court (Ninth Chamber), of 15 May 2014, in case C-135/13, Szatmári Malom Kft. vs Mezőgazdasági és Vidékfejlesztési Hivatal Központi Szerve

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[C-251/21 - Piltenes meži](#) - Judgment of the Court (Seventh Chamber), of 28 April 2022, in case C-251/21, 'Piltenes meži' SIA vs Lauku atbalsta dienest

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[C-46/93 and C-48/93 - Brasserie du Pêcheur SA](#) - Judgment of the Court of 5 March 1996, in joined cases C-46/93 and C-48/93, Brasserie du Pêcheur SA vs Bundesrepublik Deutschland and The Queen vs Secretary of State for Transport, ex parte: Factortame Ltd et al.

[C-293/97 - The Queen vs Minister of Agriculture, Fisheries and Food, ex parte Standley et al.](#) - Judgment of the Court (Fifth Chamber), of 29 April 1999, in case C-293/97, The Queen vs Secretary of State for the Environment and Minister of Agriculture, Fisheries and Food, ex parte: H.A. Standley et al.

[C-44/79 - Hauer vs Land Rheinland-Pfalz](#) - Judgment of the Court of 13 December 1979, in case C-44/79, Liselotte Hauer vs Land Rheinland-Pfalz

[C-201/15 - AGET Iraklis](#) - Judgment of the Court (Grand Chamber), of 21 December 2016, in case C-201/15, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) vs Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis

[C-441/14 - DI](#) - Judgment of the Court (Grand Chamber), of 19 April 2016, in case Dansk Industri (DI) vs Sucession Karsten Eigil Rasmussen

[C-131/12 - Google Spain and Google - Judgment of the Court \(Grand Chamber\), of 13 May 2014](#), in case Google Spain SL and Google Inc. vs Agencia Española de Protección de Datos (AEPD) and Mario Costeja González

[C-283/11 - Sky Österreich](#) - Judgment of the Court (Grand Chamber), of 22 January 2013, in case Sky Österreich GmbH vs Österreichischer Rundfunk

[C-2/10 - Azienda Agro-Zootecnica Franchini and Eolica di Altamura](#) - Judgment of the Court (First Chamber), of 21 July 2011, Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl vs Regione Puglia

[C-520/21 - Bank M. SA.](#) - Judgment of the Court (Fourth Chamber) of 15 June 2023, Arkadiusz Szcześniak vs Bank M. SA.

Chapter 1.

What is the Charter of Fundamental Rights?

[Charter of Fundamental Rights of the European Union](#) (the CFR) ensures protection of everyone's rights and freedoms (fundamental rights): personal, civil, political, economic, and social. Respect for human rights is one of the values on which the EU is founded (Article 2 of the TEU).

The notions of '**fundamental rights**', as used in the title and the body of the CFR, and 'human rights', as referred to in Article 2 of the TEU, are semantically close. In the EU Treaties³, the notion of 'fundamental rights' is used in the provisions regarding the internal affairs of the EU, defining, inter alia, the tasks performed by the Member States within the EU, known as EU policies, and the EU legal and institutional framework established for this purpose. The term 'human rights', on the other hand, is used in treaty provisions relating to the EU's external relations, governing its relations with third countries and international organisations. This Handbook is intended to assist national institutions in the implementation of programmes and projects carried out under EU Cohesion Policy (EU internal policy), financed by EU funds. It is intended to make it easier for national institutions to apply and comply with the CFR and ensure the protection of the rights and freedoms of entities granted to them by the CFR. The Handbook will therefore employ the notion of 'fundamental rights'.

The CFR confers certain rights on EU citizens (persons holding citizenship of a Member State) and persons residing in the EU (see section 1 of the Handbook). It requires that such rights are respected by the EU institutions and by the Member States when they apply EU law (see section 1.2.2 of the Handbook). **Legally, the CFR has the same binding force as the EU Treaties (TEU and TFEU)**⁴. All three of these acts - the TEU, the TFEU and the CFR - are acts of primary EU law, and as such, positioned at the top of the hierarchy of sources of EU law. They are therefore the EU's supreme law. The CFR, same as the EU Treaties, constitutes a criterion for assessing validity of EU secondary legislation (regulations, directives, and decisions⁵) as well as national legislation. This means that it is unacceptable for EU or national legislation to

³ *Treaty on the Functioning of the European Union (TFEU), Treaty on the European Union (TEU) and the Charter*

⁴ Article 6 (1) of the TEU.

⁵ Article 288 of the TFEU.

deprive us - individuals - of the fundamental rights granted to us by the CFR or to limit our ability to exercise them. Such limitation is only permissible if allowed by the CFR.

The CFR is a fairly brief piece of legislation. It consists of a preamble and 54 articles divided into seven chapters, setting out rights relating to dignity, freedom, equality, solidarity, civic rights, and justice. The specific chapters of the CFR deal with:

- I. **Dignity**; this chapter establishes the prohibition of the death penalty (Article 2 of the CFR), torture, inhuman or degrading treatment and punishment (Article 4 of the CFR), slavery and forced labour (Article 5 of the CFR);
- II. **Freedoms**; this chapter encompasses the right to respect for private and family life (Article 7 of the CFR), to marry and found a family (Article 9 of the CFR), freedom of thought, conscience, and religion (Article 10 of the CFR), the right to education (Article 14 of the CFR), freedom to conduct a business (Article 16 of the CFR) and the right to property (Article 17 of the CFR);
- III. **Equality**; this chapter sets out the principles of equality before the law (Article 20 of the CFR), equality between women and men (Article 23 of the CFR) and an open-ended list of prohibited grounds for discrimination (Article 21 of the CFR);
- IV. **Solidarity**; this chapter establishes social rights, including those relating to collective labour rights (Article 27 and Article 28 of the CFR), protection in the event of unjustified dismissal (Article 30 of the CFR), social security and social assistance (Article 34 of the CFR), health care (Article 35 of the CFR), access to services of general economic interest (Article 36 of the CFR) and rights relating to environmental protection (Article 37 of the CFR) and consumer protection (Article 38 of the CFR);
- V. **Citizens' rights**; this chapter covers the right to good administration (Article 41 of the CFR) and access to EU documents (Article 42 of the CFR), the right to petition the European Parliament (Article 44 of the CFR) and to lodge a complaint with the European Ombudsman (Article 43 of the CFR);
- VI. **Justice**; this chapter sets out the right to an effective remedy before an independent and impartial tribunal and the right to a fair and public hearing within a reasonable time (Article 47 of the CFR), the presumption of innocence and the right of defence (Article 48 of the CFR), the principles of legality and proportionality of criminal offences and penalties (Article 49 of the CFR) and the prohibition of retrial or punishment in criminal proceedings for the same offence (ne bis in idem principle) (Article 50 of the CFR);
- VII. **General** provisions governing the interpretation and application of the CFR; this chapter sets out the field of application of the CFR (Article 51 of the CFR), the interpretation of the principles and rights set out therein (Article 52 of the CFR), the level of protection of fundamental rights under the CFR (Article 53 of the CFR) and the prohibition of abuse of rights (Article 54 of the CFR).

The principal part of the fundamental rights enshrined in the CFR are not new. Innovation attributed to the CFR lies in its bringing together of rights derived from the constitutional traditions of the Member States, rights enshrined in various acts of EU and national law and established in international agreements adopted within the framework of the Council of Europe, the United Nations (UN) and the International Labour Organisation, as well as those adopted in the case law of the Court of Justice of the European Union (CJEU) and the European Court of

Human Rights (ECHR). A number of **‘modern’ fundamental rights** have been included in the CFR to reflect ongoing societal changes and scientific and technological progress; those include, for example, the right to protection of personal data, the right to good administration, and the prohibition of reproduction and cloning of human beings. Bringing fundamental rights together in the CFR is intended to make them more visible to the individuals to whom they apply and to make the exercise of these rights easier.

The CFR is the primary source of fundamental rights recognised in the EU, but not the only one⁶.

- Since the 1970s, in the absence (at that time) of a Community legal instrument setting forth a catalogue of fundamental rights of individuals, the CJEU has ensured the protection of these rights by granting them the status of general principles of EU law. This is the status of, for example, the principle of legal certainty, the principle of the protection of legitimate expectations (principle of the protection of confidence) and the prohibition of the abuse of rights. Today, the relationship between general principles of EU law and the CFR is complex. Both these sources of fundamental rights share the same status as EU primary law and the scope of their protection often overlaps - the fundamental rights stemming from them are derived from similar international and constitutional standards of the Member States. The CJEU case law on general principles of EU law has also served as an inspiration during the development of the CFR. Although the CJEU did not explicitly resolve the relationship between the general principles of EU law and the CFR⁷, it is assumed that general principles of EU law have at least two functions in the EU system of fundamental rights protection. First, they provide interpretative guidance in the interpretation of the CFR - if a provision of the CFR contains a fundamental right which the CJEU has already recognised as a general principle of EU law, the CJEU’s case law on that principle should indicate the meaning of the fundamental right established by the CFR. Secondly, general principles of EU law are a self-standing source of fundamental rights which the CFR does not address.
- Fundamental rights can also be found in the EU Treaties, e.g. Article 16 of the TEU, which provides for the right to protection of personal data, Article 24 of the TEU (right to petition the European Parliament and right to complain to the Ombudsman), Article 18 of the TFEU (prohibition of discrimination on grounds of citizenship), or Article 157 of the TFEU (right to equal treatment of men and women with regard to work and pay). Fundamental rights are also established in EU secondary legislation, e.g. in anti-discrimination directives⁸.
- Fundamental rights in the EU are also protected by international agreements, whose signatories are the EU and all the Member States. The [Council of Europe](#) plays the leading role in this respect, being an international organisation specialising in the protection of human rights, of which all Member States are members. [The European Convention on Human Rights](#) (1950) (ECHR) adopted within the framework of the CoE ensures protection of civic and political rights and allows individuals to challenge infringements of these rights by Convention signatory countries before the [European Court of Human Rights](#)

⁶ More in: D. Miąsik, *Zasady i prawa podstawowe*, Warsaw 2022.

⁷ In some cases, it refers to both sources - general principles containing fundamental rights and the Charter, see C-441/14 - DI, point 22.

⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303 of 2 December 2000, pp. 16–22).

in Strasbourg⁹. In turn, the [European Social Charter](#) (1996) (ESC) ensures protection of economic and social rights. The EU is also party to international agreements concerning the protection of human rights. In 2011, it joined the UN [Convention on the Rights of Persons with Disabilities](#) (2006) – the first international agreement establishing minimum standards of protection for persons with disabilities.

- The last, but not least, source of protection of fundamental rights in the EU are the constitutions of the Member States. In its fundamental rights jurisprudence, the CJEU often refers to the common constitutional traditions of the Member States, looking to them as sources of inspiration for the protection of these rights.

The CFR specifies the fundamental rights that both the EU and Member States must respect when implementing EU law¹⁰.

1.1 Who may benefit from the CFR?

Most of the fundamental rights pertain to **natural persons** and are applicable to ‘everyone’, regardless of the nationality or status of the person. These rights include: Article 1 of the CFR (human dignity), Article 2 of the CFR (right to life), Article 3 of the CFR (right to the integrity of the person), Article 4 of the CFR (prohibition of torture and inhuman or degrading treatment or punishment), Article 5 of the CFR (prohibition of slavery and forced labour), Article 9 of the CFR (right to marry and right to found a family), Article 18 of the CFR (right to asylum), Article 19 of the CFR (protection in the event of removal, expulsion or extradition), Article 23 of the CFR (equality between women and men), Article 24 of the CFR (the rights of the child), Article 25 of the CFR (the rights of the elderly), Article 26 of the CFR (integration of persons with disabilities), Article 29 (right of access to placement services), Article 30 of the CFR (protection in the event of unjustified dismissal), Article 31 of the CFR (fair and just working conditions), Article 32 of the CFR (prohibition of child labour and protection of young people at work), Article 33 of the CFR (family and professional life), Article 34 of the CFR (social security and social assistance), Article 39 of the CFR (right to vote and to stand as a candidate at elections to the European Parliament), Article 40 of the CFR (right to vote and to stand as a candidate at municipal elections), Article 45 of the CFR (freedom of movement and residence) and Article 46 of the CFR (diplomatic and consular protection).

Some of the fundamental rights can only be exercised by EU citizens. An EU citizen is any person who holds the citizenship of an EU Member State. EU citizenship is acquired by virtue of EU law, automatically, when citizenship of a Member State is acquired, EU citizenship is additional to national citizenship. The rights that the CFR grants exclusively to EU citizens are:

- freedom to choose an occupation and right to engage in work (Article 15 (1) of the CFR),
- freedom to conduct a business (Article 16 of the CFR),
- the right to non-discrimination on grounds of nationality within the scope of application of the Treaties (Article 21 (2) of the CFR),

⁹ The ECHR is explicitly referred to in Article 6 (3) of the TEU, which states that the fundamental rights guaranteed by that Convention and arising from the constitutional traditions common to the Member States form part of Union law as general principles of law.

¹⁰ According to Article 6 (1) of the TEU, the EU recognises the rights, freedoms and principles set out in the Charter, which has the same legal force as the Treaties.

- the right to vote and to stand as a candidate at elections to the European Parliament and at municipal elections (Article 39 and Article 40 of the CFR),
- freedom of movement and of residence within the EU (Article 45 of the CFR), and
- diplomatic and consular protection by other Member States (Article 46 of the CFR).

The CFR addresses some of the fundamental rights to very specific persons. For example, foreigners are granted the right to asylum (Article 18 of the CFR), workers - collective labour rights (Article 27 and Article 28 of the CFR) and the right to protection in case of unjustified dismissal (Article 30 of the CFR), and children - the right to direct contact with both parents and the right to protection, care, and expression (Article 24 of the CFR).

Some of the fundamental rights established by the CFR may also be exercised by legal persons domiciled in the EU. The CFR grants legal persons the following rights:

- the right of access to documents of the EU institutions (Article 42 of the CFR),
- the right to refer to the European Ombudsman cases of maladministration by EU institutions (Article 43 of the CFR),
- the right to petition the European Parliament (Article 44 of the CFR).

The CJEU assumes that legal persons are also entitled to exercise the other fundamental rights established by the CFR. It takes the view that such persons may invoke provisions of the CFR in which they are not listed as addressees. However, the scope of protection afforded to legal persons and natural persons differs in scope and level. According to the CJEU, legal persons may exercise:

- the right to respect for private and family life (Article 7 of the CFR) (case C-92/09 - Volker und Markus Schecke) and
- the right to protection of personal data (Article 8 of the CFR) (case C-92/09 - Volker und Markus Schecke) and
- the right to legal aid (Article 47 (3) of the CFR) (case C-279/09 - DEB).

It also follows from the CJEU case law that the CFR can be invoked not only by private individuals but also by public entities, including Member States (case C-610/10 – Commission vs Spain, points 48–52), state owned entities (case C-176/13 P – Council vs Bank Mellat, points 49 and 52) and state owned banks (case C-200/13 P – Council of the EU vs Bank Saderat Iran, point 47).

1.2 Who is under the obligation to apply the CFR?

The obligation to apply the CFR, which is to ensure that entitled individuals can exercise the fundamental rights accorded to them, is incumbent on the institutions, bodies, and all organisational units of the EU (the EU institutions) and on the Member States to the extent that they apply EU law (Article 51 (1) of the CFR). This section of the *Handbook* will outline the obligations relating to the application of the CFR by the EU institutions, and the following section will outline the obligations incumbent on the national bodies of the Member States within this framework (see section 1.2.2. of the *Handbook*).

1.2.1 The EU institutions are under the obligation to apply the CFR

The obligation to apply the CFR rests with all the EU institutions (the European Commission, the European Parliament, the Council of the European Union, the Court of Justice of the EU, the European Court of Auditors, and the European Central Bank), on the bodies and entities of the EU and on the staff of these entities performing the duties assigned to them. The duty to apply the CFR is incumbent on the EU institutions irrespective of whether they apply EU law (in which case the CFR applies as it does for the Member States) or whether they act outside its framework, e.g. apply EU legislation outside EU territory (in which case they are bound by the CFR, whereas the Member States are not) (more about this in section 1.2.2 of the Handbook). As regards the implementation of programmes financed by EU funds by the Member States, according to these principles, bodies obligated to comply with the CFR are the [European Anti-Fraud Office \(OLAF\)](#) and [European Public Prosecutor's Office](#), which are specialised in conducting administrative and criminal proceedings in the Member States to protect the EU's financial interests, as well as the European Court of Auditors, which conducts audit activities in the Member States.

The EU institutions are under the obligation to apply and respect the CFR in **all their activities**, including during the legislative procedures used to enact EU legislation, during the application of EU laws, and during the judicial review of EU laws and their application. In all these areas, a situation may arise where an EU institution infringes the CFR. This may occur when, for example, the European Parliament and the Council, in a regulation setting out rules for expending EU funds, would require national bodies to publish the personal data of beneficiaries of those funds in breach of the CFR's provisions ensuring the protection of their personal data (Article 8 of the CFR). An infringement of the CFR may also occur, for example, when OLAF, in the course of an administrative investigation in a Member State into a suspected irregularity in the spending of EU funds, conducts an inspection at the home of a suspected person in breach of his or her right to respect for private life (Article 7 of the CFR), fails to inform him or her of the allegations made and prevents him or her from commenting on the evidence collected, in breach of his or her rights of defence (Article 48 of the CFR) (on the effects of infringement of the CFR by the EU institutions, see section 1.7.3 of the *Handbook*).

The fundamental rights enshrined in the CFR fulfil two main functions in EU law. Firstly, they constitute interpretative guidance when interpreting EU laws. These laws must be interpreted in the light of the fundamental rights enshrined in the CFR, and if the EU rules are ambiguous, the interpretation most consistent with fundamental rights must be adopted. In this context, the well-known case C-131/12 - Google Spain, in which the CJEU established the 'right to be forgotten', i.e. the right of any individual to request the deletion from an internet search engine of information relating to them by an internet service provider. Although this right was not explicitly stated in Directive 95/46/EC¹¹, the CJEU interpreted this right from it, reading the content of the Directive in light of Article 7 of the CFR, which protects the right to respect for private life, and Article 8 of the CFR establishing the right to the protection of personal data.

Secondly, **the fundamental rights enshrined in the CFR constitute a criterion for determining the validity of EU law and of national laws implementing EU law.** Any act of EU law that infringes the fundamental rights enshrined in the CFR is invalid, which is determined solely

¹¹ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

by the CJEU, e.g. in a judgment under an action for annulment of an act of EU law (Article 263 of the TFEU) or a preliminary ruling (Article 267 of the TFEU) (see section 1.7.3.1 of the Handbook). In the well-known case C-293/12 - Digital Rights Ireland, the CJEU ruled that Directive 2006/24/EC on the retention of data¹² was invalid due to its failure to provide safeguards for the protection of personal data, infringing Article 7 (right to respect for private life) and Article 8 of the CFR (right to the protection of personal data) (see section 1.7.3.1 of the Handbook). Any conflicts between the fundamental rights enshrined in the CFR and national legislation implementing EU law are resolved in various ways, e.g. by interpreting the national legislation in accordance with the CFR, by directly applying the provisions of the CFR or by refusing to apply a national provision that is incompatible with the CFR. The national legislature is then required to resolve such a conflict by repealing the national provision incompatible with the CFR (see section 1.7.1 of the Handbook).

1.2.2 Member States are under obligation to apply the CFR when they implement Union law

Member States are also obligated to apply the CFR when they implement Union law. The notion of ‘Member State’ within the meaning of the CFR is broad and includes central-level bodies, regional and local bodies and public organisations implementing EU law¹³. According to CJEU case law, the concept of ‘Member State’ also includes a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals (‘emanation of the state’, see case C-282/10 - Dominguez). Where such bodies implement Union law, they are obligated to comply with the CFR in the same way as all other national bodies. The concept of Member State should therefore be taken to include all national bodies involved in the implementation of programmes and projects financed by EU funds, including managing authorities, intermediate bodies, monitoring committees, audit authorities and others carrying out tasks entrusted by the State in this field. All these bodies are obligated to comply with the CFR.

The Commission clarifies that EU funds beneficiaries, whatever their legal form, which have been made responsible, pursuant to a measure adopted by a Member State, for providing a public service under the control of the State and which have for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, are also obligated to apply the CFR¹⁴. This assumption is correct, as it means that only those beneficiaries of EU funds who act as an ‘emanation of the State’ are obligated to comply with the CFR. The obligation to apply the CFR is therefore only incumbent on those beneficiaries who, under the control of the State, carry out the public tasks entrusted to them and therefore have authority powers entrusted to them by the State. This is a rare situation, as in most cases the beneficiaries of EU funds are private entities (e.g. natural persons, legal persons, other legal forms) who implement projects financed by EU funds under their own responsibility on the basis of agreements for their implementation, concluded with national institutions. In implementing EU projects, they do not carry out public tasks entrusted to them by the state, nor do they have

¹² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

¹³ Explanation on Article 51 (1) of the Charter.

¹⁴ Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds (2016/C 269/01), points 2.2.1 and 3.3 (EC guidance on the Charter).

the necessary powers of authority to do so. In principle, therefore, the beneficiaries of EU funds are not bound by the CFR, which is not to say that they are not under an obligation to respect the fundamental rights established therein. They are obligated to respect them, but the source of this obligation is not the CFR, but other applicable acts of EU and national law.

1.2.2.1 Application of the CFR

According to the CFR, the Member States are obligated to apply it “only when they are implementing Union law”¹⁵. Thus, national bodies apply the CFR only when acting within the scope of application of EU law¹⁶. They are bound by the CFR when, pursuant to EU law or national law applied in conjunction with EU law, they conduct “EU matters” (see 1.2.2.1.1 of the Handbook). In contrast, it is not incumbent on them to apply the CFR when, acting solely on the basis of national legislation, they decide “purely domestic matters” (see 1.2.2.1.2 of the Handbook).

1.2.2.1.1 Application of the CFR in “EU matters”

In order for a national body to be bound by the CFR, it must take action related to ‘implementation of Union law’ (Article 51 (1) of the CFR). It is therefore crucial to establish the meaning of this concept, as it determines the obligation of national bodies to apply the CFR. The CJEU gives a broad meaning to the concept and recognises that it encompasses all cases of application, exercise, and implementation of EU law by Member States and means the same as ‘acting within the framework of EU law’¹⁷. A provision of national law falls within the scope of Union law if a provision of EU law other than the alleged breach of the CFR itself is applicable to the case (directly or indirectly, through national law). Thus, in order to be bound by the CFR, a national body must act, or pursue a case, based on a provision of EU law or a provision of national law applied for the purpose of implementing EU law.

The obligation to apply the CFR is incumbent on all national bodies, regardless of the type of their competences (legislative, executive, judicial), their placement within the structure of the state (central, regional, and local; central and local government) and their other characteristics. Examples of situations in which national authorities are under the obligation to apply the CFR are provided below.

- National bodies are bound by the CFR inter alia in the following situations when they enact national legislation implementing EU law. According to the principle of loyal cooperation (Article 4 (3) of the TEU), Member States and their national bodies are obligated to carry out the tasks arising from the Treaties and to cooperate with the EU institutions in this regard¹⁸. This obligation includes, inter alia, the requirement to adopt national legislation, and to amend or repeal it, in order to ensure the effectiveness of EU law. Thus, when national bodies adopt, amend, or repeal national legislation pursuant to EU law and for the purposes set out therein, they implement EU law in the national legal order and ensure that it can be effectively applied in the Member State. In the course of legislative procedures in which national provisions are adopted to regulate situations falling within

¹⁵ Article 51 (1) of the Charter

¹⁶ Explanations on Article 51 of the Charter.

¹⁷ CJEU, C-419/14 - WebMindLicenses, point 66; C-650/13 - Delvigne, points 25–27; C-418/11 - Texdata Software, point 73; C-265/13 - Torralbo Marcos, points 29 and 30.

¹⁸ Judgment of the CJEU, joined cases, C-20/00 i C-64/00 - Booker Aquacultur (C-20/00) and Hydro Seafood (C-64/00); C-300/04 - Eman and Sevinger.

the scope of EU law, national bodies are under the obligation to respect the CFR. They are required to formulate their national laws in such a way as to ensure that individuals can exercise the fundamental rights guaranteed to them by the CFR.

To illustrate, the CFR will be binding for the national legislators who, on the basis of Regulation 2021/1060 on EU funds, adopt legislation defining the national bodies responsible for controlling the spending of EU funds and the control procedures applied by these bodies. Absence of such legislation would mean that the Member State is not complying with its obligation to protect EU financial interests imposed by Article 325 of the TFEU and other EU legislation. Another example is the rules on the protection of beneficiaries of EU funds. According to Article 19 (1) of the TEU, Member States are obligated to provide individuals with effective legal protection in areas covered by Union law. National legislation adopted for this purpose may determine, for example, the procedures for the resolution of disputes arising from spending EU funds and the national bodies competent for such matters. Such national legislation must also ensure that individuals are protected by the fundamental rights guaranteed to them by the CFR.

- National bodies are under the obligation to apply the CFR when directly applying EU legislation and acting on the basis thereof. Such is the case when, for example, during proceedings for the recovery of wrongfully disbursed EU funds, national bodies directly apply Article 3 of Regulation 2988/1995 on the protection of the EU's financial interests, which lays down the limitation periods for irregularities, or Article 2 (2) of same Regulation, which prescribes the retroactive application of a more lenient penalty. The national bodies are then bound by the CFR;
- National bodies are under the obligation to comply with the CFR when applying national legislation implementing EU law. National bodies are also bound by the CFR when they apply national law implementing EU law and ensuring its implementation in the Member State. The obligation to apply the CFR arises when, for example, a national body, on the basis of a public procurement law implementing EU directives in this field, organises tenders for projects financed by EU funds. In such a case, it is obligated to apply the CFR. Another example involves sanctions imposed by national bodies - administrative authorities or courts - for infringements of EU law, e.g. for illegal spending of EU funds. When EU funds are spent as a result of irregularities¹⁹ or fraud affecting the financial interests of the EU²⁰ the Member States are required to impose effective, proportionate, and dissuasive sanctions - administrative or criminal - on offenders. To fulfil this requirement, they may apply sanctions prescribed by national law, imposed for comparable infringements of national law, e.g. for illegal expenditure of grants financed from the state budget. Alternatively, they may establish specific sanctions applicable only to illegal expenditure of EU funds. Whichever option or combination of options is adopted, when imposing sanctions for infringements of EU law, Member States are obligated to comply with the CFR, e.g. the presumption of innocence of the suspected person, ensuring the right of defence (Article 48 of the CFR) and respecting the principle of legality and proportionality of sanctions (Article 49 of the CFR).

¹⁹ Article 1 (2) of Regulation 2988/1995

²⁰ Directive 2017/1371

Note: it is not sufficient for the application of the CFR that a national body operates in an area governed by EU law, e.g. carries out tasks related to implementation of cohesion policy. In order to be bound by the CFR, it must conduct its activities pursuant to EU law. Thus, a national body applies the CFR when it conducts an „EU matter”, and the standard of protection of fundamental rights is then determined by the CFR. The CJEU takes the view that there can be no situations governed by EU law in which fundamental rights would not apply. Thus, the application of EU law implies the simultaneous application of the fundamental rights protected under the CFR (Case C-617/10 - Åkerberg Fransson, points 19-21). It is pointed out that the CFR is a ‚shadow’ of EU law - it follows the EU law and is always applied in conjunction with it. The CFR’s ‚shadow’, which follows EU law, protects the individual against violations of the fundamental rights guarantees in the CFR, by both EU and national authorities. It is the individual’s weapon of protection against such actions by EU institutions and Member States as would limit such individual’s ability to exercise their fundamental rights enshrined in the CFR.

If, on the other hand, the action of a national body does not involve the application of EU law, is not carried out on the basis of EU law, and the body is therefore acting or deciding on a ‚purely national’ matter, it is not obligated to apply the CFR. In such a case, protection of fundamental rights is assured by national or international law.

1.2.2.1.2 Application of the CFR in the implementation of EU-funded programmes

The rules on the application of the CFR described above apply to national bodies involved in the implementation of programmes and projects financed by EU funds for the period 2021-2027. Where these bodies act within the scope of the application of EU law²¹, i.e. on the basis of EU law or national legislation applied for the purpose of implementing EU law, they are bound by the CFR.

1.2.2.1.2.1 Application of EU legislation concerning implementation of programmes financed by EU funds

The discussion of the obligations of national bodies regarding the application of the CFR in the implementation of programmes financed by EU funds can begin with recalling the obligations imposed on Member States in this respect. Firstly, respect for fundamental rights and compliance with the CFR is one of the horizontal principles that Member States are obligated to respect throughout the entire programme implementation cycle - during the preparation, implementation, monitoring, reporting and evaluation phases²².

Secondly, and more importantly, the effective application and implementation of the CFR is also one of the horizontal enabling conditions that Member States are obligated to comply

²¹ Article 51 (1) of the Charter.

²² Article 9 of Regulation 2021/1060 on EU funds. Other horizontal enabling conditions that Member States must ensure are: equality between men and women; consideration of the gender aspect and perspective and accessibility for persons with disabilities; prevention of discrimination on grounds of gender, race, ethnic origin, religion, belief, disability, age, or sexual orientation; and compliance with the “do no significant harm” principle applicable to environmental policy. This principle prohibits the promotion or conduct of economic activities that cause significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852.

with when preparing their programmes as well as during their implementation²³. It is important to note that, unlike in the case of horizontal rules, a Member State's failure to comply with a horizontal enabling condition, including on the effective application and implementation of the CFR, can lead to significant financial consequences. Indeed, where, in the Commission's assessment, a Member State fails to comply with a horizontal enabling condition before or during the implementation of programmes, the Commission refuses to reimburse the expenditure submitted by that State in a payment claim. This means that the Commission does not make a payment to that country until it is satisfied that the country has complied with the horizontal enabling condition. This issue will be addressed in this chapter and in section 1.7.2.2 of the Handbook.

It follows from the above that the obligation to comply with the CFR rests with all national bodies implementing programmes and projects financed by EU funds. In institutional terms, these are the bodies operating within the management and control system of the programme, which the Member State is obligated to set up and ensure its effective functioning throughout the programming period. All national bodies carrying out tasks related to the functioning of this system will therefore be obligated to comply with the CFR. These tasks are designed, inter alia, to

- ensure that expenditures reported by the Member State in the statements submitted to the Commission for reimbursement from the EU budget are legal and accurate;
- prevent, detect, and correct irregularities, including financial fraud, and report them to the Commission,
- monitor the implementation of the programmes,
- ensure the functioning of an electronic system of the exchange of information between the beneficiaries and institutions operating under the programme; and
- maintain records necessary to establish an audit trail²⁴.

In summary, the obligation to comply with the CFR lies with the national bodies carrying out these tasks, including: Managing Authorities, Intermediate Bodies, monitoring committees, Audit Authorities and others operating within the programme management and control system. The obligation to ensure compliance with the CFR extends to all activities, processes and procedures undertaken by these bodies at all stages of the implementation of programmes and projects financed by EU funds. It covers the following stages:

- development of EU spending and programming strategies,
- selecting projects for EU funding
- implementing these projects
- reviewing these projects, and
- monitoring and evaluation of programmes.

²³ Article 15 and Annex III of Regulation 2021/1060 on EU Funds. The thematic enabling conditions relating to ERDF, ESF+ and Cohesion Fund are included in Annex III of Regulation 2021/1060 on EU funds.

²⁴ Article 69 of Regulation 2021/1060 on EU funds

Compliance with the CFR should be ensured by regulations (both applicable law and non-legislative) and documents adopted and applied by national bodies when implementing programmes and projects, e.g. procedures, guidelines, regulations.

The specific responsibilities and tasks to be carried out by national bodies implementing programmes and projects financed by EU funds in the period 2021-2027 are set out, *inter alia*, in:

- Regulation 2021/1060 on expending EU funds - setting forth the rules for disbursement of the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+), the Cohesion Fund, the Just Transition Fund (JTF), the European Maritime, Fisheries and Aquaculture Fund (EMFAF), the Asylum, Migration and Integration Fund, the Internal Security Fund and the Financial Support Facility for Border Management and Visa Policy, hereinafter: Regulation 2021/1060 on EU funds,
- delegated and implementing acts adopted by the Commission on the basis of Regulation 2021/1060 on EU funds;
- fund-specific Regulations for expending individual EU funds, e.g. Regulation 2021/1058 on ERDF and CF, Regulation 2021/1057 on ESF Plus, Regulation 2021/1056 on JTF, Regulation 2021/1139 on EMFAF and Regulation 2021/1059 on Interreg,
- delegated and implementing acts adopted by the Commission on the basis of the fund-specific Regulations,
- Regulation 2988/1955 on the protection of the EU's financial interests and
- other EU legislation setting out the tasks to be carried out by Member States in relation to the implementation of projects financed by EU funds.

Where national bodies act pursuant to EU legislation applied in the implementation of programmes and projects financed by EU funds, they are obligated to apply the CFR and comply with it.

It has already been mentioned in this Chapter that the obligation to apply the CFR constitutes a horizontal principle²⁵ and horizontal enabling condition²⁶. This horizontal enabling condition is worth discussing as in order to fulfil it, national bodies are required to take strictly defined actions. Under EU legislation, in order to meet the horizontal enabling condition regarding the effective application of the CFR when implementing programmes²⁷, the Member States are obligated to provide effective mechanisms for doing so. These mechanisms are to ensure²⁸:

- compliance of EU-funded programmes and their implementation with the CFR, and
- the possibility for individuals to report:
 - to the Monitoring Committee - cases of non-compliance of operations (projects, action contracts) financed by EU funds with the CFR, and:

²⁵ Article 9 of Regulation 2021/1060 on EU funds.

²⁶ Article 15 and Annex III of Regulation 2021/1060 on EU Funds. The thematic enabling conditions applicable to ERDF, ESF+ and Cohesion Fund are addressed in Annex III of the Regulation 2021/1060 on EU Funds.

²⁷ Article 15 of Regulation 2021/1060 on EU funds.

²⁸ Annex III of the Regulation 2021/1060 on EU funds.

- to the bodies designated by the Member State - complaints concerning non-compliance with the CFR during implementation of the programmes²⁹. In addition to individuals' complaints regarding EU funds submitted to national bodies, individuals may also lodge such complaints with the Commission. The Commission may refer such complaints to the Member State and require the Member State to inform it of the outcome of the actions taken with this regard.

The Member States are obligated to ensure that the horizontal enabling condition for the effective application and implementation of the CFR is met at the programme preparation stage and throughout its implementation. The wording of this requirement is worth noting, where the emphasis is on the effectiveness of the action taken by the Member States. They were obligated to apply and implement the CFR effectively and, in order to ensure this, to adopt effective mechanisms for this purpose. Effectiveness in the application of the CFR may be understood as the national bodies actually ensuring that individuals are able to exercise the fundamental rights set out in the CFR in the implementation of EU projects.

When discussing the horizontal enabling condition of effective application and implementation of the CFR, it is important to note the important role played in this respect by the monitoring committees. One of the functions of these committees, explicitly provided for in EU legislation, is to examine the fulfilment of the enabling conditions throughout the programming period³⁰. Thus, the monitoring committees are obligated to continuously examine whether Polish bodies effectively apply and implement the CFR in the course of the implementation of programmes and projects financed by EU funds. It is therefore incumbent on them to continuously check whether the solutions adopted in Polish legislation (whether generally applicable or not) and the practice of their application by national bodies during the implementation of programmes do not hinder individuals from exercising their fundamental rights afforded to them by the CFR. Fulfilment of this obligation is ensured, inter alia, by Monitoring Committee adopting and applying appropriate procedures and taking remedial action in case of identified infringements of the CFR. This objective is also served by the obligation for the monitoring committees, as mentioned above, to establish procedures allowing individuals to report cases of non-compliance of programmes and projects with the CFR³¹.

1.2.2.1.2.2 Application of Polish legislation concerning the implementation of programmes financed by EU funds

The previous section presented the duty of national bodies to apply the CFR when implementing programmes financed by EU funds, arising when they act pursuant to EU law. This duty also arises when national bodies act on the basis of Polish legislation adopted for the purpose of implementing EU programmes and projects. Polish regulations fine-tune and adapt to national circumstances the way in which tasks entrusted to national bodies within this framework by EU legislation are carried out. Notable acts of legislation in this area include:

²⁹ Member States are obligated to provide arrangements for the effective handling of complaints concerning EU funds. These complaints include disputes between potential and selected beneficiaries concerning operations proposed or selected for funding and disputes with third parties concerning the implementation of programmes or projects, regardless of the national legal qualification of the claims asserted therein (Article 69 (7) of Regulation 2021/1060 on EU funds).

³⁰ Article 40 (1)(h) of Regulation 2021/1060 on EU funds.

³¹ Annex III to Regulation 2021/1060 on EU funds.

- Implementation Act - setting forth the rules for implementation of the tasks financed by EU funds for the period 2021-2027³² and stemming therefrom:
 - acts of secondary legislation, including ordinances of the Minister of Funds and Regional Policy
 - acts that do not have the force of law, including the guidelines of the Minister for Funds and Regional Policy³³ pertaining to, inter alia, selection of projects for the period 2021-2027³⁴, eligibility of expenditures for the period 2021-2027³⁵, implementation of the principles of equality within the framework of EU funds for the period 2021-2027³⁶, monitoring committees for the period 2021-2027³⁷, evaluation of cohesion policy 2021-2027³⁸, conditions for collection and transmission of data in electronic format for the period 2021-2027³⁹, monitoring the implementation of cohesion policy programmes for the period 2021-2027⁴⁰, methods of correcting irregularities for the period 2021-2027⁴¹
- Equality Act⁴² - ensuring equal treatment in the implementation of programmes and projects financed by EU funds,
- Public Procurement Law – applicable to procurement of services, supplies and works purchased under projects financed by EU funds, implementing EU directives in this field,
- Act on Public Finance – laying down rules for expending EU funds as public funds, and
- Criminal Code and the Penal Fiscal Code – penalising offences against EU financial interests as defined in Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law

When national bodies act pursuant to national legislation ensuring application and effectiveness of EU law regarding the implementation of programmes and projects financed by EU funds, they are obligated to comply with the CFR.

The European Commission has identified three situations in which national bodies, in the implementation of programmes and projects financed by EU funds, ‘act within the scope of EU law’ and are therefore required to apply the Charter⁴³.

³² Act of 28 April 2022 on the principles of implementation of tasks financed from European funds in the financial perspective 2021-2027

³³ <https://www.gov.pl/web/fundusze-regiony/wytyczne-na-lata-2021-2027>

³⁴ https://www.funduszeuropejskie.gov.pl/media/111539/Wytyczne_dotyczace_wyboru_projektow_na_lata_2021_2027.pdf

³⁵ https://www.funduszeuropejskie.gov.pl/media/112343/Wytyczne_dotyczace_kwalifikowalnosci_2021_2027.pdf

³⁶ <https://www.funduszeuropejskie.gov.pl/media/113155/wytyczne.pdf>

³⁷ https://www.funduszeuropejskie.gov.pl/media/122620/wytyczne_dot_km_na_lata_2021_2027_z_19_wrzesnia_2023.pdf

³⁸ https://www.funduszeuropejskie.gov.pl/media/110684/wytyczne_ewaluacja_240822.pdf

³⁹ https://www.funduszeuropejskie.gov.pl/media/114008/Wytyczne_dotyczace_warunkow_gromadzenia_i_przekazywania_danych_w_postaci_elektronicznej_na_lata_2021_2027.pdf

⁴⁰ https://www.funduszeuropejskie.gov.pl/media/111931/Wytyczne_dotyczace_kontroli_w_programach_polityki_spojnosci_2021-2027.pdf

⁴¹ https://www.funduszeuropejskie.gov.pl/media/122620/wytyczne_dot_km_na_lata_2021_2027_z_19_wrzesnia_2023.pdf

⁴² Act of 3 December 2010 in the implementation of certain EU regulations regarding equal treatment

⁴³ Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds (2016/C 269/01), pp. 4-5 (hereinafter: EC Guidance on the Charter).

- 1) National bodies ‘act within the scope of EU law’ and are bound by the CFR when they develop and implement a strategy for the implementation of cohesion policy and draw up related programming documents required by EU legislation, such as e.g. Regulation 2021/1060 on EU funds, as well as fund-specific Regulations. National bodies are required to apply the CFR when, for example, preparing the Partnership Agreement and programmes, or amending them. In this respect, in the Commission’s view, it is particularly important to ensure that national bodies respect: equality before the law (Article 20 of the CFR), non-discrimination (Article 21 of the CFR), equality between women and men (Article 23 of the CFR), the rights of persons with disabilities to integration (Article 26 of the CFR), the right to property (Article 17 of the CFR) and environmental protection (Article 37 of the CFR).
- 2) National bodies ‘act within the scope of EU law’ and are bound by the CFR when setting up and ensuring effective functioning of programme management, monitoring and control system. The requirement to set up such a system and ensure its effective functioning is imposed on the Member State by Regulation 2021/1060 on EU funds and other regulations setting out the tasks related to the management, monitoring and control of these funds. The Commission recommends that national bodies pay particular attention to respecting the CFR in course of:
 - a. adopting and using documents necessary for operation of the management and control system, concerning, for example, submission of payment requests to the Commission and their certification, implementation of projects and audits, verification of reimbursement requests by beneficiaries of EU funds, evaluation of programmes, notification of irregularities and fraud to the Commission, carrying out recovery procedures in the event of detection of irregularities, and reporting to the Commission⁴⁴. The Commission recommends that within this scope, national bodies give particular attention to compliance with: the right to an effective remedy and fair trial (Article 47 of the CFR); the right to be heard, which is one aspect of the right of defence (Article 48 of the CFR); the right to respect for private and family life (Article 7 of the CFR); and the right to protection of personal data (Article 8 of the CFR);
 - b. adopting and using documents organising the partnership⁴⁵ for the purposes of implementing the programmes. The partnership organised by the Member State is to include, inter alia, regional, local, urban, and other public authorities, economic and social partners, as well as entities representing civil society, entities responsible for promoting social inclusion, fundamental rights, rights of persons with disabilities, gender equality and non-discrimination; also, research organisations and universities. The Commission emphasises that in this area it is particularly important for national bodies to safeguard: the principle of non-discrimination (Article 21 of the CFR); linguistic diversity (Article 22 of the CFR); equality between women and men (Article 23 of the CFR); and the right of persons with disabilities to integration (Article 26 of the CFR).
 - c. adopting and using the documents governing the operation of the monitoring committees⁴⁶, including rules on the membership in these committees and their rules of procedure. The Commission points out that in the course of the activities concer-

⁴⁴ A sample list of actions taken by Member States to ensure effective operation of the management and control system, in which countries are encouraged to pay particular attention to compliance with the Charter, is provided in the EC Guidance on the Charter, pp. 9-11.

⁴⁵ Article 8 of Regulation 2021/1060 on EU funds.

⁴⁶ Article 38-40 of Regulation 2021/1060 on EU funds.

ning the monitoring committees and the activities undertaken by these committees, the following must be ensured: the principle of non-discrimination (Article 21 of the CFR), the right to protection of personal data (Article 8 of the CFR), linguistic diversity (Article 22 of the CFR), equality before the law (Article 20 of the CFR), equality between women and men (Article 23 of the CFR), the rights of persons with disabilities to integration (Article 26 of the CFR) and the right to an effective remedy and to a fair trial (Article 47 of the CFR).

3) National bodies 'act within the scope of EU law' and are bound by the CFR when they implement the programmes and carry out the related tasks.

a. Managing Authorities 'act within the scope of EU law' when they: draw up and implement procedures and criteria for the selection of projects financed by EU funds, call for proposals for the award of EU grants, select projects for EU funding, sign grant agreements, monitor the implementation of projects financed by EU funds, verify payment requests submitted by beneficiaries, review project implementation, send payment requests to the Commission and report on the tasks carried out. In carrying out these tasks, the Commission recommends that Managing Authorities and Intermediate Bodies pay particular attention to respecting: the right to the protection of personal data (Article 8 of the CFR), linguistic diversity (Article 22 of the CFR), equality before the law (Article 20 of the CFR), non-discrimination (Article 21 of the CFR), equality between women and men (Article 23 of the CFR), integration of persons with disabilities (Article 26 of the CFR), protection of the environment (Article 37 of the CFR), the right to an effective remedy and fair trial (Article 47 of the CFR) and the right to safe working conditions (Article 31 of the CFR).

b. the bodies which certify expenditures submitted by the Member States to the Commission 'act within the scope of EU law' when they: draw up, certify and submit to the Commission the requests for payment, draw up the statements of expenditure, certify the completeness, accuracy and veracity of these statements, certify the legality and regularity of expenditures incurred and their disbursement for measures selected for funding under the programme, and ensure that there is an electronic system of accounting records recording all payments covered by EU funds. In the Commission's view, the institutions carrying out this task should pay particular attention to respecting the right to the protection of personal data (Article 8 of the CFR);

c. The audit institution 'acts within the scope of EU law' when it: carries out audits, develops an audit strategy, and draws up audit opinions. The Commission recommends that the audit institution should take particular care to ensure compliance with: the right to the protection of personal data (Article 8 of the CFR), non-discrimination (Article 21 of the CFR) and the right to respect for private and family life (Article 7 of the CFR).

The Commission has identified a catalogue of fundamental rights enshrined in the CFR that the national bodies should pay particular attention to when implementing programmes financed by EU funds. According to the Commission, these are (in the following order)⁴⁷:

- the right to an effective remedy and to a fair trial (Article 47 of the CFR),

⁴⁷ EC Guidance on the Charter, s. 6.

- the right to the protection of personal data (Article 8 of the CFR),
- before the law (Article 20 of the CFR) and equality between women and men (Article 23 of the CFR),
- the right to non-discrimination (Article 21 of the CFR),
- the rights of the child (Article 24 of the CFR),
- the right of persons with disabilities to integration (Article 26 of the CFR),
- the right to a high level of environmental protection (Article 37 of the CFR),
- linguistic diversity (Article 22 of the CFR),
- safe working conditions (Article 31 of the CFR),
- freedom of expression and information (Article 11 of the CFR)
- freedom of assembly and association (Article 12 of the CFR),
- right to education (Article 14 of the CFR),
- freedom to conduct a business (Article 15 of the CFR),
- the right to property (Article 17 of the CFR),
- protection in the event of removal, expulsion, or extradition (Article 19 of the CFR), and
- respect for private and family life (Article 7 of the CFR).

When discussing the national legislation applicable to the implementation of programmes and projects financed from EU funds, attention should also be paid to Polish laws ensuring the implementation of the CFR in the Polish legal order. Besides the Constitution of the Republic of Poland⁴⁸, which guarantees most of the fundamental rights enshrined in the CFR, the acts of law ensuring the legal effectiveness of the CFR in Poland include, inter alia:

- the Act on Personal Data Protection - within the scope of application of Article 8 of the CFR (protection of personal data)
- the Act on Employers' Organisations, the Act on Public Benefit Activity, and the Act on Promotion of Employment - within the scope of application of Article 11 of the CFR (freedom of expression and information)
- the Act on Trade Unions - within the scope of application of Article 12 of the CFR (freedom of assembly and association),

⁴⁸ Constitution of the Republic of Poland guarantees the rights and freedoms enshrined in, inter alia, Article 7 of the Charter (respect for private and family life), Article 8 of the Charter (protection of personal data), Article 11 of the Charter (freedom of expression and information), Article 12 of the Charter (freedom of assembly and association), Article 14 of the Charter (right to education), Article 16 of the Charter (freedom to conduct a business), Article 17 of the Charter (right to property), Article 19 of the Charter (protection in the event of removal or expulsion), Article 20 of the Charter (equality before the law), Article 21 of the Charter (non-discrimination), Article 22 (cultural, religious and linguistic diversity), Article 23 of the Charter (equality between men and women), Article 24 of the Charter (rights of the child), Article 26 of the Charter (integration of persons with disabilities), Article 31 of the Charter (fair and just working conditions), Article 37 of the Charter (protection of the environment), Article 41 of the Charter (right to good administration) and Article 47 of the Charter (right to an effective remedy and to a fair trial).

- the Education Law - within the scope of application of Article 14 of the CFR (right to education),
- the Act on Freedom of Economic Activity - within the scope of application of Article 16 of the CFR (freedom to conduct a business),
- the Act on Real Estate Management, the Act on Copyright and Related Rights and the Industrial Property Law - within the scope of application of Article 17 of the CFR (right to property)
- the Code of Criminal Procedure - within the scope of application of Article 19 of the CFR (protection in case of removal or expulsion),
- Criminal Code – within the scope of application of Article 21 of the CFR (non-discrimination),
- the Labour Code - within the scope of application of Article 21 of the CFR (non-discrimination), Article 23 of the CFR (equality between women and men), and Article 31 of the CFR (fair and just working conditions),
- the Act on the Ombudsman for Children - within the scope of application of Article 24 of the CFR (children's rights)
- the Act on Vocational and Social Rehabilitation and the Employment of Disabled Persons - within the scope of application of Article 26 of the CFR (integration of disabled persons)
- the Environmental Protection Law, the Act on Nature Conservation and the Act on the Prevention and Remedy of Environmental Damage - within the scope of application of Article 37 of the CFR (environmental protection),
- The Code of Administrative Procedure - within the scope of application of Article 41 of the CFR (right to good administration)
- Law on Proceedings before Administrative Courts - within the scope of application of Article 47 of the CFR (right to an effective remedy and to a fair trial)

1.2.2.2 Non-applicability of the CFR in “purely domestic matters”

The CFR is not binding for national bodies with regard to matters regulated and decided exclusively under national law. It therefore does not apply in ‘purely domestic matters’, which do not in any way involve EU law and in which EU law is not applied. Thus, in the event of a breach of fundamental rights (human rights) granted to the individual under national legislation which does not implement EU law, the individual cannot rely on the protection afforded to him or her under the CFR. In such cases, the individual benefits from the legal protection of national laws - constitutional and statutory - and international agreements, such as the ECHR. The national body will be obligated to respect these standards of protection in cases where it is not bound by the CFR.

1.2.3 Are individuals obligated to comply with the CFR?

The obligation to respect the CFR is incumbent on the EU institutions and on the Member States when they apply EU law. The CFR is applied in disputes and cases bringing together authorities and individuals (private parties). It is a defence instrument protecting individuals against infringements of their fundamental rights guaranteed by the CFR, such as may be committed by authorities - EU and national (vertical relations).

Nevertheless, many of the CFR's provisions are addressed directly to individuals - establishing their fundamental rights and the corresponding obligations imposed on other individuals, such as the prohibition of discrimination (Article 21 (1) of the CFR). Does this mean that the CFR is also binding for individuals? Does it apply to relationships between individuals governed by private law (vertical relationships)? The CFR does not predetermine this issue, but the CJEU allows it in exceptional situations. This issue was dealt with in Case C-555/07 - *Kükükdeveci*, in which German employment law established short notice periods for young employees (up to 25 years) and long notice periods for other employees. The CJEU ruled that these provisions discriminated against young workers on the grounds of age and were contrary to Article 21 (1) of the CFR prohibiting all discrimination. The CJEU decided in this case that the German legislation incompatible with the provisions of the CFR should not be applied by the German private employer (nor by the German courts resolving disputes arising in this context, as was clear). An equivalent decision was reached in case C-144/04 - *Mangold*, in which the CJEU also confirmed the obligation of a German private employer (and a German court) not to apply national labour laws discriminating against older persons in violation of Article 21 (1) of the CFR. The CJEU took a further step in case C-414/16 - *Egenberger*, in which it ruled that the obligation to apply the CFR in relations between individuals may also apply to provisions of the CFR other than the anti-discrimination provisions of Article 21 (1), which it had ruled on in cases C-555/07 - *Kükükdeveci* and C-144/04 - *Mangold*. The CJEU stated that in order for that to be the case, however, such provisions must be "sufficient in themselves to confer on individuals a right which they may rely on as such". It considered in this case that Article 27 of the CFR, establishing the right of employees to be informed and consulted within the company, did not confer such a subjective right on individuals, and as a result, employers are not obligated to apply it to employed workers. It follows from the CJEU case law cited above that an individual, in a dispute with another individual, may rely directly only on such provisions of the CFR which confer a subjective right on that individual. Based on such a provision, the CFR may require that the other individual not apply a national law incompatible with the provision of the CFR conferring the individual's subjective right.

Application of the CFR by individuals (referred to as the horizontal direct effect of the CFR) is an entirely exceptional situation, which the CJEU has only allowed in a handful of cases and subjected to strict requirements.

The principle remains that the CFR is binding for national authorities who, when acting in the field of application of EU law, are obligated to comply with the CFR and ensure that individuals can exercise the fundamental rights enshrined therein. EU law does not provide for the possibility for national authorities to exempt themselves from the CFR or to delegate its implementation to anyone. It is an obligation incumbent on them alone. Individuals are obligated to comply with fundamental rights when implementing EU projects. The source of this obligation, however, is not the CFR, as its application is the sole responsibility of national (and EU) authorities, but rather other legislation applicable to these individuals, such as the prohibition

of discrimination in labour relations, stipulated in the Labour Code. Thus, national authorities cannot - in discharging their obligation to comply with the CFR - delegate its implementation to individuals, e.g. applicants, beneficiaries, and other private entities. Nor can they obligate individuals to bear responsibility for the possible consequences of infringements of the CFR. Therefore, it is not possible for national authorities to make certain actions, such as awarding an EU grant, or its disbursement, conditional upon obligating individuals to comply with the CFR and bear the consequences of its infringements. Any such action by national authorities shifting their responsibility for complying with the CFR onto individuals, or diminishing it, amounts to an abuse of law, is unacceptable and, more importantly, ineffective under EU law. If, in the course of implementing programmes and projects financed by EU funds, an infringement of the CFR occurs, the resulting liability will be borne by the national body that permitted such infringement to occur, irrespective of any action it may have taken to shift that liability onto third parties. Conversely, individuals who commit infringements of fundamental rights in the course of implementing EU projects (e.g. discrimination in labour relations) will bear the related legal liability stemming from relevant acts of law that require them to respect such rights (e.g. Labour Code). This reasoning confirms the position of the Commission, which holds that only those individuals (in casu beneficiaries of EU funds) whatever their legal form, which have been made responsible, pursuant to a measure adopted by a Member State, for providing a public service under the control of the State and which have for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, are obligated to comply with the CFR⁴⁹. This proves that the obligation to ensure compliance with the CFR rests solely with the Member States; it applies to individuals only when they act as 'emanations of the State'.

1.3 How to determine the meaning of the fundamental rights enshrined in the CFR?

The CFR provides guidance in determining the meaning of the fundamental rights enshrined therein. It states that its provisions should be interpreted in accordance with the constitutional traditions common to the Member States, with the ECHR, and taking full account of national laws and practices⁵⁰. Documents helpful in interpreting the CFR's provisions include:

1. Explanations relating to the Charter of Fundamental Rights⁵¹ – an interpretative document, prepared under the authority of the Praesidium of the Convention which drafted the CFR. Provisions of the CFR⁵² and the TEU⁵³ require that Explanations relating to the CFR should be taken into consideration when interpreting its provisions.

In discussing the matter of determining the meaning of the entitlements enshrined in the CFR, it is worth mentioning that the CFR comprises rights and principles⁵⁴. Other than indicating that the EU institutions and Member States shall respect the rights, observe the principles, and promote the application thereof, the CFR does not clarify

⁴⁹ European Commission guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds (2016/C 269/01), points 2.2.1 and 3.3 (EC Guidance on the Charter).

⁵⁰ Article 52 of the Charter

⁵¹ Explanations relating to the Charter of Fundamental Rights, Official Journal C 303, 14 December 2007, pp. 17–37

⁵² Article 52 (7) of the Charter

⁵³ Article 6 (1) (3) of the TEU

⁵⁴ Article 51 (1) of the Charter, para. 7 of Preamble to the Charter.

their characteristics. Commentators on the CFR assume that provisions stipulating rights provide direct protection to individuals, are enforceable in nature and can be invoked directly before EU and national institutions for the purpose of protecting the rights enshrined therein. In contrast, the CFR's provisions containing principles cannot constitute a direct legal basis for conferring rights on individuals. In the case of the principles, protection must be claimed pursuant to EU legislation other than the CFR or national acts which provide for it. The principles serve as interpretative guidelines delineating the scope of protection available under other legal acts. They are also a criterion for assessing the legality of these acts - acts which infringe the principles cannot be applied and must be eliminated from the legal circulation⁵⁵. In light of Explanations relating to the CFR, the principles are: rights of the elderly (Article 25 of the CFR), the right of persons with disabilities to integration (Article 26 of the CFR) and environmental protection provisions (Article 37 of the CFR). Some provisions of the CFR contain elements of both rights and principles. These include equality between women and men (Article 23 of the CFR), protection of family and professional life (Article 33 of the CFR) and the right to social security and social assistance (Article 34 of the CFR)⁵⁶.

2. Common constitutional traditions of the Member States – the CFR stipulates that insofar as the CFR recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights should be interpreted in harmony with those traditions⁵⁷. The fundamental rights enshrined in the CFR should therefore be interpreted in a way that ensures a high level of protection, appropriate for EU law and consistent with common constitutional traditions. The Explanations relating to the CFR point to origin of certain fundamental rights as derived from the constitutional traditions of the Member States. This applies, for example, to Article 20 of the CFR establishing equality before the law (case 292/97 Karlsson). In searching for the constitutional origins of the fundamental rights contained in the CFR, the case law of the CJEU is helpful, as it elevates certain rights to the level of general principles of EU law. In these judgments, the CJEU has often pointed to the anchoring of these rights in national basic laws.
3. National legislation of Member States – national legislation of the Member States may provide guidance in interpreting the CFR whenever the CFR refers to such legislation. For example, according to Article 9 of the CFR, the rights to marry and to found a family are guaranteed as provided by the national laws governing the exercise of these rights. When interpreting the scope of protection to which individuals are entitled under this provision, one must take into account the national laws of the Member State relating to marriage and family formation.
4. European Convention on Human Rights and the case law of the ECHR⁵⁸ - many of the fundamental rights enshrined in the CFR have their counterparts in the ECHR. The CFR establishes that the fundamental rights enshrined therein have the same meaning and scope as the corresponding human rights established in the ECHR, its annexed protocols and case law of the ECHR⁵⁹. However, the scope of protection afforded by the

⁵⁵ Opinion of Advocate General Cruz Villalón dated 18 July 2013, points 49 and 50 in case CJEU, C-176/12 - Association de médiation sociale.

⁵⁶ Explanations relating to the Charter

⁵⁷ Article 52 (4) of the Charter, Article 53 of the Charter, Explanations to Article 52 of the Charter.

⁵⁸ Article 52 (3) of the Charter.

⁵⁹ Article 52 (3) of the Charter.

CFR may be higher⁶⁰. In other words, the ECHR sets a minimum standard of human rights protection with which EU legislation and national laws implementing EU law must comply. It is permissible for these national laws to provide a higher standard of protection than that set by the ECHR.

5. Other international agreements, to which the EU or all Member States are parties⁶¹.

- The EU is a party to, inter alia, the UN Convention on the Rights of Persons with Disabilities (2006) – the first international agreement setting minimum standards for the protection of the rights of persons with disabilities; the EU joined the Convention in 2011⁶²
- all Member States are parties to international human rights agreements adopted within the framework of the United Nations:
 - International Convention on the Elimination of All Forms of Racial Discrimination (1965);
 - The International Covenant on Economic, Social and Cultural Rights (1966);
 - International Covenant on Civil and Political Rights (1966);
 - Convention on the Elimination of All Forms of Discrimination against Women (1979);
 - Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
 - Convention on the Rights of the Child (1989).

6. CJEU case law concerning general principles of EU law and the CFR - if a provision of the CFR lays down a fundamental right which the CJEU has recognised as a general principle of EU law, then the CJEU's jurisprudence on that principle indicates the significance of the right enshrined in the CFR.

1.4. The Charter of Fundamental Rights and the European Convention on Human Rights

All the Member States belong to the Council of Europe and are bound by the ECHR⁶³. The European Union is not a party to the Convention. Although it has been discussed in the Council of Europe and the EU since the 1970s, the EU only committed itself to be bound by the Convention upon the Lisbon Treaty's entry into force (2009). Article 6 (2) of the TEU then stipulated that the EU would join the Convention, and that this accession would not affect the EU's competences under the EU Treaties.

EU's accession to the Convention on Human Rights will have an impact on several levels. The EU, as a party to this Convention, will be incorporated into the system of legal protection it institutes. The EU will be obligated to comply with the Convention and in this respect will be subject to the control of the ECHR in Strasbourg. Once the EU joins the Convention, the ECHR

⁶⁰ Explanations to Article 52 (3) of the Charter.

⁶¹ Article 53 of the Charter.

⁶² Decision of the Council of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (Official Journal of the EU L 23 of 27.01.2010, p. 3).

⁶³ Reference to the ECHR means the Convention, its Protocols and the case law of the European Court of Human Rights relating thereto

will be able to scrutinise the actions of EU institutions for compliance with the Convention, just as it currently scrutinises the actions of Member States. Moreover, individuals will be able to file direct complaints with the ECHR against EU legislative acts adopted by EU institutions, indicating violations of the Convention, just as they can now file complaints against national legislative acts adopted by Member States. The EU's accession to the Convention is also expected to enhance the EU's credibility with third countries, which, in its bilateral relations, the EU regularly calls to respect the Convention.

EU accession to the Convention on Human Rights requires concluding an accession agreement. A draft of such an agreement was prepared (2013), but it was not concluded, as the CJEU deemed the agreement incompatible with the EU Treaties and the CFR (2014) (see: [CJEU opinion 2/13](#)). The CJEU had already in the past taken a negative view of the EU's accession to the Convention (1996) (see [CJEU opinion 2/94](#)), at the time citing lack of EU competence in the area of human rights in the treaties as the reason. The EU and the Council of Europe have resumed negotiations (2019), and these are ongoing. Once the content of the accession agreement is agreed, its entry into force will require, among other things, a positive opinion from the CJEU and ratification by national parliaments⁶⁴.

The fact that the EU has not (as yet) acceded the ECHR does not mean that the Convention is not applicable in the EU. All Member States are parties thereto. The European Convention on Human Rights has two functions in EU law:

- First, it sets a minimum standard of protection to which individuals are entitled. The CFR enshrines rights which correspond to those guaranteed by the Convention. The CFR stipulates that the meaning and scope of the rights laid down in the CFR are the same as those granted by the Convention (Article 52 (3) of the CFR). The Convention establishes a minimum standard of protection, Union law may confer more extensive scope of protection.
- Second, individuals may invoke the rights guaranteed to them by the Convention as general principles of EU law, so they play a key role in the legal system (Article 6 (3) of the TEU).

1.5. The Polish-British Protocol does not exclude applicability of the CFR

The CFR has the same legal force as the TEU and the TFEU; it is an act with the same legal standing as the Treaties. During and after the negotiations, the content of the CFR gave rise to much discussion, including with regard to its application. The UK government raised objections relating to the application on its territory of the social and labour rights contained in Title IV 'Solidarity' of the CFR. The Polish government, on the other hand, was concerned about the possibility of CFR's provisions being interpreted to provide for the right of same-sex couples to marry, the right to euthanasia, the right to abortion, as well as possible use of the CFR to legitimise German property claims. To address their concerns, the British negotiated a special protocol (2007), which Poland subsequently acceded to. This is Protocol No. 30 on the application of the CFR of Fundamental Rights of the European Union to Poland and the

⁶⁴ [https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#{%2230166137%22:1}\]](https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#{%2230166137%22:1}])

United Kingdom. This document, called the Polish-British Protocol, was included in the Lisbon Treaty as an annex. It stipulates that the CFR does not extend the competence of the CJEU or any court or tribunal of Poland or the United Kingdom to declare that their laws or actions are incompatible with the CFR (Article 1 (1) of the Polish-British Protocol). It was also understood that the CFR does not establish rights that could be asserted through the courts in Poland or the United Kingdom unless such a right is provided for in the domestic law of those countries (Article 1 (2) of the Polish-British Protocol).

In the debate on advisability and effectiveness of the Polish-British Protocol, commentators have taken differing positions. According to the most far-reaching view, the Protocol was intended to exclude the applicability of the CFR to Poland. Others argued that adoption of the Protocol stemmed from excessive caution on the part of the Polish government, as safeguards against extending the CJEU's jurisdiction beyond the area delimited by the EU Treaties were sufficient and the limits of the CFR's application were quite clear in light of both its own provisions (Article 51 of the CFR) and the EU Treaties (Article 6 (1) of the TEU).

The CJEU referred to the Polish-British Protocol in two judgments. In case C-411/10 *N. P. et al.*, the CJEU ruled that the Protocol does not contest the applicability of the CFR to Poland or the United Kingdom. The Court stated that Article 1 (1) of that Protocol reaffirms the content of Article 51 of the CFR concerning the scope of application of the CFR, but does not seek to exempt those States from compliance with the CFR or to prevent the courts of those States from overseeing compliance with the CFR (pt. 119, 120 of the judgment). Also in case C 619/18 *European Commission vs Poland*, the CJEU ruled that **the Polish-British Protocol does not call into question the applicability of the CFR in Poland and is not intended to exempt Poland from its obligation to respect its provisions** (point 53 of the judgment).

This means that the Polish-British Protocol does not exempt Poland from the obligation to respect the CFR. Fundamental rights have the same meaning and the same legal force in Poland as in all other Member States.

1.6 Can the fundamental rights established in the CFR be limited?

The CFR permits limitations to the fundamental rights established therein, on condition that the related requirements are met. It stipulates that any limitations on the exercise of the fundamental rights recognised by the CFR must be provided for by law and respect the essence of those fundamental rights. Subject to the principle of proportionality, limitations may only be imposed if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the fundamental rights of other persons⁶⁵.

Although the CFR does not pre-determine this, some of the fundamental rights are not subject to limitations. These are the absolute human rights within the meaning of the ECHR, e.g. the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. These rights, which have their equivalents under the CFR (e.g. Article 2 of the CFR and Article 4 of the CFR), are also not subject to limitation.

⁶⁵ Article 52 (1) of the Charter.

When determining whether a particular fundamental right enshrined in the CFR is subject to limitations, it may be helpful to answer the following questions:

1. Can the given fundamental right be limited? Absolute human rights under the ECHR are not subject to limitation;
2. If yes, does the limitation safeguard the essence of the fundamental right being thus limited?
3. If yes, does it serve a general interest objective recognised by the EU? If no, does it serve the protection of the fundamental rights of the people?
4. If yes, is it proportionate? A limitation is proportionate if it achieves the stated aim (appropriate), is necessary and does not limit a fundamental right to an extent greater than necessary.

Chapter 2 of the Handbook provides detailed guidance for assessing the admissibility of limitations to the fundamental rights established in the CFR. A checklist of targeted questions provided in that chapter is helpful in this respect. The explanations on the website of the EU Agency for Fundamental Rights can also be used to make such determinations⁶⁶.

1.7 What consequences might arise from limiting the fundamental rights laid down in the CFR?

If, as a result of an action by an EU or national body, an individual's ability to exercise the fundamental rights granted to him/her by the CFR has been limited, the resulting legal impacts may occur at several levels. They may concern the affected individual whose fundamental rights have been infringed (see section 1.7.1. of the Handbook) and, where applicable, the Member State (see section 1.7.2. of the Handbook) or the EU institutions. (see section 1.7.3 of the Handbook).

1.7.1 Consequences for the individuals

National bodies conduct implementation of projects financed by EU funds under national law. In the course of doing so, they are obligated to ensure respect for the fundamental rights granted to individuals under the CFR. If, as a result of the actions of the national bodies, fundamental rights conferred on individuals become limited, resulting legal disputes are resolved by national courts. Depending on the type of infringement of the CFR and the nature of the case, these may be civil, administrative, or criminal courts.

In the course of resolving legal disputes arising in connection with the limitation of the fundamental rights provided for by the CFR, national bodies shall ensure the protection of these rights for individuals by applying the legal constructions (principles) established by EU law:

- the principle of consistent interpretation of EU law (see section 1.7.1.1 of the Handbook),
- the principle of primacy of EU law (see section 1.7.1.2 of the Handbook)

⁶⁶ [Charter-related materials and resources of the European Union Agency for Fundamental Rights | European Union Agency for Fundamental Rights \(europa.eu\)](#)

- the principle of direct effect of EU law (see section 1.5.7.3 of the Handbook) and
- the principle of the Member State's liability for damages - if individuals have suffered damage as a result of a limitation of their fundamental rights guaranteed by the CFR (see section 1.7.1.4 of the Handbook).

1.7.1.1 Interpretation of provisions of national legislation in conformity with the CFR

If the national body finds that the fundamental right conferred on an individual by the CFR has been limited because of a provision of national legislation and that it is therefore the national provision which prevents the individual from exercising that right, the national body is obligated, in the first instance, to assess whether it can ensure protection of such individual by means of a pro-Union interpretation of national law (an interpretation in conformity with EU law, favourable to EU law). Such an interpretation, as established by the CJEU's case law, consists of determining the meaning (interpretation) of the national legislation in the light of the content and objectives of EU legislation, i.e. in the discussed case - the CFR, which grants fundamental rights to individuals⁶⁷. The duty of providing a conforming interpretation is incumbent on all national bodies, not only on the courts, and applies to all acts of national legislation, whether binding or not. In the process of determining the meaning of a national norm 'in conformity' with an EU norm (the CFR), one important element is reasoning of purpose and function, referring to the purpose of the EU regulation, as well as effectiveness aspects, requiring the regulation to be fully effective (*effet utile*). In case of implementation of projects financed by EU funds, national law should be interpreted in a manner ensuring effective protection of the fundamental rights granted to individuals by the CFR.

A consistent interpretation of national legislation in conformity with EU law is not always possible. According to CJEU case law, a conforming interpretation must not lead to a determination of the content of the national legal norm that is contrary to the meaning and purpose intended by the national legislator (prohibition of *contra legem* interpretation), nor must it violate general principles of EU law, such as the principle of legal certainty and the principle of the protection of legitimate expectations. If the interpretation of national law in conformity with EU law (the CFR) does not result in the protection of fundamental rights and therefore does not ensure compliance with the CFR, the national body is obligated to provide the protection guaranteed therein by applying other constructions of EU law. In accordance with the principle of the primacy of EU law, the national body is obligated not to apply such national legislation as is incompatible with the CFR (see section 1.7.1.2 of the Handbook) and, where possible, to provide protection directly on the basis of the CFR, in accordance with the principle of direct effect of EU law (see section 1.7.1.3 of the Handbook).

1.7.1.2 Setting aside a national provision that is incompatible with the CFR

The principle of primacy of EU law requires, *inter alia*, that national law be compatible with EU law - primary and secondary. Therefore, the national legal order should not include or apply national provisions which are incompatible with EU law, including the CFR. If, however, such

⁶⁷ CJEU judgment in [case C-101/01 - Lindqvist](#), point 87).

provisions exist and their application has the effect of limiting the fundamental rights laid down in the CFR, the national body is obligated to disregard them and not apply them in the case at hand, as a national provision cannot prevent or impede an individual from exercising the CFR. However, if the application of the national provision leads to such an effect, it should not be applied.

1.7.1.3 Direct effect of the CFR's provisions

In proceedings before national bodies, individuals may directly invoke EU rules conferring rights on them. Such a characteristic of EU legislation, referred to as the direct effect of EU law, occurs when the legislative provisions meet the three requirements set out in CJEU case law. When they are: (1) clear and precise - they unambiguously set out the rights and obligations to which individuals are entitled, (2) unconditional - their application does not depend on future events or circumstances and (3) complete - they do not leave national bodies a margin of discretion permitting different decisions. Provisions of the CFR may also have direct effect if they meet these three requirements. In the EU institutional system, only the CJEU is competent to determine whether EU legislation has direct effect. It has already been mentioned here that the CJEU confirmed that Article 21 (1) of the CFR, establishing the prohibition of discrimination, has direct effect; conversely, it excluded the direct effect of Article 27 of the CFR on the right of employees to information and consultation within the company. These are, so far, the only statements made by the CJEU on the direct effect of the provisions of the CFR. Keeping in mind the caveat about the exclusive competence of the CJEU to determine the direct effect of EU legislation, including the CFR, one can recall the voices of commentators identifying such provisions of the CFR as, in their view, might have direct effect⁶⁸. These provisions include:

- Article 8 of the CFR - establishing the right to the protection of personal data,
- Article 11 of the CFR - relating to freedom of expression and information,
- Article 12 of the CFR - relating to freedom of assembly, association, and the right to form and to join trade unions,
- Article 16 of the CFR - establishing the freedom to conduct a business,
- Article 17 of the CFR - guaranteeing the right to property and the protection of intellectual property,
- Article 21 of the CFR - prohibiting discrimination,
- Article 23 of the CFR - ensuring equality between women and men,
- Article 28 - establishing the right to collective bargaining and action,
- Article 30 of the CFR - providing protection in the event of wrongful dismissal,
- Article 31 of the CFR - concerning the right to decent working conditions,
- Article 32 of the CFR - prohibiting child labour and protecting young people at work, and

⁶⁸ D. Leczykiewicz, Horizontal Application of the Charter of Fundamental Rights, „European Law Review” 2013, Vol. 38, s. 479; Ł. Bojarski, D. Schindlauer, K. Władasz, M. Wróblewski, Karta Praw Podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników, Warsaw 2014, p. 56.

- Article 33 (2) of the CFR - providing protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

All national bodies are under the obligation to apply the directly effective provisions of the CFR in their proceedings. In the discussed cases of implementation of EU programmes and projects, it is particularly the duty of administrative bodies and courts. However, it should be reiterated that the notion of 'national body' is understood broadly to include all entities acting under the control of the state, whatever their legal form, which have powers not normally found in ordinary relations between individuals (emanation of the state)⁶⁹. Thus, the national bodies required to apply the CFR directly are the institutions involved in the implementation of EU programmes and projects, i.e. Managing Authorities, Intermediate Bodies, Implementing Authorities, Monitoring Committees, Audit Authorities, and others carrying out the related tasks assigned by the states. They can be deemed to be an emanation of the state.

1.7.1.4 Member State's liability for damages resulting from infringement of the CFR

The national bodies ensure protection of the fundamental rights granted to individuals by the CFR by, inter alia, interpreting national laws in a pro-Union manner consistent with the CFR, disapplying national provisions inconsistent with the CFR and on the basis of the directly effective provisions of the CFR. Notwithstanding such protection, an individual who had suffered damage as a result of national body limiting his or her fundamental rights granted by the CFR may claim compensation. In such a case, in accordance with the principle of the Member States' liability for damages for infringement of EU law, as established by the CJEU in case *Francovich*⁷⁰, the individual is entitled to recover damages from the Member State for infringement of the CFR. It follows from the case law of the CJEU that a Member State is obligated to compensate an individual for damage caused by an infringement of EU law (in casu the CFR) if the purpose of the infringed EU (the CFR) provision was to confer a (fundamental) right on the individual, the infringement was sufficiently severe⁷¹ and there is a direct causal link between the infringement of EU law (the CFR) by the Member State and the damage suffered by the individual as a result. The individual may seek damages from the Member State under national legislation that is less restrictive than the above EU rules⁷². The compensation obtained from the Member State should cover the full amount of damage (tangible and intangible) caused to the individual by the national body's action infringing EU law. In this case, it means that the national body should compensate for the damage suffered by the individual as a result of the limitation of his or her fundamental right as granted by the CFR. Lawsuits for damages for infringements of EU law by Member States are brought before national courts under national procedures.

⁶⁹ C-282/10 - Dominguez.

⁷⁰ The CJEU established the principle of Member State liability for damages caused to an individual as a result of an infringement of EU law, in judgments C-6/90 and C-9/90 - *Francovich and Bonifaci*. For the specific context of infringement of fundamental rights, see CJEU, C-300/04 - *Eman and Sevinger*, point 69.

⁷¹ In its case law, the CJEU accepts that an infringement is sufficiently severe if a Member State has manifestly and substantially exceeded the limits of its discretion.

⁷² CJEU, joined cases C-46/93 i C-48/93 - *Brasserie du Pêcheur SA*, point 66.

1.7.2 Consequences for a Member State

The provisions of the CFR may be infringed by the actions of any national body and the resulting consequences come within the responsibility of the Member State. The CFR may be infringed by:

- legislative bodies that enact national law, whether universally binding or not, e.g. institutions drawing up the rules of competitions in which projects financed by EU funds are selected;
- implementing bodies applying EU law directly or indirectly, through national law giving effect to EU law, e.g. bodies making payments funding the implementation of projects selected in competitions (or refusing to do so), monitoring committees examining the implementation of operational programmes, including compliance with the CFR by national authorities and national bodies carrying out recovery procedures where EU funds have been spent as a result of irregularities;
- judicial bodies adjudicating, on the basis of EU law and national law implementing EU law, on issues relating to the implementation of programmes and projects, e.g. deciding on appeals by beneficiaries against decisions denying them EU funding for ongoing projects or imposing administrative or criminal sanctions for spending EU funds as a result of irregularities.

At EU level, the Commission has a special role in the area of compliance with EU law and the disbursement of EU funds; provisions of the Treaties assign specific, related tasks to it. The Commission is referred to as the ‘guardian of the treaties’ because of its duty to ensure proper application of EU law by the Member States and the EU institutions (Article 17 (1) of the TEU). In cooperation with the Member States, it also implements the EU budget - it is responsible for the correctness of the own resources paid into this budget and the expenditures made therefrom (Article 317 of the TFEU). Same as the Member States, it is obligated to effectively protect the financial interests of the EU against fraud and any other illegal activities detrimental to those interests (Article 325 of the TFEU, Financial Regulation 2018/1046, Regulation 2988/1955 on the protection of the financial interests of the EU). As ‘guardian of the treaties’, the Commission examines whether Member States are correctly carrying out the tasks of implementing EU policies (including cohesion policy) and financing them with EU funds; it also checks that they are effectively protecting the EU’s financial interests. In the event of non-compliance with EU law during the implementation of programmes and projects financed by EU funds, the Commission applies remedial procedures laid down in EU law, for the purpose of eliminating such non-compliance. Regardless of the type of infringement of EU law, the Commission may lodge a Treaty complaint with the CJEU vs. a Member State in the event of a breach of an obligation incumbent on that State under the Treaties (see section 1.7.2.1 of the Handbook)⁷³. If a Member State infringes the CFR, the Commission may refuse to reimburse expenditures included by that State in a payment request submitted for payment from the EU budget (see section 1.7.2.2 of the Handbook)⁷⁴. Listed here last but not least is the conditionality mechanism. It can be applied by the Commission if a Member State commits such an infringement of EU law, including the CFR, as to both infringe the rule of law and affect or pose

⁷³ Article 258-260 of the TFEU,

⁷⁴ Article 15 of Regulation 2021/2016 on EU funds

a serious risk of affecting the sound financial management or the protection of the financial interests of the EU (see section 1.7.2.3 of the Handbook)⁷⁵.

1.7.2.1 Proceedings against a Member State in case of failure to fulfil an obligation under the Treaties (Article 258-260 of the TFEU)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, and therefore the Member State does not comply with its obligations arising from EU law, the Treaties authorise the Commission to lodge a complaint with the CJEU. Such a complaint may also be brought by the Commission in the event of a Member State infringing the CFR. It then calls the Member State, at the initial stage of the procedure informally in writing, to remedy the infringement of EU law (the CFR), normally within two months. If the Member State does not remedy it, at the next stage of the proceedings, the Commission may formally, by means of a reasoned opinion, indicate evidence demonstrating that the State has infringed EU law (the CFR). It then once again calls on the Member State to remedy the infringement, also customarily within two months. If the Member State again fails to comply with the Commission's request, the Commission may refer the complaint to the CJEU with the case of a breach of EU law (the CFR) by that State. If, after examination of the case, the CJEU confirms in a judgment that the national authorities have infringed EU law (the CFR), they are obligated to comply with this judgment as soon as possible and to remedy the identified infringement of EU law (Article 258 of the TFEU). If a Member State does not comply with the judgment of the CJEU and does not remedy the infringement of EU law (the CFR) named in the judgment, the Commission may refer a second complaint against that Member State to the CJEU. In such a case, it may request that the CJEU impose financial penalties - a periodic penalty payment or a lump sum (Article 260 of the TFEU) - on that Member State. The CJEU adjudicates the amount of such penalties, taking into account the gravity of the EU legislation infringed, the impact of the infringement, its duration, and the financial capacity of the Member State. In practice, most disputes concerning infringements of EU law by Member States are settled amicably by the parties and the Commission does not refer complaints to the CJEU.

On 8 June 2023, the Commission initiated infringement proceedings against **Poland**. The Commission claims that the Act of 14 April 2023 on the State Commission for the Investigation of Russian Influences on the Internal Security of the Republic of Poland 2007-2022 violates, inter alia, the principles of legality and non-retroactivity of sanctions (Article 49 of the CFR), the right to effective judicial protection (Article 47 of the CFR), the prohibition of being tried and punished twice in criminal proceedings for the same criminal offence (Article 50 of the CFR), the right to protection of professional secrecy (Article 41 of the CFR) and the right to data protection (Article 8 of the CFR). Poland has been requested to respond to the letter of formal notice. The case is pending⁷⁶.

⁷⁵ Regulation 2020/2092 on the regime of conditionality

⁷⁶ Proceedings No. INFR(2023)2088, see [Commission launches infringement procedure against POLAND \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/infographic/infographic-commission-launches-infringement-procedure-against-poland-2023-06-08) (accessed on: 17.01.2024)

1.7.2.2 Failure to meet the horizontal enabling condition concerning the application of the CFR (Article 15 of the EU Funds Regulation 2021/1060)

Regulation 2021/1060 on EU funds requires Member States to effectively apply and implement the CFR at all stages of programme and project implementation during the period 2021-2027⁷⁷. This obligation is one of the horizontal enabling conditions. Other **horizontal enabling conditions** include the implementation and proper application of public procurement law, state aid rules and the UN Convention on the Rights of Persons with Disabilities. Member States are also obligated to fulfil thematic enabling conditions⁷⁸.

The Member State carries out its own assessments of compliance with the horizontal and thematic enabling conditions, including the condition of effective application and implementation of the CFR in the course of programme implementation. These assessments are carried out on an ongoing basis - at the stage of developing the programmes, later at the stage of amending them⁷⁹, and in the event of circumstances affecting it. The Member State then informs the Commission about the results of this self-assessment. What is important is that the Commission does not reimburse expenditures included by the Member State in payment requests submitted to it until it has established that the Member State complies with the horizontal enabling conditions. This means that **the Commission only makes payments to a Member State if it is satisfied that the Member State is effectively applying and implementing the CFR in the course of implementing programmes and projects financed by EU funds**⁸⁰. If, in the opinion of the Commission, a Member State does not fulfil this obligation, the Commission refuses to reimburse the expenditure incurred by that State for the programmes and projects implemented.

The Commission applied these provisions in December 2022, when it concluded that **Hungary** had failed to comply with the horizontal enabling condition concerning the application of the CFR. The grounds were allegations of failure to ensure judicial independence in the country (Article 47 of the CFR) and violations of academic freedom (Article 13 of the CFR), children's rights (Article 24 of the CFR) and the right to asylum (Article 18 of the CFR). For these reasons, the Commission refused to reimburse Hungary €10.2 billion (for violations of judicial independence) and €11.7 billion (for violations of academic freedom, children's rights, and the right to asylum). In doing so, the Commission suspended the payment of the entire amount (€21.9 billion) allocated to Hungary for the purpose of implementing cohesion policy⁸¹. After Hungary had carried out judicial reforms to restore judicial independence, one year later, in December 2023, the Commission decided that this horizontal enabling condition had been met (Article 47 of the CFR) and transferred €10.2 billion to Hungary. In the absence of action by Hungary regarding the remaining violations of the CFR (Article 13, Article 24, and Article 18 of the CFR),

⁷⁷ Article 15 and Annex III of Regulation 2021/1060 on EU funds. See Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Strategy for strengthening the application of the Charter of Fundamental Rights in the EU". (COM(2020)711 final).

⁷⁸ Depending on the area of support by EU funds, thematic enabling conditions refer to: smart specialisation management, broadband networks, energy efficiency of buildings, energy governance, renewable energy, risk management, water and waste management, waste management, biodiversity protection, transport planning, labour market, gender equality, education and training, social inclusion and poverty reduction, Roma integration and health and long-term care. Annex IV to Regulation 2021/1060 on EU funds.

⁷⁹ Article 15 of Regulation 2021/1060 on EU funds.

⁸⁰ Article 15 of Regulation 2021/1060 establishing the conditionality mechanism.

⁸¹ [Q&A Judicial independence and EU funding for Hungary \(europa.eu\)](#) (accessed on 17.01.2024).

the Commission withheld reimbursement of the remaining €11.7 billion⁸². The Commission's decision to pay €10.2 billion was criticised by the European Parliament, which considered that Hungary's judicial reforms were insufficient to meet the standards stemming from the CFR. It called on the Commission to employ other legal tools against Hungary, including the conditionality mechanism (see section 1.7.2.3).

Poland was in a different situation. In its partnership agreement with the Commission (2022) on the implementation of cohesion policy in the period 2021-2027⁸³, as a result of the self-assessment, Poland admitted that it had not met the horizontal enabling condition concerning the effective application and implementation of the CFR when implementing EU programmes and projects.⁸⁴ However, the fundamental rights concerned were not identified. The public debate on the topic pointed to problems with the protection of minority rights, including the practice of local governments - beneficiaries of EU funds adopting resolutions establishing "LGBT-free zones" on their territories (Article 21 of the CFR). The problem of the independence of Polish judiciary is systemic and long-standing (Article 47 of the CFR). Due to the failure to meet the enabling conditions, including the horizontal enabling condition concerning the application of the CFR, in October 2022 the Commission withheld €76 billion allocated to Poland for the implementation of EU programmes in the period 2021-2027. The issue of releasing the withheld EU funds became a priority for the new government elected in the parliamentary elections of October 2023. As a result of the arrangements made with the Commission at that time, the controversy surrounding the effective application and implementation of the CFR in Poland was eliminated⁸⁵. As a result, in December 2023, Poland submitted a first disbursement request to the Commission for the amount of €6.9 billion, out of the €76 billion allocated under the Cohesion Funds for the period 2021-2027. The transfer of this payment is planned for Q1 2024.

1.7.2.3 Conditionality regime (Regulation 2020/2092 on the regime of conditionality)

It may also happen that a Member State's infringement of the CFR will be at the same time considered a breach of the principles of the rule of law within the meaning of Regulation 2020/2092 on the regime of conditionality. This mechanism was established in 2021 to protect the funds of the EU budget and the Recovery and Resilience Facility (NextGenerationEU)⁸⁶ in cases where a Member State violates the rule of law in such a way that the infringement affects or poses a serious risk of affecting the sound financial management of the EU or the protection of the EU's financial interests⁸⁷.

The rule of law is defined in Regulation 2020/2092 establishing the conditionality mechanism as an EU value listed in Article 2 of the TEU, which means:

- a transparent, accountable, democratic, and pluralistic law-making process;

⁸² [Judicial independence and EU funding for Hungary \(europa.eu\)](#) (accessed on 17.01.2024).

⁸³ The Partnership Agreement is prepared by each Member State, setting out strategic programming directions and arrangements for the effective and efficient use of EU funds for the period from 1 January 2021 to 31 December 2027 (Article 10 of Regulation 2021/1060 on EU funds).

⁸⁴ [Umowa Partnerstwa na lata 2021-2027.pdf \(funduszeuropejskie.gov.pl\)](#), p. 219 (accessed on 17.01.2024).

⁸⁵ <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/fundusze-2021-2027/prawo-i-dokumenty/stosowanie-karty-praw-podstawowych/>

⁸⁶ Regulation 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility.

⁸⁷ Regulation 2020/2092 on the regime of conditionality.

- the principle of legal certainty;
- the prohibition of arbitrariness in executive action;
- the principle of effective judicial protection, including access to justice, provided by an independent and impartial judiciary, including in relation to fundamental rights;
- the principle of separation of powers; and
- non-discrimination and equality before the law.

The cited definition of the rule of law incorporates the fundamental rights enshrined in the CFR. The principle of effective judicial protection, including access to justice, provided by independent and impartial courts, also in relation to fundamental rights, which is part of the definition of the rule of law (Article 1 of Regulation 2020/2092 establishing the conditionality mechanism) corresponds to the right to an effective remedy and fair trial laid down in Article 47 of the CFR. Moreover, both the definition of the rule of law (Article 1 of Regulation 2020/2092 establishing the conditionality mechanism) and the CFR refer to the principle of non-discrimination (Article 21 of the CFR) and equality before the law (Article 20 of the CFR). This would mean that **an infringement of Article 20 of the CFR, Article 21 of the CFR, or Article 47 of the CFR by national authorities, such as to have affected or created a serious risk of affecting the sound financial management of EU finances or the protection of EU financial interests, could lead to triggering the conditionality mechanism against that Member State.**

Regulation 2020/2092 establishing the conditionality regime indicates that potential breaches of the principles of the rule of law may concern, inter alia, national bodies implementing the EU budget, in particular the bodies:

- awarding EU grants, and conducting
- public procurement procedures,
- financial audits,
- monitoring activities,
- audits,
- investigating and prosecuting cases of fraud, corruption, and other acts detrimental to the financial interests of the EU
- imposing sanctions for illegal expenditure of EU funds and
- conducting related recovery procedures.

Under the Regulation, a breach of the principles of the rule of law may also be manifested, inter alia, by a Member State's failure to prevent arbitrary or unlawful decisions by public authorities, to correct such decisions or to impose penalties for them as well as by limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules.⁸⁸ All of the situations outlined above, indicating a breach of the principles of the rule of

⁸⁸ Breaches of the principles of the rule of law may be suggested, inter alia, by threats to the independence of the judiciary, restrictions on the effective conduct of pre-trial proceedings in the event of violations of the law, the filing and support of charges in connection with such violations or the imposition of penalties in connection with such violations.

law, may arise in the course of a Member State's implementation of programmes and projects financed by EU funds.

The decision to activate the conditionality regime is taken by the Council, upon a request from the Commission. Under this mechanism, the Council may impose one or more of the following financial measures on a Member State. It may suspend the approval of the programmes submitted to it by the Member State, reduce the amount of advance payments made to the Member State, suspend the running time of the periodic payments, suspend, or reduce periodic payments, including by means of financial adjustments or redeployment of funds to other EU spending programmes. The measures applied by the Council should be proportionate and take into account the nature, duration, gravity, and extent of the breach of the principles of the rule of law. They should be determined in the light of the actual or potential impact of the breach of the principles of the rule of law on the sound financial management of the EU budget or on the financial interests of the EU.

It is expressly stated that the imposition of measures on a Member State under the conditionality mechanism does not affect its obligations, in particular its obligation to make payments to beneficiaries of EU funds. This means that the Member State is also obligated to make payments to the beneficiaries if, as a result of the conditionality mechanism, the Commission, for example, withholds payments made to it or reduces the amounts transferred to it from the EU budget. If the Council decides that the Member State has eliminated the breaches of the principles of the rule of law which were the grounds for activating the conditionality mechanism, it decides, upon a request from the Commission, to repeal them.

The regime of conditionality was applied to **Hungary**. In December 2022, the Council adopted a decision suspending the disbursement of €6.3 billion allocated to Hungary for the implementation of three programmes. The reasons for the suspension were Hungary's violations of the principles of the rule of law in the areas of applying public procurement law to EU-funded projects, as well as prosecutorial actions, conflicts of interest and the fight against corruption. In the absence of action by Hungary to address the identified breaches of the principles of the rule of law, disbursement of the €6.3 billion remains suspended⁸⁹.

1.7.3 Consequences for the EU institutions

The provisions of the CFR may also be infringed by the EU institutions and produce effects at that level. A breach of the CFR may result from the legislative activity of the EU institutions, such as the adoption of a piece of EU legislation that is not compliant with the CFR, or from enforcement activity, such as a breach of the CFR in the course of OLAF's audit proceedings or EPPO's investigations. The scrutiny of EU institutions' compliance with the CFR is carried out at EU level in two modalities: judicial - by the CJEU and non-judicial - by the EU institutions and bodies to which individuals can report violations of the CFR and seek protection.

1.7.3.1 Judicial review of compliance with the CFR through the CJEU

Judicial review of compliance with the CFR is exercised by the CJEU, which rules on the compatibility of secondary EU legislation adopted by the EU institutions (regulations, directives, or decisions) with the CFR. In other words, the CJEU examines whether such acts of EU

⁸⁹ [Judicial independence and EU funding for Hungary \(europa.eu\)](#) (accessed on 17.01.2024).

law limit the fundamental rights granted to individuals by the CFR. It has exclusive competence in this regard and adjudicates to this end under two procedures: an action to declare an act of EU law void (Article 263 of the TFEU) and a preliminary ruling procedure (Article 267 of the TFEU)⁹⁰. The two procedures are independent of each other and subject to different requirements.

In case of an action to declare an act of EU law void, the complainants are the EU institutions and individuals. The latter, in order to bring this action before the CJEU, must demonstrate the existence of a sufficient direct and individual interest in declaring the contested act of EU law void. Practice proves that this requirement is difficult to fulfil and individuals are rarely party to this complaint procedure. By contrast, the preliminary ruling procedure is initiated by the national court submitting a reference (question) for a preliminary ruling to the CJEU. A preliminary ruling procedure can therefore only be initiated if proceedings are ongoing at national level before the national court in which a doubt has arisen as to the incompatibility of an EU provision or a national provision implementing EU rules with the CFR. In such proceedings, the national court, at the request of a party to the proceedings or ex officio, will refer the question to the CJEU for a preliminary ruling.

When the fundamental rights granted to individuals under the CFR are limited by national legislation, their protection shall be ensured by national bodies, in particular the courts, in accordance with national procedures (see section 1.7.1. of the Handbook).

1.7.3.2 Extrajudicial monitoring of compliance with the CFR

Extrajudicial protection of the fundamental rights of individuals granted to them by the CFR is exercised in particular by: European Ombudsman, European Data Protection Supervisor, European Parliament, and European Commission.

The right to file a complaint with the [European Ombudsman](#) is a fundamental right enjoyed by EU citizens and residents of the EU. Such a complaint may pertain to maladministration by EU institutions, with the exception of the CJEU performing judicial functions (Article 44 of the CFR).

In the course of their tasks, the EU institutions process personal data of citizens, either in hard copy or electronically. Among other things, they collect these data, record, store, transmit, block, and delete them. It is the task of the [European Data Protection Supervisor](#) to ensure that in doing so, the EU institutions protect such data (Article 8 of the CFR) and respect the individual's right to privacy (Article 7 of the CFR). Anyone who believes that the EU institutions, in the course of processing personal data, have violated his or her rights in this scope may lodge a complaint with the European Data Protection Supervisor.

[The right to petition](#) ensures that individuals can turn to the European Parliament with cases that lie within the EU's sphere of activity and concern them directly. This right is enjoyed by EU citizens, persons residing in the EU, as well as companies, organisations and associations domiciled in the EU. It is a fundamental right, guaranteed by the Treaty (Article 44 of the

⁹⁰ This procedure is initiated by the national court conducting the proceedings in a Member State, by referring a question to the CJEU for a preliminary ruling on the compatibility of an act of EU law with the Charter, or its meaning. In response to this question, the CJEU assesses whether the challenged act of EU law is compatible with the Charter or interprets its provisions.

CFR, Article 227 of the TFEU). A petition may contain, for example, an individual request, a complaint, a position, or a call for the European Parliament to adopt a position on a particular matter.

Chapter 2.

Practical guidance on the application of the CFR by national bodies in the course of implementation of projects financed by EU funds

Checklist as an instrument to assess the compliance with the CFR of a national body's actions in the course of the implementation of projects financed by EU funds

The *checklist* has been created with the purpose of assisting the staff of national bodies involved in the implementation of EU-funded projects to assess the compliance of their actions with the CFR. The CFR comprises many fundamental rights. Assessing whether they have been infringed requires a case-by-case analysis. Use of the *checklist* can facilitate this task. It is a tool that can be used by national bodies at all stages of implementation of projects financed by EU funds to assess whether the actions taken in this scope are in compliance with the CFR. The *checklist* has no binding character. It can be used as an aid by, *inter alia*

- national bodies developing regulations
 - at central level, concerning, for example, the committees for partnership setting up management and control systems, monitoring, preparation of programmes;
 - at the level of managing authorities and intermediate bodies, on drafting procedures and criteria for project selection, drafting programme documentation, template agreements;
- monitoring committees, e.g. in the selection and approval of programme documents and criteria for the selection of operations, during the ex-post evaluation of programme implementation,

- managing authorities and intermediate bodies in the application of EU and national legislation concerning the implementation of projects financed by EU funds, for the purposes of e.g. selecting operations, signing project agreements, monitoring their implementation and verifying payment requests,
- certification and audit authorities when carrying out inspections and audits concerning the disbursement of EU funds.

The *checklist* can also be a useful resource when **dealing with complaints from individuals (e.g. beneficiaries) regarding infringements of their fundamental rights as laid down in the CFR**. It can also be used by e.g. the CFR co-ordinators, the Horizontal Principles co-ordinators at the managing authorities, the European Funds Ombudsmen at the Ministry of Funds and Regional Policy and the Managing Authorities.

Structure of the *checklist*: stages of the assessment of a national body's compliance with the CFR in the implementation of projects financed by EU funds

The assessment of a national body's compliance with the CFR in the course of implementing EU-funded projects addressed in this *Handbook* is carried out in three stages. These stages reflect the method of assessing whether a limitation of a given fundamental right fulfils the requirements formulated explicitly in the text of the CFR, primarily in Article 52 (1) thereof, according to which:

“Any limitation on the exercise of the rights and freedoms recognised by this CFR must be provided for by law and respect the essence of those rights and freedoms [**admissibility test – emphasis by the Authors**]. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. [**proportionality test – emphasis by the Authors**]”

Stage one: test of the limitation of the fundamental right enshrined in the CFR. The purpose of this stage is for the national body to determine whether the fundamental right protected under the CFR has been limited as a result of application of the national provision or action of the national body. If the answer to this question is positive, proceed to the second stage of compliance assessment.

During the first stage, it is suggested to examine the list of fundamental rights enshrined in the CFR, divided into red, yellow, or grey flag categories

YES (fundamental right was limited)

NO (no limitation of the fundamental right – no infringement of the CFR)

Stage two: the admissibility test for the limitation of a fundamental right established by the CFR. Its purpose is for the national body to verify whether a limitation of the right or freedom under the CFR is permissible. A limitation of a fundamental right in a situation where the CFR precludes it means that there has been an infringement of the CFR. If, on the other hand, the CFR allows for a limitation of a fundamental right, proceed to the third stage of the compliance assessment, to determine compliance of that limitation with the CFR

YES (limitation of the fundamental right is admissible)

NO (limitation of the fundamental right not admissible)

Stage three: the proportionality test of the limitation of the fundamental right established by the CFR. Its purpose is for the national body to determine whether the limitation of the fundamental right established by the CFR was proportionate. If the limitation of the fundamental right was proportionate, there has been no infringement of the CFR. If, on the other hand, the limitation was excessive (disproportionate), the CFR has been infringed.

YES (limitation of the fundamental right proportionate - no infringement)

NO (disproportionate limitation of a fundamental right - infringement of the CFR)

Thus, the assessment of the national body's compliance with the CFR during the implementation of EU-funded projects consists of the following three stages:

2.0 Preliminary issue: Does the CFR apply to the case?

The CFR is applicable to the implementation of projects financed by EU funds. The national bodies carrying out the related activities apply EU primary legislation, e.g. in fulfilling their Treaty obligation to protect the financial interests of the EU (Article 325 of the TFEU), and EU secondary legislation, e.g. in carrying out the tasks imposed on them by Regulation 2021/1060 on EU funds, and the fund-specific regulations. They also apply national legislation, e.g. the Implementation Act, which determines how the obligations imposed on these bodies by EU legislation are to be implemented. In connection with the application of EU law, national bodies are obligated, under Article 51 (1) of the CFR, to respect and comply with the CFR (see more in section 1.2.2 of the *Handbook*).

2.1 Stage one of the assessment: determining whether the fundamental right protected by the CFR has been limited as a result of the application of a national law or the action of a national body

The first stage in assessing the compliance with the CFR of a national body's actions in the course of implementation of EU-funded projects is for the national body to determine whether a national law or an action of the national body has limited an individual's fundamental rights under the CFR. In order to make this assessment, the fundamental rights contained in the CFR have been divided in the checklist into three groups, identified as flags, illustrating a high (red

flag), medium (yellow flag) or low (grey flag) degree of likelihood of their limitation in the implementation of EU-funded projects⁹¹.

Red flags are those fundamental rights established by the CFR that are at high risk of being limited by national bodies in the course of implementation of projects financed by EU funds⁹².

Yellow flags are those fundamental rights established by the CFR that are at medium risk of being limited by national bodies in the course of implementation of projects financed by EU funds.

Grey flags are those fundamental rights established by the CFR that are at low risk of being limited by national bodies in the course of implementation of projects financed by EU funds.

Within the individual colours of the ‘flags’, the fundamental rights established by the CFR are discussed in the order of numbering of the articles in which they are laid down in the CFR. For each analysed fundamental right, supporting questions and examples of infringements are provided, to facilitate their analysis.

- Supporting questions – are intended to help establish the meaning of a given fundamental right, to help assess whether and how that fundamental right may be limited by the application of a national law or by the action of a national body, and to identify possible problems that may arise on the basis of that fundamental right in matters relating to the implementation of projects financed by EU funds.
- Examples of limitation of a fundamental right - illustrate situations in which the given fundamental right may be limited or infringed.

The graphic below shows the breakdown of the fundamental rights enshrined in the CFR according to the degree of likelihood that they would be limited by national bodies carrying out activities related to the implementation of projects financed by EU funds.

Division of the fundamental rights enshrined in the CFR according to the degree of likelihood that they would be limited by national bodies carrying out activities related to the implementation of projects financed by EU funds.

⁹¹ This division is based on the most frequent cases of limitations found in case law and on cases from the practice of the Office of Commissioner for Human Rights of Poland.

⁹² The checklist does not include fundamental rights compliance with which is ensured solely by the EU institutions, such as the right of access to EU documents (Article 42 of the Charter), the right to petition the European Ombudsman (Article 44 of the Charter), or the right to petition the European Parliament (Article 44 of the Charter).

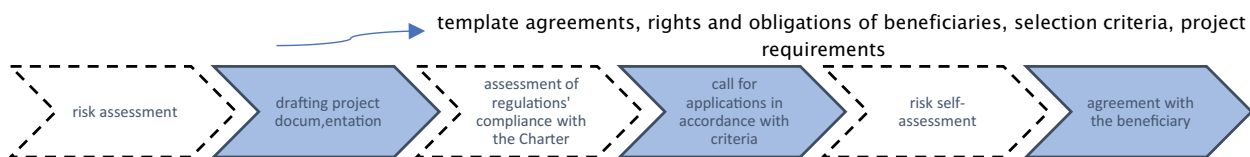
Red flag respect for private and family life (Article 7)	Red flag protection of personal data (Article 8)	Red flag equality before the law (Article 20)	Red flag non-discrimination (Article 21)	Red flag integration of persons with disabilities (Article 26)
Red flag right to good administration (Article 41)	Red flag right to effective remedy and to a fair trial (Article 47)	Red flag presumption of innocence and right of defence (Article 48)	Red flag principles of legality and proportionality of criminal offences and penalties (Article 49)	Red flag right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
Yellow flag freedom of expression and information (Article 11)	Yellow flag freedom of assembly and of association (Article 12)	Yellow flag freedom of the arts and sciences (Article 13)	Yellow flag right to education (Article 14)	Yellow flag freedom to choose an occupation and right to engage in work (Article 15)
Yellow flag freedom to conduct a business (Article 16)	Yellow flag right to property (Article 17)	Yellow flag equality between women and men (Article 23)	Yellow flag the rights of the child (Article 24)	Yellow flag the rights of the elderly (Article 25)
Yellow flag fair and just working conditions (Article 31)	Yellow flag social security and social assistance (Article 34)	Yellow flag access to services of general economic interest (Article 36)	Grey flag dignity (Article 1)	Grey flag right to life (Article 2)
Grey flag right to physical and mental integrity (Article 3)	Grey flag prohibition of torture and inhuman or degrading treatment or punishment (Article 4)	Grey flag prohibition of slavery and forced labour (Article 5)	Grey flag right to liberty and security (Article 6)	Grey flag right to marry and right to found a family (Article 9)
Grey flag freedom of thought, conscience and religion (Article 10)	Grey flag right to asylum (Article 18)	Grey flag protection in the event of removal, expulsion or extradition (Article 19)	Grey flag workers' right to information and consultation within the undertaking (Article 27)	Grey flag right of collective bargaining and action (Article 28)
Grey flag right of access to placement services (Article 29)	Grey flag protection in the event of unjustified dismissal (Article 30)	Grey flag prohibition of child labour and protection of young people at work (Article 32)	Grey flag family and professional life (Article 33)	Grey flag health care (Article 35)
Grey flag environmental protection (Article 37)	Grey flag consumer protection (Article 38)	Grey flag right to vote and to stand as a candidate at elections to the European Parliament (Article 39)	Grey flag right to vote and to stand as a candidate at municipal elections (Article 40)	Grey flag freedom of movement and of residence (Article 45)

It is also possible to identify such fundamental rights enshrined in the CFR which are most at risk of limitation **depending on the type of actions taken by national bodies** (see Annex 1). In this view, it is possible to identify the limitations of fundamental rights conferred by the CFR that may occur in the course of:

- drafting regulations regarding, for example, organisation of the partnership, programme management and control systems, monitoring, rules for membership of the Monitoring Committee, rules of procedure for committees, programmes, programme documents, procedures and criteria for project selection, programme documentation or conditions for support;

- activity of monitoring committees, e.g. analysing and approving the programmes' communication strategies, the criteria for selecting operations and their selection;
- application of EU and national law, e.g. by managing authorities and intermediate bodies for the purposes of implementing programmes, selecting operations, signing agreements, monitoring implementation of projects or verifying payment requests;
- conducting inspections and audits of projects and programmes implementation.

As regards the entire implementation cycle of EU-funded programmes and projects, it should be considered **good practice with regard to the application of the CFR to assess the risk of infringement of individual fundamental rights**. Such an assessment should be carried out **before and after drafting the legislation** (e.g. draft project selection criteria, project requirements, intended objectives and ways of achieving them, and template agreements with beneficiaries).



As regards infringements not attributable to the action of the national body drafting the legislation in question, an assessment of the risk of infringement of fundamental rights by beneficiaries may be recommended. Such an assessment will allow identifying the obligations incumbent on them and adjusting the requirements for disbursement of EU funds accordingly. It may be good practice to require applicants for funding to carry out an **additional self-assessment** of a particular risk during the call for proposals and / or implementation of the project, which will allow the identified risks to be taken into account in the selection of beneficiaries. At the same time, it should be borne in mind that a possible obligation on the part of the final beneficiary to comply with the CFR (e.g. in the form of a general declaration) does not relieve the body of its duty to ensure compliance of the implemented actions with fundamental rights (see section 1.2.3. of the *Handbook*).

Indicative use of the checklist

Examples given under specific articles may refer by analogy to different stages of implementation of EU funds. The table below indicates which articles are accompanied by examples attributed to each stage:

Activities related to implementation of projects financed by EU funds	Articles of the CFR particularly at risk of infringement
Developing legislation	Articles 6, 8, 20, 21, 26, 47, 11, 12, 13, 15, 16, 17, 22, 23, 24, 34, 9, 18, 35, 45 of the CFR
Drafting programme documentation, including project selection criteria	Articles 6, 7, 8, 20, 21, 26, 47, 11, 12, 13, 14, 15, 16, 17, 22, 23, 24, 31, 34, 9, 10, 18, 29, 35, 37, 38, 39, 40, 45 of the CFR
Drafting template agreements with beneficiaries	Articles 7, 8, 20, 26, 48, 11, 12, 13, 14, 15, 16, 17, 24, 25, 31, 34, 3, 1, 2, 3, 4, 5, 6, 10, 18, 27, 28, 29, 30, 32, 33, 35, 37, 36, 38, 39, 40, 45 of the CFR
Evaluation of applications for EU funding and selection of projects to receive EU funding	Articles 7, 26, 41, 49, 48, 14, 17, 22, 23, 24, 25, 31, 3, 1, 2, 3, 4, 5, 10, 18, 27, 28, 29, 32, 33, 35, 37, 38, 39, 40 of the CFR
Project implementation verification and audits	Articles 6, 7, 41, 47, 48, 49, 50, 14, 17, 25, 31, 3, 1, 2, 3, 4, 5, 19, 27, 28, 29, 30, 32, 33, 35, 37, 38, 40 of the CFR
Verification of payment requests and accounting for projects	Articles 7, 41, 47, 48, 49, 50, 14, 25, 31, 19 of the CFR

To illustrate a potential recommended way of countering infringements of the fundamental rights enshrined in the CFR using the *checklist*, the following example may be useful:

The national body plans to establish a programme to subsidise preventive screening for breast cancer and cervical cancer within a single voivodship. Before preparing the first draft of the documentation, it is advisable to discuss and analyse potentially problematic issues. In particular, the entitlements and expectations of the beneficiaries should be taken into account. To this end, it is necessary to determine which spheres of life or issues will be affected by the indicated measure (1) and to take into account the initially planned manner of its implementation (2). In the example under discussion, the intended mode of action is to carry out medical examinations (2), and the objective is to increase access to these examinations due to the low level of activity of female inhabitants of the territory in terms of cancer detection (1).

- (1) The problem of low participation in preventive screening may stem from a number of factors. In the example analysed here, we will limit ourselves to the preliminary identification of one of them, namely the problem of geographical accessibility of the places where such medical services are provided and of communication exclusion. The first risk that arises in this context is the possibility of **discrimination on the grounds of place of residence** if, due to lack of adequate regulation, excluded areas that would be uneconomical for the beneficiary to reach are allowed to be omitted entirely freely.

- (2) Provision of medical services involves, among other things, observing patients' rights, which are codified in the provisions of the Act on Patients' Rights. In this area, the issue of respecting the privacy of patients and providing them with adequate information arises. The case at hand might also be considered in light of a somewhat less obvious problem, namely the **protection of sensitive data**. It represents the second risk we have identified.

After preliminary identification of risks, work on draft versions of the programme documents should proceed with these very risks in mind. In their context, care will need to be taken with the parts of the regulations concerning the conditions of access to testing (1 and 2), particularly with regard to where it is to be carried out, and the definition of programme beneficiaries. The third of these areas will be the elements concerning the collection and processing of personal data, including the method of keeping medical records. Once a draft version of the documentation has been produced, a reassessment of compliance with the CFR should be undertaken. During the analysis of this documentation, the following problems could - hypothetically - arise:

- 1) with regard to discrimination on the grounds of place of residence - neither the project selection criteria nor the project requirements indicate the area in which residents should have access to testing. A potential limitation of the CFR right, i.e. the prohibition of discrimination, can therefore be identified. An example of how this could be avoided could be introducing an additional criterion into the project documentation, requiring that the screening tests are carried out using mobile testing facilities (e.g. so-called mammobuses).
- 2) With regard to protection of sensitive data - there is the issue of the Managing Authority's access to project documentation maintained by the beneficiary, in the context of control rights. The draft template agreement foresees the right of free and full access of the MA to all project documentation. This poses a risk to personal data by giving a disproportionate power to a body that could potentially have access to test results or other medical data of individuals who have benefited from the research offered.

Similarly, these issues (data protection standards) should be secured internally at the level of the beneficiary, which in this context could translate into introducing appropriate obligations with regard to the storage of medical records in the template agreement with the beneficiary. An additional solution would be to introduce, as part of the call for proposals procedure, a requirement for the entity applying for funding to submit a short self-assessment in order to demonstrate that it has, for example, adequate resources in place or has implemented appropriate data protection practices.



Potential risk	Draft documentation	Potential remedies
protection of sensitive data	Managing Authority having free access to all project documentation	
discrimination on grounds of place of residence	no regulation on the choice of project area	modification of the selection criteria and project requirements (including modification of the template agreement)

Red flags - fundamental rights enshrined in the CFR, which are at high risk of being limited by national bodies in the course of implementation of projects financed by EU funds

Article 7 Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

What is protected under this article?

- family relations
- private relations
- parental authority
- freedom to make life decisions
- secrecy of communication
- information about private life
- identity, sexuality
- inviolability of the home

In determining whether the application of a national law or the action of a national body could result in a limitation of the right to respect for private or family life in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
interference in the domain of family relations (de facto ties), parental body or custody (decisions about the family and children) or other private relations?	
limitation of the ability to make life decisions freely, including those concerning professional life or lifestyle?	
infringement of the secrecy of correspondence, e.g. the installation of message-tracking software on electronic devices purchased with EU funds?	
collecting sensitive data, e.g. medical data or data relating to sexuality?	

Example of limitation

A limitation of the right to private or family life could occur if a national body included, in an agreement with a beneficiary regarding an EU-funded project, a prohibition on spouses

and relatives working on the implementation of the project, or an obligation to disclose such a relationship, e.g. through a declaration by the beneficiary's employees.

Such an issue was the subject of **case T-4/20 Sieć Badawcza Łukasiewicz**. The General Court examined whether a rule included in the annex to the grant agreement, according to which a conflict of interest occurred in the case of existence of family ties between employees, could lead to a limitation of the right to private or family life. In the course of an audit of the project, the Commission considered the lists of the number of hours worked by one of the staff members to be incorrect due to the fact that the number had been approved by the wife of this staff member. The Commission concluded that with this division of work responsibilities in the case, there existed a conflict of interest resulting in potential irregularities in the employee's list of hours worked within the implemented project.

The General Court held that the Commission's proposal could result in a limitation of the right to private or family life if it led to negative consequences in the sphere of professional life due to the existence of private ties between employees. Nonetheless, the General Court found the requirement to avoid conflicts of interest due to family ties to be legitimate and compatible with the objective of preventing irregularities in the disbursement of EU funds. Whether the named employee or his wife should be dismissed altogether, transferred to another post, or removed from project-related duties, on the other hand, is, however a question of assessing the proportionality of the limitation of the right to protect their private life.

This example can be applied by analogy to the following stages of implementation: development of project documentation, drafting template agreements with beneficiaries, evaluation of funding applications, project implementation correctness verification and audit.

Article 8 Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

What is protected under this article?

- personal data
- private life
- the right to be forgotten
- ability of the data subject to rectify the information
- communication and internet activity
- health data
- sensitive data
- ability of the data subject to control processing of the data

In determining whether the application of a national law or the action of a national body could result in a limitation of the right to the protection of personal data in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions. It is worth mentioning that many of them have been concretised and formulated in the GDPR regulation.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
processing of personal data without a legal basis, e.g. without the required consent of the person, without a legitimate interest or without a specific purpose?	
destruction, loss, modification, or unauthorised disclosure of access to personal data processed by the national body?	
denial of access to the data subject?	
denial of the data subject's right to rectification or erasure?	
violation of requirements for the transfer of personal data, e.g. the transfer of personal data to an entity that does not comply with the legal rules for their protection or to a third country that does not ensure a level of protection of personal data equivalent to that of the Member States?	
automated processing of personal data or profiling which has produced an adverse effect on the individual or has led to unequal treatment (e.g. the use of data of applicants for assistance using an algorithm in deciding whether to provide such assistance, where the operation of the algorithm has proved to be erroneous or has led to discrimination)?	

Example of limitation

A limitation of the right to the protection of personal data could arise if the rules governing the operation of a food aid programme financed by EU funds implied an obligation to collect the personal data of those to whom food parcels and meals were directed. Such a hypothetical situation could occur in case of operating street outlets distributing aid parcels. A potential breach could occur if persons wishing to benefit from such aid were required to provide their personal data (including name, address, and age) for this purpose. If the programme's objectives did not include conducting statistical surveys, the broad scope of such data could be considered unjustified. The same would be the case if photos of the aid action were published daily on the social media of the beneficiary implementing the project. Publishing information allowing identification of food aid recipients could violate their right to privacy.

The issue of personal data protection in the course of EU funds disbursement was analysed by the CJEU in case **C-92/09 Volker und Markus Schecke and Eifert**. The Court pointed out that one of the provisions of the Regulation requiring Member States to annually publish an ex-post list of beneficiaries of EAGF and EAFRD aid along with the amount of support received from these funds limited their right to the protection of personal data. CJEU considered that the publication of the names of beneficiaries of the agricultural funds and the amounts received on the website constituted an interference with their private life within the meaning of Article 7 and Article 8 of the CFR. The CJEU found that the obligation to publish this data was imposed on the beneficiaries without their consent. The form for obtaining support only mentioned their acceptance that their personal data were subject to publication. The CJEU did not consider this as equivalent to their consent to the publication of the data concerning them.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

Article 20 Equality before the law

Everyone is equal before the law.

What is protected under this article?

- equality of individuals, guaranteeing the right to comparable treatment in similar situations
- freedom from arbitrary decisions by the authorities
- equal access to public goods and services
- the right to apply for assistance provided on an equal basis

In determining whether the application of a national law or the action of a national body could result in a limitation of the principle of equality before the law in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
unequal treatment of individuals or groups of individuals being in a comparable situation?	
giving an individual or group of individuals an unjustified advantage or, depriving them of their legitimate rights (infringement of the non-discrimination principle)?	
depriving an individual or group of individuals of due benefits or imposing on them undue obligations relating to working conditions or pay (infringement of the non-discrimination principle in the field of employment and occupation)?	
discrimination against an individual in the process of applying for EU funding for a project, by e.g. favouring certain applicants based on circumstances which do not constitute project selection criteria?	

Example of limitation

A limitation of the right to equality before the law could be illustrated by the example of an EU-funded HPV vaccination programme aimed at reducing the number of persons suffering from cervical cancer. Under this programme, women aged 9 to 18, as those particularly at risk of this type of disease, would be eligible for free HPV vaccination. However, this right would not apply to men, who - like women - can contract the virus and pass it on. A provision providing for a right to free vaccination only for women would have a discriminatory effect on men on the basis of their gender. This discriminatory effect could not be justified by the objective of the programme, which was to reduce the incidence of cervical cancer, irrespective of the gender of the persons receiving it.

The CJEU analysed the right to equal treatment in a situation involving the implementation of EU-funded projects **in case C-135/13 Szatmári Malom**. It concerned a farmer who applied for EAFRD funding to replace an old mill with a new one, with no increase in production capacity. The national authority did not accept the application, pointing out that, according to the

national legislation implementing the EAFRD disbursement regulation, support from this fund could only be granted for the modernisation of mills and not for new mills. The farmer challenged the decision, and the national court asked the CJEU about the compatibility of the national legislation with the Regulation. The CJEU responded by pointing out that it is up to the Member States to lay down the detailed rules for granting EAFRD support. However, these rules must be consistent with the requirement laid down in the Regulation that support must improve performance in the milling sector. Member States may introduce additional requirements provided that they do not exceed the discretion granted to them.

The aim of the national legislation under review was to prevent the construction of new mills, financed by the EAFRD, when existing mills were not fully utilised. The CJEU considered this objective to be legitimate. However, it found that the national authority limited the farmer's right to equal treatment (Article 20 the CFR), as the construction of a new mill would lead to the closure of the old mill, with no increase in production capacity. According to the judgment, in the light of that objective, the situation in which one or more milling facilities are closed in order to be replaced with a new milling facility, but with no increase in existing capacity, may be regarded as comparable to the situation in which pre-existing milling facilities are modernised and, accordingly, the exclusion of the first situation from the support scheme is contrary to the principle of equal treatment.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

Article 21 Non-discrimination

1. Any discrimination based on any ground such as gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

What is protected under this article?

- equal access to goods and services, including public aid
- no exclusion on grounds of a characteristic irrelevant to the measure
- equal treatment of social minorities
- special treatment of vulnerable groups (minorities)
- equal treatment of EU citizens with Member State's citizens
- equal opportunities and assistance to underprivileged persons

Article 21 of the CFR prohibits all discrimination. The **grounds for discrimination specified in it**, including gender, race, colour, ethnic and social origin, genetic features, language, religion, beliefs, are illustrative and form **an open catalogue**. This means that Article 21 the CFR protects against any discrimination, irrespective of the criterion or characteristic that places a person at a disadvantage compared to others in a comparable situation.

In determining whether the application of a national law or the action of a national body could result in a limitation of the principle of non-discrimination in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of a national authority, in a situation involving the implementation of an EU-funded project:	YES/ NO?
experienced harassment or sexual harassment?	
Has the application of a national law or the action of a national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
<ul style="list-style-type: none"> · direct discrimination against an individual? (see definitions provided in the Handbook) · indirect discrimination against an individual? (see definitions provided in the Handbook) 	

Example of limitation

A limitation of the non-discrimination principle could be illustrated by the example of a government programme encouraging people to work in public health care. The programme would involve subsidising nurses' education and paying supplementary pension benefits to employees working in public health care facilities. A limitation of the non-discrimination principle would occur if eligibility for the supplementary pension benefit were made conditional on

reaching a certain age, with the age being different for women and men, and in addition, for women, the benefit would increase proportionally depending on the number of children that they gave birth to.

The CJEU considered a similar problem in **case C-401/11 Soukupová**. It concerned an agricultural support programme designed to ensure generational replacement of farm operators by encouraging older farmers to take early retirement. The legal proceedings in this case were initiated by a female farmer who was not covered by this scheme because she had reached, at the time of the support, the age required by national legislation to acquire pension benefits. This legislation provided for a different age for women and men to acquire such benefits, with the age for women also depending on the number of children raised. The female farmer considered that she had suffered discrimination because, unlike male farmers, she could not benefit from an additional pension benefit. The CJEU found that older female farmers and older male farmers were in comparable situations from the point of view of the objective pursued by the support scheme. It ruled that it would be incompatible with Union law and its general principles of equal treatment and non-discrimination to treat such situations differently without objective justification, in view of the fact that, under the pension legislation of the Member State concerned, the 'normal retirement age' was set differently depending on the gender of the applicant for early retirement support in agriculture and, in case of female applicants, depending on the number of children they raised.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

Article 26 Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

What is protected under this article?

- independence and autonomy of persons with disabilities
- social and professional integration of persons with disabilities
- participation of persons with disabilities in community life, including political life
- access to education, employment, culture, recreation, and sport for persons with disabilities
- accessibility of public transport and architectural accessibility
- accessibility of information and communication technologies and systems

In determining whether the application of a national law or the action of a national body could result in a limitation of the rights of persons with disabilities in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
preventing or hindering persons with disabilities from benefiting from measures designed to ensure their: independence, social and professional integration, participation in social, political, or economic life, access to education, employment, culture, recreation, sport, public transport, or technology?	
measures to promote institutional care, provided in residential institutions, instead of care provided in the community (limitations of the principle of deinstitutionalisation of social services)?	
Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project:	YES/ NO?
experienced direct or indirect discrimination on the grounds of disability?	
experienced harassment because of a disability?	
been deprived of the right to special health care for persons with disabilities or the right to social security benefits and social advantages, or have these rights been limited?	

Example of limitation

The rights of persons with disabilities could be limited if a programme financed by EU social funds were to provide funding for large inpatient facilities, including social care homes and assisted living facilities, while excluding funding for support for family members and caregivers providing direct care for persons with disabilities (so-called respite care). Such programme objectives would lead to further dependency of persons with disabilities and the elderly on institutional care and would exacerbate their state of dependency and lack of social integration.

The risk of infringing the rights of persons with disabilities in European Social Fund Plus Guidelines was pointed out by the Commissioner for Human Rights of Poland⁹³. He noted that the provisions of the annex to the ESF Plus guidelines, which provide for EU funding for large inpatient facilities, including the creation of assisted living facilities, but exclude respite care organised by private providers from EU funding, could have such an effect.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications.

⁹³ See the Commissioner's interventions of 11/10/2023 and 13/11/2023 to the Minister of Funds and Regional Policy regarding the European Social Fund Plus Guidelines. See more at: <https://bip.brpo.gov.pl/pl/content/rpo-fundusze-europejskie-deinstytucjonalizacja-mfipr-odpowiedz> Accessed on 26.01.2024.

Article 41 Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices, and agencies of the Union.
2. This right includes:
 - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

What is protected under this article?

- an impartial and fair handling of the case by the administrative body
- reasonable time for the administration to deal with the case
- the right to be heard
- access to one's own case file
- obligation of the administration to provide reasons for its decision
- right to compensation for damages

Note that Article 41 of the CFR refers only to the Union institutions and is therefore not binding for national bodies. However, the right to good administration, according to the case law of the CJEU, is binding for Member States as a **general principle of EU law** (see **case C-419/14 WebMindLicenses**). Similar rights and principles of conduct that derive from Article 41 of the CFR can also be derived from **national constitutions and the principle of a democratic state under the rule of law contained therein**, as well as other constitutional provisions. In the context of administrative decision-making, the principles of good administration are formulated in **national code of administrative procedure (general principles)**.

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to good administration in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation related to the implementation of an EU-funded project, been unable to exercise:	YES/ NO?
the right to a fair and impartial handling of their case within a reasonable time by a national body?	
the right to be heard within a time before taking, by the national body, of measures which may adversely affect him or her?	
access to his or her case file kept by the national body, while respecting considerations of confidentiality and professional and commercial secrecy?	
the right to receive a justification of the national body's decision?	

Example of limitation

A limitation of the right to good administration could occur in the case presented below. A beneficiary, one month before the deadline for settling an EU-funded project, submitted a request to the national body for an extension of this deadline due to force majeure. The body did not grant this request due to a lack of legal basis. On the day of accounting for the project, the national body demanded that the beneficiary reimburse part of the grant due to the lack of data on the work actually carried out. The fact that the national body did not ask the beneficiary for explanations before deciding to recover the grant can be considered a possible limitation of the right to good administration.

The EU General Court indicated in **case T-108/18 Universität Koblenz-Landau v EACEA** that the right to be heard and the right to receive grounds for a decision are important elements of the right to good administration. It ruled that the extent of the obligation to provide grounds for a decision must be assessed in relation to the specific circumstances, taking into account the content of the decision, the nature of the arguments raised and the interest that the addressee may have in obtaining an explanation. The assessment of the sufficiency of the reasons for a decision should take into account the factual and legal circumstances under which the decision is made. Thus, a decision is sufficiently reasoned if it is drawn up in a context known to its addressee which enables him to understand the scope of the action taken against him. By contrast, in **case T-604/15 Ertico - ITS Europe vs. the Commission**, the EU General Court pointed out that the principle of good administration, which entails the duty of the body to examine carefully and impartially all the relevant aspects of the case before it, is one of the guarantees granted to the individual in the EU legal order with regard to administrative procedures.

This example can be applied by analogy to the following stages of implementation: evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit, review of payment requests and accounting for projects.

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended, and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

What is protected under this article?

- access to administrative and judicial remedies and procedures
- a fair and public hearing by an independent and impartial court
- processing of the case within a reasonable time
- independence and impartiality of the courts
- effectiveness of appeals in administrative and judicial proceedings
- the right of defence, including the right to present positions and replies
- the right to legal aid (defence counsel)
- the right to obtain legal advice

In determining whether the application of a national law or the action of a national body could result in a limitation of the individual's right to an effective remedy and to a fair trial in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of a national body, in a situation related to the implementation of a project financed by EU funds, been unable to exercise:	YES/ NO?
the right to an effective remedy before a court, but also protection in proceedings before non-judicial authorities, such as bodies of public administration ⁹⁴ ?	
the right to a fair and public hearing of their case within a reasonable time appropriate to the complexity of the case and allowing for genuine assistance?	
the right to legal advice, assistance of counsel or representation in legal proceedings?	
the right to legal aid where it is too expensive or difficult for the individual to secure such aid themselves and where, without such aid, the individual cannot make his or her case effectively before the courts?	

Example of limitation

A limitation of the right to an effective remedy and a fair trial could occur if the programme documents adopted by the programme monitoring committee provided that the decision of this committee rejecting a project application was not subject to appeal. In accordance with these documents, the participants in the competition were informed of the refusal of EU funding for a project in the form of an email without any reasons for the refusal. A possible infringement of the right to an effective remedy would involve a failure to ensure that competition participants have the right to complain about a decision refusing to fund a project with EU funds and have access to information on how to appeal the decision as well as the terms and conditions for doing so. Another infringement would involve the failure to provide reasons for a negative decision refusing EU funding, which would prevent competition participants from knowing the reasons for the decision and the court from judicially reviewing such a decision.

The CJEU ruled on a similar issue in **case C-562/12 Liivimaa Lihaveis**. **The CJEU** held that the adoption of a Programme Handbook containing provisions on implementation of an operational programme by the Monitoring Committee constituted the application of Union law within the meaning of Article 51 (1) of the CFR. Therefore, the Monitoring Committee was bound by the CFR. The CJEU pointed out that rejection of a grant application by this committee resulted in the applicant being excluded from the EU grant procedure, without any decision being communicated to the applicant. It was clear from the Programme Handbook that the decisions of the Monitoring Committee were not subject to appeal. An applicant whose grant application had been rejected was therefore not in any legal position to challenge the refusal. The CJEU ruled that the absence of a remedy against the decision of the Monitoring Committee leads to an infringement of the applicant's right to an effective remedy under Article 47 of the CFR.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries, project implementation correctness verification and audit, review of payment requests and accounting for projects.

⁹⁴ The right to an effective remedy should be understood as the possibility of lodging an appeal in such a way that its filing can lead to a real review of the case by a higher authority or a court and can lead to a change in the legal or factual situation of the individual in case of an infringement; such remedies may include the possibility of filing a complaint against an administrative decision or a complaint against the inaction of an authority.

Article 48 Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed

What is protected under this article?

- presumption of innocence
- the right of defence
- a fair and equitable trial
- the right to assistance of counsel
- the right to be heard
- the right to know the charges
- access to case files, evidence, and the positions of other participants in the proceedings
- the right to legal assistance and defence
- the right to have the proceedings concluded within a reasonable time
- communication with the counsel and its confidentiality

In determining whether the application of a national law or the action of a national body could result in a limitation of the principle of the presumption of innocence and the individual's right of defence in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation related to the implementation of an EU-funded project:	YES/ NO?
been punished or suffered adverse legal or factual consequences for having committed a prohibited act without being found guilty, where such an act was punishable only if proven guilty ⁹⁵ ?	
while accused of a criminal offence, could not exercise the right of defence, either in person or through an agent?	
not been granted access to the case file, the positions of other participants in the proceedings or the evidence against themselves or was unable to address those positions and evidence?	

⁹⁵ It is indeed worth knowing that there is a possibility in the law of being held liable on the basis of risk and without establishing fault; it is often used in case of administrative sanctions, but not if they are of a punitive (criminal) nature..

Example of limitation

A limitation of the right of defence could occur if the national body, when imposing a financial penalty on the beneficiary for irregularities committed during project implementation, involving financing ineligible expenditures and lack of the required accounting documentation, relied only on the audit findings of the external auditor. An infringement of the right of defence could occur if, firstly, the auditor did not address the beneficiary's written questions and assertions regarding the audit findings and the national body did not take into account the lack of communication between the auditor and the beneficiary. Secondly, a limitation could also result from the action of the administrative body if it failed to independently verify the facts established by the audit and relied solely on the assessments made by the auditor.

The right of defence was analysed by the EU General Court in **case T-604/15 - Ertico - ITS Europe vs the Commission**. The company, as a small or medium-sized enterprise (SME), had benefited for many years from EU subsidies, including from the 7th Framework Programme for Research and Development. The EU agency managing that programme considered that the company had lost its SME status, which the company disputed and requested that the decision be amended by the approval panel. The General Court considered whether, in a situation where the legislation did not provide for the right to be heard by the approval panel and, consequently, the panel did not hear the company before reaching a negative decision against it, it had breached its rights of defence. The General Court held that the obligation to respect the rights of defence and the principle of good administration also existed in the absence of legislation explicitly providing for such. In the General Court's view, the company should have been given the opportunity to be heard before a decision was taken in its case, regardless of whether the legislation granted it such a right. In conclusion, the General Court held that respect for the rights of defence in the course of any proceedings against a person, such as may lead to a decision unfavourable to that person, is a fundamental principle of EU law compliance with which should also be ensured in the absence of legislation relating thereto.

This example can be applied by analogy to the following stages of implementation: projects implementation correctness verification and audit, review of payment requests and accounting for projects.

Article 49 Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

What is protected under this article? What is being guaranteed?

- prohibition of punishment for an act that was not prohibited at the time it was committed
- definition of the conditions for criminal liability at Act level
- the principle of proportionality of the penalty to the gravity of the offence

In determining whether the application of a national law or the action of a national body could have the effect of limiting the principles of legality and proportionality of criminal offences and penalties, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation related to the implementation of an EU-funded project:	YES/ NO?
been convicted for having committed an act that was not punishable under national or international law at the time when it was committed?	
been sentenced to a punishment disproportionately severe in relation to the gravity of the offence?	
suffered adverse legal or factual consequences as a result of a decision of the national body taken without legal basis?	

Example of limitation

A limitation of the principle of legalism and proportionality of penalties could occur in the following situation. Let us assume that an agreement with a beneficiary under a subsidy programme for young farmers, in the form of a monthly additional remuneration paid for four years, stipulates that if the beneficiary does not fulfil the obligations set out in the agreement, the subsidy must be returned in full. In the context of this article, it should be noted that these principles when combined with other sanctions should also be applied to contractual penalties, since otherwise it would open up the possibility of circumventing this provision of the CFR and

the requirements indicated therein with regard to punitive measures, i.e. those that go beyond the objective of, for example, protecting the Union budget (which justifies the reimbursement of the subsidy paid) and come close in their nature to a sanction intended to punish specific, undesirable behaviour. In the agreement, the beneficiary committed, *inter alia*, to complete additional agricultural training, which lasted for several months. This requirement did not stem from the regulations. Due to an interruption in the operation of the educational facilities during the state of epidemic (force majeure), the beneficiary obtained the certificate one month after the required contractual deadline. All other obligations were fulfilled in accordance with the deadline. Despite this, the national body demanded repayment of the entire amount paid to the farmer for four years, refusing to reduce the penalty proportionally in relation to the length of time the obligation was delayed.

According to CJEU case law, repayment of unlawfully disbursed aid does not constitute a penalty. However, if the intended objectives of the aid have been achieved, the obligation to repay the entire amount of the subsidy, whilst part of the subsidy has been disbursed legitimately, could be regarded as a punitive measure intended to compel timely action. In the context of this article, it should be noted that it should also be applied to contractual penalties, as this would otherwise open up the possibility of circumventing this provision of the CFR and the requirements indicated therein with regard to punitive measures.

This example can be applied by analogy to the following stages of implementation: project implementation correctness verification and audit, review of payment requests and accounting for projects.

Article 50 Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

What prohibitions are stated in this article?

- prohibition of being tried again for the same act
- prohibition of being punished again for the same act
- prohibition of retroactive application of criminal law provisions

In determining whether the application of a national law or the action of a national body could result in a limitation of the right not to be tried or punished twice in criminal proceedings for the same criminal offence in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions:

Has an individual, as a result of the application of the national law or the action of the national body, in a situation related to the implementation of an EU-funded project, been:	YES/ NO?
tried or punished again for the same punishable offence for which he or she has already been acquitted or convicted by a final judgment within the Union?	
punished again for an offence for which he or she has already incurred a penalty imposed in criminal proceedings, by way of imposing a sanction of a different nature (e.g. an administrative sanction) that is punitive in nature?	

Example of limitation

A limitation of the prohibition of retrial or punishment for the same offence could occur in the case of a beneficiary of a grant who committed irregularities when organising a tender to select a subcontractor for the implemented project. The criteria for subcontractor selection were written in a discriminatory manner, favouring a contractor with whom the beneficiary had previously concluded an informal agreement. The prohibition of double punishment could be limited in the case when, despite being informed, when assessing the penalty, the managing authority would not take into account the penalties imposed on the beneficiary by other authorities (e.g. the President of the Office for Competition and Consumer Protection or the tax administration) for the same irregularity based on the tariff for calculating financial adjustments.

The *ne bis in idem* principle, i.e. the prohibition of double punishment, was analysed by the CJEU in **case C-150/10 Beneo-Orafti** when considering the question of cumulation of administrative sanctions imposed under two EU regulations on restructuring aid in the sugar sector. The CJEU recalled that the *ne bis in idem* principle was reaffirmed, *inter alia*, in Article 50 of the CFR. The CJEU pointed out that this principle, on the grounds of the sectoral regulations,

requires a determination of whether the sanctions provided for in two different regulations constitute administrative penalties. Thus, in order to determine whether, in a given case, prosecution or punishment is inadmissible due to the *ne bis in idem* principle, it is necessary to assess the penalties imposed under the sectoral regulations. Only when they constitute administrative penalties does the *ne bis in idem* principle apply. In the given case, the CJEU held that this principle does not preclude cumulative application of the measure of returning EU funds and the imposition of a financial penalty for improperly obtaining payments from the EU budget.

This example can be applied by analogy to the following stages of implementation: project implementation correctness verification and audit, review of payment requests and accounting for projects.

Yellow flags - fundamental rights enshrined in the CFR, which are at moderate risk of being limited by national bodies in the course of implementation of projects financed by EU funds

Article 11 Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

What is protected under this article?

- freedom of speech (expression)
- freedom to express opinions
- freedom of communication
- freedom to impart information and ideas
- freedom from censorship or pressure
- freedom of journalism
- media pluralism
- open public debate

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to freedom of expression and information in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in	YES/ NO?
limitation of the freedom of public expression, e.g. through deletion of comments posted on websites with regard to disbursement of EU funds?	
limitation of the freedom of journalism, e.g. through pressures or inducing self-censorship?	

Example of limitation

A limitation of the freedom of expression and information could occur in the case of exclusion of private publishers of local press from seeking funding in a competition for co-financing of information campaigns concerning EU funds. A regulation with such an exclusion effect would favour press titles and publications issued by national bodies e.g. local authorities (municipalities). As pointed out by the CJEU in Case C-283/11 **Sky Österreich** concerning the broadcasting of sporting events, the freedom of expression and information can be violated when the broadcaster holds exclusive transmission rights to specific content.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

Article 12 Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

What is protected under this article?

- right to hold peaceful public assemblies
- freedom to associate in associations, foundations and non-formalised organisations
- activities of political parties
- activities of trade unions
- activities of non-governmental and civil society organisations (NGOs)
- equal access of social organisations to public institutions, infrastructure and services

In determining whether the application of a national law or the action of a national body could result in a limitation of the freedom of assembly and of association in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
hindering or restricting the possibility to hold peaceful public or private assemblies at a selected place and time?	
impeding or restricting the possibility to establish or operate associations, political parties, trade unions or other assemblies?	
hindering the access of associations, political parties, trade unions or other assemblies to resources, goods, services, infrastructure or space, or preferential treatment of any such entity in accessing them?	
limiting or discouraging conditions for the establishment or joining of social associations and organisations, trade unions or other organisations?	

Example of limitation

A limitation of the freedom of assembly and of association could arise in the case of a competition for EU funding of projects against mobbing at work. The competition requirement would be that an employer may seek EU funding for the creation of a full-time position of work ethics advisor only on the condition that the person to be employed on the position is not a member of any trade union, political party or non-governmental organisation.

This example can be applied by analogy to the following stages of implementation: law making, development of programme documentation, drafting template agreements with beneficiaries.

Article 13 Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

What is protected under this article?

- artistic creativity
- scientific research conduct
- scientific research conduct
- autonomy of universities and scientific research institutions
- access to and use of cultural goods
- access to sport

In determining whether the application of a national law or the action of a national body could result in a limitation of the freedom of the arts and sciences in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
limitation of independence of scientific research or artistic freedom, e.g. through preventive censorship?	
limitation of access to scientific achievements, works of culture or sport?	
limitation of equal access to public aid or public services by entities operating in the field of arts, science or sport?	

Example of limitation

A limitation of the freedom of the arts and sciences could arise in the case of exclusion, from an EU-funded programme, of research projects conducted by scientists not affiliated with universities or research institutes owned by the State Treasury. This could lead to a limitation of scientific research by scientists employed by universities and research centres. A limitation **of the freedom of the arts and sciences could also occur** in the case of an EU-funded project that would require universities (project beneficiaries) to introduce changes to their internal organisational structure, or would make the support conditional on the achievement of a specific research outcome, as this could affect the reliability of the research and the freedom of scientists.

Context of the example by stages of implementation: drafting law, development of programme documentation, drafting template agreements with beneficiaries.

Article 14 Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

What is protected under this article?

- right to education
- access to vocational and continuing training
- access to free compulsory education
- foundation of educational establishments by private entities
- equality in access to education
- respect for parents' convictions regarding education and teaching of their children

In determining whether the application of a national law or the action of a national body could result in a limitation of the right to education in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
hindering or excluding access to educational establishments, including free compulsory education?	
hindering or excluding the possibility to carry out educational activity by private educational establishments?	
differentiating access to education and knowledge on a prohibited ground such as an individual's nationality?	
development of education conditions leading to the exclusion or detrimental treatment of certain social groups?	

Example of limitation

A limitation of the right to education could arise in the case of a pre-school that would benefit from ESF Plus funds and would be open from Monday to Friday between 12 and 4 p.m. In such a situation, a large proportion of parents would not be able to have their children attend the preschool. This would lead to discrimination of some parents and their children if,

under such circumstances, these persons would not have guaranteed access to education in another form or at another facility.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications, project implementation correctness verification and audit, verification of payment requests and accounting for projects.

Article 15 Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

What is protected under this article?

- freedom to choose and engage in work
- freedom to seek employment
- freedom to choose occupation
- freedom of establishment
- possibility to work in other EU Member States
- equal treatment of workers from other countries

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's freedom to choose an occupation and right to engage in work in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project:	YES/ NO?
been deprived of the right to engage in work or to pursue a freely chosen occupation, or hindered in making such a choice?	
as an EU citizen, been deprived of the right to freely seek employment, to work, to exercise the right of establishment or to provide services in any Member State, or hindered in the exercise of this right?	
as a national of a third country who is authorised to work in the territory of a Member State, been deprived of the right to working conditions equivalent to those of citizens of the Union, or hindered in the exercise of this right?	

Example of limitation

A limitation of the freedom to choose an occupation and of the right to engage in work could arise in the case of a regulation on a programme of EU funding support for young farmers, according to which the applicants, as an eligibility criterion, are required to be payers of social insurance contributions only to Agricultural Social Insurance Fund (separate, sectorial

social insurance fund). Yet, pursuant to the regulations on the social security system, farmers who take up additional employment (e.g. under a part-time employment contract) are automatically required to pay related social insurance contributions to general social insurance institution. Thus, such a farmer, employed e.g. on a contract of mandate to provide assistance in return for additional remuneration, would not be eligible to apply for the support. This could lead to less favourable treatment of farmers seeking an additional source of income, and could discourage them from taking up additional gainful activity.

A similar case has been dealt with by the Commissioner for Human Rights of Poland⁹⁶. In a letter of 26 October 2021, the Commissioner requested the Minister of Agriculture and Rural Development to change the criteria of support provision to farmers. The Commissioner pointed out that the requirement of being insured with Agricultural Social Insurance Fund in order to be eligible for an EU grant resulted in the discrimination of farmers insured with general Social Insurance Institution in the award of grants under the Rural Development Programme.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

⁹⁶ See more at: <https://bip.brpo.gov.pl/pl/content/rpo-mrirw-dotacje-prow-dyskryminacja-rolnikow-zus-krus-odpowiedz>

Article 16 Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

What is protected under this article?

- conduct of business
- freedom of contract
- undistorted competition
- lack of unjustified state interference with the freedom to conduct a business

In determining whether the application of a national law or the action of a national body could result in a limitation of the freedom to conduct a business in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
preventing an individual from conducting a business, e.g. by excluding a certain group of citizens from the possibility to do so?	
preventing an individual from establishing and conducting a business in a form and place or with business partners of his or her choice?	
introducing requirements which make it excessively difficult to conduct a business, by placing certain types of entrepreneurs, such as small and medium-sized enterprises, in a weaker position?	

Example of limitation

A limitation of the freedom to conduct a business could arise in the case of a regulation on a support programme for micro-enterprises manufacturing regional food products, according to which the EU funding beneficiaries are required to continue the manufacture of the products and the payment of taxes in a given municipality for 5 years following the end of the project.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

Article 17 Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

What is protected under this article?

- ownership of movable and immovable property and of money
- free disposal of property, e.g. through its lending for use or rental
- disposal of property, e.g. by will or in another form
- intellectual property
- use of property
- no interference by the state (expropriation), except with just compensation from third parties

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to property in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project:	YES/ NO?
been deprived of the right to own, use, dispose of and bequeath his or her lawfully acquired immovable or movable property e.g. through its lending for use, lease, rental, sale or donation?	
Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	
infringement of intellectual property rights, e.g. through disseminating a piece of work such as a photograph, a movie, a piece of writing, etc. without consent of the author and without due compensation?	
limitation of an individual's use of his or her possessions (movable or immovable property), e.g. through a requirement to make them available to other persons or to dispose of them, or through prohibiting their use?	
deprivation of an individual of his or her source of income or lawfully acquired rights, or limiting such rights, e.g. of the possibility to draw financial benefits?	

Example of limitation

A limitation of the right to property could arise in the case of an EU-funded programme of support to investments in renewable energy sources, including the construction of wind farms, which does not provide for compensation to owners of land that is adjacent to the wind farms and is affected by them e.g. through a significant decrease of the land value.

The right to property has been analysed by the CJEU in **Case C-251/21 Piltenes** meži. The CJEU has held that the right to property is not an absolute right, which means that its exercise may be limited by a national law if the limitation is proportionate and pursues a public interest objective. In the case in question, the limitation was aimed at protecting nature and the environment. The CJEU has also held that a person whose right to property has been limited is not entitled to compensation in any case of such limitation. However, compensation is due if the limitation results in a loss of value of the land, because the actual effect of the limitation is similar to that of partial deprivation of the property. Therefore, the owner of the land is entitled to compensation under Article 17 of the Charter.

The issue of protection of the right to property against state interference has also been addressed by the CJEU in **Case C-59/17 SCI Château du Grand Bois** concerning an EU-funded programme of support for restructuring and conversion of vineyards. The vineyard owner claimed that his right to the vineyard property had been infringed by an official of the agricultural agency that awarded support under the programme. The official had entered the vineyard without authorisation of the owner, with the aim to carry out on-the-spot control. As pointed out by the CJEU, Union law provides protection against arbitrary or disproportionate interference by public authorities in private activities of individuals, and any such intervention has to have a legal basis and be justified on the grounds laid down by law. Officials may carry out controls without prior authorisation of the property owner only if so expressly permitted by Union legislation or national legislation or if authorised by the property owner.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications, project implementation correctness verification and audit, verification of payment requests and accounting for projects.

Article 22 Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

What is protected under this article?

- cultural heritage and cultural activities of minorities
- religious diversity and culture of religious groups
- linguistic diversity, including through teaching and preservation of culture in minority languages

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to cultural, religious and linguistic diversity in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project:	YES/ NO?
suffered less favourable treatment despite being in the same situation as a person of a different culture or religion or speaking a different language?	
as a representative of a religious, cultural or linguistic minority, had limited access to publicly funded aid or services for cultivating his or her culture or language, or have such activities been hindered as a result of policy of the state?	

In CJEU judgments, the protection of diversity has been analysed in the context of the protection of national languages. As pointed out by the CJEU in Case C-391/09 *Runevič-Vardyn and Wardyn* concerning the spelling of a Polish surname in a Lithuanian certificate of civil status, Article 22 of the Charter may provide a rationale for a language policy of a Member State but such a policy has to respect fundamental rights of other persons, including rights relating to their language.

Example of limitation

A limitation of the right to linguistic diversity in a situation involving the implementation of an EU-funded project could arise in the case of a programme of co-funding additional lessons of minority languages. If, hypothetically, the programme documentation listed specific languages to be supported while disregarding other languages, consideration could be given to assessing the programme documentation's compliance with the principle of non-discrimination. Similar objections could be raised if, in the documentation, the body referred to support provision to ethnic minority languages without taking account of national minority languages, as this would constitute a limitation of the right to linguistic diversity.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, assessment of project applications.

Article 23 Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

What is protected under this article?

- gender equality in employment (recruitment)
- gender equality in working conditions
- gender equality in pay

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to equality between women and men in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of a project financed with EU funds:	YES/ NO?
suffered less favourable treatment while being in the same situation as a person of a different gender (gender identity)?	
Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	
discrimination against an individual on the grounds of gender (gender identity) with regard to work or pay?	
preventing an individual from combining work and family life?	
preventing an individual from exercising his or her parental rights, e.g. taking mandatory maternity leave?	

Example of limitation

A limitation of the right to equality between women and men could arise in the case of a regulation on a competition for co-funding scientific projects, according to which the project scientific manager has to present his or her scientific achievements in the period of the ten years preceding the application, but without excluding the periods of maternal leave and child care leave. Such a regulation could lead to indirect discrimination of women who have been on maternity or child care leave.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, evaluation of funding applications.

Article 24 The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

What is protected under this article?

- state care of children, respecting their well-being
- children's health, including mental health
- children's right to self-determination and expression of views
- taking account of the child's best interest in all actions affecting the child
- children's contacts with their parents
- children's safety, including at school and online

In determining whether the application of a national law or the action of a national body could result in a limitation of the rights of a child in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
preventing children from expressing their views freely, or not taking children's views into consideration on matters which concern them, in accordance with their age and maturity?	
the child's best interests not being a primary consideration in actions that affect the child?	

Example of limitation

A limitation of the rights of the child in a situation involving the implementation of an EU-funded project could arise in the case of a programme addressed to childcare facilities offering extra-curricular activities for children, e.g. in sport. The provision of support to an institution at which students may not refuse to participate in such activities would deprive children of the right to express their views and the right to self-determination.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications.

Article 25 The rights of the elderly

The Union recognises and respects the right of older people to live with dignity and independence and to participate in social and cultural life.

What is protected under this article?

- older people's right to specialist care
- access to health care, including support services
- self-determination and expression of views
- access of older people to culture
- older people's social participation and activation

In determining whether the application of a national law or the action of a national body could result in a limitation of the rights of the elderly in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body in a situation involving the implementation of an EU-funded project, been:	YES/ NO?
deprived of the right to social protection to which he or she is entitled, including the right to decent social security benefits and social assistance benefits?	
deprived of the right to specialist health care, including access to long-term geriatric or palliative care?	
excluded from participation in social, political, cultural or economic life, e.g. through hindering his or her access to recreation and sport or to support for persons at post-working age on the labour market, or exercise of the right to education, including in the field of new technologies?	

Example of limitation

A limitation of the rights of the elderly could arise in the case of a hospital that is a beneficiary of an EU-funded programme of public service digitalisation. At one stage of the project, the hospital was required to introduce the possibility of medical appointment registration via an electronic platform and to register the number of its users. To avoid responsibility for incorrect implementation of the project, the hospital significantly limited patients' access to traditional registration for appointments at the hospital's reception, so as to make patients use the online registration application. Older people not skilled in the use of new technologies could consider this a hindrance of access to medical services offered by the hospital.

Context of the example according to stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications, project implementation correctness verification and audit, verification of payment requests and accounting for projects.

Article 31 Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

What is protected under this article?

- safe working conditions
- health and dignity of workers
- respect for maximum working hours
- daily and weekly rest
- annual paid leave
- protection against mobbing and harassment at work

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to fair and just working conditions in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body in a situation involving the implementation of an EU-funded project, worked in conditions:	YES/ NO?
posing a threat to his or her health or safety?	
not respecting his or her dignity (e.g. has experienced sexual harassment at work)?	
without limitation of maximum working hours, without the right to rest periods or to an annual period of paid leave?	

Example of limitation

A limitation of the right to fair and just working conditions could arise in the case of a cultural heritage support programme that provides EU funding for projects in the field of digital remastering of old national films. During an audit, the auditor found that many tasks were delegated by the beneficiary to external service providers. Their staff members were employed on civil law contracts although, given the nature of their work, they should have been employed on employment contracts.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications, project implementation correctness verification and audit, verification of payment requests and accounting for projects.

Article 34 Social security and social assistance

- 1 The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
- 3 In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

What is protected under this article?

- social security benefits
- continuity of employment in the event of maternity
- continuity of employment in the event of illness
- continuity of employment in the event of an accident at work
- decent living conditions in the event of dependency or old age
- assistance in the event of loss of employment
- social and housing assistance
- decent existence for those who are poor and excluded

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to social security or social assistance in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body in a situation involving the implementation of an EU-funded project, been deprived of:	YES/ NO?
the right to social security benefits set out in national law?	
the right to social services set out in national law and providing protection in the events such as maternity, illness, accident at work, dependency, old age or loss of employment?	
resources to live on, and has found himself or herself in a situation of poverty through no fault of their own?	

Example of limitation

A limitation of the right to social security and social assistance could arise in the case of an order issued by the Minister for Cohesion Policy, following recommendations of the Commission, to establish a position of CFR coordinator in each voivodeship governor's office. The coordinators were employed and trained under an EU-funded project. A requirement of the project was that the coordinators had to remain in the position for a period of 5 years after completing the training. Such a requirement could hinder the taking of maternity leave by a CFR coordinator.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries.

Article 36 Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

What is protected under this article?

- universal access to services of general economic interest
- access to services of general public interest, in particular for persons at risk of discrimination
- specific level of quality of services of general economic interest

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right of access to services of general economic interest in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
limitation of an individual's access to services of general economic interest, such as public transport, postal services or healthcare?	
limitation of an individual's access to publicly funded projects or investments?	

Example of limitation

A limitation of the right of access to services of general economic interest could arise in the case of implementation by a municipality of an EU-funded project of sewerage network extension in rural area. The workplan required that for the first weeks of the works, water supply to the project area had to be cut off. In the contract, the municipality did not include a provision requiring the contractor to ensure an alternative method of water supply for this period, e.g. by water tanker trucks. As a result, healthcare facilities within the area had to suspend medical visits of patients and had to cancel the appointments.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries.

Grey flags: fundamental rights enshrined in the CFR, which are at low risk of being limited by national authorities in the course of implementation of projects financed by EU funds

Article 1 Human dignity

Human dignity is inviolable. It must be respected and protected.

What is protected under this article?

- life, health and safety
- individual's autonomy and self-determination
- freedom from physical and psychological violence and respect for intimacy
- freedom from torture
- freedom to make life and moral choices without compulsion
- respect and dignified treatment

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to human dignity in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body in a situation involving the implementation of an EU-funded project, been:	YES/ NO?
humiliated?	
placed in a situation that could be considered as torture or inhuman treatment, e.g. in very difficult and derogatory living conditions in a given place?	
treated in an instrumental way?	
deprived of the ability to provide for his or her basic needs in life?	
deprived of the ability to influence his or her own life, e.g. has been placed, without grounds, in a support institution for people with disabilities, without the possibility to freely make decisions regarding himself or herself?	
paid disproportionately low remuneration, e.g. below the minimum wage, for work performed by him or her, or has not been paid at all for such work?	
forced to work in very difficult and degrading conditions, e.g. against health and safety rules?	

Example of limitation

A limitation of the right to dignity could arise in the case of a municipal juvenile rehabilitation centre that is a beneficiary of EU funding support for social welfare institutions. The right to dignity would be limited if the centre staff disciplined the juveniles by maintaining an excessively strict regime, e.g. by imposing severe penalties on them, such as long term placement in isolation. If the national body providing the EU funding failed to react to the situation despite being informed of such practices, it would constitute a violation of Article 1 of the CFR.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 2 Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

What is protected under this article?

- life and health
- public health and safety
- assistance, including medical assistance, in the event of risk to life or health

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to life in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body in a situation involving the implementation of an EU-funded project:	YES/ NO?
been deprived of access to medical care in a situation of a serious risk to his or her life or health, or of other assistance in the event of such a risk?	
died or suffered serious injury as a result of the use of force by a public uniformed service officer abusing his or her powers?	
Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	
a serious risk to the health or life of an individual?	
a serious risk of an epidemic or a disaster posing a threat to people, or a serious risk to the environment?	

Example of limitation

A limitation of the right to life could arise in the case a large-scale toxic algal blooms and an environmental disaster on one of the main rivers, caused by waste water discharge from coal mines. The national research centre, supported by an EU-funded environmental project, was responsible for water quality monitoring but did not undertake any response action. In fear of the reaction of the state authorities, the centre limited the operations to registering its observations in the research documentation for scientific purposes. As a result, large numbers of fish died. The polluted water and a major part of the fish catch posed a threat to human health and life.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 3 Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - a) the free and informed consent of the person concerned, according to the procedures laid down by law;
 - b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
 - c) the prohibition on making the human body and its parts as such a source of financial gain;
 - d) the prohibition of the reproductive cloning of human beings.

What is protected under this article? What is guaranteed?

- physical integrity
- mental integrity
- privacy and intimacy
- right to free and informed consent to research participation
- patient autonomy (making decisions about the course of treatment)
- prohibition of eugenic practices
- prohibition on making the human body a source of financial gain
- prohibition of reproductive cloning of human beings

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to physical and mental integrity in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
forced medical intervention without free and informed consent of the patient, as required by law, or forced scientific experimentation on a patient?	
damage to human health?	
psychological abuse of an individual or other violation of his or her mental integrity?	
making the human body or its part a source of financial gain?	
cloning of human beings?	

Example of limitation

A limitation of the right to physical and mental integrity could arise in the case of a laboratory implementing, with the support of Union grants, a project of free genetic tests for cancer predisposition, offered to municipality residents. In the project application, the laboratory pointed out that it would use the collected genetic material also for conducting “other scientific research on the human genome”. Some residents, attracted by the offer of free testing, decided to sign the clause on the use of their genetic data for purposes other than conducting the tests for individuals. Yet, in other circumstances they would not have agreed to the use of their samples for other purposes. It can be assumed that the clause was not voluntary and that the tests were available for free only under the project. At the stage of proportionality assessment, consideration could be given to the potential public interest in the form of scientific progress. However, there should be doubts as to the extent to which the consent of people undergoing the tests was voluntary and, consequently, whether there was no limitation of the right to physical integrity and whether the limitation was permissible.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 4 Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

What is protected under this article? What is guaranteed?

- freedom from torture and the sense of personal security
- prohibition of inhuman or degrading treatment
- freedom from degrading or cruel punishment

In determining whether the application of a national law or the action of a national body could result in the use of torture and inhuman or degrading treatment or punishment with regard to an individual, in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
a situation causing severe physical or mental discomfort of an individual, such as isolation or prolonged lack of access to food, water or toilet?	
physical or mental suffering of an individual, corporal punishment or intimidation?	

Example of limitation

Inhuman or degrading treatment could arise in the case of a municipal refugee reception centre that is financed with EU funds but is technically unfit to serve this purpose, i.e. is too small or has no sanitary facilities.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 5 Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

What is protected under this article?

- right to determine one's own destiny
- independence from the will of others
- freedom from forced or compulsory labour
- right to free and paid work

In determining whether the application of a national law or the action of a national body could result in a limitation of the prohibition of slavery and forced labour in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
using an individual to perform forced labour?	
trafficking in human beings?	
taking decisions about an individual's destiny without his or her consent or with the use of coercion, deception, manipulation or threat?	
blackmail, including economic blackmail, against an individual?	

Example of limitation

The phenomenon of slavery often takes forms that are difficult to recognise. In the context of the implementation of an EU-funded project, an example can be the activity of a project beneficiary who uses work of people staying in the country illegally, without personal identity documents. With regard to such people, psychological, physical and economic blackmail may be used in order to control their behaviour. Various forms of human trafficking can be found in the operations of cross-border job search groups that make profit on the forced situation of persons, e.g. refugees, who perform work.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 6 Right to liberty and security

Everyone has the right to liberty and security of person.

What is protected under this article?

- personal freedom
- personal security
- right to information on the reasons for detention
- immediate bringing to court in the event of detention
- judicial review of the legality of detention
- compensation for unlawful arrest or detention

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to liberty and security in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
an individual's detention or deprivation of liberty of movement?	
violation of an individual's personal space or restriction of an individual's contact with other people?	
violation of security or liberty of the home?	

Example of limitation

Violations of liberty and security of person take place, most frequently, in the context of activities of law enforcement authorities and the application of criminal law. As regards bodies engaged in the implementation of EU funds, a limitation of liberty and security of person may take place e.g. in the case of applying stringent measures during control proceedings, or in the case a beneficiary is required to immediately appear in person, whenever requested by a national body, in order to provide explanations or documents, or in order to consent to on-the-spot check at the beneficiary's place of residence or business during the beneficiary's absence.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries, project implementation correctness verification and audit.

Article 9 Right to marry and right to found a family

The 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.

What is protected under this article?

- right to marry and right to recognition of marriage contracted in another country
- possibility to found a family and to have family relations recognised
- possibility to dissolve marriage
- right to procreation

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to marry and right to found a family in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
refusal to recognise a marriage or any other type of union provided for by law and contracted in another Member State?	
preventing an individual from founding a family or living together with another individual?	

Example of limitation

A limitation of the right to marry and to found a family could arise in the following case. A resolution of a municipal council gave priority, in awarding EU funding for childcare, to biological or adoptive parents who were married, were raising at least two children together and one or both of whom worked. As a result of the resolution, single parents and couples living in informal relationships and raising children were excluded from the possibility to receive the EU funding. This could be considered a restriction on their right to found a family.

A similar problem was reported to the Commissioner for Human Rights of Poland by the European Funds Commissioner of the Opolskie Voivodeship. A resident of the town of Nysa requested the town's exclusion from the eligibility to receive EU funding because of the adoption of a resolution that contained discriminatory provisions, which had been confirmed by a judgment of the Supreme Administrative Court. According to the provisions, priority in awarding the „parental benefit” for childcare was given to biological or adoptive parents who were married, were raising at least two children together and one or both parents, depending on the

age of the children, worked. As a result of the resolution, single parents and couples living in informal relationships and raising children, were excluded⁹⁷.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation.

⁹⁷ See more: M. Sznajder, C. Węgliński, M. Wróblewski (ed.), The role of national bodies with a human rights remit in ensuring fundamental rights compliance of EU funds, Baseline report drawn up by the Office of the Commissioner for Human Rights (Poland), 2023, online: <https://bip.brpo.gov.pl/sites/default/files/2024-02/%28j%C4%99zyk%20angielski%29%20Baseline%20report%20-%20FRA.pdf>, p. 19.

Article 10 Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

What is protected under this article?

- freedom of thought, conscience and religion
- freedom to manifest religion or belief
- worship, teaching, practice and observance of religion
- right to conscientious objection
- pluralism of religion and worldview
- autonomy of community of believers

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's freedom of thought, conscience and religion in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
forced disclosure of an individual's religious belief, worldview or opinions?	
forcing an individual, against the law, to act contrary to his or her conscience?	
preventing an individual from using or providing services because of his or her religion or belief, e.g. through not providing vegetarian meals in EU-funded school canteens?	

Example of limitation

A limitation of the freedom of thought, conscience and religion could arise if school canteens co-financed with EU funds served only meat dishes. People on vegetarian, vegan or other diets would be excluded from the possibility to eat meals there.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects.

Article 18 Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

What is protected under this article?

- possibility to apply for asylum
- refugee status and related rights
- right to temporary protection
- right to subsidiary protection

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to asylum in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
discrimination against a refugee on the grounds of race, religion, country of origin, age, disability, gender, gender identity or sexual orientation, in particular in access to public services such as welfare programmes and other assistance programmes?	

Example of limitation

A limitation of the right to asylum could arise in the case of an EU-funded project competition, e.g. in the field of social assistance or social and cultural activities for refugees, which is based on excluding criteria, e.g. if access to the services is available only to persons from specific third countries. A limitation of the right to asylum could also occur in a situation where, in order to consider a person as a refugee eligible for assistance, it is necessary to provide evidence or documents beyond those required under the standard procedure of awarding the refugee status. The rights related to this status include the refugee's right to have members of his or her close family protected too. Thus, denying access to the services to the person's family members who do not have refugee status themselves could be considered a violation of their fundamental rights.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects.

Article 19 Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

What is protected under this article? What is guaranteed?

- prohibition of collective expulsions
- prohibition of extradition to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment
- obligation to provide support to asylum seekers

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's protection in the event of removal, expulsion or extradition in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
expulsion or extradition of a foreign citizen staying on the territory of a Member State to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment?	
complete refusal to provide assistance to an asylum seeker or depriving an asylum seeker of the real possibility to seek such assistance?	

Example of limitation

The implementation of migration policies by national authorities falls within the scope of Union law and, consequently, of the CFR, regardless of the connection with the disbursement of EU funds. National authorities that implement projects financed with EU funds may find themselves in a situation in which their action can result in a limitation of the right to protection in the event of removal, expulsion or extradition. Such a situation may take place in the context of programmes under which activities are financed in the field of assistance provision to refugees, including at accommodation centres, if the authority's action can lead to the loss of official status, a visa or a residence permit on the territory of a Member State. This could happen in the case of refugees losing financial means to stay on the territory of a Member State, if such means are dependent on the EU funded assistance provided to them.

This example can be applied by analogy to the following stages of implementation: project implementation correctness verification and audit, verification of payment requests and accounting for projects.

Article 27 Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

What is protected under this article?

- information for workers about their rights and the establishment's situation
- consultation with workers, in particular on matters that concern them
- employee participation in operating the establishment

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to information and consultation within the undertaking in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
preventing an EU fund beneficiary, their employees or representatives from having access to information about the establishment and matters of significance for its operation, in the cases and under the conditions provided for in the Union or national law?	
preventing an EU fund beneficiary, their employees or representatives from exercising their right to be consulted on matters of significance for the operation of the establishment or for the workers, in the cases and under the conditions provided for in the Union or national law? (the right to workers' participation)?	

Example of limitation

It is not a duty of national bodies engaged in the implementation of EU-funded programmes to replace labour inspection authorities in the performance of their tasks. However, such national bodies should not, in view of the labour rights established in the CFR, support forms of employment that do not guarantee an adequate level of employee participation in the operation of the establishment. In the case of entrepreneurship support programmes financed by EU funds, the national authorities should ensure that workers' rights are respected. This should be done by introducing relevant provisions in agreements concluded with the beneficiaries. A limitation of the right to employee participation could arise, for example, in the case of support to the operation of enterprises which employ a large number of workers, are part of large capital groups and where adequate structures of employee representation do not exist.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 28 Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

What is protected under this article?

- right to negotiate and conclude collective agreements
- taking collective action (strike action)
- freedom to elect employee representatives
- protection from the adverse effects of repression for taking part in strike action

In determining whether the application of a national law or the action of a national body could result in a limitation of the workers and employers' right to collective bargaining and action in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
preventing or impeding the beneficiary of EU funds, its employees or organisations, from exercising their right to negotiate and conclude collective agreements or the right to take collective action, including strike action, in defence of their interests, in particular by: <ul style="list-style-type: none">• the lack of possibility to organise strike action and enter into negotiations?• employer's non-recognition of the decision to take collective action, including strike action, and of the request to conduct negotiations?• employer's non-recognition of workers' representatives and their groups?• subjecting those participating in the strike action or bargaining to negative consequences, e.g. disciplinary, financial and other informal sanctions?	

Example of limitation

A limitation of the workers and employers' right to collective bargaining and action could arise in a situation where a municipality used EU funds to finance the operation of a helpline for victims of domestic violence, offering psychological and legal advice. The contract with the project implementing authority stipulated that assistance was to be provided continuously round the clock. The implementing body's on-call staff were paid below the generally applicable minimum rates and they would decide to organise strike action. Due to the fear of financial penalties for not executing the contract, the implementing body refused to negotiate with the employees and terminated the contracts under which they performed their work.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 29 Right of access to placement services

Everyone has the right of access to a free placement service.

What is protected under this article?

- access to a free placement service
- equal treatment in access to public services in the area of seeking employment
- access to fair and reliable assistance in finding employment

In determining whether the application of a national law or the action of a national body could result in a limitation of the workers and employers' right of access to a free placement service in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/NO?
preventing an individual from having access to a free placement service at a basic level, e.g. by making the provision of support subject to disproportionately difficult or discriminatory conditions?	
providing a placement service to an individual in an inadequate manner making it impossible for him/her to really take up employment, e.g. lack of real adaptation and individualisation of the assistance given?	

Example of limitation

A limitation of the right of access to a free placement service could arise in the case of a programme supporting the promotion of employment where EU funding would be awarded to organisations providing free career counselling, using discriminatory criteria for access to such a service. An example of limitation would also be the EU funding of a career counselling activity that would not be free of charge and would include only one free training session, with the others being paid for by jobseekers.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 30 Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

What is protected under this article?

- right to protection against unjustified dismissal
- worker's right to know the reason for a notice of termination
- in the event of an intention to dismiss a worker, the right to consultation with employee representation, e.g. a trade union
- right to a period of notice on dismissal

In determining whether the application of a national law or the action of a national body could result in a limitation of the workers' right to protection against unjustified dismissal in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
unjustified dismissal?	
dismissal without any reason for a notice of termination given by the employer?	
dismissal without consultation with the employees' representation, e.g. a trade union?	
dismissal without notice?	

Example of limitation

A limitation of workers' right to protection in the event of unjustified dismissal could arise in the case of the documentation of an EU-funded competition aimed at creating jobs for young people. The objective of the competition would be to support the creation of full-time jobs for people who have completed apprenticeships or traineeships. The competition documentation stipulated that such persons should be employed under an employment contract at the end of the project period. The agreement with the employer-beneficiary did not contain any requirements for workers already employed. In order to spend EU funds, the employer-beneficiary dismissed the currently working employees, under the pretext of reorganising the enterprise and eliminating their jobs, and in their place hired apprentices whose wage costs it financed from the EU grant.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, project implementation correctness verification and audit.

Article 32 Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

What is protected under this article?

- children under 16 years of age against being used at work
- minimum age of children's admission to employment
- working conditions for young people
- young people against exploitation
- the working conditions for children are such that they do not harm their safety, health or physical, mental, moral or social development or interfere with their education

In determining whether the application of a national law or the action of a national body could result in a limitation of the prohibition of child labour and not ensuring the protection of young people in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
admission of children under the age of 16 to employment?	
admission of young people to employment without ensuring working conditions appropriate to their age or without protecting them against economic exploitation?	
admission of young people to performing work which is likely to harm their safety, health, physical, mental, moral or social development or to interfere with their education?	

Example of limitation

A limitation of the prohibition of child labour and a failure to ensure protection to young people could arise if, as part of an EU-funded project to convert a municipal vacant building into a dormitory for schoolchildren, the project implementing body used free labour of young people who wanted to live there. To this end, it would enter into employment contracts not providing for remuneration for their work.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 33 Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

What is protected under this article?

- family life
- professional life
- paid maternity leave
- reconciliation of family and professional life
- protection from dismissal for a reason connected with maternity
- maternity leave following the birth or adoption of a child

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to family and professional life in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, been:	YES/ NO?
deprived of the possibility to reconcile family and professional life?	
unjustifiably deprived of all or part of their parental rights?	
dismissed or discriminated against for reasons connected with maternity or paternity?	
deprived of the right to paid maternity leave or to parental leave following the birth or adoption of a child?	

Example of limitation

The requirement for an EU-funded project to support the long-term care of children with disabilities could result in a limitation of the right to family and professional life. The project would provide funding for the purchase of medical equipment and supplies on the condition of participation in care training courses, which would be run for one month on weekdays between 10 a.m. and 2 p.m. Parents of children with disabilities interested in the training courses, unable to combine participation with their work, were forced to use their annual leave to attend the training courses, which was the condition for receiving financial support from EU funds.

This example can be applied by analogy to the following stages of implementation: drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 35 Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

What is protected under this article?

- access to preventive health care
- the right to medical treatment in the national health care system
- the right to a high level of human health protection taking into account scientific and medical developments
- the right to information on the state of health
- prevention of risks to human health upon actions carried out by the state

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to health care or in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an individual, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project:	YES/ NO?
lost the right of access to preventive health care or encountered difficulties in accessing such care?	
lost the right to medical treatment provided for under national law or encountered difficulties in receiving such treatment?	
suffered harm to his or her health, for example due to a failure to ensure a high level of human health protection during the implementation of an EU-funded project?	

Example of limitation

A limitation of the right to health care could arise if, as part of an EU-funded programme of energy sector modernisation, the state supported the construction of a waste incineration plant. Funding was given to an investment project immediately adjacent to a large multi-family housing estate. Harmful fumes, including biogas negatively affecting the health of the residents of this and neighbouring housing estates, escaped from the stored waste. Indisputably, the incinerator operator was directly responsible for the damage caused. However, the cause of the violation were also the competition requirements developed by the national body, allowing EU funding to co-finance the investment that posed a serious risk to public health, without taking into account the need to comply with requirements to protect human health and life and to protect the environment.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 37 Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

What is protected under this article?

- environmental protection
- quality of the environment in population centres
- sustainable development
- development of plants and animals

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to environmental protection in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO
pollution of the environment, e.g. air, or other negative environmental impacts?	
significant destruction of plant or animal populations, including their displacement or alteration of the ecosystem, without protective measures being put in place or their restoration elsewhere?	
harm to health, for example due to a failure to ensure a high level of human health protection during the implementation of an EU-funded project?	

Example of limitation

A limitation of the right to environmental protection could arise if the city authorities implemented an EU-funded project to revitalise the riverside boulevards aimed to enhance the tourist attractiveness of the city. As part of the project, the boulevards were to be widened and the city also envisaged the construction of waterfront terraces. In the course of the project implementation, duck breeding sites were destroyed, vegetation was reduced, and laying concrete on the area raised the temperature in the city's riverside district. Regardless of the possible responsibility of the city authorities and the investment project contractor, environmental standards were also violated because of the competition conditions that allowed the financing of an investment with a high environmental risk. The competition conditions did not take into account the need to respect environmental standards. Nor did they require the contractor to have the skills and resources to safeguard the environment for the duration of the works.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 38 Consumer protection

Union policies shall ensure a high level of consumer protection.

What is protected under this article?

- consumers
- consumers' right to information and support
- consumers' right to protection, including that from marketing manipulation, because of a weaker position
- competitiveness of products and services

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to consumer protection in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, resulted in:	YES/ NO?
the use by traders of practices that violate consumers' rights, e.g. taking advantage of their weaker position?	
advertising manipulation?	
overpricing?	
inappropriate price labelling e.g. failure to indicate an „Omnibus price”, i.e. the previous lowest price for a product or service that was in force throughout a certain period before the current reduction?	

Example of limitation

A limitation of the right to consumer protection could arise in a situation where a city decided to co-finance with EU funds a music festival organised for many years. According to the programme documents, the festival organiser was obliged to submit draft festival regulations ensuring the safety of the mass event. In the regulations, the festival organiser reserved for itself the exclusive right to conduct commercial and service activities during the event. As a result, within the festival town, the prices of drinks, including water, were several times the market price.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects, project implementation correctness verification and audit.

Article 39 Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

What is protected under this article?

- right to vote in elections to the European Parliament
- right to stand as a candidate at elections to the European Parliament
- right to vote by universal and direct suffrage
- right to a free and secret ballot

In determining whether the application of a national law or the action of a national body could result in a limitation of the EU citizens' right to vote and to stand as a candidate at elections to the European Parliament in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an EU citizen, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project, encountered difficulties or lost the opportunity to exercise:	YES/ NO?
the right to vote or to stand as a candidate at elections to the European Parliament by direct universal suffrage, in a free and secret ballot, in the Member State of residence, under the same conditions as nationals of that State?	

Example of limitation

A limitation of the EU citizens' right to vote and stand as candidates at elections to the European Parliament could arise if a grant were received from EU funds for a civil society activation project on the condition that the beneficiary of the grant suspended his or her political activity for the duration of the grant and for the following 5 years after the completion of the project.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding applications and selection of most competitive projects.

Article 40 Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

What is protected under this article?

- right to vote in municipal elections
- right to stand as a candidate at municipal elections

In determining whether the application of a national law or the action of a national body could result in a limitation of an individual's right to vote and to stand as a candidate at municipal elections in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an EU citizen, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project encountered difficulties or been prevented from exercising:	YES/ NO?
the right to vote or to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State, e.g. by being discouraged from participating in the vote in the place of his or her choice?	

Example of limitation

A limitation of the right to vote and stand as a candidate at municipal elections in a situation involving the implementation of an EU-funded project can arise when EU-funded support was used to violate democratic election standards, including inter alia the principle of equality of elections and equality of candidates. An example could be a situation where part of the EU-funded support granted for the promotion of an EU project, which is a public entity, was used by this public entity for the purposes of conducting an election campaign, e.g. by the head of the municipality implementing the EU project.

This example can be applied by analogy to the following stages of implementation: development of programme documentation, drafting template agreements with beneficiaries, evaluation of funding application and selection of most competitive projects, project implementation correctness verification and audit

Article 45 Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

What is protected under this article?

- freedom of movement within EU
- freedom of residence in EU
- EU citizens' right to non-discrimination on the ground of their origin

In determining whether the application of a national law or the action of a national body could result in a limitation of the EU citizens' right to move and reside freely in a situation involving the disbursement of EU funds, it may be helpful to answer the following questions.

Has an EU citizen, as a result of the application of the national law or the action of the national body, in a situation involving the implementation of an EU-funded project:	YES/ NO
been deprived of the right to move or reside freely within the territory of another Member State?	
Have family members of the EU citizen been deprived of these rights?	

Example of limitation

A limitation of the EU citizens' right to free movement and residence could arise if, as part of an EU-funded training programme targeted at medical staff, contracts were concluded with health professionals laying down their obligation to work for at least 3 years after the end of their training in public and free health care facilities in a Member State. These employees would not be able to benefit from the freedom of movement of persons, work and establishment in order to move to other Member States and enjoy the freedoms of the internal market there.

This example can be applied by analogy to the following stages of implementation: drafting legislation, development of programme documentation, drafting template agreements with beneficiaries

Summary

The goal of the first stage of assessing the compliance of a national law or the action of a national body with the CFR in the course of implementing EU-funded projects is to determine whether or not there has been **a limitation** of the fundamental rights protected in the CFR. If the answer or answers to the questions in the checklist above suggest that such a limitation has occurred, it is necessary to proceed to **the next two stages of the compliance assessment**, which are aimed to assess whether such a limitation is allowed and whether it is proportionate.

It should be borne in mind that not every limitation of the fundamental rights laid down in the CFR results in **a violation** of those rights. Indeed, a limitation of a fundamental right may be in conformity with the CFR if it is allowed, pursues a legitimate objective and does not go beyond what is necessary.

2.2 Stage two of the assessment: determination by the national body whether the CFR allows for the possibility of limitation of an individual's fundamental right provided for therein?

If, resulting from the application of the checklist above, it is found that there has been a limitation of a fundamental right conferred by the CFR (see chapter 2.1), it is necessary to proceed to the second stage of assessing the CFR compliance of the national body's action in the course of EU-funded project implementation. The second stage of the examination will assess whether or not the limitation of the fundamental right is allowed. This subject is discussed in this section of the Handbook. In order for the limitation of the fundamental rights laid down in the CFR to be allowed in the light of the CFR, two requirements must be met: first, the law must provide for the possibility of a limitation of the fundamental right in question and, second, the limitation must not violate the essence of the fundamental right in question. If a limitation of the fundamental right is found to be allowed, the third and final stage of the examination will assess the proportionality of the limitation (see chapter 2.3).

Is the limitation provided for by law?

The CFR does not explicitly indicate the fundamental rights that cannot be subject to limitations (absolute fundamental rights). It is understood that the following fall into this category:

- human dignity (Article 1 of the CFR),
- prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the CFR),
- prohibition of slavery and forced labour (Article 5(1) and 5(2) of the CFR),
- freedom of thought, conscience and religion (Article 10(1) of the CFR, and
- principle of presumption of innocence (Article 48 of the CFR).

The remaining fundamental rights may be subject to limitations.

In order to assess whether a limitation of a fundamental right is allowed, it is first necessary to check whether it has an adequate **legal basis**, i.e. whether the limitation of the fundamental right is provided for by national laws or by EU legal acts. For example, pursuant to Article 31(3) of the Constitution of the Republic of Poland, limitations on the exercise of constitutional freedoms and rights may be established **only by law**.

Does the limitation respect for the essence of the fundamental right at issue?

Next, it is necessary to check whether the limitation of the fundamental right does not call into question the essence of the fundamental right as such. The limitation will not call into question the essence of the fundamental right if it is only allowed under strictly defined circumstances. If, in contrast, as a result of the application of a national law or the action of a national body, **it is not possible to benefit from** the key elements of the fundamental right in question, it may be presumed that the essence of the fundamental right has been violated.

In case **T-4/20 Sieć Badawcza Łukasiewicz** the Court pointed out that the requirement to avoid conflicts of interest due to family or emotional ties is intended to prevent a blatant and obvious violation of the requirement of impartiality and objectivity, which is particularly incumbent on the person responsible for certifying the timesheets of those working on an EU-funded project. Assuming that the provision preventing conflict of interest could violate the right to private and family life and the right to marry and found a family protected by Articles 7 and 9 of the CFR, the violation would not affect the content of these rights, but at most the exercise thereof would be limited.

A violation of the essence of a fundamental right is determined by whether the limitation in question merely hinders or narrows the possibility of exercising a particular fundamental right, or whether it excludes it altogether and renders that fundamental right only formally valid. An example of this is Case C-293/12 and C-594/12 – Digital Rights Ireland concerning a regulation allowing public authorities to obtain universal (not only against suspects) access to electronic messages. Such unlimited access by public authorities to private electronic messages of individuals must be considered a violation of the essence of the fundamental right to respect for private life (Article 7 of the CFR). In such a case, there is no situation in which communication can take place privately. Indeed, everyone's communications can be constantly and freely voyeurised by the authorities. Likewise, if an individual has no access to information about the processing of his or her personal data, he or she cannot therefore correct it if necessary, nor does he or she have the right to complain to a court about the unlawful processing of his or her personal data, the protection of such data is illusory, existing – if at all – only formally. In practice, the individual is deprived of any legal protection (see judgment in Case C-362/14 - Schrems I).

Therefore, in order to assess whether the application of the national law or the action of the national body constituted an allowed limitation of an individual's fundamental right conferred by the CFR in a situation involving the disbursement of EU funds, the following questions can be answered.

Is the limitation of the fundamental right provided for in the CFR:	YES/NO?
provided for by law (universally binding law)?	
not affecting the essence of the fundamental right in question?	

If the limitation of the fundamental right is not provided for by law or it violates the essence of the fundamental right in question, the limitation **violates** the fundamental right in question.

2.3 Stage three of the assessment: determination by the national body whether the limitation of an individual's right provided for in the CFR is proportionate?

If, in the previous **second stage of assessing the compliance** with the CFR of a national law or the action of a national body in the course of implementing EU-funded projects, it has been determined that the limitation of the fundamental right provided for in the CFR under examination is allowed (see chapter 2.2), it is necessary to proceed to the **third stage of the compliance assessment**, where the **proportionality** of the limitation is checked. This section of the chapter will explain how the proportionality of the limitation of the fundamental right can be determined. What is important is the outcome of this assessment. If an allowed limitation is found to be proportionate, there is no violation of the CFR, whereas if the limitation is found to be disproportionate, it may be established that there is a violation of the CFR (see chapter 2.4). The proportionality of the limitation determines its ultimate lawfulness.

Does the limitation of the fundamental right serve a legitimate objective?

The examination of the proportionality of the limitation of the fundamental right must be started by establishing whether the limitation determined serves a legitimate objective. **The objective of the limitation must clearly arise from a national law or the action of the national body** (i.e. it must be laid down in an act of general application, e.g. a law or a directive, but not in the programme documentation acts). A legally legitimate objective will be the one that is consistent with the general interest or the needs to protect the fundamental rights of others. The CFR does not contain a list of such objectives. The assessment of proportionality may refer to one of the public interest objectives identified in the CJEU case law, such as e.g. the protection of human dignity, the rights and freedoms of others, public morality, public order, public security, the protection of human and animal health and life or the protection of plants, the protection of national cultural property of artistic, historical or archaeological value, or the protection of industrial and commercial property, consumer protection, and others. Purely economic aims, such as the promotion of the national economy, its proper functioning or fiscal considerations, cannot justify a limitation on the exercise of the fundamental rights conferred by the CFR ⁹⁸.

⁹⁸ C-201/15 - AGET Iraklis, point 72.

Is the limitation provided for in the CFR appropriate to meet the objective pursued?

It should also be considered whether or not the limitation of the fundamental right provided for in the CFR is appropriate to attain the objective pursued.

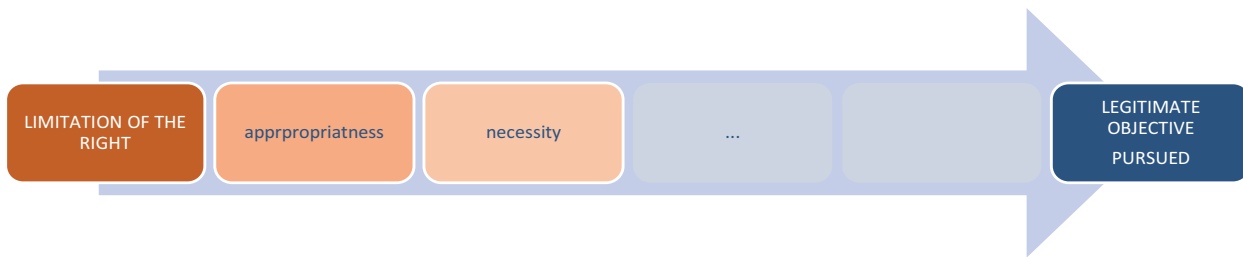


In Case C-92/09 Volker und Markus Schecke and Eifert, the CJEU ruled that, aiming at enhancing transparency of the use of agricultural funds, the obligation under an EU regulation to publish on a website the names of farmers benefiting from such funds constitutes a limitation on the right to respect for family life and the right to protection of personal data (Articles 7 and 8 of the CFR). Nevertheless it corresponds to a general interest objective recognised by the Union. Indeed, the publication of the names of beneficiaries of aid from agricultural funds and the amounts received by them was intended to increase the transparency of the use of EU funds spent on agriculture and the quality of the management of these funds, in particular by strengthening public control of their use. The CJEU held that, by strengthening public control of the use of agricultural funds, the publication contributed to the proper use of EU funds by the public administration. In addition, the publication of the use of amounts disbursed from EU agricultural funds allowed EU citizens to better participate in the public debate about decision-making on the orientation of EU agriculture.

To sum up, the appropriateness (adequacy) of the limitation of the fundamental right established in the CFR means that it is appropriate to attain the legitimate objective pursued (enables its attainment or contributes to its better fulfilment).

Does the limitation of the fundamental right conferred by the CFR go beyond what is necessary to attain the objective pursued? Are there any measures available that would interfere less in fundamental rights?

It must also be determined whether the limitation of the fundamental right conferred by the CFR does not go beyond what is necessary to attain the objective pursued. This necessity depends on whether there are available measures or possible other ways of limiting the fundamental right which would interfere less in the fundamental right being limited. An attempt must therefore be made to determine whether or not the adopted limitation of the fundamental right is actually necessary. If there are alternative, less intrusive, or less restrictive measures available, these measures should be used in order to interfere least with the limited fundamental right conferred by the CFR.

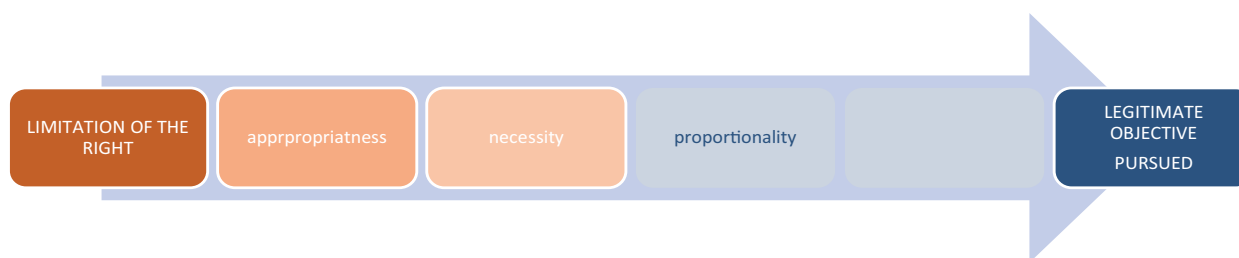


The necessity of limiting the fundamental rights established in the CFR means that the objective pursued cannot be met by taking other measures that would less limit the fundamental right in question (no alternative).

In Case C-92/09 Volker und Markus Schecke and Eifert, the CJEU ruled that while publishing data on farmers benefiting from EU agricultural funds, the fundamental rights laid down in Articles 7 and 8 of the CFR must be taken into consideration. With regard to the situation of the farmers, the CJEU found that the EU legislator did not adequately balance the Union's interest in ensuring transparency of operations and an optimum use of EU funds, on the one hand, and the fundamental rights recognised by Articles 7 and 8 of the CFR, on the other. The CJEU ruled that **no consideration had been given to the possibility of drawing up the rules for publishing information on beneficiaries in such a way that they would attain the objective of transparency, but at the same time interfere less with beneficiaries' rights to respect for private life and protection of personal data.** Such a measure could involve limiting the publication of data by name relating to those beneficiaries according to the periods during which those persons received such aid, the frequency of such aid or the nature and amount of thereof.

Is the limitation of the fundamental right proportionate to the objective pursued?

Finally, it is necessary to consider the **sensu stricto proportionality of the limitation of the fundamental right established in the CFR**, i.e. to examine whether the negative effects of the measure will not be disproportionately severe, far-reaching or excessive in relation to the objective the measure is intended to serve. Indeed, the limitation of the fundamental right must not impose **on those affected a burden which is disproportionate and excessive in relation to the objective** that the limitation is intended to serve. A balancing exercise must therefore be undertaken between the need to attain a legitimate objective and the interference with the fundamental right in question laid down in the CFR. In the case of a confluence of fundamental rights, the requirements for the protection of the respective fundamental rights must be reconciled and an appropriate balance must be struck between them. These criteria are, obviously, subject to evaluation. The question of the **sensu stricto proportionality** is important insofar as there may be examples of limitations of fundamental rights which are appropriate (useful to attain the objective pursued), necessary (there is no alternative less restrictive limitation), but which impose an excessive burden on individual's fundamental rights in relation to the objective they are intended to attain.



Assessing the *sensu stricto* proportionality is a difficult task, as it requires balancing arguments of a highly evaluative nature. In practice, however, cases in which only this element of the proportionality test will be decisive are very rare. If there is such a necessity, one can refer to some guidelines for the assessment of proportionality in the strict sense:

- In simple terms, it can be said that what should be assessed is whether the advantages of the regulation in question (social gain) outweigh its disadvantages (social or individual costs). Relevant factors to be taken into account include the scope of entities (how large is a group of entities, what is the nature/status of the entities?), temporal, spatial or economic (including financial) scope of the limitation in question.
- Considering the objective of the regulation, it should be taken into account to what extent it is actually justified, e.g. in the case of the rationale of budget protection, whether the threat to the security of public finances is real in the given situation, which is supported by existing analyses e.g. publicly available studies. The very abstract, purely hypothetical nature of the risk will be less likely to justify possible limitations of fundamental rights.
- When referring to rights and freedoms, it is necessary not only to refer to the provisions governing a particular situation, but to the totality of the individual's rights in order to check to what extent, despite a given limitation, the individual will still be able to exercise those rights and freedoms. In this context, the existence of provisions providing for the possibility of compensation for a particular harm or disadvantage may be an argument.
- It is also important to examine the rank of the right or freedom being limited. Those rights that are particularly important to guarantee the fundamental principles of a democratic state under the rule of law (such as equality, non-discrimination), or personal dignity and related rights (personal freedom, prohibition of torture, respect for physical and mental integrity). Similarly important are the principles derived from the rule of law, such as the principle of legality, the principle of legal certainty, the principle of protection of the acquired rights, the prohibition of retroactive law). In this context, it is also worth paying attention to whether the regulation in question applies on an automatic basis and does not provide for the possibility of taking into account individual, exceptional circumstances (e.g. force majeure).
- Related to the rule of law is also an appropriate consideration of the availability of measures and procedural guarantees for the protection of the rights as a very important interest that limits the discretion of the authorities. Indeed, without these guarantees, the remaining fundamental rights would become ineffective due to the impossibility of effectively demanding respect therefor.⁹⁹

⁹⁹ Cf. A. Śledzińska-Simon, *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności Teoria i praktyka* [Analysis of the Proportionality of Limitations of Constitutional Rights and Freedoms (Chapter 3. Analysis of Proportionality in the Constitutional Tribunal Jurisprudence)] (Rozdz. 3. Analiza proporcjonalności w orzecznictwie Trybunału Konstytucyjnego), Wrocław 2019, str. 129 i n.; <http://www.bibliotekacyfrowa.pl/publication/102713>;

Referring again to Case C-92/09 Volker und Markus Schecke and Eifert, it can be pointed out that e.g. the objective of ensuring transparency in spending EU agricultural funds is not a value that can automatically take precedence over the individual's right to the protection of personal data (Article 8 CFR). It was therefore necessary to limit the measure adopted, i.e. the publication of the names of beneficiaries of agricultural aid, e.g. by adopting the criterion of the amount of aid granted, instead of a general publication of all beneficiaries – natural persons with their names.

In order to assess, therefore, whether the application of the national law or the action of the national body may have resulted in a disproportionate limitation of an individual's fundamental right conferred by the CFR in a situation involving the disbursement of EU funds, an attempt may be made at answering the following questions.

Does the limitation:	YES/NO
Serve a legitimate objective?	
Is the limitation an appropriate measure to attain the objective pursued?	
Does the limitation not go beyond what is necessary to attain the objective pursued? Are there any measures available that would interfere less in fundamental rights?	
Is the limitation proportionate to the objective pursued?	

2.4 Conclusion – assessment of the compliance of the national body's action with the EU CFR

A violation of the CFR takes place if the answers to the questions in the checklist are as follows:

1st Stage of compliance assessment: has there been a limitation of the fundamental right established in the CFR?

If the answer to the question of whether the national law under consideration or the action of the national body affects or is likely to limit the fundamental rights laid down in the CFR is negative, it means that there has been no limitation of the fundamental right established in the CFR. Therefore there is no need to continue the assessment. If, on the other hand, the answer to the above question is positive, it is necessary to proceed to the second stage of the compliance assessment.

2nd Stage of compliance assessment: is the limitation of the fundamental right established in the CFR allowed?

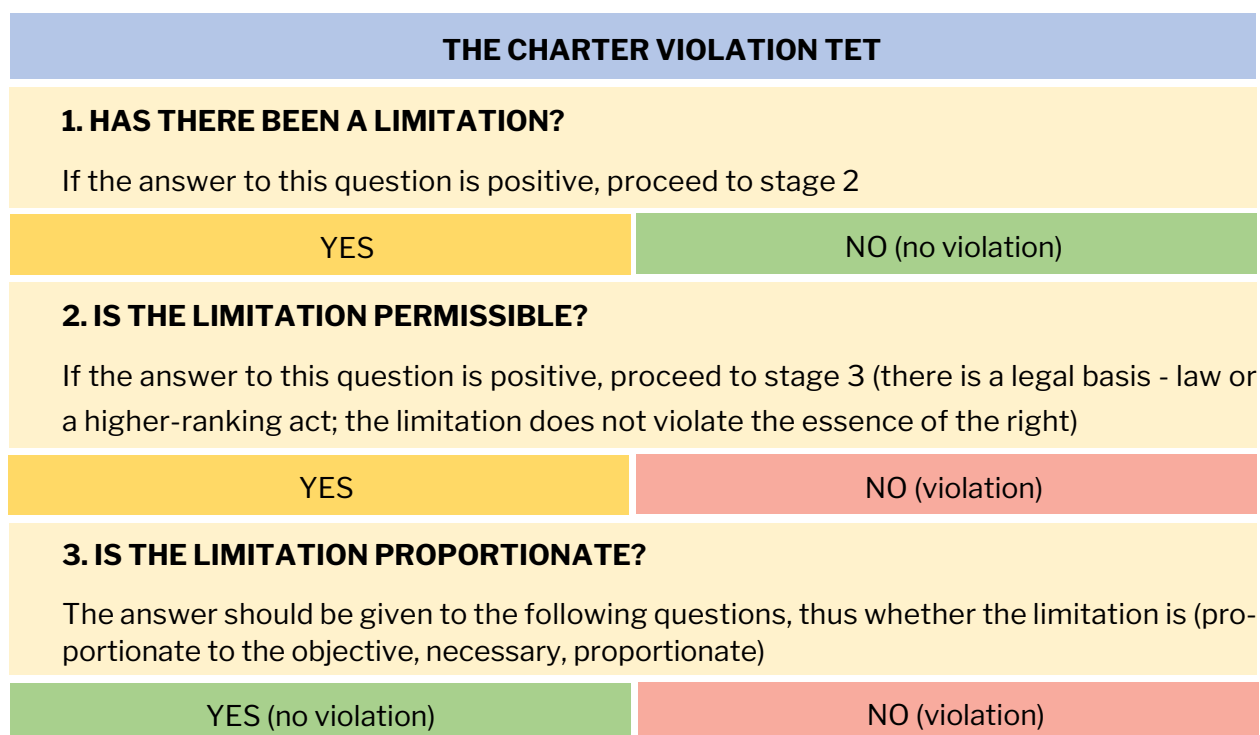
The next question to be answered is whether the national provision under examination or the action of the national body are allowed, i.e. whether they are provided for by law and respect the essence of the fundamental right being limited. If the answer to this question is negative, i.e. the limitation in question of the fundamental right is not allowed in the light of the CFR, it means that there has been a violation of the CFR. If, on the other hand, the answer is positive, i.e. the limitation in question of the funda-

mental right is allowed in the light of the CFR, it is necessary to proceed to the third stage of the compliance assessment.

3rd Stage of the compliance assessment: is the **limitation** of the fundamental right established in the CFR **proportionate** (appropriate, necessary and proportionate) in the strict sense?

The final question concerns the **assessment of the proportionality** of the national law under examination or of the action of the national body, limiting the fundamental rights established in the CFR, in relation to a legitimate objective. If the answer to this question is positive, i.e. the limitation of the fundamental right laid down in the CFR is proportionate, it means that there has been no violation of the CFR. If, on the other hand, the answer to this question is negative, i.e. the limitation of the fundamental right laid down in the CFR is disproportionate in relation to the objective, this means that there has been a violation of the CFR.

The assessment process is shown in the infographics below.



Final remarks

EU funding plays a key role in the implementation of EU policies in Member States. Member States and EU institutions must ensure that EU-funded projects comply with Union law, including the CFR. The CFR is becoming increasingly important not only as regards action of the EU institutions, but also at the level of national authorities when applying EU law. The CFR is one of the newer instruments for the protection of human rights in the national legal order and can play an important role alongside the Constitution and the European Convention on Human Rights. The CFR establishes the legal standards to be followed by EU institutions enacting and applying EU laws on the implementation of EU projects as well as by national authorities adopting national regulations of this type and applying EU and national laws in this area.

The CFR can be used and is increasingly invoked to protect the rights established therein by, among others, applicants for EU funds and beneficiaries who spend them. Articles 7 and 8 of the CFR ensured farmers benefiting from EU funds the protection of their personal data and the right to respect for family life violated by the provisions of the EU regulations, which required Member States to publish the personal and financial data of these farmers. The extent of the data published was considered excessively detailed in relation to the objective of proper spending of EU funds, which it was intended to serve¹⁰⁰. Articles 20, 21(1) and 23 of the CFR established guarantees of equal and non-discriminatory treatment on the grounds of gender when applying for support from EU funds for early retirement¹⁰¹. The right of applicants for EU funding to effective remedy, in the form of a judicial review of the national body's decision not to award funding, was derived from Article 47 of the CFR¹⁰². It follows from these cases that **national institutions carrying out tasks related to the implementation of EU-funded projects, such as e.g. managing authorities, intermediate bodies, monitoring committees, audit authorities and others, perform tasks laid down in EU legislation and therefore apply EU law within the meaning of Article 51(1) of the CFR and are obliged to comply with the CFR.** This Handbook is to assist these institutions in carrying out this task. It presents basic information on the rights and freedoms laid down in the CFR and discusses examples of potential violations during the implementation of EU-funded projects.

The guidance provided in the Handbook, including the questions and examples included in the checklist, may not be sufficient to determine how, in a given case, the protection of the fundamental rights guaranteed by the CFR should be ensured. In practice, for example, more detailed, complex or hitherto unanalysed issues may arise. The basic material contained in the Handbook is intended to assist in establishing standards of legal protection on your own and in making correct decisions. This is often a difficult task, requiring the assessment of various decisions, e.g. legal, organisational, financial and individual, directly affecting individuals. Establishing good practices in the application and observance of the CFR during the implementation of EU-funded projects is important for a Member State's actual fulfilment of the horizontal requirement to comply with the CFR. This Handbook is intended to assist the national authorities in the correct application of the CFR and to ensure the compliance with it, and to ensure that entities involved in the implementation of EU-funded projects enjoy the full rights granted to them in the CFR.

¹⁰⁰Joined cases C-92/09 and C-93/09 Schecke & Eifert.

¹⁰¹C-401/11 B. Soukupová.

¹⁰²C-562/12 Liivimaa Lihaveis.

Annex 1: Breakdown of fundamental rights laid down in the CFR according to degree of probability of their limitation by national authorities in the context of particular types of activity

Law making

inter alia: organisation of the partnership, setting up of management systems, monitoring and control of programmes, drawing up rules for membership of the monitoring committee and rules of procedure of the committee, development of programmes

Red flag respect for private and family life (Article 7)	Red flag protection of personal data (Article 8)	Red flag equality before the law (Article 20)	Red flag non-discrimination (Article 21)	Red flag integration of persons with disabilities (Article 26)
Red flag right to good administration (Article 41)	Red flag right to effective remedy and to a fair trial (Article 47)	Red flag presumption of innocence and right of defence (Article 48)	Red flag principles of legality and proportionality of criminal offences and penalties (Article 49)	Red flag right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
Yellow flag freedom of expression and information (Article 11)	Yellow flag freedom of assembly and of association (Article 12)	Yellow flag freedom of the arts and sciences (Article 13)	Yellow flag right to education (Article 14)	Yellow flag freedom to choose an occupation and right to engage in work (Article 15)
Yellow flag freedom to conduct a business (Article 16)	Yellow flag right to property (Article 17)	Red flag equality between women and men (Article 23)	Yellow flag the rights of the child (Article 24)	Yellow flag the rights of the elderly (Article 25)
Yellow flag fair and just working conditions (Article 31)	Yellow flag social security and social assistance (Article 34)	Yellow flag access to services of general economic interest (Article 36)	Grey flag dignity (Article 1)	Grey flag right to life (Article 2)
Grey flag right to physical and mental integrity (Article 3)	Grey flag prohibition of torture and inhuman or degrading treatment or punishment (Article 4)	Grey flag prohibition of slavery and forced labour (Article 5)	Grey flag right to liberty and security (Article 6)	Grey flag right to marry and right to found a family (Article 9)
Grey flag freedom of thought, conscience and religion (Article 10)	Grey flag right to asylum (Article 18)	Grey flag protection in the event of removal, expulsion or extradition (Article 19)	Grey flag workers' right to information and consultation within the undertaking (Article 27)	Grey flag right of collective bargaining and action (Article 28)
Grey flag right of access to placement services (Article 29)	Grey flag protection in the event of unjustified dismissal (Article 30)	Grey flag prohibition of child labour and protection of young people at work (Article 32)	Grey flag family and professional life (Article 33)	Grey flag health care (Article 35)
Grey flag environmental protection (Article 37)	Grey flag consumer protection (Article 38)	Grey flag right to vote and to stand as a candidate at elections to the European Parliament (Article 39)	Grey flag right to vote and to stand as a candidate at municipal elections (Article 40)	Grey flag freedom of movement and of residence (Article 45)

Activity of monitoring committees

inter alia: analysis and approval of the operational programme's communication strategy and of the criteria for selecting operations, selection of operations

Red flag respect for private and family life (Article 7)	Red flag protection of personal data (Article 8)	Red flag equality before the law (Article 20)	Red flag non-discrimination (Article 21)	Red flag integration of persons with disabilities (Article 26)
Red flag right to good administration (Article 41)	Red flag right to effective remedy and to a fair trial (Article 47)	Red flag presumption of innocence and right of defence (Article 48)	Red flag principles of legality and proportionality of criminal offences and penalties (Article 49)	Red flag right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
Yellow flag freedom of expression and information (Article 11)	Yellow flag freedom of assembly and of association (Article 12)	Yellow flag freedom of the arts and sciences (Article 13)	Yellow flag right to education (Article 14)	Yellow flag freedom to choose an occupation and right to engage in work (Article 15)
Yellow flag freedom to conduct a business (Article 16)	Yellow flag right to property (Article 17)	Red flag equality between women and men (Article 23)	Yellow flag the rights of the child (Article 24)	Yellow flag the rights of the elderly (Article 25)
Yellow flag fair and just working conditions (Article 31)	Yellow flag social security and social assistance (Article 34)	Yellow flag access to services of general economic interest (Article 36)	Grey flag dignity (Article 1)	Grey flag right to life (Article 2)
Grey flag right to physical and mental integrity (Article 3)	Grey flag prohibition of torture and inhuman or degrading treatment or punishment (Article 4)	Grey flag prohibition of slavery and forced labour (Article 5)	Grey flag right to liberty and security (Article 6)	Grey flag right to marry and right to found a family (Article 9)
Grey flag freedom of thought, conscience and religion (Article 10)	Grey flag right to asylum (Article 18)	Grey flag protection in the event of removal, expulsion or extradition (Article 19)	Grey flag workers' right to information and consultation within the undertaking (Article 27)	Grey flag right of collective bargaining and action (Article 28)
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Grey flag environmental protection (Article 37)	Grey flag consumer protection (Article 38)	Grey flag right to vote and to stand as a candidate at elections to the European Parliament (Article 39)	Grey flag right to vote and to stand as a candidate at municipal elections (Article 40)	Grey flag freedom of movement and of residence (Article 45)

Law making (e.g. managing authorities and intermediate bodies)

inter alia: establishment of selection procedures and criteria, development of programme documentation, determination of conditions for support provision

Red flag respect for private and family life (Article 7)	Red flag protection of personal data (Article 8)	Red flag equality before the law (Article 20)	Red flag non-discrimination (Article 21)	Red flag integration of persons with disabilities (Article 26)
Red flag right to good administration (Article 41)	Red flag right to effective remedy and to a fair trial (Article 47)	Red flag presumption of innocence and right of defence (Article 48)	Red flag principles of legality and proportionality of criminal offences and penalties (Article 49)	Red flag right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
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Red flag environmental protection (Article 37)	Grey flag consumer protection (Article 38)	Grey flag right to vote and to stand as a candidate at elections to the European Parliament (Article 39)	Grey flag right to vote and to stand as a candidate at municipal elections (Article 40)	Grey flag freedom of movement and of residence (Article 45)

Application of law (e.g. managing authorities, intermediate bodies)

Inter alia: implementation of programmes, selection of operations, signing of agreements, monitoring of implementation, verification of payment requests

Red flag respect for private and family life (Article 7)	Red flag protection of personal data (Article 8)	Red flag equality before the law (Article 20)	Red flag non-discrimination (Article 21)	Red flag integration of persons with disabilities (Article 26)
Red flag right to good administration (Article 41)	Red flag right to effective remedy and to a fair trial (Article 47)	Red flag presumption of innocence and right of defence (Article 48)	Red flag principles of legality and proportionality of criminal offences and penalties (Article 49)	Red flag right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
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Payment control and audit (e.g. certifying authorities, audit authorities)

Red flag respect for private and family life (Article 7)	Red flag protection of personal data (Article 8)	Red flag equality before the law (Article 20)	Red flag non-discrimination (Article 21)	Red flag integration of persons with disabilities (Article 26)
Red flag right to good administration (Article 41)	Red flag right to effective remedy and to a fair trial (Article 47)	Red flag presumption of innocence and right of defence (Article 48)	Red flag principles of legality and proportionality of criminal offences and penalties (Article 49)	Red flag right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
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Grey flag environmental protection (Article 37)	Grey flag consumer protection (Article 38)	Grey flag right to vote and to stand as a candidate at elections to the European Parliament (Article 39)	Grey flag right to vote and to stand as a candidate at municipal elections (Article 40)	Grey flag freedom of movement and of residence (Article 45)

Annex 2: Charter of Fundamental Rights of the European Union

OJ EU.C.2007.303.1 of 2007.12.14

Status: act in force

Version as of: 31 December 2009

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2007/C 303/01)

(OJ EU C of 14 December 2007).

The European Parliament, the Council and the Commission solemnly proclaim the Charter of Fundamental Rights of the European Union as set out below:

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

CHAPTER I DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - a) the free and informed consent of the person concerned, according to the procedures laid down by law;
 - b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
 - c) the prohibition on making the human body and its parts as such a source of financial gain;
 - d) the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

CHAPTER II FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The 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.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13

Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28

Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29

Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31

Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37

Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V CITIZENS' RIGHTS

Article 39

Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43

Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46

Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI JUSTICE

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII GENERAL PROVISIONS

Article 51

Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be 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, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

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◦ ◦

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

Annex 3: Explanations relating to the Charter of Fundamental Rights

OJ EU.C.2007.303.17 of 2007.12.14

Status: act in force

Version as of: 14 December 2007

EXPLANATIONS(*) RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS

(2007/C 303/02)

(OJ EU C of 14 December 2007).

These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.

TITLE I – DIGNITY

Explanation on Article 1 – Human dignity

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ In its judgment of 9 October 2001 in Case C-377/98 Netherlands v European Parliament and Council [2001] ECR I-7079, at grounds 70 – 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law.

It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

Explanation on Article 2 – Right to life

1. Paragraph 1 of this Article is based on the first sentence of Article 2(1) of the ECHR, which reads as follows:

‘1. Everyone’s right to life shall be protected by law ...’.

2. The second sentence of the provision, which referred to the death penalty, was superseded by the entry into force of Article 1 of Protocol No 6 to the ECHR, which reads as follows:

‘The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.’

Article 2(2) of the Charter is based on that provision.

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3. The provisions of Article 2 of the Charter correspond to those of the above Articles of the ECHR and its Protocol. They have the same meaning and the same scope, in accordance with Article 52(3) of the Charter. Therefore, the ‘negative’ definitions appearing in the ECHR must be regarded as also forming part of the Charter:

(a) Article 2(2) of the ECHR:

‘Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

(b) Article 2 of Protocol No 6 to the ECHR:

‘A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions...’.

Explanation on Article 3 – Right to the integrity of the person

1. In its judgment of 9 October 2001 in Case C-377/98 Netherlands v European Parliament and Council [2001] ECR-I 7079, at grounds 70, 78 to 80, the Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.

2. The principles of Article 3 of the Charter are already included in the Convention on Human Rights and Biomedicine, adopted by the Council of Europe (ETS 164 and additional protocol ETS 168). The Charter does not set out to depart from those principles, and therefore prohibits only reproductive cloning. It neither authorises nor prohibits other forms of cloning. Thus it does not in any way prevent the legislature from prohibiting other forms of cloning.

3. The reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court adopted in Rome on 17 July 1998 (see its Article 7(1)(g)).

Explanation on Article 4 – Prohibition of torture and inhuman or degrading treatment or punishment

The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article.

Explanation on Article 5 – Prohibition of slavery and forced labour

1. The right in Article 5(1) and (2) corresponds to Article 4(1) and (2) of the ECHR, which has the same wording. It therefore has the same meaning and scope as the ECHR Article, by virtue of Article 52(3) of the Charter. Consequently:

- no limitation may legitimately affect the right provided for in paragraph 1,

- in paragraph 2, ‘forced or compulsory labour’ must be understood in the light of the ‘negative’ definitions contained in Article 4(3) of the ECHR:

‘For the purpose of this article the term “forced or compulsory labour” shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.’.

2. Paragraph 3 stems directly from human dignity and takes account of recent developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks. The Annex to the Europol Convention contains the following definition which refers to trafficking for the purpose of sexual exploitation: ‘traffic in human beings: means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children’. Chapter VI of the Convention implementing the Schengen Agreement, which has been integrated into the Union’s acquis, in which the United Kingdom and Ireland participate, contains the following wording in Article 27(1) which refers to illegal immigration networks: ‘The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party’s laws on the entry and residence of aliens.’ On 19 July 2002, the Council adopted a framework decision on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1) whose Article 1 defines in detail the offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation, which the Member States must make punishable by virtue of that framework decision.

TITLE II – FREEDOMS

Explanation on Article 6 – Right to liberty and security

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5:

- “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

The rights enshrined in Article 6 must be respected particularly when the European Parliament and the Council adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union, notably to define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.

Explanation on Article 7 – Respect for private and family life

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word ‘correspondence’ has been replaced by ‘communications’.

In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Explanation on Article 8 – Protection of personal data

This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regula-

tion contain conditions and limitations for the exercise of the right to the protection of personal data.

Explanation on Article 9 – Right to marry and right to found a family

This Article is based on Article 12 of the ECHR, which reads as follows: ‘Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.’ The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

Explanation on Article 10 – Freedom of thought, conscience and religion

The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention, which reads as follows: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue.

Explanation on Article 11 – Freedom of expression and information

1. Article 11 corresponds to Article 10 of the European Convention on Human Rights, which reads as follows:

‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention, without prejudice to any restrictions which the competition law of the Union may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.

2. Paragraph 2 of this Article spells out the consequences of paragraph 1 regarding freedom of the media. It is based in particular on Court of Justice case-law regarding television, particularly in Case C-288/89 (judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007), and on the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty and now to the Treaties, and on Council Directive 89/552/EC (particularly its seventeenth recital).

Explanation on Article 12 – Freedom of assembly and of association

1. Paragraph 1 of this Article corresponds to Article 11 of the ECHR, which reads as follows:

‘1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

The meaning of the provisions of paragraph 1 of this Article 12 is the same as that of the ECHR, but their scope is wider since they apply at all levels including European level. In accordance with Article 52(3) of the Charter, limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR.

2. This right is also based on Article 11 of the Community Charter of the Fundamental Social Rights of Workers.

3. Paragraph 2 of this Article corresponds to Article 10(4) of the Treaty on European Union.

Explanation on Article 13 – Freedom of the arts and sciences

This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the ECHR.

Explanation on Article 14 – Right to education

1. This Article is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR, which reads as follows:

‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’

It was considered useful to extend this Article to access to vocational and continuing training (see point 15 of the Community Charter of the Fundamental Social Rights of Workers and Article 10 of the Social Charter) and to add the principle of free compulsory education. As it is worded, the latter principle merely implies that as regards compulsory education, each child has the possibility of attending an establishment which offers free education. It does not require all establishments which provide education or vocational and continuing training, in particular private ones, to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation. In so far as the Charter applies to the Union, this means that in its training policies the Union must respect free compulsory education, but this does not, of course, create new powers. Regarding the right of parents, it must be interpreted in conjunction with the provisions of Article 24.

2. Freedom to found public or private educational establishments is guaranteed as one of the aspects of freedom to conduct a business but it is limited by respect for democratic principles and is exercised in accordance with the arrangements defined by national legislation.

Explanation on Article 15 – Freedom to choose an occupation and right to engage in work

Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case-law (see inter alia judgment of 14 May 1974, Case 4/73 Nold [1974] ECR 491, paragraphs 12 to 14 of the grounds; judgment of 13 December 1979, Case 44/79 Hauer [1979] ECR 3727; judgment of 8 October 1986, Case 234/85 Keller [1986] ECR 2897, paragraph 8 of the grounds). This paragraph also draws upon Article 1(2) of the European Social Charter, which was signed on 18 October 1961 and has been ratified by all the Member States, and on point 4 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989. The expression ‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

Paragraph 2 deals with the three freedoms guaranteed by Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union, namely freedom of movement for workers, freedom of establishment and freedom to provide services.

Paragraph 3 has been based on Article 153(1)(g) of the Treaty on the Functioning of the European Union, and on Article 19(4) of the European Social Charter signed on 18 October 1961 and ratified by all the Member States. Article 52(2) of the Charter is therefore applicable. The question of recruitment of seamen having the nationality of third States for the crews of vessels flying the flag of a Member State of the Union is governed by Union law and national legislation and practice.

Explanation on Article 16 – Freedom to conduct a business

This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 Nold [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 SpA Eridiana and others [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see inter alia Sukkerfabriken Nykøbing judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 Spain v Commission [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.

Explanation on Article 17 – Right to property

This Article is based on Article 1 of the Protocol to the ECHR:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case-law of the Court of Justice, initially in the Hauer judgment (13 December 1979, [1979] ECR 3727). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also inter alia patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.

Explanation on Article 18 – Right to asylum

The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties.

Explanation on Article 19 – Protection in the event of removal, expulsion or extradition

Paragraph 1 of this Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights).

Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see *Ahmed v. Austria*, judgment of 17 December 1996, 1996-VI, p. 2206, and *Soering*, judgment of 7 July 1989).

TITLE III – EQUALITY

Explanation on Article 20 – Equality before the law

This Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 *Racke* [1984] EC 3791, judgment of 17 April 1997, Case C-15/95 *EARL* [1997] ECR I-1961, and judgment of 13 April 2000, Case C-292/97 *Karlsson* [2000] ECR 2737).

Explanation on Article 21 – Non-discrimination

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimina-

tion in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article. Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.

Explanation on Article 22 – Cultural, religious and linguistic diversity

This Article has been based on Article 6 of the Treaty on European Union and on Article 151(1) and (4) of the EC Treaty, now replaced by Article 167(1) and (4) of the Treaty on the Functioning of the European Union, concerning culture. Respect for cultural and linguistic diversity is now also laid down in Article 3(3) of the Treaty on European Union. The Article is also inspired by Declaration No 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 of the Treaty on the Functioning of the European Union.

Explanation on Article 23 – Equality between women and men

The first paragraph has been based on Articles 2 and 3(2) of the EC Treaty, now replaced by Article 3 of the Treaty on European Union and Article 8 of the Treaty on the Functioning of the European Union which impose the objective of promoting equality between men and women on the Union, and on Article 157(1) of the Treaty on the Functioning of the European Union. It draws on Article 20 of the revised European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

It is also based on Article 157(3) of the Treaty on the Functioning of the European Union and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The second paragraph takes over in shorter form Article 157(4) of the Treaty on the Functioning of the European Union which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 52(2), the present paragraph does not amend Article 157(4).

Explanation on Article 24 – The rights of the child

This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.

Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.

Explanation on Article 25 – The rights of the elderly

This Article draws on Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. Of course, participation in

social and cultural life also covers participation in political life. **Explanation on Article 26 – Integration of persons with disabilities**

The principle set out in this Article is based on Article 15 of the European Social Charter and also draws on point 26 of the Community Charter of the Fundamental Social Rights of Workers.

TITLE IV – SOLIDARITY

Explanation on Article 27 – Workers’ right to information and consultation within the undertaking

This Article appears in the revised European Social Charter (Article 21) and in the Community Charter on the rights of workers (points 17 and 18). It applies under the conditions laid down by Union law and by national laws. The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides. There is a considerable Union acquis in this field: Articles 154 and 155 of the Treaty on the Functioning of the European Union, and Directives 2002/14/EC (general framework for informing and consulting employees in the European Community), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils).

Explanation on Article 28 – Right of collective bargaining and action

This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article. The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.

Explanation on Article 29 – Right of access to placement services

This Article is based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 30 – Protection in the event of unjustified dismissal

This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees’ rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

Explanation on Article 31 – Fair and just working conditions

1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression

‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

Explanation on Article 32 – Prohibition of child labour and protection of young people at work

This Article is based on Directive 94/33/EC on the protection of young people at work, Article 7 of the European Social Charter and points 20 to 23 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 33 – Family and professional life

Article 33(1) is based on Article 16 of the European Social Charter.

Paragraph 2 draws on Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. It is also based on Article 8 (protection of maternity) of the European Social Charter and draws on Article 27 (right of workers with family responsibilities to equal opportunities and equal treatment) of the revised Social Charter. ‘Maternity’ covers the period from conception to weaning.

Explanation on Article 34 – Social security and social assistance

The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist. ‘Maternity’ must be understood in the same sense as in the preceding Article.

Paragraph 2 is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68.

Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.

Explanation on Article 35 – Health care

The principles set out in this Article are based on Article 152 of the EC Treaty, now replaced by Article 168 of the Treaty on the Functioning of the European Union, and on Articles 11 and 13 of the European Social Charter. The second sentence of the Article takes over Article 168(1).

Explanation on Article 36 – Access to services of general economic interest

This Article is fully in line with Article 14 of the Treaty on the Functioning of the European Union and does not create any new right. It merely sets out the principle of respect by the Union for

the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Union law.

Explanation on Article 37 – Environmental protection

The principles set out in this Article have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union.

It also draws on the provisions of some national constitutions.

Explanation on Article 38 – Consumer protection

The principles set out in this Article have been based on Article 169 of the Treaty on the Functioning of the European Union.

TITLE V – CITIZENS' RIGHTS

Explanation on Article 39 – Right to vote and to stand as a candidate at elections to the European Parliament

Article 39 applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) corresponds to Article 14(3) of the Treaty on European Union. Article 39(2) takes over the basic principles of the electoral system in a democratic State.

Explanation on Article 40 – Right to vote and to stand as a candidate at municipal elections

This Article corresponds to the right guaranteed by Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these Articles in the Treaties.

Explanation on Article 41 – Right to good administration

Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law (see inter alia Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403). The wording for that right in the first two paragraphs results from the case-law (Court of Justice judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 *TU München* [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 *Lisrestal* [1994] ECR II-1177, 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589) and the wording regarding the obligation to give reasons comes from Article 296 of the Treaty on the

Functioning of the European Union (cf. also the legal base in Article 298 of the Treaty on the Functioning of the European Union for the adoption of legislation in the interest of an open, efficient and independent European administration).

Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union. Paragraph 4 reproduces the right now guaranteed by Article 20(2) (d) and Article 25 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

Explanation on Article 42 – Right of access to documents

The right guaranteed in this Article has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation (EC) No 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions, bodies and agencies generally, regardless of their form (see Article 15(3) of the Treaty on the Functioning of the European Union). In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) of the Treaty on the Functioning of the European Union.

Explanation on Article 43 – European Ombudsman

The right guaranteed in this Article is the right guaranteed by Articles 20 and 228 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 44 – Right to petition

The right guaranteed in this Article is the right guaranteed by Articles 20 and 227 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 45 – Freedom of movement and of residence

The right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 21; and the judgment of the Court of Justice of 17 September 2002, Case C-413/99 Baumbast [2002] ECR I-7091). In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

Paragraph 2 refers to the power granted to the Union by Articles 77, 78 and 79 of the Treaty on the Functioning of the European Union. Consequently, the granting of this right depends on the institutions exercising that power.

Explanation on Article 46 – Diplomatic and consular protection

The right guaranteed in this Article is the right guaranteed by Article 20 of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 23). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

TITLE VI – JUSTICE

Explanation on Article 47 – Right to an effective remedy and to a fair trial

The first paragraph is based on Article 13 of the ECHR:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union’s system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, ‘Les Verts’ v European Parliament (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

Explanation on Article 48 – Presumption of innocence and right of defence

Article 48 is the same as Article 6(2) and (3) of the ECHR, which reads as follows:

- ‘2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.

Explanation on Article 49 – Principles of legality and proportionality of criminal offences and penalties

This Article follows the traditional rule of the non-retroactivity of laws and criminal sanctions. There has been added the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights.

Article 7 of the ECHR is worded as follows:

- “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.

In paragraph 2, the reference to ‘civilised’ nations has been deleted; this does not change the meaning of this paragraph, which refers to crimes against humanity in particular. In accordance with Article 52(3), the right guaranteed here therefore has the same meaning and scope as the right guaranteed by the ECHR.

Paragraph 3 states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities.

Explanation on Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Article 4 of Protocol No 7 to the ECHR reads as follows:

- “1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention”.

The ‘non bis in idem’ rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 Gutmann v Commission [1966] ECR 149 and a

recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.

In accordance with Article 50, the ‘non bis in idem’ rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 *Gözütok* [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities’ Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the ‘non bis in idem’ rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

TITLE VII – GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Explanation on Article 51 – Field of application

The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term ‘institutions’ is enshrined in the Treaties. The expression ‘bodies, offices and agencies’ is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second

sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 Grant [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be 'implementation of Union law' (within the meaning of paragraph 1 and the above-mentioned case-law).

Explanation on Article 52 – Scope and interpretation of rights and principles

The purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights. The wording is based on the case-law of the Court of Justice: '... it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights' (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds). The reference to general interests recognised by the Union covers both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union.

Paragraph 2 refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.

Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers

threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR.

1. Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:
 - Article 2 corresponds to Article 2 of the ECHR,
 - Article 4 corresponds to Article 3 of the ECHR,
 - Article 5(1) and (2) corresponds to Article 4 of the ECHR,
 - Article 6 corresponds to Article 5 of the ECHR,
 - Article 7 corresponds to Article 8 of the ECHR,
 - Article 10(1) corresponds to Article 9 of the ECHR,
 - Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR,
 - Article 17 corresponds to Article 1 of the Protocol to the ECHR,
 - Article 19(1) corresponds to Article 4 of Protocol No 4,
 - Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,
 - Article 48 corresponds to Article 6(2) and(3) of the ECHR,
 - Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.
2. Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:
 - Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,
 - Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level,
 - Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,
 - Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents,
 - Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation,
 - Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States,

Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g., judgment of 13 December 1979, Case 44/79

Hauer [1979] ECR 3727; judgment of 18 May 1982, Case 155/79 AM&S [1982] ECR 1575). Under that rule, rather than following a rigid approach of ‘a lowest common denominator’, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions. Paragraph 5 clarifies the distinction between ‘rights’ and ‘principles’ set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the ‘precautionary principle’ in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 Pfizer v Council, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 Van den Berg [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States’ constitutional systems to ‘principles’, particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34. Paragraph 6 refers to the various Articles in the Charter which, in the spirit of subsidiarity, make reference to national laws and practices.

Explanation on Article 53 – Level of protection

This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR.

Explanation on Article 54 – Prohibition of abuse of rights

This Article corresponds to Article 17 of the ECHR:

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

^(*) Editor’s note: References to article numbers in the Treaties have been updated and some minor technical errors have been corrected.



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