The Flux of EU Law – Interesting Times for Legal Professionals

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Abstract The author highlights the ever expanding scope of EU law and its relevance for national practitioners by presenting, in different chapters, the various stages of development of the *acquis* illustrated by case-law characteristic of the respective stages. Regarding classical market regulation, the impact of secondary law on national civil law and procedure is essentially shown through recent consumer protection decisions of the CJEU. The chapter dealing with the protection of fundamental rights examines in particular the “horizontal” legal effects of “rights” and “principles” of the Charter of Fundamental Rights and emphasises the need to check the compatibility of secondary legislation with the Charter since it has been given primary law status by the Lisbon Treaty. A further chapter looks at the area of Freedom, Security and Justice, with mutual recognition as leading principle, where recent CJEU case-law also suggests a strong impact of the Fundamental Rights Charter on both civil and criminal justice cooperation; however it remains to be clarified to which extent the Charter will be applicable even within the part of the proceedings still based on national procedural law.

Keywords EU law · Judge · Prosecutor · Legal profession · Consumer protection · Fundamentals rights · Charter · Judicial cooperation · Spillover effects

1 Introduction

Some time ago I was invited to speak to a large group of judges who are preparing themselves for joining the corps of “national judges as Union judges”. The purpose

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was to give the audience some insights into the role of national judges in the application of EU law. Before the event, a suggestion was made – in jest no doubt – that there was a need to “scare” the listeners into awareness of what lies ahead. My preferred approach, however, was to conclude the presentation by recommending to the audience that they should not be frightened by EU law but, instead, that they should become interested by it.

It is true that EU law is a demanding aspect of the current life of legal professionals. At the same time, it seems to me that part of the problem in this area is precisely the fact that lawyers and judges are perhaps too apprehensive about the complexities of EU law and therefore prone to evading it. Such an attitude may inhibit the breeding of knowhow in EU law that is necessary not only for its proper application but also for its further development. Therefore, a better recipe than scare mongering is to encourage interest in EU law. It is in a constant state of flux, and one may sometimes be left perplexed or wondering, or even exhausted, but never bored.

European law plays an increasing role in the professional responsibilities of judges, lawyers and prosecutors. The scope of issues that are affected by European law has become ever wider. Even if some legal fields are impacted more substantially than others, there is hardly any area of law today that could be regarded as wholly free from actual or potential European influences.

The challenges for both the judiciary and the lawyers are great. The wide-ranging scope of issues where European law is relevant makes it necessary for all legal professionals to have a good grasp of the system of EU law and the ways in which EU norms affect the application of domestic law. Ultimately, the rights that individuals or economic operators derive from EU law depend on the enforcement of those rights through the national courts. Judges as well as lawyers advising and representing parties are therefore particularly pivotal figures in the achievement of effective legal protection under European law.

The order is tall, and getting ever taller as European law evolves and expands. What is more, whole new dimensions have been added to the European legal construction, and nearly all its aspects are also cropping up in the courtrooms.

We have moved from the era of market freedoms to an era where EU law addresses not only the issues of economic operators but also issues that concern citizens outside their economic roles. This has brought with it not only a widening of the scope of EU law but also the adoption of a method of integration that is based on mutual recognition rather than common norms and harmonisation, as well as the strengthening of the protection of fundamental rights as an integral part of EU primary law.

2 Classics Moving Ahead

In broad terms, the first era of Community law was based on the protection of the fundamental market freedoms and on their reconciliation and balancing with the protection of other social interests. The role of the judiciary was, and still is, to contribute to the enforcement of common norms by ensuring their uniform and effective application. This task is underpinned by the crucial general principles of EU law that were

developed by the European Court of Justice, in particular the doctrines concerning direct effect, supremacy, conforming interpretation, procedural requirements and state liability.

In this classic domain of EU law, the basic structures and principles are by and large well established. The main difficulties come from the fact that it is inevitably hard to manage a system of norms that covers a very wide scope of matters, is subject to dynamic change and evolves through a massive and ever growing body of case-law. Keeping track of developments, finding the right sources and distilling the essential normative information from endless volumes of data and text are the biggest challenges in this area.

Even in the established fields of Union law, significant new developments occur through the dynamic process of interpretation by the CJEU. Thus, for instance, issues concerning the horizontal direct effect of treaty provisions have been the subject of fairly recent case-law.¹ Apart from clarifications and refinements, there are ongoing doctrinal evolutions that are important to follow.

At the level of secondary law, normative evolution through case-law is an ordinary phenomenon, but sometimes there are more far-reaching aspects involved. For instance, substantive EU law may turn out to have spill-over effects even in domestic procedural law.

Rather important examples of this are found in the consumer protection field. A series of case-law concerning the procedural consequences of consumer protection directives has emerged in the course of the last decade, starting with the *Océano* judgment in the year 2000 until the most recent judgment *VB Pénzügyi Lízing Zrt.* from 2010. The crux of this case-law is that the protective aim of the directives concerned has been regarded as a public policy interest of such a nature that it requires an *ex officio* application of those substantive provisions even where a consumer himself has not in any way raised the point before the court. In this way, the approximation of substantive consumer rights has, through the CJEU's interpretation, been reinforced in such a way that the effects of secondary EU law reach into a central part of the national law of civil procedure.

Most of the cases have involved the Directive on Unfair Contract Terms (93/13/EEC),² where especially the enforcement of jurisdiction clauses has been at issue. In view of the Court's reasoning, however, the implications of these judgments can hardly be understood to be limited to those particular types of clauses. Furthermore, there have been similar issues and rulings in judgments concerning other directives related to consumer protection in contractual relations. One of these

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¹ Case C-281/98 *Angonese*, judgment & June 2000 ECR I-4139 (free movement of workers); Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, GC judgment 7 December 2007 ECR I-10779 (freedom of establishment).

² ECJ judgment 27 June 2000, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941; Judgment 21 November 2002, Case C-473/00 *Cofidis* [2002] ECR I-10875; Judgment 26 October 2006, Case C-168/05 *Mostaza Claro* [2006] ECR I-10421; Judgment 4 June 2009, Case C-243/08 *Pannon GSM* nyr; Judgment 6.10.2009 Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579; Judgment 9 November 2010, Grand Chamber, Case C-137/08 *VB Pénzügyi Lízing Zrt.*

cases³ was in the context of the (old) Consumer Credit Directive, and another⁴ in the context of the Doorstep Selling Directive (85/577/EEC).

The central reasoning of the Court can be summarised by drawing from the most recent case, *VB Pénzügyi Lízing Zrt*. The Court notes⁵ that the system of protection introduced by the Directive [on Unfair Contract Terms] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. On account of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. That is a mandatory provision aiming to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them. In order to guarantee the protection intended by the Directive, the imbalance that exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract.⁶ Thus, in the exercise of the functions incumbent upon it under the provisions of the Directive, the national court must ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of the Directive. If it does, that court must assess that term, if necessary, of its own motion, in the light of the requirements of consumer protection laid down by that Directive.

In the *Pannon* case, the Court was even more explicit by stating⁷ that the national court is required to ensure the effectiveness of the protection intended to be given by the provisions of the Directive. Consequently, the role thus attributed to the national court by Community law in this area is not limited to a mere power to rule on the possible unfairness of a contractual term, but also consists of the obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task. This applies also when the court is assessing whether it has territorial jurisdiction.

The court then went on to clarify⁸ that the national court is not, however, required under the Directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status. In other words, where the national court finds that a contract term is unfair, the court must not apply it, except if the consumer opposes such non-application.⁹

The above-mentioned case-law is worth noting not only because of its specific subject matter but also because it can serve to illustrate a more general point. Even if

³Judgment 4 October 2007, Case C-429/05 *Rampion* [2007] ECR I-8017. This case is also worth noting because unlike the above mentioned cases, the *Rampion* case arose from national proceedings in which the consumer acted as plaintiff and not as defendant.

⁴Judgment 17 December 2009, Case C-227/08 *Martín Martín*, nyr.

⁵Paragraphs 46–47.

⁶Paragraph 48.

⁷Paragraph 32.

⁸Paragraph 33.

⁹Paragraph 35.

a national judge may be aware that there is a directive dealing with a given topic, such as consumer protection against unfair contract terms, that knowledge is not enough. Unless the judge is also well-informed about the case-law relating to that directive, he may fail to give proper protection to the rights of the parties whose cases come before him. It would be quite interesting to know what proportion of current civil judges throughout Europe are in fact aware of the state of the law in this specific area.¹⁰ This is just one example of the wider challenge of keeping track of dynamic changes taking place through case-law.

3 Fundamentals Shaping Up

The fundamental market freedoms no longer stand alone as the central pillars of EU law. In the wake of wider and deeper integration, the status of fundamental rights as an integral component of EU law has gradually become more and more accentuated.

This has been a long and highly important process in the evolution of EU law. The early examples from the pioneering but rather sporadic case-law of the 1970's (in particular *Internationale Handelsgesellschaft*¹¹ and *Nold*¹²) have been followed by several more recent landmark cases such as *Schmidberger*,¹³ *Omega*¹⁴ and *Kadi*.¹⁵ At Treaty level things have moved on from the inclusion of Article F(2) in the original 1992 version of the Treaty on European Union to the adoption of the EU Charter on Fundamental Rights in 2000, and culminated in the entry into force of the Treaty of Lisbon whereby the Charter¹⁶ became a legally binding and integral part of EU primary law.¹⁷

The fact that the EU now has its own, specifically formulated and legally binding catalogue of fundamental rights at the level of primary law is a very significant step in many ways. This development also has implications for the issues facing national courts in this area. Below, I will mention some of the aspects that call for attention.

At the outset, it must be noted that the Charter contains a *variety* of provisions and not all of them are intended to have the same kind of legal effects. Thus, for instance,

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¹⁰For a recent and more detailed discussion of the above mentioned case-law see Martin Ebers, 'ECJ (First Chamber) 6 October 2009, Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* – From *Océano* to *Asturcom*: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata' (2010) 18 *European Review of Private Law*, pp. 823–846. And also Hanna Schebesta, 'Does the National Court Know European Law? A Note on *Ex Officio* Application after *Asturcom*' (2010) 18 *European Review of Private Law*, pp. 847–880.

¹¹Case 11/70, judgment 17 December 1970, ECR 1125.

¹²Case 4/73, judgment 14 May 1974, ECR 491.

¹³Case C-112/00, judgment 12 June 2003, ECR I-5659.

¹⁴Case C-36/02, judgment 14 October 2004, ECR I-9609.

¹⁵Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission*, judgment 3 September 2008, ECR I-6351 3 September 2008.

¹⁶The current version is the Charter of the Fundamental Rights of the European Union 2010/C 83/02 OJ 30.3.2010 C83/389.

¹⁷For a recent disquisition of the EU system of fundamental rights see Allan Rosas and Lorna Armatai, *EU Constitutional Law*, 2010, pp. 145–162.

Article 52(2) of the Charter reflects a distinction between “rights” and “principles” and limits the effects of the latter by providing that “principles” may be implemented by legislative and executive acts of the Union, and by acts of Member States when implementing Union law, and that they shall be “judicially cognisable” only in the interpretation of such acts and in the ruling on their legality. The distinction is not borne out in the substantive provisions of the Charter itself. The Explanations drafted by the Convention,¹⁸ which have no legal value, give some but not altogether clear guidance on the matter. For instance, Article 26 on the integration of persons with disabilities is referred to as a principle, even if the text of the Article is phrased in terms of recognition and respect for the “rights” of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 52(5) indicates that “principles” contained in the Charter – whichever clauses will eventually be qualified as such – are not intended as being capable of having direct effect. In other words, they could as such not be invoked by individuals in concrete cases. This would distinguish “Charter principles” not only from “Charter rights” but also from the “general principles” of EU law, which under CJEU case-law may be capable of having direct effect in this sense.

This initial observation in itself suggests that national judges and lawyers should be aware that even the basic concepts leave open many questions regarding the legal effects of different provisions of the Charter for future clarification through CJEU case-law.

The legally binding nature of the Charter attaches, under the general principles of EU law, *supremacy* to its legal effects – at least to the extent that the Charter contains “rights” rather than mere “principles”. From the perspective of the national legal systems, the Charter is placed on a superior hierarchical level in relation to the European Convention on Human Rights or other international conventions dealing with human rights. In most EU Member States, the latter do not in themselves rank as constitutional norms in the domestic legal order.¹⁹ Under the principle of supremacy, as consistently maintained by the CJEU, the Charter now outranks even domestic constitutional norms. While Article 52(3) of the Charter provides for a correspondence in substance by stipulating that where Charter rights correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as under the Convention,²⁰ the difference in the hierarchical status of the two sets of norms nevertheless entails a significant difference in their legal effects at the national level, as Charter rights will be capable of displacing conflicting domestic norms more effectively and more extensively than ECHR rights.

Another important aspect of the Charter has to do with the legal effect of its provisions – or some of those provisions – in *horizontal relations*. The issue is not new but its implications have grown as the Charter as such now has a binding primary law status.

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¹⁸Charte 4473, Convent 49, 11 October 2000.

¹⁹In this respect, Austria is an exception in that the ECHR has internally been accorded constitutional status (Bundesverfassungsgesetz vom 4. März 1964, BGBl. Nr. 59/1964).

²⁰The principle of correspondence expressly applies without prejudice to the possibility of Union law providing more extensive protection.

In the famous *Mangold*²¹ case, which concerned a contractual employment relationship between private parties and was decided before the entry into force of the Lisbon Treaty, the CJEU based its ruling on a finding that non-discrimination on grounds of age must be regarded as a general principle of Community law. In other words, the legal basis of that principle was not in the relevant secondary law directive²² – which was not yet effective when the circumstances of the case arose – but at the level of primary law.²³ Consequently, the Court held, it was the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with the general principle of Community law (paragraph 77).²⁴

This line of case-law was confirmed in *Kücükdeveci*,²⁵ which also arose from a contractual dispute between private parties. *Kücükdeveci* was decided after the entry into force of the Lisbon Treaty, but the facts of the case pre-dated that point in time. Thus, the Charter was not yet legally binding when the dispute in the main proceedings arose. The CJEU judgment nevertheless made reference also to the Charter, Article 21(1) of which covers non-discrimination on grounds such as age (paragraph 22). But like in *Mangold*, the ruling in *Kücükdeveci* was still primarily based on the principle of non-discrimination on grounds of age as a general principle of EU law (paragraph 50) rather than as a fundamental right under the Charter. Still, it seems obvious that the future implications of this line of case-law are relevant for the Charter as well. In what ways, more precisely, remains to be seen.

Unlike *Mangold*, the *Kücükdeveci* case arose from circumstances at a time when the implementation period for the relevant directive on non-discrimination had already expired. The Court reiterated that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (paragraph 46). It also restated the duty of a national court to ensure conforming interpretation of national law in order to give effect to a directive but noted that in this case the national court had pointed out that national law was not open to interpretation in conformity with the directive (paragraphs 47–49).

The CJEU explicitly refrained from modifying its consistently held position as regards the legal effect of directives in horizontal relationships. Instead, it had recourse to the principle of non-discrimination on grounds of age as a general primary law

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²¹Case C-144/04, GC judgment 22 November 2005, ECR I-9981.

²²Council Directive 2000/78 was in force but the period reserved for its implementation had not yet expired.

²³The Court stated that directive 2000/78 did not itself “lay down” the principle of equal treatment in the field of employment and occupation (p. 74).

²⁴As is well known, the *Mangold* judgment gave rise to great criticism and controversy in Germany and led i.a. to the *Honeywell*-case in which it was argued that the CJEU judgment in *Mangold* was a so called “ausbrechender Rechtsakt”, i.e. ultra vires. The constitutional complaint was rejected by the German Constitutional Court in August 2010 (2 BvR 2661/06).

²⁵Case C-555/07, GC judgment 19 January 2010 nyr.

principle of EU law,²⁶ and derived from that principle an obligation for the national court to *exclude the application of a conflicting domestic norm, even in a dispute between private parties*. With a view to the current legal status of the Charter, such a development in recent case-law is potentially of huge significance. The scope, limits and consequence of this line of case-law remain to be clarified in the future.²⁷ As was pointed out above, not all provisions of the Charter are meant to have the same legal effects, and some of them have not been intended as having any direct effect at all, vertical or horizontal. At any rate, the fact that the legal effects of Charter rights may extend to horizontal relations at least in the sense of requiring the setting aside of conflicting domestic provisions calls for great attentiveness on the part of national judges and lawyers.²⁸

Both *Mangold* and *Kücükdeveci* have highlighted not only the horizontal effects of certain fundamental rights norms but also the *temporal implications* of the application of such norms.

It has consistently been held that an interpretation given by the CJEU to a rule of EU law clarifies or defines the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force. In other words, interpretative rulings have a retroactive effect. The norm as interpreted can, and must, be applied by the courts even to legal relationships arising and established before the interpretative ruling was given (provided that other conditions for bringing an action are in place).²⁹ In matters decided on grounds of interpretation, the CJEU has been less inclined to concede requests to limit the temporal effects of its rulings than in cases where a provision of EU secondary law has been found invalid.

Whereas directives come with specific time frames for their implementation, the situation is different for general principles such as those relating to fundamental rights. As was indicated above, it cannot be said that fundamental rights were introduced into the Community or EU legal order at a given point in time. There has been a long process of legal evolution in this area, which in part is a reflection of the overall dynamism that is typical of this field of law. Discrimination on grounds of age or sexual orientation are examples in this sense. We can know exactly whether or when the implementation period for a given directive has expired. By contrast, it may be harder to determine when non-discrimination of a specific kind in a specific context has become a binding legal requirement under the general principles of EU primary law. In *Mangold* and *Kücükdeveci*, the CJEU concluded that as far as the circumstances of those cases were concerned, there was no temporal issue in this sense:

²⁶Like in *Mangold*, the Court again stressed that Directive 2000/78 merely gave expression to, but did not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age was a general principle of EU law.

²⁷Another interesting case is in the pipeline, Case C-147/08 *Römer*, concerning discrimination on grounds of sexual orientation, on which the Advocate General's conclusions have been issued on 15 July 2010 but which is still undecided by the CJEU.

²⁸For further comment see Anja Wiesbrock, *Case Note – Case C-555/07, Küçükdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010*, 11 German Law Journal, pp. 539–550 (2010), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1255>; Filippo Fontanelli, Some reflections on the choices of the European Court of Justice in the *Kücükdeveci* preliminary ruling, *Perspectives on Federalism*, Vol. 2, issue 2, 2010.

²⁹Case C-73/08 *Bressol and Chaverot*, GC judgment 13 April 2010 nyr., p. 90.

non-discrimination on grounds of age was considered to be applicable in those cases as a general principle of EU law. In *Mangold*, this finding was crucial to the case as the non-discrimination directive was not yet effective at the time of the circumstances of the case, and the position adopted by the Court attracted a lot of criticism. Other circumstances may arise where the situation can be subject to doubt or controversy.³⁰

In due course, the fact that there is now a catalogue of rights articulated in a binding Charter will reduce such problems but not eliminate them. Because of the broad scope and general formulation of fundamental rights, there is always ample room for interpretation and dynamic evolution.

Whereas this may be seen as a normal and acceptable phenomenon in purely vertical situations, the implications for horizontal relations are more problematic. We have the principle of supremacy, a collection of vague norms that are given concrete substance by judicial interpretation and that are capable of affecting relationships between private parties with retroactive effect, also by excluding the application of conflicting domestic norms. With such ingredients, there will be an inevitable downside in greater legal uncertainty and unpredictability. It is hardly surprising if questions are also raised regarding the legitimacy of such a normative environment.

Furthermore, the implications of the Charter at the national level may extend beyond its actual scope of application. Such *spillover effects* are likely because of the need for coherence, rationality and consistency in the domestic legal order as a whole. According to Article 51, the Charter is applicable whenever the Member States implement³¹ EU law. In reality, however, EU law is so intertwined with domestic law that it is difficult to maintain a distinction between one and the other. In many respects, it would also be hard to justify a difference in the interpretation and protection of fundamental rights that would depend on whether the situation can be distinguished as being governed by EU law or not. It seems reasonable to expect that the Charter and interpretations given to its provisions will have spillover effects outside its formal scope, both in the sphere of national case-law and in the activities of the national legislators.

Recently, for instance, the CJEU ruled that Article 47 of the Charter (on effective legal protection) does not permit a general exclusion of legal persons from the possibility of obtaining legal aid.³² This is an example of an issue where the interpretation of the Charter can hardly remain isolated in relation to the availability of legal aid in situations that are not strictly covered by the Charter. It would appear neither rational nor reasonable to adopt or maintain a system of legal aid in which the right of a legal person to receive such aid would depend on whether the case turns on the application of EU law or domestic law. The qualification of the applicable norms in such terms would be a strange criterion for determining the availability of legal aid. At the be-

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³⁰In *Römer*, referred to above, AG Jääskinen discusses the issue in relation to discrimination on grounds of sexual orientation (pp. 146–147 of his opinion 15 July 2010). The case has not yet been decided by the CJEU.

³¹Implementation of EU law includes its application, which in fact is the word used in some of the language versions of the Charter.

³²Case 279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, judgment 22 December 2010 nyr.

ginning of a case it may even be highly unclear which norms will finally govern its resolution.

The Charter will have an impact on the activities of national courts not only in terms of how it affects the interpretation of EU law but also by its effects on the *validity* of EU secondary law provisions. Questions concerning the validity of such provisions may arise in proceedings before national courts by virtue of Article 277 TFEU, under which the grounds for invalidity of any act of general application adopted by Union institutions may be invoked in national proceedings in which such an act is at issue. Thus, the fact that a natural or legal person has very limited possibilities to bring an action under Article 263 TFEU to challenge the validity of EU legislative measures does not detract from the possibility of such questions being raised in national proceedings involving the application of such legislative provisions. While national courts have no jurisdiction to declare EU measures invalid they are, in accordance with Article 267 TFEU, entitled or even obliged to make references to the CJEU for a preliminary ruling on questions of validity of EU provisions that may arise in the course of national proceedings.³³

Under the system of legal protection laid down by the Treaties, the duties of national courts in the application of EU law are extensive. Not only do they have a duty to control the compatibility of national law with EU norms but they are also required to pay attention to questions bearing on the validity of legislative and other acts adopted by the EU institutions.

The validity of provisions of EU secondary law in turn depends on their compatibility with fundamental rights as enshrined in the Charter.³⁴ While most references made by national courts under Article 267 of the Treaty are on questions of interpretation of EU law, issues related to the validity of EU secondary law are likely to arise more often and require references to be made on such questions as well.³⁵ In other words, it is not enough for national courts to test and question their domestic norms for compatibility with EU law but also to question EU secondary norms for their compatibility with the Charter. Even if the CJEU has exclusive competence to decide on the validity of such norms, those questions may give grounds for national courts to refer the issue to the CJEU.

Overall, national courts will have an important role in the enforcement of the Charter of Fundamental Rights. Naturally, this will take place in the traditional kind of interaction with the CJEU that is based on the preliminary rulings of the latter.

The European Commission will of course exercise its own functions even in this field. The Commission has formulated its strategy for the implementation of the Char-

³³Case C-50/00 P *Unión de Pequeños Agricultores v Council*, judgment 27 July 2002, ECR I-6677, p. 40; Case C-263/02 P *Commission v Jégo-Quéré*, judgment 1 April 2004 ECR I-3425, p. 30.

³⁴See, for instance, Joined Cases C-92/2009 *Volker und Markus Schecke GbR* and C-93/09 *Hartmut Eifert*, GC judgment 9 November 2010 nyr. The Court referred to the Charter and its legal value being equivalent to that of the Treaties and stated in those circumstances, the validity of the provisions of two Council Regulations that were at issue must be assessed in the light of the provisions of the Charter.

³⁵In Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others*, the question referred for a preliminary ruling concerns the validity of a provision in a directive. The case has not yet been decided by the Court but in her Opinion AG Kokott has concluded that Article 5(2) of Directive 2004/113/EC is invalid due to infringement of the prohibition of discrimination on grounds of sex.

ter,³⁶ stressing that it is not a text setting out abstract values but an instrument to enable people to enjoy the rights enshrined within it when they are in a situation governed by Union law. The Commission is determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law (point 1.3.2. of the document). The Commission will, whenever necessary, start infringement procedures against Member States for non-compliance with the Charter in the implementation of Union law. According to the strategy, priority will be given to infringement proceedings which raise issues of principle or which have a particularly far-reaching negative impact for citizens. Even if the Commission intends to use its own powers of supervision to enforce the Charter, it is obvious that most concrete issues will arise and be primarily dealt with in national proceedings involving the national courts as well as the CJEU through the preliminary rulings procedure.

4 An Area of Freedom, Security and Justice Emerging

The beautiful Treaty title referred to above has opened up important new dimensions to the work of judges, lawyers and prosecutors. Mutual recognition is the key principle of EU policies regarding judicial cooperation in both civil and criminal matters. Mutual recognition as a method of legal integration is not based on an ambition to approximate national laws but, instead, a method designed to overcome the difficulties that arise from the diversity of the Member States' legal and judicial systems without eliminating the diversity itself.

The principle of mutual recognition is not a new line of policy as such. The recognition and enforcement of judgments in civil and commercial matters has been governed by common rules for decades, but the form of the legal instrument has changed from convention to Council Regulation.³⁷ In the field of the fundamental market freedoms, the mutual recognition and enforcement of civil and commercial judgments was an essential corollary to support the functioning of an internal market. Similarly, the Council Regulation on Insolvency Proceedings³⁸ is a complement to the legal framework of the internal market.

The subsequent expansion of legal instruments based on the principle of mutual recognition has taken this line of policy further, in order to respond to the needs arising in circumstances where people enjoy free movement across borders.³⁹ At the same time, the policy has moved into areas such as family law and criminal law that

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³⁶Communication from the Commission 19 October 2010: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final.

³⁷Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³⁸Council Regulation (EC) 1346/2000.

³⁹In a recent Irish parliamentary report, the point is formulated as follows (in regard to criminal justice matters): "Criminal issues under the JHA are seen as a necessary area for consideration so as to ensure that the *free movement of persons* is not manipulated into the *free movement of criminality*." Houses of the Oireachtas, Joint Committee on European Scrutiny: European Scrutiny Report No. 32, Police and Judicial Co-operation and the Fight against Cross-Border Crime, December 2010, p. 11.

are more sensitive from the point of view of fundamental rights than the traditional civil and commercial matters, and also more delicate from a political point of view.

It is generally recognised that the good functioning of the principle of mutual recognition of judicial decision requires a high level of mutual confidence between Member States, which in turn must be based on a common respect for fundamental and human rights. The legal and judicial systems, including the criminal justice system as a whole, must meet the necessary standards in theory as well as in practice.

As regards judicial co-operation in civil matters, the key provisions are contained in Council Regulations that govern questions of jurisdiction as well as the recognition and enforcement of judgments. Regulation 2201/2003⁴⁰ is a case in point. In a recent judgment concerning the interpretation of that Regulation, *Aguirre Zarraga*,⁴¹ the CJEU referred to the “clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement”⁴² and to the “system for recognition and enforcement of judgments” established by that regulation. The Court went on to state that this system “rests on the premise that those courts respect, within their respective areas of jurisdiction, the obligations which that regulation imposes on them, in accordance with the Charter of Fundamental Rights”⁴³ Further, the Court stressed that the system is “based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights”.⁴⁴

It is not entirely clear what this statement in the Court’s reasoning means in terms of the application of the Charter. Does the Court suggest that when the authorities of the Member States exercise jurisdiction under the Regulation, the proceedings and measures taken by them are within the scope of the Charter by virtue of the fact that jurisdiction is based on an EU legal instrument? In other words, is it to be understood that the authorities of the Member States are “implementing Union law” in the sense of Article 51(1) of the Charter when they exercise jurisdiction under the Regulation, although the decisions and procedures themselves are governed by national law? In that case, the Charter would be relevant in matters that go beyond the actual provisions of the EU legal instrument. The extent to which an EU legal instrument such as Regulation 2201/2003, by establishing a jurisdictional regime in certain types of matters, triggers the application of the Charter in the main proceedings – together with the supervision and enforcement mechanisms attaching to it – seems uncertain.

In *Aguirre Zarraga*, the question was whether the court in a Member State of enforcement was entitled to review a decision of the Member State of origin, and refuse to enforce it, on the grounds of an infringement of a fundamental right in connection with the proceedings in the Member State of origin. At issue was the right

⁴⁰Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

⁴¹Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga*, judgment 22 December 2010 nyr, paragraphs 59–60.

⁴²Likewise in *Povse*, Case C-211/10 PPU, 1 July 2010 nyr, paragraph 73.

⁴³Paragraph 59.

⁴⁴Paragraph 70.

of the child to be heard, which is enshrined in the Regulation itself, Article 42(2), and enhanced in Article 24 of the Charter, which requires that the child's views be taken into consideration in matters that concern him or her, in accordance with their age and maturity. CJEU ruled that the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment ordering the return of a child who has been wrongfully removed on the ground that the court of the Member State of origin, which handed down that judgment, may have infringed Article 42 of Regulation No 2201/2003, interpreted in accordance with Article 24 of the Charter of Fundamental Rights. The assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.

In this regard, the position seems clear. The Court appears to be taking the principle of mutual recognition seriously by adhering to a strict and exclusive division of competences and responsibilities between the courts of the Member State of origin and the Member State of enforcement. Thus, the courts of the Member State of enforcement are precluded from a “révision de fond” in regard to the decision of the Member State of origin.⁴⁵ Such a review is not allowed even on grounds that concern compliance with fundamental rights. Whether there are some circumstances in which the Court would nevertheless concede deviations from this position remains an open question.

What is the position in the field of judicial co-operation in criminal matters? In this area, the European Arrest Warrant (EAW) is a key instrument. The Council Framework Decision governing the EAW⁴⁶ has a more limited scope than the regulations in the field of civil justice. The framework decision does not lay down any system of jurisdiction for criminal matters. It only deals with the execution of arrest warrants issued for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The framework decision is primarily concerned with the duties of the judicial authorities in the Member State to whom an arrest warrant is issued. By contrast, the proceedings or measures by the authorities of the Member State of origin are based on the application of national laws. The authorities of a Member State to whom an EAW is addressed will decide, on the basis of the legislation implementing the Framework Decision whether to execute the warrant and surrender the requested person to the issuing Member State. Once the requested person has been surrendered, the issuing Member State will deal with him in accordance with its own laws, which normally are not based on any EU legal instruments.⁴⁷

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⁴⁵The basic position was already set out in *Povse*, where the Court stated that questions concerning the merits of the judgment as such, and in particular the question whether the necessary conditions enabling the court with jurisdiction to hand down that judgment are satisfied, including any challenges to its jurisdiction, must be raised before the courts of the Member State of origin, in accordance with the rules of its legal system. Likewise, an application to suspend enforcement of a certified judgment can be brought only before the court which has jurisdiction in the Member State of origin, in accordance with the rules of its legal system (paragraph 74).

⁴⁶2002/584/JHA.

⁴⁷Indeed, mutual recognition is a mechanism designed to *overcome* the fact that the national laws and systems are diverse and not harmonised.

As the authorities of the issuing Member State are not applying or otherwise implementing EU law but domestic law, they would not appear to be subject to the EU Charter of Fundamental Rights in that context, and therefore not subject to the mechanisms of supervision and enforcement that are attached to the Charter. Obviously, the proceedings and measures in the issuing Member State will be governed by the respective national regime of fundamental rights as well as the ECHR and other human rights conventions by which the Member State is bound. But the EU regime would normally not be engaged by the mere fact that the proceedings or other measures in the issuing Member State have been enabled by the compliance of the authorities of another Member State with the latter's EU law obligation of mutual recognition. There is no case-law to date to clarify the extent to which the Charter could be relevant in relation to the main proceedings in the case where the EAW is or has been issued. At least the wording of Article 51(1) of the Charter does not seem to support an interpretation that would extend the scope of the Charter to such proceedings or other measures taken in the issuing Member State. This means that an equivalent and effective protection of fundamental and human rights could not be ensured through the kind of EU measures that are available in the case of infringements of EU law obligations.⁴⁸

To what extent the regime laid down by the Framework Decision on the EAW allows for a "révision de fond" by the requested Member State on grounds of fundamental or human rights is an issue that remains to be clarified by CJEU case-law. The actual provisions of the Framework Decision do not foresee such a review by the judicial authorities of the requested Member State.⁴⁹ According to Article 1(3) the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, but this provision in itself does not settle the question of the attribution of responsibilities in this regard between the issuing Member State and the requested Member State.

In the preamble it is stated that nothing in the Framework Decision may be interpreted as prohibiting a refusal to surrender a person for whom an EAW has been issued when there are reasons to believe, on the basis of objective elements, that the warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that person's position may be prejudiced for any of these reasons (recital 12). Furthermore, the preamble states that the Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media. Recital 13 proclaims that no person should be removed, expelled

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⁴⁸Article 7 TEU provides for another mechanism but the threshold for that is high. The Article enables institutions of the Union to act when there is a clear risk of a serious breach or a serious and persistent breach by a Member State of the values referred to Article 2 TEU, which include respect for human rights. This is a political mechanism of last resort, intended for situations of an exceptional nature with a systemic, structural dimension. Where there is a clear risk of a serious breach of these values this mechanism may be triggered by a reasoned proposal of a third of the Member States, of the European Parliament, or of the Commission.

⁴⁹The grounds on which the execution of an EAW must or may be refused are listed in Articles 3 and 4 of the framework decision.

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.

The fact that such reservations are not reflected in the actual provisions of the Framework Decision creates uncertainty regarding the legal position. A number of Member States have indeed made various additional exceptions in their national implementing laws. These have so far not been tested in the CJEU. The Commission does not as yet have the power to conduct infringements proceedings in this area,⁵⁰ and no preliminary rulings have addressed these questions until now.⁵¹

To date, the CJEU has stated in general and unqualified terms that the principle of mutual recognition, which underpins the framework decision, means that the Member States are in principle obliged to act upon an EAW issued to them. Thus, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution laid down in Article 3 of the framework decision or in the cases listed in Article 4 thereof.⁵²

It is a very disturbing prospect to envisage mutual recognition of arrest warrants while envisaging, at the same time, risks of torture, inhuman or degrading treatment, or persecution, in the state issuing such a warrant – another Member State.⁵³ The adoption of policies based on the principle of mutual recognition is based on the assumption that such scenarios, or other problems of the kind mentioned in recitals 12 and 13, are not realistic within the EU and that there should be no need for a “révision de fond” by the requested Member State. The dilemma is twofold. Firstly, what if, nevertheless, there are some real causes for concern. Secondly, on what basis can the courts of requested Member States determine whether any objections that are raised on the grounds of fundamental rights are well-founded or not. It is not hard to raise various kinds of objections, but it can be quite hard to assess their merits, especially within the required time-frames. Ultimately these issues boil down to the question, to what extents are we actually going to operate mutual recognition, to what extents do we practice something else.

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⁵⁰This situation will change in accordance with the transitional provisions of Article 10 of Protocol 36 to the Treaty of Lisbon. After five years from the entry into force of the Treaty, the Commission will be allowed to exercise its powers under Article 258 TFEU, unless the framework decision is amended already prior to that.

⁵¹The Finnish Supreme Court had occasion to make a reference on these issues in the Case C-105/10 PPU *Gataev*, OJ C 100 of 17.4.2010 p. 32, but the EAW at issue was subsequently withdrawn by the issuing Member State, and the reference was therefore also withdrawn before a ruling was given. For the time being, there are Member States whose Courts are not even allowed to seek preliminary rulings concerning legal instruments in the area of cooperation in criminal matters. The restrictions based on the now repealed Article 35 TEU will be phased out in accordance with the provisions of Protocol 36 to the Treaty of Lisbon.

⁵²Case C-261/09 *Mantello*, GC judgment 16 November 2010 nyr, paragraphs 36–37. Likewise Case C-388/08 PPU *Leymann and Pustovarov*, judgment 1 December 2008 ECR I-8983, paragraph 51.

⁵³Yet, Finnish courts have in fact encountered a situation where an EAW was issued by another Member State for the purpose of the execution of a custodial sentence and it was argued before the Finnish courts that the surrender of the requested persons should be refused on the grounds that they had been persecuted in the issuing Member State and that the persecution manifested itself in the very trial at which they had been sentenced. See footnote 48.

The European Court of Human Rights has had occasion to consider a complaint based on the surrender of a person on the basis of an EAW in the case of *Stapleton*.⁵⁴ The ECtHR reiterated its settled position according to which it is not excluded that an issue might, exceptionally, be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. The Court did not consider that the facts of the case disclosed any substantial grounds for believing that there would be a real risk that the applicant would be exposed to such a “flagrant denial” of Article 6 rights in the UK. The Court noted, in this regard, that the UK was a Contracting Party and that, as such, it has undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 6. The Court rejected the applicant’s suggestion that the executing or surrendering State should go beyond the examination of a “flagrant denial” and determine whether there has been established a real risk of unfairness in the criminal proceedings in the issuing State.

The growing number and importance of secondary law instruments that have been adopted in order to implement the principle of mutual recognition have brought up new aspects of EU law for national judges and lawyers to deal with. In this area, there are many issues that will keep them preoccupied in the coming years.

5 Coping or Groping Ahead

The order is tall for legal professionals. They must be able first of all to know how to identify the situations where European law plays a role, to analyse more concretely what the issue is in a given context, to search and find the relevant legal sources and finally to see what conclusions are to be drawn from them. All of these tasks can be quite demanding and time-consuming. Knowing where European law is relevant and how it affects the case in hand requires a great deal of professional skill and effort.

Many practising lawyers, judges or prosecutors are not specialised in certain types of cases or certain fields of law. Instead, they must cope with a variety of cases and subject matters. This makes the additional challenges emanating from European law even bigger. Obviously, the degree of specialisation varies depending on many factors. But even if the complexities of modern life and modern law do call for the advancement of particular strands of expertise both in the legal practice as well as in the courts, the fact remains that particularly in smaller jurisdictions it is not even practically possible to bring specialisation as far as it can be brought in some large jurisdictions.

Thus, the needs of competence development will also vary. The types and the quality of training as well as the sources of information that are offered to support lawyers and judges and to help them build up their skills must reflect, and be responsive to,

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⁵⁴Decision of 4 May 2010, application 56588/07. The applicant’s surrender, requested on the basis of an EAW, from Ireland to the UK had been ordered by the Supreme Court of Ireland. He invoked in particular Article 6 of the ECHR on the grounds that given the delay in prosecuting the charges against him, a surrender would violate his rights under that article.

the realities. Many judges and lawyers must be able to deal with a wide variety of legal issues, including a potentially wide range of EU law issues.

Under such circumstances it is all the more important to have an adequate grasp of the main principles, structures and issues of EU law, because a systemic knowledge will best help with the most crucial point, namely the ability to identify situations and questions where EU law is relevant. Questions properly identified can also be resolved – even if that may require an interesting effort.

6 A Word on ERA and John Toulmin

ERA provides a fine and valuable forum for the training of legal professionals in EU law. The great advantages of ERA are, apart from the high quality of the events offered, the fact that the activities are multi-national and multi-professional. Judges, lawyers, prosecutors, academics and policy-makers from different national systems as well as from the EU level can exchange their expertise, their insights and experiences and interact in order to enhance everyone's knowledge – and foster interest in European law. With that, ERA offers an ideal environment for the kind of competence development that is needed.

During his long tenure in the service of ERA as the Chairman of its Board of Trustees, *John Toulmin* has made a great, active and devoted contribution to ERA's development from a modest start to a major training institution in EU law. We owe him a lot, in appreciation and gratitude.

Both ERA and John Toulmin deserve our very best wishes, the first for a dynamic and successful future, the other for a more tranquil and enjoyable one.