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Review paper

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IS THE CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION APPLICABLE IN CRIMINAL PROCEDURE?

ABSTRACT

The Charter of Fundamental Rights of European Union (CFR) is a document enshrining the fundamental rights protected within the European Union's legal framework. In this paper the author explores the role of the CFR in criminal procedure. Beginning with an overview of the CFR's historical development and legal significance, this paper explores its incorporation into the EU legal order, particularly through the Treaty of Lisbon. It explores the CFR's status as a primary source of law having legal force equivalent to that of the EU Treaties. Following that, the paper explains the applicability of the CFR in general and then concretely in criminal procedure. Paper investigates provisions of CFR relevant to the criminal proceedings and with mention of the case law of CJEU tries to answer some practical questions relating to CFR's provisions related to criminal proceedings. The main goal of this paper is to answer the question if the CFR is even applicable in criminal procedure.

Keywords: *the Charter of Fundamental Rights of European Union, criminal procedure, applicability of the CFR*

1. INTRODUCTION

The issue of fundamental rights has risen gradually with the evolution of the scope of the European Union (hereinafter: EU). Even though the EU was originally the economic integration, with its expansion of members and the need of expansion in competences, member states had to start answering questions about the area of fundamental rights. First mention of some fundamental rights can be found in the founding treaties especially prohibition of discrimination based on the nationality but only within the scope of the treaties.¹ Another

¹ Article 69 of the Treaty establishing the European Coal and Steel Community, <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT>.

mention of the fundamental rights can be found in a jurisprudence of the Court of Justice of the European Union (hereinafter: CJEU). One of the most important decisions was made in the Case 29/69 *Stauder vs. City of Ulm*² where CJEU said that the fundamental human rights are enshrined in the general principles of community law and are protected by the court. What also must be mentioned is that every member state is a contracting party to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention), which means that the fundamental rights are protected by the European Court of Human Rights (hereinafter: ECHR). Current status of protection of fundamental rights in EU can be found in the Treaty on European Union (hereinafter: TEU) in Article 6. The second paragraph says that the Union shall accede to the Convention. The third paragraph mentions fundamental rights guaranteed by the Convention, and fundamental freedoms which are result from the constitutional traditions common to the Member States, as the general principles of Union's law. But for the purposes of this paper the most important paragraph is the first one mentioning the existence and the legal status of The Charter of Fundamental Rights of European Union (hereinafter: CFR).

The purpose of this paper is to explain what exactly the CFR is, its brief historical development and legal significance in the European law, the reasons of the adoption of this document, the application of the CFR in general and then concretely in the criminal procedure and to explain the CFR's provisions relevant to the criminal procedure.

2. WHAT IS THE CFR?

The CFR is a catalogue of certain political, economic, and social rights guaranteed to EU citizens and residents. It was drafted by the European Convention in 2000 and the original idea was for the Member States to sign the CFR at the next revision of the treaties (the next one was the Treaty of Nice), however, that did not happen.³ Since Member States were not interested in adopting the CFR as an international agreement which would made the CFR a part of the primary law, it was solemnly proclaimed as an interinstitutional agreement between the European Parliament, the Council of European Union,

² Judgment of the The Court of 12 November 1969, *Erich Stauder v City of Ulm*, Case 29/69

³ Anderson, D., Murphy, C. C., The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe. In EUI Working Papers, Law 2011/08, Department of Law, p. 2. ISSN 1725-6739

and the European Commission⁴. That meant that it was not binding for neither Member States nor the CJEU.

The first attempt to implement the CFR into the primary law was by the Treaty establishing the Constitution for Europe. Its second part was dedicated to the CFR and basically the whole text of the original CFR was transferred into the Treaty establishing the Constitution for Europe. This Treaty was signed in 2004 but was not ratified by all the Member States so it has never become binding. Later, in 2007, the Lisbon treaty⁵ was signed and entered into force in 2009. Since then, the CFR is a part of the primary law having the same legal value as founding treaties, thus is legally binding for the Member States and the European Union as a whole and every legal act must be in compliance with it. It is explicitly stated in the first paragraph of the Article 6 of TEU: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

The CFR consists of 54 Articles divided into seven chapters – dignity, freedoms, equality, solidarity, citizens’ rights, justice, and general provisions, with preamble in the beginning of the document. In the comparison with the Convention, the CFR guarantees wider protection of human rights especially in the field of modern issues which were not present in the time of signing the Convention. For example, the CFR forbids human cloning (Article 3), it protects the personal data (Article 8) and it guarantees the right to asylum (Article 18). Those rights cannot be found in the Convention.

As the Article 2 of the TEU says: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Protection of human rights is important component of democracy and rule of law which are also the values of EU. The existence of the CFR underlines this protection and guarantees the legal certainty to EU citizens.

⁴ Official Journal 2000, C-364/1 of 18 December 2000

⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

3. THE APPLICATION OF CFR

The scope of the CFR can be found directly in the CFR, concretely in the Article 51. According to the paragraph 2 of this Article: “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.” This confirms the fact that the CFR is just a catalogue of fundamental rights. The CFR does not create any new fundamental rights, those are already existing since they are inherited to all human beings regardless of gender, nationality, ethnicity, religion, colour, or language. The CFR only names fundamental rights whose are protected by the EU.

As the paragraph 1 of Article 51 claims, “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.” From this paragraph we can deduce that not only the European Parliament, the European Commission and the Council of European Union are bound by the CFR, like it was before 2009, but also other institutions and bodies of the EU, e.g. CJEU. Every act of the institution or the body of the EU must be in compliance not only with the treaties but also with the CFR.

The EU institutions must act according to the CFR even when they act outside of the EU legal framework. This was stated by the CJEU: “the Charter is addressed to the EU institutions, including [...] when they act outside the EU legal framework”⁶. Member States are bound by the CFR only when they are implementing the EU law. An individual may object to a violation of the rights guaranteed by the CFR only when the Member State implements the EU law. This was confirmed by the CJEU in the case of Åkerberg Fransson⁷: “...the Charter’s field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.” This definition is quite broad and sometimes it can be tricky to identify when the Member State acts in the scope of EU law. In these cases, there is the CJEU and its case-law which can help us solve this problem.

According to Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) “the Court of Justice of the European Union shall have

⁶ Judgment of 20 September 2016, *Ledra Advertising/Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 67

⁷ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20; Judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304

jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union". The CFR is not explicitly mentioned here but since it is a part of primary law same as the Treaties the CJEU has jurisdiction to interpret the CFR. If a court or a tribunal of Member State has questions about the interpretation of the EU law, and they consider it a necessary to be able to give the judgment, they can request the CJEU to give a preliminary ruling. One of the obligatory contents of the request for a preliminary ruling is "a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings"⁸.

As it was stated numerous times by the CJEU "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"⁹ which means that where a legal situation „does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction"¹⁰. The existence of the CFR itself cannot be the reason of the request for a preliminary ruling since as I mentioned earlier the CFR does not establish any new power for the EU. If the necessary conditions are met, in other words if Member State acts in the scope of the EU law, the CFR can be applied to a wide range of cases which according to the jurisprudence of CJEU can be for example legal aid, penalties for customs offences, cartels, recruitment of local police officers, blood donation, operation of gaming machines, support for rural development, advertising by TV broadcasters, disclosure of accounting documents, obligation to issue fingerprints for a passport or retirement age.¹¹ National courts often apply the CFR in the areas of border checks, asylum and migration, judicial cooperation in criminal matters, fields of employment, non-discrimination and data protection.¹²

⁸ Article 94 of Rules of procedure of the Court of Justice.

⁹ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20; Judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, paragraph 19

¹⁰ Judgment of 12 July 2012, *Currà and Others*, C-466/11, EU:C:2012:465, paragraph 26; Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 22; Judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, paragraph 20

¹¹ European Union Agency for Fundamental Rights. Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level, Guidance. Luxembourg: Publications Office of the European Union, 2020, p. 18. ISBN 978-92-9461-024-9. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf.

¹² European Union Agency for Fundamental Rights, *op. cit.* p. 19.

3.1 European Union Agency for Fundamental Rights

In the field of fundamental rights, the EU established the European Union Agency for Fundamental Rights also known as Fundamental Rights Agency (hereinafter: FRA). Its objective is “to provide the relevant Union institutions, bodies, offices and agencies and the Member States when implementing Union law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”¹³.

FRA has published a guidance handbook called *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level* which offers a practical orientation on the scope of the CFR. As it is explicitly said in the guidance “while it is based on the case-law of CJEU, it cannot replace a case-by-case assessment and the need to consult legal services as appropriate”¹⁴. The guide was designed for Member States, especially for individuals who are involved in national legislative and administrative authorities but also for individuals working at national courts or human right organisations.

4. APPLICABILITY OF THE CFR IN THE CRIMINAL PROCEDURE

As it was already explained, the CFR is binding Member States only when they are implementing the EU law. This rule is therefore applicable in criminal procedure too, since the national court is the one who is exercising the implemented law when it is making the decision after the law was breached. Not only the court but also investigators of the case must respect the law. When the case is related to implemented EU law, they must respect the CFR which is protecting fundamental rights.

If in front of a national court arise a question about interpretation of EU law including the CFR, national court would turn to CJEU with a prejudicial question to be able to make a fair decision. It is even more important in criminal proceedings because the final decision of national court could heavily impact life and fundamental rights of the defendant. As it is known from the case law of

¹³ Article 2 of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights amended by Council Regulation (EC) 2022/555 of 5 April 2022

¹⁴ European Union Agency for Fundamental Rights, *op. cit.* p. 9.

CJEU the principle of primacy of EU law exists. It is based on the idea where a conflict between EU law and Member State law appears the EU law prevail. It is to ensure that people in all of EU territories are uniformly protected by the EU law. Thus, the national law should be in compliance with EU law but only in the fields where Member States ceded sovereignty to EU.¹⁵ The EU law itself has hierarchy of EU law with the primary law on top of it. Every secondary act must be in compliance with the primary law. The CFR is part of a primary law that means that every secondary act is (or at least should be) compliant to it.¹⁶ In many cases the court interprets secondary acts together with related CFR provision. And since the secondary act is applicable in the particular case, the CFR provisions will also be applicable.

The CFR's chapter VI called Justice contains four rights important for criminal proceedings - right to an effective remedy and to a fair trial¹⁷, presumptions of innocence and right of defence¹⁸, principles of legality and proportionality of criminal offences and penalties¹⁹, right not to be tried or punished twice in criminal proceedings for the same criminal offence²⁰. That does not mean that other provisions of CFR are not related to criminal procedure at all. It depends on the specific case.

4.1. Article 47 – Right to an effective remedy and to a fair trial

Article 47 provides right to legal remedy to every defendant, regardless of being a citizen of EU or not, if they are a subject of EU jurisdiction. It is based on Article 13 the Convention which enshrines right to an effective remedy before a national authority. EU law protection is wider because it enshrines right to an effective remedy in front of the court. This right was recognized as one of the general principles of EU law by the CJEU in 1986. Article 47 means inclusion of this precedent in CFR. It applies to the institutions of EU and to Member States while implementing the EU law with respect to all rights guaranteed by EU law.²¹

¹⁵ Glossary of summaries. Primacy of EU law (precedence, supremacy). See: <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html>

¹⁶ Glossary of summaries. EU hierarchy of norms. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:norms_hierarchy

¹⁷ Article 47 of CFR

¹⁸ Article 48 of CFR

¹⁹ Article 49 of CFR

²⁰ Article 50 of CFR

²¹ Explanation on Article 47 — Right to an effective remedy and to a fair trial. Explanations relating to the Charter of Fundamental Rights

Right to a fair trial is based on Article 6(1) of the Convention. This right is not confined only to disputes related to civil law but also for administrative law and criminal law.²² Under this article the right to be defended and represented is also provided together with right to legal aid for those who are in economic need. Article 47 has been further developed in secondary law, e.g. Directive 2012/13/EU on the right to information in criminal proceedings²³, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings²⁴, or Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings²⁵.²⁶

4.2. Article 48 – Presumption of innocence and right of defence

This right has the same meaning and scope as the right guaranteed by the Convention in accordance with Article 52(3) of the CFR. Presumption of innocence means innocent until proven guilty. This is one of the most important rules in criminal procedure. Right to defence is tied to right to fair trial because when right to defence is not allowed then there is no possibility to conduct a fair trial. Right to defence includes right to be informed about the nature and cause of the one's accusation, right to be informed in language the person understands, having adequate time to prepare his defence, defend himself in person or through legal assistance, to examine witnesses, and have free assistance of an interpreter if the person is not able to speak language used in front of the court.²⁷ Article 6 of the Convention does not allow any exceptions to presumption of innocence which should also be applied to the CFR. However, as de Hert says: "the practice, nonetheless, is rather different and both courts' case law demonstrates that the presumption of innocence may at times be weakened"²⁸.

²² *Ibid.*

²³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

²⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

²⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

²⁶ de Hert, P. (2016). EU criminal law and fundamental rights. In V. Mitsilegas, M. Bergström, & T. Konstadinides (Eds.), *Research Handbook on EU Criminal Law* (pp. 105-124). Edward Elgar Publishing Ltd. pp. 117 – 118. See: https://pure.uvt.nl/ws/portalfiles/portal/19815826/pdh16EU_criminal_law_and_fundamental_rights_Mitsilegas16.pdf

²⁷ Explanation on Article 48 — Presumption of innocence and right of defence Explanations relating to the Charter of Fundamental Rights.

²⁸ de Hert, P. (2016). *op. cit.* pp. 115-116.

4.3. Article 49 – Principles of legality and proportionality of criminal offences and penalties

This article follows the rule of non-retroactivity.²⁹ The person cannot be held guilty for a criminal offence which was not an offence at the time of its commission. Same applies for the criminal penalty. The heavier penalty cannot be imposed than the penalty that was applicable at the time of commission of an offence.

Principle of proportionality means that the penalty cannot be disproportionate to the criminal offence. This is also enshrined in the constitutional traditions of Member States and jurisdiction of CJEU.³⁰

4.4. Article 50 – *Ne bis in idem*

The *ne bis in idem* principle means that the person has right not to be tried or punished in criminal proceedings twice in the same criminal offences. This rule applies not only in one State but also between the jurisdiction of several Member States. There are some limited exceptions covered by the horizontal clause in Article 52(1) of CFR.³¹ There are four limitation criteria: the principle of necessity, necessity of general interest recognized by the Union and the need to protect the rights and freedoms for others, prohibition of intervening into the essence and the principle of lawfulness.³² Concrete exception can be found for example in Articles 54 -58 of the Schengen Convention³³.

5. CASE LAW

In this part of my paper, I would like to explain some interesting cases that appeared in front of the CJEU related to interpreting and applying the CFR

²⁹ Explanation on Article 49 — Principles of legality and proportionality of criminal offences and penalties. Explanations relating to the Charter of Fundamental Rights.

³⁰ *Ibid.*

³¹ Explanation on Article 50 — Right not to be tried or punished twice in criminal proceedings for the same criminal offence. Explanations relating to the Charter of Fundamental Rights.

³² EGELÍĜI, Ö. E. EU Charter of Fundamental Rights. Marmara University, June 2013. p. 120.

³³ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

provisions in criminal proceedings. Most of them are more recent because I wanted to show that even now after 15 years of having CFR in the part of primary law, there are still unanswered practical questions about its applicability in concrete cases that may arise anytime in the future.

5.1. C-617/10 Åkerberg Fransson

One of the significant judgments is the case of Åkerberg Fransson which I have already mentioned earlier. According to Scalia this case was “a step forward in the CJEU’s controlling role over the compatibility of Member States’ criminal law provisions with fundamental rights”³⁴. In this case Mr. Åkerberg Fransson was charged of serious tax offences in 2009 because the information he provided concerning the VAT was false. The problem was that for the same reasons he was already given penalties by administrative court in 2007, prior to charges in criminal procedure. The Swedish national court basically asked if this is the case of violation of *ne bis in idem* principle.

CJEU, specifically the Court and its Grand Chamber, had to firstly decide if the Court is even competent to make a decision in this case. The governments of Sweden, Czech Republic, Denmark, Ireland and Netherlands, and European Commission disputed the admissibility of the questions referred for a preliminary ruling. In their opinion the tax penalties and criminal procedure of Mr. Åkerberg Fransson is a subject-matter of national law, and it is not the case of implementation of EU law.³⁵ According to the Court tax evasion because the provided information concerning the VAT was false falls under Directive 2006/112 on the common system of value added tax³⁶ and under the Article 325 TFEU regarding the fight against any financial fraud. The Court said: “tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter”³⁷. The Court had found the

³⁴ Scalia, V. Protection of Fundamental Rights and Criminal Law. The Dialogue between the EU Court of Justice and the National Courts. *Eucrim*, issue 3/2015, <https://eucrim.eu/articles/protection-fundamental-rights-and-criminal-law/>, 3 April 2024.

³⁵ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 16

³⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006L0112>

³⁷ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 27

EU law in the case and, therefore, had jurisdiction to answer prejudicial questions.

The Court decided that the *ne bis in idem* principle does not preclude a Member State from imposing a tax penalty and a criminal penalty, for the same acts of non-compliance with declaration obligations in the field of value added tax, if the first penalty is not criminal in nature which should be determined by the national court. On the other hand, it would be against the *ne bis in idem* principle if the penalty would have criminal nature. In order to ensure that all VAT is collected, and thus financial interests of EU are protected, Member States are allowed to choose applicable penalties, either administrative penalties or criminal penalties or combination of both. There are three criteria for deciding whether the administrative penalty is criminal in nature or not. The first is the legal classification of the offence under national law, the second is the nature of the offence, and the third is the nature and degree of severity of the penalty.³⁸

5.2. C-524/15 Luca Menci

Similar to Åkerberg Fransson case, in this case it was Mr Menci who was firstly ordered to pay administrative penalty and later was, for the same reason of not paying taxes within the time limit stipulated by the law, charged with the tax offences. The Italian national court also basically asked if this case falls under the *ne bis in idem* principle. The Court, again Grand Chamber, decided that criminal proceedings may be brought against a person failing to pay value added tax due within the time limits stipulated by law even when that person was already charged by a final administrative penalty of criminal nature. This contradicts what The Court previously said in the Fransson case about administrative penalty not having a criminal nature, however, the Court adds conditions, particularly the legislation has to pursue an objective of general interest important enough to justify a duplication of proceedings and penalties, contains rules ensuring coordination which limits to what is strictly necessary, and provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. Ensuring that the actual disadvantage from duplication of the proceedings and penalties is not excessive is the role of the national court.³⁹

³⁸ *Ibid*, paragraph 34-37

³⁹ Judgment of 20 March 2018, *Luca Menci*, C-524/15, EU:C:2018:197, paragraph 65

5.3. C-203/20 AB and Others (*Révocation d'une amnistie*)

What is without a doubt a case of Member State implementing EU law is European arrest warrant (hereinafter: EAW) first adapted by Council Framework Decision 2002/584/JHA on the EAW⁴⁰. But even in these cases practical questions about its implementation arise which are then answered by CJEU via preliminary ruling. An interesting case happened in Slovak Republic. There were few persons accused of series of offences allegedly committed in 1995 but in 1998 the Prime Minister of the Slovak republic exercising the powers of President at that time issued an amnesty covering those offences. Because of that the national court decided to put an end to those prosecutions in 2001. In 2017 new constitutional law entered in the force according to which the mentioned amnesty can be revoked by the resolution of National Council of Slovak Republic. Constitutional Court of Slovak Republic decided that this resolution was in compliance with the constitution and prosecutions were resumed. Slovak national court intended to issue EAW but was uncertain whether the *ne bis in idem* principle precludes the issue of EAW, so the national court turned to CJEU with a prejudicial question.⁴¹

CJEU had to first answer a question about its jurisdiction. Slovak government claimed that the court does not have a jurisdiction because no provision of EU law is applicable in the main proceedings so the Charter cannot be applicable either. But the Court said that the prejudicial question is not about the non-harmonized crimes which are object of a main proceedings but about issuing EAW so the Court has a jurisdiction to answer prejudicial question.

The decision of national court by which the prosecutions was brought to an end has the same effects as the decision of acquittal. However, the sole effect of that decision was to discontinue criminal prosecutions before ruling on the criminal liability.⁴² The Court therefore decided that “Article 50 of the Charter must be interpreted as not precluding the issue of a European arrest warrant against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision, in the case where that decision was adopted before any

⁴⁰ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>

⁴¹ Judgment of 16 December 2021, *AB and Others*, C-203/20, EU:C:2021:1016 paragraph 10-18

⁴² Judgment of 16 December 2021, *AB and Others*, C-203/20, EU:C:2021:1016 paragraph 59-60

determination as to the criminal liability of the person concerned⁴³". That means if the criminal liability was decided before amnesty and later the amnesty had been revoked, the national court cannot continue with criminal proceedings.

5.4. C- 282/20 ZX (Régularisation de l'acte d'accusation)

As I mentioned earlier there are cases when together with the provision of CFR the CJEU interprets secondary act. One of these cases is C-282/20 where the Directive 2012/13/EU together with the Article 57 was interpreted. ZX was accused of possession of fake money quoted on currency markets at home and abroad. At the pre-trial hearing the regularity of the indictment was specifically raised. The court decided that the indictment complied with all formalities. However, after the court gathered all the evidence about the fact if the conditions for hearing the parties and giving judgment were met, the court had found some errors in indictment. Thus, Bulgarian specialised prosecutor's office wanted to amend the charges. ZX claimed that there was not basis to do that and that the court should correct those errors in its judgment. The national court said that the errors should have been established at the pre-trial hearing and the case should have been referred back to the prosecutor for drawing up a new corrected indictment. This did not happen and according to Bulgarian law this can happen only at the pre-trial hearing. The national court turned to CJEU with prejudicial question which basically asked if this situation is compatible with Article 6(3) of Directive 2012/13⁴⁴ and Article 47 of the CFR.⁴⁵

According to CJEU the moment at which the benefit of the procedural rights must be ensured is, at the latest, before the criminal begins to examine the charges and that the Directive 2012/13 does not preclude the judge from taking necessary measures to regularise the indictment so the right of the defence and fair trial are protected. The Court also stated that the information related to the charges sent to the defence may be later amended if they are disclosed to the accused person when the person has still time to respond effectively. Therefore,

⁴³ Judgment of 16 December 2021, *AB and Others*, C-203/20, EU:C:2021:1016 paragraph 62

⁴⁴ The article says: "Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person."

⁴⁵ Judgment of 21 October 2021, *ZX (Régularisation de l'acte d'accusation)*, C-282/20, EU:C:2021:874, paragraph 9-23

the Court had decided that the Bulgarian law was not compliant to Directive 2012/13 and Article 47 of the CFR.⁴⁶

6. CONCLUSION

From all that was said in this paper, in my opinion, the CFR as a catalogue of fundamental rights which is part of the EU primary law is applicable in the criminal procedure. Not only the provisions mentioned in chapter VI of the CFR but also other provisions if they are relevant to particular case. The CFR would not be applicable in the case of not implementing EU by Member State which is applicable not only in criminal proceedings. However, in many cases in criminal proceedings it is possible to find EU law at least to some extent. It must be mentioned that fundamental rights are protected not only by CFR but also by constitutions of each Member States and by ECHR which is binding for every Member State. That means that even if there would be case of not applying CFR, fundamental rights stay protected by other ways.

As we can see from the years of when the cases mentioned earlier happened, the interpretation of CFR by the CJEU and its applicability in criminal procedure is still not that clear as we would wish it to be. There are still some unknown practical problems which could arise anytime in the future and CJEU must be ready to answer them. In my opinion, the CFR's application will never be one hundred percent clear. The EU works on its new legislation every year which means new situations for application of the CFR and that can lead to another prejudicial questions. Maybe it would not be a bad idea if the FRA made similar guidance about application of CFR as they already did but focused solely on the application in the criminal proceedings.

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