Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification of the Scope of EU Law in Situations Involving National Discretion?

ECJ (Grand Chamber) 19 November 2019, Joined Cases C-609/17 and C-610/17, *TSN*

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Introduction

In its judgment in the *TSN* case delivered on 19 November 2019, the Grand Chamber of the European Court of Justice (the Court) had to determine whether, in adopting national measures on paid annual leave that are more generous than the minimum of four weeks' paid annual leave laid down in an EU Directive[1], EU member states are bound to comply with the Charter of Fundamental Rights of the EU (the Charter) and, in particular, the requirements of the right to paid annual leave enshrined in its Article 31(2). Perhaps somewhat surprisingly, the Court held that the enactment of more protective paid leave rules cannot be regarded as falling within the scope of EU law. As a result, the member states do not have to ensure compliance with the fundamental rights laid down in the Charter when they adopt such measures.

With this judgment, the Grand Chamber of the Court fine-tuned its interpretation of the scope of EU law as referred to in Article 51(1) of the Charter. According to that provision, as interpreted by the Court in *Åkerberg Fransson*, the Charter binds the member states only when they act within the scope of

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[1]Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

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application of EU law.[2] In other words, the jurisdictional reach of the Charter coincides with the applicability of EU law. Yet, in the absence of a clear-cut legal standard to define the boundaries of EU law, the division of competences between the EU and its member states with respect to the protection of fundamental rights is still subject to much debate. One of the most contentious questions in this regard relates to the extent to which the member states ought to comply with the fundamental rights featured in the Charter in the adoption of national measures when they are implementing EU law.[3]

Against that backdrop, the novelty of *TSN* is that, for the first time, the Grand Chamber of the Court explicitly confirms that the scope of the Charter does not extend to so-called national 'opt-ups', i.e. more favourable or protective national provisions. This case note discusses the constitutional implications resulting from that judgment as regards the distribution of powers between the EU and national authorities in the implementation of EU substantive policies.

Factual background to the proceedings

Ms Marika Luoma worked as a laboratory assistant. Pursuant to the collective agreement applicable to the health sector, she was entitled to 42 working days, or seven weeks, of paid annual leave. As she recovered from a surgical operation, Ms Luoma was on sick leave for an extended period of time, and therefore requested that the remaining days of paid annual leave to which she was entitled be carried over to a later date. Ms Luoma's employer, Fimlab Laboratoriot, denied that request and, instead, only agreed to carry over the minimum period of four weeks' paid annual leave granted by Article 7(1) of Directive 2003/88 (the Working Time Directive). In the other joined case, the situation was similar. Under the terms of the collective agreement governing his terms and conditions of employment, Mr Tapio Keränen was entitled to 30 working days, or five weeks of paid annual leave. However, following a period of sick leave, his request for the remaining days of paid annual leave to be carried over was denied. In accordance with the applicable collective agreement, the days spent on sick leave were

[2]ECJ 26 February 2013, Case C-617/10, *Åkerberg Fransson*, para. 21.

[3]*See e.g.* K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', 8(3) *EuConst* (2012) p. 375; M. Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"', 52 *CML Rev* (2015) p. 1201; X. Groussot et al., 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', Eric Stein Working Paper N°1/2011; A. Torres Pérez, 'The Federalizing Force of the EU Charter of Fundamental Rights', 15(4) *International Journal of Constitutional Law* (2017) p. 1080; D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', 50 *CML Rev* (2015) p. 1267.

attributed to the days of paid annual leave that were in excess of the core nucleus of protection laid down in Article 7 of the Working Time Directive.

In essence, the facts pertaining to the two joined cases are identical. They concern the refusal to carry over the entitlement to paid annual leave that goes beyond the minimum set out in the Working Time Directive, in the event where the periods of sick leave and paid annual leave coincide. In both cases, it is plain that the paid leave afforded by the applicable collective agreement goes beyond the harmonised minimum of four weeks' paid annual leave guaranteed by EU law. This possibility is recognised by the minimum harmonisation clauses contained in Article 153(4) TFEU and Article 15 of the Working Time Directive, which allow the member states to take more protective or generous paid leave guarantees.[4] In the present case, the Finnish authorities had effectively given more generous paid leave guarantees. At the same time, those supplementary paid leave days could not be transferred to another civil year when they coincided with days of sick leave. The refusal to allow a transfer of those paid annual leave days beyond the minimum of four weeks potentially infringes the right to paid annual leave recognised in Article 31(2) of the Charter. The question referred to the Court therefore revolved around the issue as to whether the national rules at stake had to comply with the Charter. In accordance with its Article 51(1), the member states ought to comply with the Charter only when they act within the scope of EU law[5]. Yet, given the uncertainty affecting the boundaries of EU law, the question whether national authorities must respect the rights enshrined in the Charter when they adopt domestic measures extending the minimum period of paid leave offered by Article 7 of the Directive remains open for debate.

Opinion of the advocate general and judgment of the Court

In its judgment, the Court agreed with Advocate General Bot that Article 7(1) of Directive 2003/88 does not preclude national rules or collective agreements that provide for the granting of additional days of paid annual leave. At the same time, EU law does not require those additional days to be carried over to the next year on grounds of illness. The Court's reasoning revolved around the minimum character of the Working Time Directive.[6] While Article 7(1) of this Directive set out a minimum period of paid annual leave of 'at least four weeks', national laws or collective agreements may provide for a period of paid leave in excess of that

[4]It also derives from Art. 153(2)(b) TFEU, according to which EU secondary legislation adopted to protect the workers' health and safety can only constitute 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the member states'.

[5]*Åkerberg Fransson*, *supra* n. 2, para. 21.

[6]ECJ 19 November 2019, Joined cases C-609/17 and 610/17, *TSN*, paras. 33-34.

period. Accordingly, the adoption of higher national standards is governed by national law outside the regime established by the Directive.[7]

The Court subsequently considered that the adoption of provisions granting workers days of paid annual leave beyond the minimum period of four weeks laid down in Directive 2003/88 cannot be regarded as implementing that Directive. Consequently, it did not fall within the scope of the Charter under Article 51(1) of the Charter. In so doing, the Court disagreed with the Opinion delivered by Advocate General Bot. The Advocate General took the view that, even if Article 15 of Directive 2003/88 left a certain margin of discretion to the member states in the adoption of national opt-ups, such discretionary powers must be exercised in accordance with EU law. This approach entailed that the exercise of that national regulatory autonomy may be constrained by the 'requirements that flow from the protection of fundamental rights'[8] and, in particular, the EU right to paid annual leave enshrined in Article 31(2) of the Charter. In this respect, the expansion of the scope of Charter review to more protective paid leave rules may have the effect of curtailing the scope for regulatory autonomy available at the domestic level in accordance with Article 15 of the Working Time Directive.

Advocate General Bot acknowledged that this provision 'gives the member states the option to act and therefore does not impose a specific obligation on them'. However, he conflated this provision with other EU secondary provisions that offer the member states some form of discretion in the implementation of EU substantive policies.[9] It follows from the Court's case law that the exercise of such discretion should be regarded as implementing EU law for the purposes of Article 51(1) of the Charter. In support of this argument, the Advocate General further stressed that Article 153(4) TFEU explicitly required national authorities to act in a manner compatible with the Treaties in the exercise of their discretion to adopt national 'opt-ups'. Given that the Charter ranks as primary law, the member states ought to comply with the rights featured therein when they use the option granted to them by Article 15 of Directive 2003/88.[10]

Unlike the Advocate General, the Court considered that a distinction must be drawn between the exercise of discretionary powers in the implementation of EU law and the adoption of more favourable paid leave rules.[11] The Court's reasoning relied heavily on the specific features of the competences exercised by the EU in the field of workers' protection. The Court started from the premise that 'the mere fact that domestic measures come, as is the situation in the present case, within an

[7]Ibid., paras. 35-36.
[8]Ibid., Opinion of AG Bot, para. 88.
[9]Ibid., paras. 91-92.
[10]Ibid., paras. 94-96.
[11]*TSN*, *supra* n. 6, para. 50.

area in which the European Union has powers cannot bring those measures within the scope of EU law and therefore cannot render the Charter applicable'.[12] Subsequently, it carried out an assessment of the distribution of powers between the Union and its member states in the field of social policy.

In this context, the Court first of all observed that social policy was an area of shared competence, as specified in Article 4(2)(b) TFEU. In accordance with Article 153(1) TFEU, the EU should strive to 'support and complement the activities of the member states in the field of improvement of the working environment to protect the safety and health of workers'.[13] The Court also stressed that Article 153(2)(b) TFEU, read in combination with Article 153(4) TFEU, and Article 15 of the Working Time Directive, established the minimum character of that Directive. In the light of the minimum nature of Directive 2003/88, the member states retain the power to adopt more stringent protective measures 'outside the framework of the regime established by that Directive'.[14]

The Court further held that the power retained by national authorities or social partners to adopt more protective paid leave rules cannot be regarded as constituting the implementation of the Working Time Directive in the absence of a specific obligation imposed on them in the exercise of that power.[15] Consequently, the rights which exceed the principle of four weeks' paid annual leave, as well as the conditions for a possible carrying over of those rights in the event of illness, fall outside the scope of EU law under Article 51(1) of the Charter. Because EU law did not apply, neither did the Charter. As a result, the Court did not need to assess the compatibility with Article 31(2) of the Charter of more protective paid leave guarantees.

Commentary

In *TSN*, the Grand Chamber of the Court concluded that the introduction of more protective national paid leave guarantees did not fall within the scope of EU law under Article 51(1) of the Charter. This section will analyse the implications of that judgment as regards the distribution of powers between the EU and its member states in the protection of fundamental rights.

After discussing previous case law relating to the scope of the Charter, the relationship between minimum harmonisation and the jurisdictional reach of EU law will be examined. More specifically, this contribution focuses on the constitutional consequences of the judgment. The primary importance of *TSN* lies in

[12]Ibid., para. 46.
[13]Ibid., para. 47.
[14]Ibid., paras. 48-49.
[15]Ibid., para. 53.

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the Court's understanding of the requirement of specificity. The interpretation adopted by the Grand Chamber seems to usher in a new approach towards the relationship between the national and EU systems of fundamental rights protection in regulatory areas where the member states retain considerable discretion. More specifically, the judgment in *TSN* suggests that the division of powers as regards the protection of fundamental rights ultimately hinges upon the degree of regulatory autonomy available to the member states in the relevant policy area. After analysing the Court's approach in relation to the scope of the Charter, I will then proceed to ascertain the implications of that judgment in the field of social policy. It is submitted that the Court's assessment of the distribution of competences in that field justifies a cautious approach towards the jurisdictional reach of the Charter. In the final section, I will give a brief account of why the Court's understanding of the requirement of specificity is also likely to have implications in other regulatory areas where the member states retain a wide degree of discretion in the implementation of EU law.

The Court's case law on the scope of application of the Charter: what does 'implementing EU law' mean?

According to Article 51(1) of the Charter, the rights featured therein are binding upon the member states 'only when they are implementing Union law'. This provision was adopted with a view to limiting the scope of judicial review of national measures under Charter rights. In so doing, the drafters of the Charter aimed to preserve the regulatory autonomy of national authorities in fields which are not governed exhaustively by EU law.[16] However, the concept of implementation is not defined in the Charter itself.

In *Åkerberg Fransson*, the Court adopted a broad understanding of implementation which entails that 'the Charter must be complied with where national legislation falls within the scope of EU law'.[17] In other words, there can be no situation that is governed by EU law in which the Charter does not apply.[18] It follows that EU fundamental rights are meant to apply only when another EU law provision

[16]V. Trstenjak and E. Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU', 38(3) *E.L. Rev* (2013) p. 306; G. De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights', 26(2) *E.L. Rev* (2001) p. 127.

[17]*Åkerberg Fransson*, *supra* n. 2, para. 21.

[18]K. Lenaerts and J.A. Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) p. 1568.

applies.[19] Although the exact categorisation is still 'subject to much debate',[20] the Court has carved out a two-fold classification of national measures involving the implementation of EU law for the purposes of Article 51(1) of the Charter.[21]

In the first place, the *ERT* doctrine prescribes that EU fundamental rights apply when the member states make use of the derogations provided for by EU law in order to justify a restriction on one of the free movement provisions.[22] Even where national authorities rely on an exception to a Treaty freedom, they must *still* conform to EU fundamental rights insofar as the existence and exercise of that power is circumscribed by EU law.[23] In other words, any obstacle to free movement falls within the ambit of EU law and must therefore meet the conditions imposed by EU law.[24] In this respect, the scope of EU law extends far beyond EU legislative (positive) competences to capture the negative competences resulting from the judicial interpretation of the internal market freedoms featured in the Treaties.[25]

In the second place, the *Wachauf* doctrine, also known as the 'agency situation',[26] entails that national authorities are subject to compliance with the rights guaranteed by the Charter when they implement EU law *sensu stricto*. In such circumstances, national authorities are treated as Union bodies insofar as they are entrusted with the task of securing the implementation of EU law within their own domestic legal orders. In other words, the Charter applies in relation to national authorities 'when they are acting as part of the decentralised administration of the Union'.[27]

[19]Lenaerts, *supra* n. 3, p. 378-380; L.S. Rossi, '"Same Legal Value as the Treaties"? Rank, Primacy and Direct Effects of the EU Charter of Fundamental Rights', 18(4) *German Law Journal* (2017) p. 778.

[20]E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges', 51 *CML Rev* (2014) p. 31.

[21]Dougan, *supra* n. 3, p. 1210-1217; ECJ 30 April 2014, Case C-390/12, *Pfleger and Others*, paras. 31-36.

[22]*Pfleger and Others*, ibid., paras. 31-36. F.G. Jacobs, 'Wachauf and the Protection of Fundamental Rights in EC Law', in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) p. 137.

[23]*Pfleger and Others*, *supra* n. 22; Opinion of AG Sharpston, para. 45.

[24]F. Fontanelli and A. Arena, 'The Harmonization Potential of the Charter of Fundamental Rights of the European Union', 20 *European Journal of Law Reform* (2018) p. 66.

[25]S.Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) p. 43. *See also* G. Davies, 'The Competence to Create an Internal Market: Conceptual Diversity and Unbalanced Interests', in S. Garben and I. Govaere (eds.), *The Division of Competence between the EU and the Member States - Reflections on the Past, the Present and the Future* (Hart Publishing 2017) p. 74.

[26]J.H.H. Weiler and N.J.S. Lockhart, '"Taking Rights Seriously": The European Court of Justice and its Fundamental Rights Jurisprudence', 32 *CML Rev* (1995) p. 73.

[27]T. Van Danwitz and K. Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights', 35 *Fordham International Law Journal* (2012) p. 1406.

The notion of implementation ultimately hinges upon the question as to whether a sufficient degree of connection exists between the national act at issue and the concrete norm of EU law.[28] That 'specificity' requirement entails that the Court must be satisfied that 'the provisions of EU law in the area concerned [impose a] specific obligation on member states with regard to the situation at issue'.[29] For that purpose, the Court adopts a contextual approach[30] whereby it seeks to ascertain the relationship between EU law and the national measure in question. More specifically, it has regard to criteria such as 'whether [that measure] is intended to implement a provision of EU law; the nature of the [measure] at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of directly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it'.[31]

It follows from the Court's reasoning in *TSN* that the legal basis and wording of the concrete norm of EU law must also be taken into account within the contextual assessment carried out by the Court in order to determine whether the specificity requirement is fulfilled. This approach falls in line with a trend in recent case law that suggests the existence of a correlation between the type of competence exercised by the EU and the scope of application of the Charter.[32] In its judgment, the Court relies on an analysis of the legal basis of the Working Time Directive (Article 153 TFEU) to conclude that the adoption of more favourable paid leave rules on the basis of the minimum harmonisation clause contained in Article 15 does not come within the scope of EU law.

The Court's unsettled case law on the relationship between minimum harmonisation and the scope of the Charter

In spite of the clarifications resulting from the Court's case law, the relationship between national implementing measures and the jurisdictional reach of EU law remains contentious. One of the most controversial questions debated by

[28]D. Chalmers and A. Arnull, *The Oxford Handbook of European Union law* (Oxford University Press 2015) p. 393.

[29]ECJ 24 September 2019, Case C-467/19 PPU, *Spetsializirana prokuratura (Présomption d'innocence)*, para. 41.

[30]Dougan, *supra* n. 3, p. 1235-1237.

[31]ECJ 6 March 2014, Case C-206/13, *Siragusa*, para. 25.

[32]E. Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections About Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System', 55 *CML Rev* (2018) p. 1007.

commentators (and the Court[33]) is related to the interaction between minimum harmonisation and the scope of EU law.[34] Prior to *TSN*, the identification of the scope of EU law with respect to higher national standards based on a minimum harmonisation clause was subject to diverging interpretations, but none of these interpretations was formally endorsed by the Grand Chamber.

In *Alemo-Herron and Others*,[35] the Court seemed to espouse the view that the Charter applies in instances of employee protection beyond the field harmonised by an EU directive. According to Article 3 of Directive 2001/23,[36] the transferee undertaking is bound to observe the rights and obligations agreed upon in the collective agreement applicable to the relevant sector *at the time of the transfer*. However, the UK authorities relied on the minimum harmonisation clause enshrined in Article 8 of that Directive to provide for the incorporation of the rights and obligations arising from collective agreements concluded even *after the date of the transfer*. In this context, the Court was requested to ascertain whether the dynamic approach adopted by the UK authorities was compatible with the right to conduct a business featured in Article 16 of the Charter.

In its judgment, the Court remained oblivious to the issue of the relationship between the scope of EU law and the minimum character of the Directive. Instead, the Court embarked on an assessment of the compatibility of the dynamic interpretation of Directive 2001/23 in the light of Article 16 of the Charter. It concluded that this Directive 'cannot be interpreted as entitling the member states to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct

[33]*See* e.g. ECJ 17 December 1998, Case C-2/97, *Borsana*; ECJ 14 April 2005, Case C-6/03, *Deponiezweckverband Eiterköpfe*; ECJ 18 July 2013, Case C-426/11, *Alemo-Herron and Others*; ECJ 25 March 2004, Case C-71/02, *Karner*.

[34]*See e.g.* F. De Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights', 43(1) *CML Rev* (2006) p. 9; M. Bartl and C. Leone, 'Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for Social Legislation?', in H. Collins (ed.), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) p. 113; N. Boeger, 'Minimum Harmonisation, Free Movement and Proportionality', in P. Syrpis (ed.), *The Judiciary, The Legislature and the EU Internal Market* (Cambridge University Press 2012) p. 62; M. Bartl and C. Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review', 11 *EuConst* (2015) p. 140; J.H. Jans, 'Minimum Harmonisation and the Role of the Principle of Proportionality', in M. Führ et al. (eds.), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Rehbinder* (ESV 2007) p. 705; S. Weatherill, 'Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community', in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Wiley 1994) p. 13.

[35]*Alemo-Herron and Others*, *supra* n. 33.

[36]Council Directive 2001/23 of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertaking, businesses or parts of undertakings or businesses.

a business'.[37] Although the Court did not explicitly address the scope of the Charter, this conclusion relies on the assumption that, when the member states make use of the option granted to them by Article 8 of Directive 2001/23, they must be deemed to implement this Directive for the purposes of Article 51(1) of the Charter.[38]

By contrast, in *Julian Hernandez*,[39] the Court took the view that 'a provision of national law ... which merely grants employees more favourable protection resulting from the exercise of the exclusive competence of the member states ... cannot be regarded as coming within the scope of [EU law]'.[40] If an employer becomes insolvent, Article 3 of Directive 2008/94[41] mandates the member states to set up a body which is responsible to guarantee, during a period of at least three months of remuneration, the payment of the 'employees' outstanding claims resulting from contracts of employment or employment relationships'. The request for a preliminary ruling referred to the Court concerned a measure whereby the Spanish authorities extended the temporal scope of that provision in accordance with the minimum harmonisation clause laid down in Article 11 of that Directive. More specifically, the contested national legislation guaranteed the payment by the Spanish state of outstanding remuneration after the minimum period of at least three months enshrined in the Directive. This provision was adopted with a view to compensate employers for the loss incurred as a result of undue delays – or 'irregularities'– in the administration of justice.[42]

In its judgment, the Court considered that Article 11 of Directive 2008/94 merely 'recognises the power which the member states enjoy under national law to provide for such more favourable provisions outside the framework of the regime established by the Directive'.[43] The Court then inferred from the foregoing that, in the exercise of the power to adopt more favourable provisions, national authorities were acting outside the confines of EU law. As a result, they were not bound to comply with EU fundamental rights in the enactment of such provisions.

In the light of the somewhat contrasting approaches adopted by several chambers of the Court, it remained quite unclear as to whether national 'opt-ups' adopted on the basis of a minimum harmonisation clause fell within the scope of EU law. In its judgment in *TSN*, the Grand Chamber of the Court seized

[37]*Alemo-Herron and Others*, *supra* n. 33, para. 34.

[38]Bartl and Leone (2017), *supra* n. 34, p. 116-120.

[39]ECJ 10 July 2014, Case C-19813, *Julian Hernandez e.a.*

[40]Ibid., para. 45.

[41]Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version).

[42]*Julian Hernandez e.a.*, *supra* n. 39, paras. 38-43.

[43]Ibid., para. 44.

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the opportunity to clarify the relationship between minimum harmonisation and the scope of EU law. According to the Court, the adoption of more protective paid leave guarantees on the basis of the minimum harmonisation clauses incorporated in Article 153(4) TFEU and Article 15 of Directive 2003/88 did not come within the scope of EU law. As a result, it is not subject to Charter rights and, specifically, Article 31(2) of the Charter.

The Court's assessment of the requirement of specificity: towards a new approach to the relationship between the national and EU fundamental rights' standards?

The Court's understanding of the scope of the Charter revolved around an intricate assessment of the specific features of the competences conferred upon the EU in the employment-related social policy field. In particular, the Court focused on the regulatory context of Directive 2003/88 in order to ascertain whether a sufficiently specific link existed between that Directive and national paid leave rules that go beyond the minimum level of protection established by that Directive. As the Court pointed out, the EU institutions' room for manoeuvre in the field of social policy is constrained constitutionally by sector-specific Treaty provisions set forth in Article 153 TFEU. Accordingly, the Union should strive to 'support and complement the activities of the member states in the field of improvement of the working environment to protect the safety and health of workers'.[44] In any event, it cannot go further than to adopt, 'by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States'.[45] At the same time, the Court stressed that the member states remain free to adopt more protective rules in that field on the basis of the minimum harmonisation clauses enshrined in Article 153(4) TFEU and Article 15 of the Working Time Directive.

Considering the degree of discretion that they retain on the basis of the minimum harmonisation clauses featured in those provisions, the Court found that the jurisdictional requirement of specificity was not satisfied. In paragraph 53 of *TSN*, the Court held that 'where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the member states with regard thereto, the national rule enacted by a member state as regards that aspect falls outside the scope of the Charter'.[46] The Court's understanding of the specificity requirement therefore entailed that the

[44]Art. 153(1) TFEU.

[45]Art. 153(2)(b) TFEU. Further details can be found in P. Watson, *EU Social and Employment Law*, 2nd edn. (Oxford University Press 2014) p. 16; S. Van Raepenbusch and D. Hanf, 'Flexibility in Social Policy', in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) p. 65.

[46]*TSN*, *supra* n. 6, para. 53.

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scope of EU law hinges upon the degree of regulatory autonomy retained by the member states when they adopt paid leave rules that exceed the EU minimum of four weeks' paid annual leave.[47] This approach suggests that the distribution of powers between the EU and its member states as regards fundamental rights protection is ultimately determined by reference to the level of discretion attributed to national authorities in the implementation of specific legislative instruments adopted at EU level.[48]

In this perspective, this judgment seems to usher in a new approach towards the relationship between the national and EU systems of fundamental rights protection in regulatory areas where the member states enjoy a wide degree of discretion. In particular, the Court's approach stands in stark contrast to previous case law. In *Åkerberg Fransson*, the jurisdictional threshold of the Charter was interpreted broadly so as to encompass national measures that are only loosely connected to EU law.[49] Although national authorities enjoyed ample discretion in the fight against tax evasion, the Court considered that a national legislation setting out penalties intended to sanction value added tax (VAT) offences fell within the scope of EU law. In support of this conclusion, the Court stressed that the enforcement of tax penalties was necessary to ensure the effectiveness of the system of collection of VAT set up at Union level.[50] With this judgment, the Court made clear that, in the exercise of discretion inherent in the implementation of EU law, national authorities are bound to comply with the EU fundamental rights featured in the Charter.

The Court also confirmed that, when member state action falls within the scope of EU law, both the national and EU standards of fundamental rights protection may overlap.[51] The crux of the matter, then, pertains to the interaction between the national and EU approaches towards specific fundamental rights in areas of parallel application.[52] It follows from *Melloni* and *Taricco II* that the determination of the appropriate standard of review of national action under Article 53 of the Charter ultimately boils down to the level of discretion attributed

[47]F.J. Mena Parras, 'From Strasbourg to Luxembourg? Transposing the Margin of Appreciation Concept into EU Law', Working Paper N°2015/7 p. 16.

[48]B. Pirker, 'Mapping the Scope of Application of Fundamental Rights: A Typology', 3(1) *European Papers - A Journal on Law and Integration* (2018) p. 145; Mena Parras, ibid., p. 16.

[49]As Daniel Thym noted, the 'high level of abstraction of common rules for VAT' implies that the 'member states retain (very) wide discretion how to fight tax evasion within the framework of national procedural autonomy': D. Thym, 'Separation versus Fusion - or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice', 9 *EuConst* (2013) p. 394-395.

[50]*Åkerberg Fransson*, *supra* n. 2, paras. 24-28.

[51]Ibid., para. 29.

[52]Sarmiento, *supra* n. 3, p. 1302.

to the member states.[53] This means that, in situations involving a certain degree of discretion in the implementation of EU law, the Charter acts as a 'minimum standard' or 'safety net'.[54] The member states are thus allowed to make use of that discretion in order to increase the level of protection enshrined in the Charter.[55] In other words, national authorities may opt for a higher standard of fundamental rights protection only to the extent that the subject-matter has not been fully regulated at EU level.[56]

By contrast, the Court's approach in *TSN* suggests that the jurisdictional reach of the Charter hinges upon the degree of regulatory autonomy retained by the member states when they adopt national 'opt-ups' in the field of social law. This means that the relationship between the national and EU standards of fundamental rights protection is structured along the lines of the distribution of powers between the EU and its member states in that policy area. In relation to national implementing measures, a distinction is struck between the matters that are determined at EU level, which may be subject to Charter rights, and the matters left to the discretion of the member states, which may be subject to national fundamental rights.

By drawing a clear-cut division of competences as regards fundamental rights protection, the Court steered the debate from issues of rights (i.e. what is the appropriate level of fundamental rights protection?) towards issues of competence – who has the power to define the content of rights? In doing so, the Court failed to define the core normative content of the right to paid annual leave enshrined in Article 31(2) of the Charter. In particular, it remains unclear whether the principle of four weeks' paid annual leave set out by Article 7(1) of the Working Time Directive can be considered as the specific expression of Article 31(2) of the Charter.

[53]ECJ 26 February 2013, Case C-399/11, *Melloni*, para. 60; ECJ 5 December 2017, Case C-42/17, *M.A.S. and M.B.*, paras. 44-45. V. Franssen, 'Melloni as a Wake-up Call - Setting Limits to Higher National Standards of Fundamental Rights' Protection', *European Law Blog*, 10 March 2014, ⟨europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/⟩, visited 20 October 2020; D. Sarmiento, 'To Bow at the Rhythm of an Italian Tune', *Despite our Differences Blog*, 5 December 2017, ⟨despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/⟩, visited 20 October 2020; S. Perez Fernandes, 'Fundamental Rights at the Crossroads of EU Constitutionalism. Decoding the Member States' Key(s) to the Charter', 60 *Revista de Derecho Comunitario Europeo* (2018) p. 691.

[54]Spaventa, *supra* n. 32, p. 1021.

[55]L.F.M. Besselink, 'The Parameters of Constitutional Conflict after Melloni', 10 *European Current Law* (2014) p. 1183; Sarmiento, *supra* n. 3, p. 1295.

[56]Torres Pérez, *supra* n. 3, p. 1089; Perez Fernandes, *supra* n. 53, p. 681-686; Thym, *supra* n. 49, p. 408.

Judicial deference towards national regulatory autonomy in the field of social policy

In the previous section, I have described the Court's analysis of the regulatory context in which the member states operate when they adopt national measures on paid leave. That assessment enables the Court to determine the degree of regulatory autonomy left to the member states in the field of social policy and, especially, the protection of the workers' health and safety. In this respect, the Court's emphasis on the distribution of powers between the EU and its member states in that policy area seems to justify its cautious approach towards the application of Charter rights in relation to more protective national paid leave rules.

The member states enjoy considerable discretion to adopt national 'opt-ups' on the basis of the minimum harmonisation clauses featured in Article 153(4) TFEU and Article 15 of the Working Time Directive. In that context, the extension of the scope of Charter review to more protective paid leave guarantees would not only unsettle the division of competences between the EU and its member states but also, potentially, affect the level of regulatory autonomy available to the member states.[57] The member states' room for manoeuvre may indeed be inhibited to a considerable extent if they are bound to comply with Charter rights and, especially, the right to paid annual leave featured in Article 31(2) of the Charter when they adopt national 'opt-ups'.[58] This may, in turn, have a chilling effect on the willingness of states to make use of their power to pass more favourable measures in the field of workers' protection.[59]

This is all the more problematic in the light of the limited regulatory powers available to the EU in relation to social policy and, more specifically, the adoption of measures designed to protect the workers' health and safety. A regulatory vacuum might indeed arise as a result of the application of Charter rights in relation to national measures adopted in a policy field where the Union has no or only limited regulatory powers.[60] This problem is further compounded by the fact that, as recent attempts to reform the protective rules adopted in that field demonstrate, the EU institutions are unable to reach a political compromise on the adoption of legislative measures on social matters.[61]

[57]Bartl and Leone (2015), *supra* n. 34, p. 146 ff.

[58]Spaventa, *supra* n. 32, p. 1018; Bartl and Leone (2015), *supra* n. 34, p. 149.

[59]D. Sarmiento, 'Charter Applicability under More Favourable Provisions of National Law. The *TSN* Judgment and the Future of Article 51.1 of the Charter', *EU Law Live Blog*, 20 November 2019, ⟨eulawlive.com/blog/2019/11/20/charter-applicability-under-more-favourable-provisions-of-national-law-the-tsn-judgment-and-the-future-of-article-51-1-of-the-charter/⟩, accessed 20 October 2020.

[60]Spaventa, *supra* n. 32, p. 1008. *See also* Weatherill, *supra* n. 25, p. 204 ff.

[61]C. Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future', 67 *Current Legal Problems* (2014) p. 213-215.

Against that background, one of the most striking features of *TSN* is that it embodies a particularly narrow conception of the jurisdictional requirement of specificity. In the light of the degree of discretion afforded to the member states, the Court adopts a cautious approach towards negative integration, by means of judicial interpretation, of domestic standards of workers' protection. The Court's cautious assessment of the scope of the Charter in relation to national 'opt-ups' adopted in the field of social law seems to reflect a trend towards 'retroceding space for domestic social spheres'.[62] This trend is illustrated by recent case law on the entitlement to social benefits of economically inactive Union citizens in the context of the free movement of persons in the EU.[63]

In *Dano*,[64] the question was raised as to the compatibility with the rights enshrined in the Charter of a refusal to grant a jobseeker allowance to an EU citizen. This case concerned the refusal to grant Ms Dano, an unemployed Romanian residing in Germany with her son Florin, 'special non-contributory cash benefits' as defined by Article 70 of Regulation 883/2004. Ms Dano could not rely on the principle of equality of treatment laid down in Article 24 of Directive 2004/38 insofar as she did not meet the residence requirements of that Directive.[65] In particular, she did not have sufficient resources for herself and her son not to become a burden on the social assistance system of Germany. Therefore, she invoked Regulation 883/2004 in order to be granted a jobseeker allowance, to no avail.

In that context, the Grand Chamber of the Court was requested to determine whether the refusal to grant 'special non-contributory cash benefits' was Charter-compliant. It concluded that the Charter did not apply in relation to this refusal insofar as Article 70(4) of that Regulation made clear that the 'special non-contributory cash benefits' defined therein should be provided in the host member state 'in accordance with its legislation'. In other words, 'Article 70 of Regulation

[62]E. Muir, 'Drawing Positive Lessons From the Presence of "the Social" Outside of EU Social Policy Stricto Sensu', 14 *EuConst* (2018) p. 86.

[63]*See also* ECJ 19 September 2013, Case C-140/12, *Brey*; ECJ 15 September 2015, Case C-67/14, *Alimanovic*.

[64]ECJ 11 November 2014, Case C-333/13, *Dano*.

[65]It is notable that the Court did not elaborate on the relationship between the Treaty principle of non-discrimination laid down in Arts. 18 and 21 TFEU and the legislative provisions adopted to give effect to this principle. According to the Court, the right of non-discrimination on the grounds of nationality is given 'specific expression' in Art. 24 of Directive 2004/38 and Art. 4 of Regulation 2004/883, which seems to imply that its interpretation of these provisions is in line with the Treaty prohibition of discrimination (paras. 59-61). *See* H. Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano* ?', 52 *CML Rev* (2015) p. 381-383; N. Nic Shuibhne, 'What I Tell You Three Times is True: Lawful Residence and Equal Treatment after Dano', 23(6) *Maastricht Journal of European and Comparative Law* (2016) p. 926.

No 883/2004, which defines the term "special non-contributory cash benefits", is not intended to lay down the conditions creating the right to those benefits'.[66] In the absence of harmonisation as regards the conditions creating that right under EU law, it is for the host member state itself to lay down the conditions for granting those benefits and to 'define the extent of the social coverage provided for that type of benefit'.[67] The exercise of these regulatory powers was regarded as falling outside the notion of implementation of EU law within the meaning of Article 51(1) of the Charter.

It appears from the reasoning set forth by the Court that the finding of non-applicability of the Charter is justified by the fact that Regulation 883/2004 does not seek to harmonise the member states' social security systems. In particular, this Regulation leaves it open to them to 'determine the rights and duties associated with social security insurance as well as the conditions for benefit entitlement'.[68] By contrast, the judgment handed down by the Court in *TSN* concerns an area where the Union legislator has actually reached a legislative compromise on the definition of a minimum standard of harmonisation with respect to paid annual leave guarantees.

In spite of these differences, the Court's approach should be read along the lines of growing judicial deference towards the exercise of the regulatory autonomy retained by the member states in the field of social policy.[69] By insulating national regulatory settlements in that field from the intrusive reach of EU law, the Court goes a long way towards preserving the member states' room for manoeuvre on social matters. It is arguable that, in so doing, the Court aims to avoid the creation of a regulatory vacuum resulting from the discrepancy between, on the one hand, the application of EU law in relation to domestic measures[70] and, on the other hand, the limited regulatory powers vested in the EU in the social policy field.[71]

[66]Dano, *supra* n. 64, para. 89.

[67]Ibid., para. 90.

[68]Verschueren, *supra* n. 65, p. 387.

[69]S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union', 13(1) *EuConst* (2017) p. 41-43.

[70]Sacha Garben observes, in that regard, that 'the internal market case law of the Court of the past decade [has] been considered responsible for the "social displacement" in the EU'. *See* S. Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance', 21 *Cambridge Yearbook of European Legal Studies* (2019) p. 124; S. Giubonni, 'Freedom to Conduct a Business and EU Labour Law', 14(1) *EuConst* (2018) p. 178.

[71]Garben, *supra* n. 69, p. 37; Spaventa, *supra* n. 32, p. 1105-1006. *See also* F.W. Scharpf, 'The Asymmetry of European Integration, or Why the EU cannot be a "Social Market Economy"', 8 *Socio-Economic Review* (2010) p. 211.

Implications beyond the field of social law: the thorny relationship between minimum harmonisation and other types of national discretion

From the foregoing it may be inferred that the Court's cautious approach towards the jurisdictional reach of the Charter should be confined to the peculiarities of the social policy field. However, its approach is likely to have implications beyond that policy area. As the judgment in *TSN* demonstrates, the Court's understanding of the requirement of specificity hinges upon the level of regulatory autonomy retained by the member states in the relevant area. This means that the scope of EU law ultimately depends on the assessment carried out by the Court for the purpose of defining the regulatory context within which the member states operate when they implement specific legislative instruments adopted at EU level. In this respect, the Court's interpretation of the requirement of specificity may also have implications in relation to other regulatory areas where the member states retain a wide margin of discretion.

The Court's approach may first of all warrant the exclusion of the applicability of the Charter as regards national 'opt-ups' maintained or introduced pursuant to other minimum harmonisation clauses adopted at EU level. One may indeed find constitutional – i.e. Treaty-based[72] – minimum harmonisation clauses in relation to other sensitive policy fields such as criminal law,[73] environmental protection[74] and consumer protection.[75] The model of legislative minimum harmonisation is also often included in internal market measures based upon functional Treaty provisions such as Article 114 TFEU that affect, even incidentally, welfare-orientated policies of high political salience such as the protection of the interests of consumers[76] and public health.[77] Although the conclusion reached by the Court pertains to a constitutional minimum harmonisation clause, it also seems justified in relation to other minimum harmonisation legislations given that they

[72]On the distinction between constitutional and legislative minimum harmonisation, *see* M. Klamert, 'What We Talk About When We Talk About Harmonisation', 17 *Cambridge Yearbook of European Legal Studies* (2015) p. 373-375; R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) p. 265 ff.

[73]Art. 82(2) TFEU.

[74]Art. 193 TFEU.

[75]Art. 169(4) TFEU.

[76]*See* e.g. Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules. *See also* P. Rott, 'Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law', 40 *CML Rev* (2003) p. 1107.

[77]S. Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market', in N. Nic Shuibhne and L.W. Gormley (eds.), *From Single Market to Economic Union - Essays in Memory of John A Usher* (Oxford University Press 2012) p. 182-183; Boeger, *supra* n. 34, p. 66-67.

do not impose any specific obligation on national authorities with respect to the adoption of national 'opt-ups'.[78]

In the absence of a clear-cut legal standard to distinguish between minimum harmonisation and other types of national discretion, it is also unclear how to reconcile the requirement of specificity with several legislative techniques by which the EU leaves a wide margin of discretion to the member states in the implementation of EU law.[79] The Court itself is eager to differentiate between a situation involving discretion in the implementation of EU law and the enactment of national paid leave rules going beyond the EU minimum of four weeks' paid annual leave. According to the Court, the adoption of national 'opt-ups' differs 'from the situation in which an act of the Union gives the member states the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act, and from the situation in which such an act authorises the adoption, by the member states, of specific measures intended to contribute to the achievement of the objective of that act'.[80]

It remains to be seen, however, how the distinction struck by the Court might work out in practice.[81] From the outset, this distinction may be warranted in the light of the varying degrees of regulatory autonomy afforded to national authorities by either legislative mechanisms. In the exercise of national implementing discretion bestowed upon national authorities through legislative devices such as optional or remedial rules,[82] each member state is bound to ensure the

[78]This conclusion applies without prejudice to the application of Charter rights in accordance with the *ERT* doctrine. The internal market dimension of EU legislations adopted on the basis of Art. 114 TFEU is indeed more likely to give rise to an independent breach of the Treaty freedoms and, hence, trigger the rights featured in the Charter on the basis of that doctrine. Further details on that issue can be found in Spaventa, *supra* n. 32, p. 1018-1019; Boeger, *supra* n. 34, p. 69 ff.

[79]M. Dougan, *National Remedies before the Court of Justice – Issues of Harmonisation and Differentiation*, (Hart Publishing 2004) p. 131; Torres Pérez, *supra* n. 3, p. 1082-1084.

[80]*TSN*, *supra* n. 6, para. 50.

[81]F. Fontanelli, 'Implementation of EU law through Domestic Measures after Fransson: the Court of Justice Buys Time and 'Non-preclusion' Troubles Loom Large', 39(5) *E.L. Review* (2014) p. 692-693.

[82]On the different types of national discretion that may result from the adoption of EU secondary legislations, *see* T. van den Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation', in Garben and Govaere, *supra* n. 25, p. 251; T. van den Brink, 'Towards an Ever Clearer Division of Authority between the European Union and the Member States', in T. van den Brink et al. (eds.), *Sovereignty in the Shared Legal Order of the EU. Core Values of Regulation and Enforcement* (Intersentia 2015) p. 217; T. van den Brink, 'The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU-Member States Relations', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 211.

attainment of the concrete and specific regulatory objectives defined at EU level.[83] By contrast, minimum harmonisation clauses leave them free to make use of the option to set higher national standards. In other words, the member states are under no obligation 'to act at all, nor to act in a specific way'.[84]

Nevertheless, that does not mean that national authorities enjoy an unfettered freedom in the enactment of more favourable or protective national standards. On the contrary, the exercise of such power is limited by a negative obligation not to 'infringe on the EU minimum level of protection or violate the Treaty',[85] as specified in Article 153(4) TFEU.[86] At the same time, other types of national discretion may also leave considerable leeway to the member states in the implementation of EU secondary legislations. As a result, there may sometimes be a very thin line between minimum harmonisation and other types of national implementing discretion. As a recent order handed down by the Court demonstrates,[87] the regulatory autonomy afforded to national authorities by either legislative devices may be such that it seriously complicates the task of identifying the requisite specific obligation addressed to national authorities in order to conclude that EU law applies.[88] This is hardly surprising given that, as *TSN* demonstrates, the Court's interpretation of the scope of EU law ultimately depends on its assessment of the regulatory context within which the member states operate when they implement specific EU legislative instruments.

Conclusion

In its judgment in the *TSN* case, the Grand Chamber of the Court brought about some much-needed clarity in the debate on the relationship between minimum harmonisation and the jurisdictional reach of the Charter. One of the most significant features of *TSN* undoubtedly lies in the Court's treatment of the requirement of specificity. According to the Court, the enactment of national measures going beyond the EU minimum of four weeks' paid annual leave does not come

[83]As specified in Art. 288 TFEU. *See also* Van den Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation', ibid., p. 259.

[84]Bartl and Leone (2015), *supra* n. 34, p. 148-149.

[85]Ibid.

[86]*See also* Art. 169(4) (consumer protection) and Art. 193 TFEU (environment).

[87]In Case C-467/19PPU, the Court decided that the discretionary powers bestowed on the member states by an optional clause contained in a minimum harmonisation directive adopted in the field of criminal procedure (Directive 2016/343) were not subject to the Charter's fundamental rights in the absence of a specific obligation imposed upon them in that regard. *See* ECJ 24 September 2019, Case C-467/19 PPU, *Spetsializirana prokuratura (Présomption d'innocence)*, paras. 34-42.

[88]Dougan, *supra* n. 3, p. 1219.

within the scope of EU law. In this respect, the Court's approach suggests a clear-cut division of powers between the Union and its member states in relation to fundamental rights protection based on the extent of discretion retained by the member states when they adopt more generous guarantees on paid leave.

The judicial assertion of distinct standards of fundamental rights illustrates the complexity inherent in the creation of a system of fundamental rights protection within the multi-layered constitutional system of the Union. This development is likely to entail far-reaching implications as regards the distribution of powers in other regulatory areas where the member states retain considerable discretion. From the commentary it can be inferred, however, that one should err on the side of caution when dealing with the implications of that judgment in relation to other regulatory areas. In practice, the Court's interpretation of the scope of the Charter will ultimately depend on its assessment of the regulatory context within which the member states operate and, especially, the level of regulatory autonomy that they enjoy in the relevant policy field. In this respect, the requirement of specificity may ultimately help frame the EU system of fundamental rights protection in a way that 'respect[s] the connection between political responsibility and legal responsibility under the rule of law'.[89] It is doubtful, however, that this approach will contribute to foster the predictability of the distribution of powers between the EU and its member states since the inclusion of national discretion in EU legislation is a concrete and specific legislative decision that may be affected by the imprecise wording of secondary legislative provisions.[90]

[89]J. Masing, 'Unity and Diversity of European Fundamental Rights Protection', 41(4) *E.L. Review* (2016) p. 508.

[90]Van den Brink (2017), *supra* n. 83, p. 263.

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