

Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared

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1. Introduction

Both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) play an important role in the protection of fundamental rights in Europe. However, whereas the ECtHR has always been a heavyweight in the protection of fundamental (human) rights, the CJEU has traditionally played a more modest role in this protection. Recently, however, this court has been developing into a more important guardian of fundamental rights.¹ One of the reasons for this is the coming into force of the EU's own fundamental rights document: the Charter of Fundamental Rights of the European Union (the Charter), which became binding for EU Member States in 2009.² Although the CJEU is increasingly dealing with fundamental rights cases, and appeals and referrals to the Charter are piling up,³ there is still unclarity concerning the application of the Charter.⁴ Its doctrines and concepts are not as clearly defined as comparable concepts in the European Convention on Human Rights (ECHR). This is the case, for example, if one considers the topic of *the personal scope* of the fundamental rights in the Charter. The issue of the personal scope concerns the question of who can claim the protection of the fundamental rights.⁵ It is generally accepted

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1 J. Gerards, 'Who Decides on Fundamental Rights Issues in Europe? Towards a mechanism to Coordinate the Roles of the National Courts, the ECJ and the ECtHR', in S. Weatherill and S. de Vries (eds.), *Five years legally binding EU Charter of Fundamental Rights – What is the state of play in the protection of fundamental rights in the EU?* (2015); S. Weatherill, 'From Economic Rights to Fundamental Rights', in S. de Vries et al. (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (2013); S. De Vries, 'The protection of fundamental rights within Europe's Internal Market after Lisbon – an endeavour for more harmony', in S. De Vries & U. Bernitz (eds.), *Protection of Fundamental Rights in the EU after Lisbon* (2013); J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 *European Law Journal*, no. 1.

2 Gerards, supra note 1, p. 49.

3 Ibid.

4 L. Bojarski et al., *The Charter of Fundamental Rights as a Living Instrument* (2014), p. 5.

5 D. Curtin & R. van Ooik, 'The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter of Fundamental Rights', (2001) 8 *Maastricht Journal of European and Comparative Law*, no. 1, p. 103; S. Greer et al., *Human rights in the Council of Europe and the European Union* (2018), pp. 312-313.

that *individuals or natural persons*⁶ can claim these rights, but it is more controversial whether *private legal entities*⁷ and *public authorities*⁸ can also claim the protection of such rights.⁹ Proponents of excluding these latter entities from claims to fundamental rights have contended that the protection of fundamental rights for private legal entities and public authorities can result in ‘the inflation of fundamental rights’.¹⁰ This encompasses the stance that the protection of fundamental rights should remain reserved for cases where substantial interests are at stake. Only then can the high level of protection of fundamental rights compared to other rights be justified. Substantial interests are for example the dignity, freedom or autonomy of human beings. It is argued that when public authorities or private legal entities make appeals, these interests are not always at stake; therefore they should be excluded from fundamental rights protection.¹¹

The texts of the Charter provisions, which are usually directed at the indistinct ‘everyone’, do not provide clarity on the question of whether, and if so under what circumstances, private legal entities and public authorities can invoke the Charter. In case law on the topic, the CJEU delivers ambiguous answers. This unclarity relates mostly to the possibility for public authorities and semi-public authorities to invoke Charter protection,¹² but there is also a lack of clarity regarding private legal entities.¹³ Thus far, the CJEU has been able to avoid providing an extensive viewpoint on the personal scope of the Charter.¹⁴ However, since appeals and referrals to the Charter are increasing every year, it is expected that it will only be a matter of time before the CJEU is confronted with specific cases where parties ask for explicit answers, especially with regard to the possibility for public authorities to make appeals to the provisions of the Charter.¹⁵ When this happens, it would be helpful if the CJEU is familiar with its surrounding landscape and is able to account for it.

Firstly, this landscape encompasses the application of ECHR rights by another major fundamental rights player in Europe: the ECtHR. Since Article 52(3) of the Charter determines that articles in the Charter that correspond to articles in the ECHR should have the same meaning and scope as the corresponding articles, the CJEU has to account for the application of ECHR provisions by the ECtHR.¹⁶ Following on from this, the landscape is formed by the application of fundamental rights by the national courts of Member States. Not only do national courts have long traditions in applying their own constitutional fundamental rights, they are also important fundamental rights players when they apply the ECHR and the Charter in national cases.¹⁷ The CJEU should take account of these national applications of fundamental rights, since Article 52(4) of the Charter demands that Charter rights shall be interpreted in harmony with the constitutional traditions

6 Where ‘natural persons’ are mentioned, ‘biological human beings’ are intended. Ohlin identifies this as ‘the naturalistic conception of the person’ (J.D. Ohlin, ‘Is the Concept of the Person Necessary for Human Rights?’, (2005) 105 *Columbia Law Review*, pp. 233-234).

7 In this paper the term ‘private legal entity’ is reserved for companies, businesses, corporations or associations that are not under the responsibility of public authorities and that have legal personality. For the criteria that the ECtHR and the CJEU follow to make clear whether a legal entity is under the responsibility of a governmental body see Sections 3.2.2. and 4.2.2. of this article.

8 The term ‘public authority’ shall be used to describe entities that exercise governmental powers. See also *Radio France et al. v France* Application No. 53984/00, 23 September 2003 and Section 4.2.2. of this article.

9 See e.g. M. Emberland, *The Human Rights of Companies, Exploring the Structure of ECHR Protection* (2006) on the question whether companies can use the ECHR to protect themselves against the state. See A.G. Maris, *Grondrechten tegen, jegens en voor de overheid*, (2008) on the question of whether public authorities should be able to invoke rights of the ECHR.

10 M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

11 *Ibid.* See also J. Gerards, *Grondrechten onder spanning. Bescherming van fundamentele rechten in een complexe samenleving* (Inaugural lecture, Utrecht) (2017), p. 9.

12 See e.g. the discussion of the *Bank Mellat* cases and the *Spain v Council and Commission* case (T-496/10, *Bank Mellat I*, 29 January 2013, ECLI:EU:T:2013:39; Case-176/13P, *Bank Mellat II*, 18 February 2016, ECLI:EU:C:2016:96; Case-521/15, *Spain v Council and Commission*, 20 December 2017, ECLI:EU:2017:982) in Section 3.2.2. In these cases the question at stake was whether Member States or emanations of Member States could make appeals to the Charter. The CJEU has refrained from giving an explicit answer to this question.

13 In the *WebMindLicenses* case for example (Case-419/14, *WebMindLicenses*, 17 December 2015, ECLI:EU:C:2015:832), the CJEU excluded Art. 8 of the Charter (the right to the protection of personal data) from applicability to private legal entities, but did not give reasons for this. See Section 3.2.1.

14 The most illustrative example of a case in which the CJEU intentionally avoided providing clarity about the personal scope of the Charter is the aforementioned case *Spain v Council and Commission*, *supra* note 12.

15 The number of preliminary requests in which national courts made referrals to the Charter rose from 19 in 2010 to 60 in 2016. See Commission Staff Working Document – Accompanying document to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2016 report on the application of the EU Charter of Fundamental Rights, COM (2017) 162 final, p. 26.

16 In the Explanations relating to Art. 52(3) of the Charter it is mentioned that the meaning and scope of the rights in the Charter are not only determined by the text of the ECHR, but also by the case law of the ECtHR and the CJEU on the ECHR provisions.

17 Gerards, *supra* note 1, pp. 52-53.

of Member States. Furthermore, the landscape is determined by the different background and objectives of the ECHR and the EU legal systems. The question of to what extent the CJEU could, or should, draw lessons from the personal scope application of the ECHR, or is able to choose its own approach, is highly dependent on the objectives of the ECHR and the EU systems. If these objectives differ, a different personal scope application of the Charter and the ECHR might be adequate. If, however, these objectives are largely the same, it seems more valid to copy the personal scope application of the ECHR. For the purpose of this article, it is therefore important to provide an account of the background and objectives of the ECHR and the EU legal systems. Finally, the landscape is determined by the current state of affairs concerning the personal scope of the Charter. Although there is unclarity, the CJEU has applied the Charter to different entities in the past. When further developing its doctrine of personal scope, the CJEU should at least take its earlier application into account.

Since some aspects of the *umwelt* as outlined above have been underexposed in the literature¹⁸ and in the past the CJEU has not always taken sufficient account of its legal surroundings,¹⁹ this article aims to give a more detailed examination of the landscape the CJEU has to consider when dealing with the personal scope of the Charter in the future. This will provide the CJEU with tools to deliver well-informed rulings on the personal scope of Charter provisions. These tools will encompass answers to the question of how the Charter and the ECtHR are applied by the three main players on the European fundamental rights stage (the CJEU, the ECtHR and the national courts). They also encompass answers to the question how these applications relate to the different backgrounds and objectives of the ECHR and the EU legal systems.

To underpin these conclusions, first, a sketch of the background and objectives of the EU and ECHR legal systems will be given in Section 2. Assumptions will be made about the personal scope applications that would appear to be in line with these objectives. Then, in Section 3, the current state of affairs concerning the personal scope application of the Charter as interpreted by the CJEU will be reviewed. After this, in Section 4, an analysis will be presented of the personal scope of the ECHR as interpreted by the ECtHR. In Section 5, the results of these analyses are compared and discussed in the light of the objectives of the ECHR and EU systems. Finally, in Section 6, the personal scope application of the ECHR and the Charter by national courts will be examined. It will be investigated whether the national courts diverge from the personal scope application of the Charter and the ECHR by the CJEU and the ECtHR respectively. It will also be examined whether, and how, the national application of the ECHR and the Charter is in line with the personal scope of the national constitutions of these Member States. The Member States investigated are the Netherlands, Portugal, Spain and Poland. These Member States reflect the diversity of political and legal systems in continental Europe. The Netherlands was one of the founder Member States of the EU (then the European Coal and Steel Community) and already had a strong democratic tradition before it joined the European Community in 1958. It ratified the ECHR in its early years (1954) and as a Member State of the EU it could exercise influence on the drafting of the Charter (which came about in 2000).²⁰ Poland, on the other hand, is a relatively young democracy where the democratisation process only started when the authoritative regime of the Soviet Union came to an end in 1989. It became a member of the EU in 2004 and could therefore not affect the drafting process of the Charter. It ratified the ECHR in 1993, more than 40 years after the Netherlands. In this spectrum, Portugal and Spain are located somewhere in the middle. In both countries, democratic transformation started in the 1970s after authoritative regimes had

18 In the few contributions that dealt with the topic of the personal scope of fundamental rights, this topic was often only briefly touched upon or attention was mainly focused on the possibility for private legal entities to invoke the rights of the ECHR. See concerning the former e.g. Curtin & van Ooik, supra note 5; Greer et al., supra note 5; Gerards, supra note 11; M. Bulterman, 'Ontwikkelingen in de Luxemburgse rechtspraak' in J. Gerards et al. (eds.), *Vijf jaar bindend EU-Grondrechtenhandvest* (2015), pp. 63-65 and commentaries of J. Gerards for T-496/10, *Bank Mellat I*, 29 January 2013, ECLI:EU:T:2013:39, EHRC 2013/250 and Case-176/13P, *Bank Mellat II*, 18 February 2016, ECLI:EU:C:2016:96, EHRC, 2016/66. See concerning the latter amongst others Emberland, supra note 9 and W.H.A.M. van den Muijsenbergh & S. Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal*.

19 For example, between 1992 and 2002 the CJEU was out of step with the ECtHR when it held that the right to privacy in the ECHR (Art. 8 of the ECHR) was not applicable to private legal entities. The ECtHR did not agree with this, as follows from its ruling in the *Niemietz* case (*Niemietz v Germany*, Application No. 13710/88, 16 December 1992). In its *Roquette Frères* ruling the CJEU finally brought its interpretation in line with that of the ECtHR (Case-94/00, *Roquette Frères*, 22 October 2002, ECLI:EU:C:2002:603).

20 Charter of Fundamental Rights of the European Union (2000/C, 364/01).

been deposited. Both countries joined the EU in 1986 and could therefore influence the drafting process of the Charter. Perhaps these different political and legal backgrounds have led to a different personal scope application of fundamental rights (from the Charter, ECHR and national constitutions).²¹

The method used for the examination of the personal scope application of the Charter and the ECHR by the CJEU and the ECtHR respectively is the classic legal method of literature study, case law review and the study of legislation. It will first be explored whether the texts of the Charter and the ECHR itself provide guidelines on the personal scope application of these documents (amongst others attention will be paid to Article 34 of the ECHR). As it will appear that for both the Charter and the ECHR this is hardly the case, the application of the Charter and the ECHR by the CJEU and the ECtHR in case law is dealt with. The case law that is presented is systematically collected according to a general search in authoritative literature on the personal scope of ECHR and Charter provisions. With regard to the review of the national application of Charter rights, ECHR rights and constitutional rights, a different method is used. This method is set out in Section 6.1.

Before presenting the results of the analyses made, it is important to note that the application of the various fundamental rights instruments to *natural persons (individuals)* will not be examined in this article. This is because there is widespread consensus on the fact that natural persons can claim the protection of fundamental rights.²² Attention will be focused on the invocation of fundamental rights by *private legal entities and public authorities*.

2. Background and objectives of the ECHR and EU legal systems

The ECtHR and CJEU have different historical backgrounds and objectives.²³ The ECHR came about in response to the Second World War. One of its main aims was to prevent Europe from the enormous human rights violations that had occurred during the war.²⁴ The ECtHR's main objective therefore is the protection of individual fundamental rights that are important to human beings against the abuse of power by public authorities.²⁵ In this way, the values that are important for the self-realisation of the individual – i.e. autonomy, human dignity, equality, democracy and liberty – can be secured.²⁶ By contrast, the EU was originally mainly conceived as an economic order in which economic objectives and an internal market perspective formed the backbone.²⁷ Its traditional purpose (and thus that of the CJEU) is to ensure the primacy, unity and effectiveness of EU law in order to establish and promote economic integration in Europe.²⁸ Over the past two decades, especially with the Lisbon Treaty coming into force, the protection of

21 See for an overview of the years when the Member States of the EU entered the EU: https://europa.eu/european-union/about-eu/countries_nl#tab-0-1 (last visited 16 July 2018). See for an overview of the dates of ratification of the ECHR (ETS No. 005): https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures?p_auth=4TLW4c8C (last visited 16 July 2018). There is also a practical reason to focus on these Member States. These states have cooperated in the research project 'The Charter of Fundamental Rights in action', see *supra* note*. In this project, extensive data on the application of the Charter and the ECHR in these Member States has been collected and analysed. These data and analyses are useful for information on the application of fundamental rights on the national level (see Section 6).

22 See Gerards, *supra* note 11, p. 9. There can, however, be discussion on the applicability of fundamental rights to certain groups of natural persons that have a special relationship with the government, such as prisoners, politicians, civil servants and children, See e.g. C.A.J.M. Kortmann, *Constitutioneel recht* (2016), p. 374. Due to the limited scope of this article, the matter shall not be dealt with but it is an interesting topic for a follow-up study.

23 See Gerards, *supra* note 1, pp. 57-59. Gerards calls for the different *raison d'etres* of the CJEU and ECtHR.

24 Council of Europe, *The Conscience of Europe. 50 Years of the European Court of Human Rights* (2010), pp. 16-18; P. Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (2018), pp. 2-3. This aim also appears from the references in the preamble of the ECHR to the Universal Declaration of Human Rights (UDHR). In one of the first drafts of the UDHR, the Second World War was explicitly named as a reason to declare the UDHR (see Draft International Declaration of Rights (Preamble and Articles 1-6), 6 June 1947, E/CN. 4/AC.1/W.1).

25 See Gerards, *supra* note 1, p. 58; P.H. Teitgen, 'Introduction to the European Convention on Human Rights' in R.St.J. Macdonald et al. (eds.), *The European System for the Protection of Human Rights* (1993), pp. 3-4; *Niemietz v Germany*, Application No. 13710/88, 16 December 1992.

26 Greer, 'Being "realistic" about human rights', (2009) 60 *Northern Ireland Legal Quarterly*, no. 2, pp. 150-151 and p. 156; Ohlin, *supra* note 6; Gerards, *supra* note 11, p. 9.

27 It was the official aim of the European Coal and Steel Community and the European Economic Community (the predecessors of the current European Union) to contribute to economic expansion and a common market (see Art. 2 of the Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951 and Art. 2 of the Treaty of Rome of 15 March 1957, establishing the European Economic Community). See also De Vries, *supra* note 1, p. 87.

28 See Gerards, *supra* note 1, p. 58 and Case-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107, para. 60.

individual fundamental rights and the rule of law have been added to this objective.²⁹ Nonetheless, economic freedoms are still core values for the EU that might trump fundamental rights.³⁰ This is visible, for example, when a conflict arises between an economic freedom and a fundamental right. The CJEU considers whether the protection of the fundamental right can count as a justified restriction of the economic freedom.³¹ It does not consider whether the economic freedom can count as a justified restriction of the fundamental right (as the ECtHR would do).³² This shows that the protection of individual fundamental rights is valued, but that fundamental rights interests always have to be reconciled with economic interests.

It would appear in conformity with the main aims of the EU system that Charter protection is granted not only to protect the interests of individual human beings, but also to protect economic or rule of law interests without a direct link existing to harm done to individuals. The focal point of the EU is namely not only the protection of the interests of individual human beings; the protection of economic and rule of law interests is at least equally important. With regard to the issue of the personal scope, this would make it plausible that *private legal entities* can also invoke the Charter to defend interests which are not related to 'classic' human rights values, such as human dignity or autonomy, but are more commercial or economic in nature. This is at stake for instance when a company invokes the right to a fair trial to fight sanctions that would have a disadvantageous effect on its financial situation. In addition, it would not appear to be contrary to the objectives of the EU system if *public authorities* invoke the Charter for their own economic interests or rule of law interests. The latter is the case, for example, when a public authority is the victim of abuse of power of another public authority and it invokes a fundamental right to challenge this.

This is different for the ECHR system. As the focus of the ECHR and the ECtHR is the protection of the *individual person* against the power of public authorities, it would not appear to be self-evident that private legal entities and public authorities can also claim the protection of ECHR provisions for situations other than those where these entities make an appeal to ECHR rights in order to protect the interests of individuals.³³ It therefore appears not to be in line with the ECHR's objectives if these entities can also invoke ECHR provisions for their own (legal or economic) interests.

In the next sections of this article it shall be investigated whether the abovementioned assumptions correspond to the actual personal scope application that follows from the Charter and the ECHR and the case law thus far in relation to this.

3. Personal scope of the Charter

3.1 Charter: text

The fundamental rights in the Charter are mostly 'universal rights'. This means that these provisions are aimed at 'everyone' (or 'no one' when a prohibition is articulated).³⁴ Nevertheless, some provisions have specific target groups, such as 'EU citizens' or 'third country nationals'.³⁵ Also, three provisions in the Charter explicitly refer to legal persons: Articles 42 (right of access to documents), 43 (right to file a complaint to the European Ombudsman) and 44 of the Charter (right to petition). For these targeted provisions it is clear which entities can invoke them. This is less so for the universal clauses in the Charter. It is not self-evident

29 The protection of the rule of law is visible for example in Art. 3(2) of the Treaty of the European Union (TEU). The will to top up the fundamental rights protection of the EU is visible in Arts. 2 and 6 of the TEU. Art. 6 gives the Charter a binding status (Art. 6 clause 1 of the TEU). It also creates a basis for the Union to accede to the ECHR (Art. 6 clause 2 of the TEU) and states that the fundamental rights emanating from the ECHR and constitutional traditions of the Member States constitute general principles of EU law (Art. 6 clause 3 of the TEU). See also S. Douglas-Scott, 'The European Union and human rights after the Treaty of Lisbon', (2011) 11.4 *Human rights law review*, pp. 645-682. See also Gerards, *supra* note 1 pp. 49-51.

30 See De Vries, *supra* note 1, pp. 88 and 94; Morijn, *supra* note 1, p. 37.

31 See e.g. C-112/00, *Schmidberger*, 12 June 2003, ECLI:EU:C:2003:333.

32 See De Vries, *supra* note 1, p. 88; Morijn, *supra* note 1, p. 37.

33 This is the case for example when a publisher (private legal entity) invokes the freedom of expression in order to protect the freedom of expression of journalists working for the publisher. Or when public prosecutors or Ombudsmen (public authorities) invoke fundamental rights.

34 See for the latter e.g. Art. 4 clause 1 of the Charter.

35 The different target groups in Charter provisions can be illustrated by the different clauses of Art. 15 of the Charter, which protect the freedom to choose an occupation and the right to engage in work. The first clause is directed at everyone. The second clause is directed at citizens of the Union. The third clause is directed at third country nationals.

that ‘everyone’ relates to other entities than natural persons. Do these provisions also refer to private legal entities and public authorities? The text of the Charter provisions does not provide clarification on this matter. There is, however, Article 263 of the Treaty on the Functioning of the EU (TFEU), which defines the entities that can bring an appeal before the CJEU. Member States and legal persons are explicitly mentioned. This can be perceived as a sign that private legal entities (legal persons) and public authorities (Member States) are able to invoke the Charter before the CJEU. This, however, is merely an indication. Article 263 of the TFEU is a procedural provision that only applies before the CJEU. It does not determine which parties can bring appeals to the Charter before other courts (national courts). Moreover, even if in general an entity has legal standing before the CJEU, the CJEU is still allowed to exclude these entities from making appeals to the Charter.³⁶ Accordingly, a clear picture on the personal scope of the Charter cannot be deduced from the text of the Charter or other EU legislation. More information can be deduced from the case law of the CJEU on the application of separate Charter provisions.

3.2 Charter: CJEU application

3.2.1 Private legal entities

In its case law so far, the CJEU has explicitly decided that, with regard to the provisions in the Charter that are directed at ‘everyone’, Articles 7, 16, 17 and 47 of the Charter can be claimed by private legal entities. The CJEU elaborated on the applicability of Article 47 of the Charter (the right to an effective remedy and to a fair trial) in the case of *DEB* in 2012.³⁷ In dispute was the question whether private legal persons could invoke the right to legal aid, as specified in Article 47(3) of the Charter. *DEB* was a German private legal entity that wanted to start legal proceedings against the German state for not transposing EU Directives into national law, but was unable to pay the compulsory court fees. It could also not pay for the assistance of a lawyer, which was demanded in the present procedure. When a request for legal aid was refused by the German *Landesgericht*, *DEB* stated that its right to legal aid had been violated. In its judgment, the CJEU held that, in principle, private legal persons can invoke this right and are able to make requests for dispensation from court fees and lawyers’ fees.³⁸ However, this right is not absolute and may be limited if this serves a public interest, but it will be for the national courts to decide whether a limitation is justified in concrete cases.³⁹

In addition to Article 47 of the Charter, private legal entities can claim the right to respect for private life as codified in Article 7 of the Charter. For a long time, the CJEU refrained from permitting this. In *Hoechst*, in 1989, the CJEU ruled that the right to privacy (which at that time only had a codification in the ECHR, since the Charter was not yet in force) was *not* applicable to activities with a professional and business nature.⁴⁰ It held that ‘[t]he protective scope of that article [8 of the ECHR] is concerned with the development of man’s personal freedom and may not therefore be extended to business premises’.⁴¹ When three years later the ECtHR gave its judgment in the *Niemietz v Germany* case, this resulted in a different approach to the personal scope of fundamental rights between the two European courts.⁴² In the *Niemietz* case the ECtHR ruled that Article 8 of the ECHR could also be applicable to business activities.⁴³ In 2002, the CJEU finally brought its interpretation in line with that of the ECtHR in its *Roquette Frères* ruling.⁴⁴ Article 8 of the ECHR was held to apply to company *Roquette Frères* when the company’s premises were investigated by the European Commission. Since the Charter was not yet a binding instrument, no mention was made of its Article 7. However, now that the Charter has full legal force and Article 7 is held to have the same meaning and scope as Article 8 of the ECHR, it can be asserted that private legal entities will be able to invoke Article 7

36 The CJEU excluded Art. 8 of the Charter (the right to the protection of personal data) from applicability to private legal entities in the *WebMindLicenses* case, see *supra* note 13 and Section 3.2.1.

37 C-619/10, *DEB*, 6 September 2012, ECLI:EU:C:2012:531.

38 *Ibid.*, paras. 37-43 and 59-60.

39 *Ibid.*, paras. 59-60.

40 Case-46/87, *Hoechst*, 21 September 1989, ECLI:EU:C:1989:337, para. 18.

41 *Ibid.*

42 See *Niemietz v Germany*, *supra* note 19.

43 See also Section 4.2.1. for more information on this judgment.

44 See *Roquette Frères*, *supra* note 19, para. 29.

of the Charter if the respect for the private lives and homes of the individuals inside the legal entity – e.g. managers, directors or other members of staff – is interfered with.⁴⁵

With regard to the application of Charter provisions to private legal entities, Article 16 (the right to conduct a business) is perhaps the most relevant to be mentioned. This is one of the most frequently invoked provisions of the Charter, specifically by private legal entities.⁴⁶ This can be explained by the fact that the freedom to conduct a business does not only entail the freedom to exercise an economic or commercial activity, but also encompasses the freedom of contract and free competition, the freedom to choose with whom to do business and the freedom to determine the price of a service.⁴⁷ These (sub-) rights were already recognised as general principles of EU law before codification in the Charter and are by their nature very suitable for invocation by private legal entities.⁴⁸ It is therefore hardly surprising that the CJEU has already applied this provision on multiple occasions to private legal entities.⁴⁹ The diverse (company) interests that are protected by the freedom to conduct a business can be illustrated with the case of *Achbita*.⁵⁰ Ms Achbita worked for G4S, a private undertaking which provided reception services in public and private sectors. G4S prohibited Ms Achbita, who was a Muslim, from wearing a headscarf. The company justified this prohibition by referring to its wish to project a neutral image towards customers and made an appeal to the freedom to conduct a business. The CJEU acknowledged this appeal and ruled that, although this will always depend on the circumstances of the case, the protection of the freedom to conduct a business can indeed justify a ban on the wearing of headscarves in order to protect an employer's wish to project an image of neutrality.⁵¹

Finally, the CJEU has declared in multiple cases that the right to property, as enshrined in Article 17 of the Charter, is applicable to private legal entities.⁵² The right to property was already recognised as a general principle of EU law in 1979.⁵³ Its codification in Article 17 has grown to be one of the most frequently invoked provisions of the Charter.⁵⁴ The application of Article 17 to a private legal company was, for example, at stake in the case of *Sky Österreich*, where the CJEU acknowledged exclusive broadcasting rights as the property of limited liability company Sky Österreich,⁵⁵ and in the case of *Berlington*, where the CJEU held that the imposition of tax rates to commercial companies that operated slot machines in amusement arcades could infringe the right to property under Article 17 of the Charter.⁵⁶

In addition to the abovementioned provisions that the CJEU did declare applicable to private legal entities, in *WebMindLicenses* the CJEU has also explicitly *excluded* a provision from applicability to private legal entities. It concerns the right to the protection of personal data, codified in Article 8 of the Charter.⁵⁷ The CJEU did not give reasons for this point of view, but possibly it was self-evident to the CJEU that the wording 'personal' in 'personal data' would only refer to natural persons. This interpretation conflicts with the ECtHR's interpretation of the right to personal data (which is covered by Article 8 of the ECHR). The ECtHR was not hesitant in having this right claimed by private legal entities.⁵⁸

45 The Explanations relating to Arts. 7 and 52 of the Charter determine that Art. 7 of the Charter corresponds with Art. 8 of the ECHR. These provisions therefore have the same meaning and scope.

46 Commission Staff Working Document 2016, supra note 15, pp. 27-28.

47 Case-283/11, *Sky Österreich*, 22 January 2013, ECLI:EU:C:2013:28.

48 Explanations relating to Art. 16 of the Charter. The right to exercise an economic or commercial activity was already recognised in 1974 in the *Nold* judgment (Case-4/73, 14 May 1974, ECLI:EU:C:1975:114) and the freedom of contract was recognised in 1979 in the case of *Sukkerfabriken Nykobing* (Case-151/78, 16 January 1979, ECLI:EU:C:1979:4).

49 E.g. Case-157/14, *Neptune Distributions*, 17 December 2015, ECLI:EU:C: 2015:823, para. 85 and *Sky Österreich*, supra note 47, to be discussed below.

50 Case-157/15, *Achbita*, 14 March 2017, ECLI:EU:C:2017:203).

51 *Ibid.*, para. 38.

52 Since its equivalent in the ECHR (Art. 1 of Protocol No.1 to the ECHR) is the only provision in the ECHR that explicitly states that legal persons can invoke this right, a different conclusion is hard to conceive.

53 Case-44/79, *Hauer*, 13 December 1979, ECLI:EU:C:1979:290.

54 Commission Staff Working Document 2016, supra note 15, pp. 27-28.

55 See *Sky Österreich*, supra note 47.

56 Case-98/14, *Berlington*, 11 June 2015, ECLI:EU:C:2015:386, paras. 89-91.

57 See *WebMindLicenses*, supra note 13, para. 79.

58 In *Goodwin v United Kingdom*, Application No. 17488/90, 26 March 1996, the ECtHR ruled that the protection of business secrets can be a legitimate aim to restrict the freedom of expression. See also P. Oliver, 'The protection of privacy in the economic sphere before the European Court of Justice', (2009) 46 *CML Rev*, p. 1451 and Section 4.2.1.

3.2.2 Public authorities

The greatest lack of clarity concerning the personal scope of the Charter concerns the possibility for public authorities to claim the protection of the Charter. Thus far, the CJEU has acknowledged that Member States can make an appeal to the fundamental rights of the Charter in order to protect the fundamental rights of their citizens.⁵⁹ This is similar to the granting of fundamental rights to private legal entities in order to protect the rights of the human beings within the entity. The interesting question now is whether Member States and other public authorities can also invoke Charter provisions on their own behalf. In the *Bank Mellat* cases, the General Court and the European Court of Justice (Court of Justice) devoted some considerations to this matter.⁶⁰ In *Bank Mellat I*, the Council had put Bank Mellat, an Iranian commercial bank, on a list concerning restrictive measures against the Islamic Republic of Iran. This was done in order to apply pressure to end Iran's nuclear proliferation activities. Bank Mellat requested the General Court to annul this placement. The bank argued that the procedure leading up to this listing, amongst others, had infringed its right to effective judicial protection (as protected by Article 47 of the Charter). The General Court held that private legal entities that are emanations of non-Member State countries (such as Bank Mellat) can invoke the fundamental rights of the Charter as long as the nature of the rights does not make this impossible.⁶¹ It thereby defined an emanation of a state as either a non-governmental entity that participates in the exercise of governmental powers or a non-governmental entity that runs public services under governmental control.⁶² To see whether an entity is an emanation of the state, the General Court uses criteria similar to those the ECtHR has defined to decide whether an entity is a governmental organisation under Article 34 of the ECHR.⁶³ These criteria are discussed further in Section 4.2.2.

The importance of the judgment of the General Court lies in the fact that it holds that semi-public authorities (even if they are emanations of the state) can rely on the fundamental rights provisions of the Charter. This judgment did not, however, make clear whether this is only applicable to *semi-public* authorities (that is, non-governmental bodies exercising public tasks under governmental control) or also to *public authorities as such* (governmental bodies). The judgment of the Court of Justice on appeal gave somewhat more guidance on this matter.⁶⁴ The Court of Justice ruled that '*any natural person or any entity bringing an action before the Courts of the European Union*' may invoke *procedural rights* such as the rights to defence, the right to effective judicial protection and the obligation to state reasons.⁶⁵ At first glance, this judgment seems crystal clear: the Court holds that every entity can invoke fundamental rights, whether it is an actual public entity or a semi-public entity (an emanation of the state). This conclusion, however, is too limited, since the judgment leaves two questions yet unanswered. The first is whether public authorities can invoke only procedural rights, or whether they can also claim other – substantive – fundamental rights. Secondly, as brought up by Gerards, the Court of Justice did not make clear whether the use of the term '*procedural rights*' directly refers to *the provisions in the Charter* which entail these procedural rights (Articles 41, 42 and 47-50) or whether they only refer to procedural rights *as general principles of EU law*.⁶⁶ In the first reading, the direct applicability of at least some Charter provisions to public authorities would be certain. In the second reading, however, such direct applicability is yet to be established. In that case, only an application of Charter provisions by analogy seems to be in place.

After the judgment of the Court of Justice in *Bank Mellat I*, the General Court continued to hold that procedural Charter rights can be invoked by semi-public authorities in the case of *Almaz-Antey*.⁶⁷ In this ruling, the General Court again directly applied Article 47 of the Charter to a company that was closely connected

59 Case-84/11, *Susisalo*, 21 June 2012, ECLI:EU:C:2012:374; Case-28/09, *Commission v Austria*, 21 December 2011, ECLI:EU:C:2011:854.

60 See *Bank Mellat I* and *Bank Mellat II*, supra note 12.

61 *Bank Mellat I*, supra note 12, paras. 36-41.

62 *Ibid.*, paras. 42-44.

63 *Bank Mellat I*, supra note 12, paras. 32-46. References to the ECHR and its case law on the topic are nevertheless not made in the *Bank Mellat I* case.

64 See *Bank Mellat II*, supra note 12.

65 *Ibid.*, paras. 49-50 (emphasis added).

66 Commentary by J. Gerards for CJEU 18 February 2016, ECLI:EU:C:2016:96, C-176/13 P (*Bank Mellat II*), EHRC 2016/66; See also Gerards, supra note 11, p. 17.

67 T-255/15, *Almaz-Antey*, 25 January 2017, ECLI:EU:T:2017:25.

to a (non-Member) State.⁶⁸ The Court of Justice, on the other hand, is more reserved and, for the time being, seems to be a proponent of the analogous application of the Charter. This follows from its 2017 judgment in the *Spain v Council and Commission* case.⁶⁹ The Court of Justice expressly chose not to take a position on the question whether a Member State itself (Spain) could invoke Article 41 of the Charter. Instead, it mentioned that Article 41 reflects a general principle of EU law and Member States can rely on this principle (as is the case for all general principles of EU law). The Court of Justice thereafter asserted that the applicability of Article 41 of the Charter did not have to be discussed since only the possible violation of the general principle had to be assessed.⁷⁰ It is possible to understand this reasoning as implying that Member States are not able to invoke the provisions of the Charter directly. Instead, Member States (and possibly other public authorities) can invoke general principles of EU law. This has, however, not been made explicit by the CJEU.

Considering the above, it seems like the CJEU wants to hold off making a clear-cut statement on the matter of Charter applicability to public authorities for as long as possible. However, if in the future a Member State appeals to the CJEU with a claim to a Charter provision that is not the reflection of a general principle, the CJEU will no longer be able to avoid the question and will be forced to take a stance on the applicability of the Charter. For its decision regarding this matter, it might gain inspiration from the personal scope application of the ECHR. This shall be dealt with in the next section.

4. Personal scope of the ECHR

4.1 ECHR: text

Most ECHR provisions are universal clauses that are directed at ‘everyone’.⁷¹ Are private legal entities and public authorities also covered by these clauses? Unfortunately, the answer to this question cannot be deduced from the text of the ECHR itself. Of course there is Article 34 of the ECHR, which determines that only persons (i.e. natural persons), non-governmental organisations and groups of individuals are able to file a complaint before the ECtHR. Consequently, governmental organisations or public authorities do not seem to have the possibility to lodge an individual application at the ECtHR, and therefore cannot invoke the ECHR before the ECtHR. Private legal entities, on the other hand, do not appear to be excluded. Article 34 of the ECHR, however, is a purely procedural provision that only applies before the ECtHR. It does not answer the question of whether and to what extent the (universal) ECHR provisions *per se* can be invoked by private legal entities or public authorities. If ECHR provisions are applied by other courts, i.e. national courts or the CJEU, these courts are not bound by the limitations of Article 34 of the ECHR.⁷² They may decide for themselves whether they follow these limitations. Thus, Article 34 does not give a clear answer to the question of whether private legal entities and public authorities are also covered by the universal ECHR provisions. Fortunately, the ECtHR’s case law allows some conclusions to be drawn on the topic.

4.2 ECHR: ECtHR application

4.2.1 Private legal entities

In its case law, the ECtHR has accepted that private legal entities can claim the protection of the right to the protection of property (Article 1 of Protocol No. 1 to the ECHR),⁷³ the right to a fair trial (Article 6 of

68 Ibid., paras. 68 and 127.

69 *Spain v Council and Commission*, supra note 12.

70 Ibid., para. 89. Finally, the CJEU did not hold that this principle was violated in the investigation procedures at stake, paras. 88-106.

71 An exception is Art. 1 of Protocol No.1 to the ECHR, which is specifically directed at natural persons and legal persons.

72 In the *Bank Mellat I* ruling, supra note 12, the General Court of the European Court of Justice affirms this point of view for claims to the ECHR before the Courts of Justice of the European Union. It considers that ‘Article 34 of the ECHR is a procedural provision which is not applicable to procedures before the Courts of the European Union.’ (para. 38). Similar reasoning can be found on the national level, for example in the Dutch *Urgenda II* case (Court of Appeal The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2591, para. 35). See Section 6.2.2. for further information on this matter.

73 This is not surprising, since this is the only provision that explicitly states that legal entities can appeal to it. See for the application of this article to a private legal entity *Asito v Moldova*, Application No. 40663/98, 8 November 2005. The applicant was an incorporated insurance company.

the ECHR),⁷⁴ the right to respect for the home (Article 8 of the ECHR),⁷⁵ the right to freedom of expression (Article 10 of the ECHR)⁷⁶ and the right to freedom of assembly and association (Article 11 of the ECHR).⁷⁷ Some examples can illustrate this.

Firstly, the right to a fair trial has been held applicable to private legal entities in many cases.⁷⁸ An example is *Teltronic-CATV v Poland*.⁷⁹ Limited liability company Teltronic-CATV (Teltronic) filed a claim against company Best-Sat. Best-Sat had refused to pay for the construction of a TV cable network by Teltronic. Teltronic's claim was not examined by the Polish courts, since the company – which was close to bankruptcy – could not pay the obligatory court fees. Teltronic complained that the excessive court fees restricted its right of access to a court and asserted that the Polish courts had violated Article 6 of the ECHR. The ECtHR acknowledged this appeal and ruled that the court fees hindered the applicant in its access to court. It therefore found a violation of Article 6 of the ECHR.

A trigger for the application of Article 8 of the ECHR to private legal entities was the ECtHR's ruling in the *Niemietz v Germany* case.⁸⁰ The ECtHR ruled that the right to respect for the home did not only apply to residences that are used solely for private activities, but also to residences that are used for private as well as business activities. Then, in *Société Colas Est and Others v France* the ECtHR decided that Article 8 of the ECHR might also apply to premises that are used *exclusively* for business activities.⁸¹ In such cases, the protection of Article 8 of the ECHR can be claimed by companies when the private life or correspondence of the individuals inside these premises is interfered with.⁸² This can be the case, for example, when business premises are searched in competition law procedures.⁸³

The ECtHR has held further on multiple occasions that the right to freedom of expression (Article 10 of the ECHR) applies to private legal entities. For example, in the 1979 *Sunday Times* case, this right was already applied to Times Newspapers Limited, a publisher of a newspaper.⁸⁴ In addition, in *Pastor X and the Church of Scientology v Sweden*, a church invoked this provision to protect the freedom of expression of its members.⁸⁵ In the case of *Autronic AG v Switzerland*, the ECtHR even ruled that a private legal entity can invoke the protection of Article 10 of the ECHR for *purely commercial activities*; that is, activities that are only conducted for purposes of pecuniary gain.⁸⁶ The ECtHR held that the purpose for which Article 10 is invoked is not relevant. The court did not elaborate on its reasoning for this point of view.

By contrast, the ECtHR has not recognised the applicability to legal entities of other rights than the abovementioned. This is, however, self-evident for most other ECHR rights since many of them are only relevant to individuals. Examples are the prohibition of torture (Article 3),⁸⁷ the freedom from arbitrary detention (Article 5)⁸⁸ and the right to marry (Article 12).⁸⁹ For by far the most rights in the ECHR, therefore, the situation at present is clear.

74 *Teltronic-CATV v Poland*, Application No. 48140/99, 10 January 2006. In literature it is agreed that the other procedural rights in the ECHR (Arts. 7, 13 and 19) are applicable to private legal entities as well. The rationale for applying these rights to private entities is that it would be unfair if a party has a stronger legal position in proceedings against a private legal person than in proceedings against natural persons. See L. Timmerman, 'Hebben rechtspersonen mensenrechten?', in *Rechtspleging in het ondernemingsrecht* (1997) 26, p. 45. A.L.J. van Strien, 'Rechtspersonen en mensenrechten' (1996) *RM Themis*, p. 9; A.J. Sewnandan Mishre, 'Het belang van het Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden voor rechtspersonen' (2012) *V&O*, no. 10, pp. 165-166; Van den Muijsenbergh & Rezai, supra note 18, p. 49.

75 *Hatton and Others v UK*, Application No. 36022/97, 2 October 2001.

76 *Pastor X and the Church of Scientology v Sweden*, Application No. 7805/77, 1979.

77 *AB Kurt Kellermann v Sweden*, Application No. 41579/98, 26 October 2004.

78 See Van den Muijsenbergh & Rezai, supra note 18, p. 49; E. Fura-Sandström, 'Business and Human Rights – Who Cares?', in L. Caflish et al. (eds.), *Human Rights – Strasbourg Views / Droits de l'Homme – Regards de Strasbourg. Liber Amicorum Luzius Wildhaber* (2007), pp. 162-163.

79 See *Teltronic-CATV v Poland*, supra note 74.

80 See *Niemietz v Germany*, supra note 19.

81 *Société Colas Est and Others v France*, Application No. 37971/97, 16 April 2002.

82 *Ibid.*, para. 41.

83 *Ibid.*

84 *Sunday Times v The United Kingdom*, Application No. 6538/74, 26 April 1979.

85 See *Pastor X and the Church of Scientology v Sweden*, supra note 76.

86 *Autronic AG v Switzerland*, Application No. 12726/87, 22 May 1990, para. 47.

87 *Verein Kontakt-Information-Therapie (KIT) and Siegfried Hagen v Austria*, Application No. 11921/86, 12 October 1988.

88 See Van den Muijsenbergh & Rezai, supra note 18, p. 51 (text under note 43).

89 *Ibid.*, (text under note 44).

4.2.2 Public authorities

Article 34 ECHR stipulates that only non-governmental organisations can lodge a complaint before the ECtHR. Public authorities can therefore not claim the protection of the ECHR *before the ECtHR*. According to the ECtHR, a governmental organisation is a legal entity which participates in the exercise of governmental powers or runs a public service under governmental control.⁹⁰ Decentral organs of the state, such as provinces and municipalities, are also included in this definition.⁹¹ The same applies to private legal entities that carry out public tasks under the responsibility of public authorities and that meet a number of other conditions.⁹² To establish whether such bodies are ‘public authorities’ under the ECHR, account must be taken of their legal status, the rights and competences they can exercise, the nature of their activities, the context in which they exercise them and their degree of independence from the government.⁹³ A legal entity is generally not regarded as a governmental organisation if it is legally and financially independent of the government, does not have more competences than what is common in civil law and is governed by civil law rather than administrative law.⁹⁴ In addition, the absence of a monopoly position in a commercial sector is an indication for not being a governmental organisation.⁹⁵ Finally, the ECtHR has made it clear that also if a legal entity is under the responsibility of a state that is not a Contracting Party, this does not yet mean that the legal entity cannot be regarded as a governmental organisation.⁹⁶

As mentioned above, the typically procedural provision of Article 34 does not exclude that ECHR rights can be invoked by public authorities before other courts than the ECtHR. Nevertheless, in its case law the ECtHR also seems to have limited the personal scope of *the actual provisions* of the ECHR to private legal entities and (groups of) natural persons.⁹⁷ This is particularly clear from the case law on Article 11 of the ECHR, protecting the freedom of assembly and association. The ECtHR has explicitly held that for an entity to be able to invoke this provision (before the ECtHR or before a national court), it must be independent and free from interference of the state.⁹⁸ The criteria used for the determination of this required independence are similar to the criteria used for the determination of ‘a governmental organisation’ in the sense of Article 34 of the ECHR. Public authorities and entities connected to public authorities are thus not able to claim at least the protection of Article 11 of the ECHR before both the ECtHR and national courts. Whether this also applies to the other articles in the ECHR is still undetermined.

5. The personal scope of the Charter and the ECHR analysed and compared

In this section the interpretation of the personal scope of the Charter by the CJEU is analysed and compared with the interpretation of the personal scope of the ECHR by the ECtHR. Conclusions shall also be drawn with regard to the question of how these personal scope applications relate to the background and objectives of the EU and ECHR systems.

90 See *Radio France et al. v France*, supra note 8; *Islamic Republic of Iran Shipping Lines v Turkey*, 13 December 2007, Application No. 40998/98, para. 79.

91 *Ayuntamiento de M v Spain*, Application No. 15090/89, 7 January 1991; See also *Danderyds Kommun v Sweden*, Application No. 52559/99, 7 June 2001; *Demirbas and Others v Turkey*, Application Nos. 1093/08, 301/08, 303/08, 306/08, 309/08, 378/08, 382/08, 410/08, 421/08, 773/08, 883/08, 1023/08, 1024/08, 1036/08, 1260/08, 1353/08, 1391/08, 1403/08 and 2278/08, 9 November 2010; *Municipal Section of Antilly v France*, Application No. 45129/98, 23 November 1999; *Hatzitakis and Thermaikos and Mikra Borough Councils v Greece*, Application Nos. 48391/99 and 48392/99, 18 May 2000. Political officials have an ambivalent stance in this matter. In the capacity of state officials they are not allowed to invoke the ECHR, but in the capacity of individual politicians they are, see *Roseiro Bento v Portugal*, Application No. 29288/02, 18 April 2006, *Demirbas and others v Turkey*, Application No. 1093/08, 9 December 2008 and *Castells v Spain*, Application No. 11798/85, 23 April 1994.

92 See *Radio France et al. v France*, supra note 8.

93 *Ibid.*; *Osterreichischer Rundfunk v Austria*, Application No. 35841/02, 7 December 2006; *Transpetrol v Slovakia*, Application No. 28502/08, 15 November 2011.

94 See *Islamic Republic of Iran Shipping Lines v Turkey*, supra note 90.

95 See *Osterreichischer Rundfunk v Austria*, supra note 93.

96 *Ljubljanska Banka DD. v Slovakia*, Application No. 29003/07, 12 May 2015.

97 This means that the ECHR cannot be invoked by public authorities at all, not even at the national level.

98 *Chassagnou and Others v France*, Application Nos. 25088/94, 28331/95 and 28443/95, 20 April 1999 and Guidelines on Freedom of Association, Office for Democratic Institutions and Human Rights (ODIHR) (2015), pp. 28-29.

Charter

It has been shown that private legal entities can rely on the protection of the Charter in order to protect their own economic or rule of law interests. This can be illustrated, for example, by the *DEB* case discussed in Section 3. By invoking the right to legal aid (Article 47 of the Charter), the company DEB tried to obtain access to a court and defend its economic interests. Only with access to a court, could DEB address the transposing of a Directive which would be beneficial for its financial position. For the CJEU, it is even easier than it is for the ECtHR to directly allow private legal entities to invoke fundamental rights provisions for their own economic interests. After all, the Charter includes provisions that are well-suited to protecting the economic interests of companies, especially the freedom to conduct a business (Article 16). As analysed in Section 2, this application of Charter provisions to protect the own interests of private legal entities is in line with the EU's objectives.

When it comes to the applicability of Charter provisions to public authorities, it appears that public authorities (Member States) are able to claim the protection of the Charter to protect the fundamental rights of their citizens. However, the Court of Justice has not yet explicitly stated that public authorities or semi-public authorities (emanations of the state) can also directly invoke Charter provisions for their own interests. Thus far, the CJEU has only ruled that public authorities are able to invoke Charter rights by analogy; that is, by invoking the protection of general principles of EU law. Up till now, the invocation of actual Charter provisions has thus been reserved for natural persons and private legal entities. It must be mentioned, however, that the CJEU has also not specifically excluded claims of public authorities to the Charter. It is up to the CJEU to provide more clarity on the matter in future case law. In this regard, it should be noted that claims from public authorities to protect their own rule of law or economic interests would not be contrary to the objectives of the EU legal system. They would, nonetheless, not be in line with the objectives of the ECHR system, which is the protection of the fundamental rights of the individual to protect their opportunities for self-realisation.

ECHR

It appears from the ECtHR case law that ECHR provisions are claimed in order to protect against harm to individuals, even if the claims are made by private legal entities. This can be seen, for example, in the *Niemietz* case, in which Article 8 of the ECHR was invoked in order to protect the privacy of individuals working on the business premises of a company,⁹⁹ and also in *Pastor X and the Church of Scientology v Sweden*, in which a church invoked the freedom of expression for the interest of its members.¹⁰⁰ This application agrees with the traditional objective of the ECHR system. The case of *Autronic* seems to be an exception to this rationale, since here the ECtHR explicitly asserted that a private legal entity could invoke the ECHR purely for the protection of its own (economic) interests. Protection against harm done to individuals appeared not to be at stake. Moreover, in other cases companies have also been able to successfully invoke the ECHR without the direct aim of serving the interests of individuals. For example, in the *Teltronic-CATV* case, private legal entity Teltronic was allowed to claim the protection of Article 6 of the ECHR for its own economic and rule of law interests.¹⁰¹ The same interests were at stake in the *Asito v Moldova* case, in which a private insurance company could make an appeal to the right to property and the right to a fair trial.¹⁰² Thus, contrary to what would logically follow from the background of the ECHR, the ECtHR does not only allow private legal entities to invoke ECHR provisions for the interests of individuals. Private legal entities can also invoke the ECHR for the protection of their own interests, even if these are financial in nature and have little to do with human dignity or individual self-realisation.

As regards public authorities and entities that carry out public tasks under the responsibility of public authorities, it has been shown that these entities are excluded from invoking ECHR rights before the ECtHR (Article 34 of the ECHR). It is therefore not possible for public authorities to claim the protection of

99 See *Niemietz v Germany*, supra note 19.

100 See *Pastor X and the Church of Scientology v Sweden*, supra note 76.

101 See *Teltronic-CATV v Poland*, supra note 74.

102 See *Asito v Moldova*, supra note 73.

ECHR provisions before the ECtHR for their own interests. In addition, it can be assumed that the ECtHR has also expressly limited the applicability of substantive rights (such as the freedom of association) to private associations when the ECHR is applied before other courts than the ECtHR.¹⁰³ This application of ECHR provisions is consistent with the ECtHR's objective of purely protecting the fundamental rights of individuals.

All things considered, thus far, few notable differences between the ECHR and the Charter as regards their personal scope can be distinguished. Both the CJEU and the ECtHR appear to allow private legal entities to invoke, respectively, the Charter and the ECHR for their own interests. This is not (yet) the case for public authorities. The similarity in application can be regarded as remarkable in light of the differences in objectives and backgrounds between the ECHR and the EU systems. Apparently, the CJEU does not regard its focus on *economic integration and the rule of law* a justification for also allowing public authorities claiming the protection of Charter provisions for their own economic or rule of law interests. And similarly, the ECtHR does not regard its traditional objective of protecting *individual human beings* as an obstacle for also protecting the more economic interests of private legal entities.

In the following section it shall be investigated whether these small differences in personal scope are also visible when the national courts of the Netherlands, Portugal, Spain and Poland apply the ECHR and the Charter. It shall be examined whether this national application corresponds to the personal scope application of the national constitutions of these Member States.

6. Personal scope of fundamental rights provisions on the national level

6.1 Introduction

Information on the national application of constitutional rights, ECHR rights and Charter rights by the courts of the Netherlands, Portugal, Spain and Poland has been gained from country rapporteurs.¹⁰⁴ Information about the national applications of ECHR rights and national constitutional rights has been gained through a general search in authoritative literature.¹⁰⁵ Since the national application of the Charter is less crystallised than the national application of the ECHR and constitutional rights, information about the national application of the Charter has not been collected in the same way, but has been obtained through a systematic review of national case law in which the term 'Charter of Fundamental Rights of the EU' is mentioned. The reviewed cases have been limited to those that were dealt with by highest courts (supreme courts or constitutional courts). In addition, only rulings within the time frame 1 January 2015 until 31 December 2017 were analysed.¹⁰⁶

6.2 The Netherlands

6.2.1 Dutch Constitution

It is generally held that the constitutional rights provisions of the Dutch Constitution (Articles 1-23) can be invoked by private legal entities as long as this is compatible with the nature of the fundamental right.¹⁰⁷ In this regard, the right to respect privacy (Article 10)¹⁰⁸ and the right to assembly and demonstration

103 This is assumed on the basis of Art. 11 jurisprudence, see Section 4.2.2.

104 Information concerning the Netherlands was provided by Manon Julicher (Utrecht University). Information concerning Portugal was provided by Marina Henriques and Carolina Carvalho (University of Coimbra). Information concerning Spain was provided by Aina Amat Blai (Human Rights Institute of Catalonia). Information concerning Poland was provided by Pasquale Policastro (University of Szczecin).

105 And the case law mentioned in that literature.

106 These limitations in time and courts do not call into question the representativeness of the outcomes. In the first years after the coming into force of the Charter (2009), it was mostly ignored by national lawyers and judges. Only recently are these legal actors discovering the possibilities of this document. It is therefore representative to examine the application of the Charter in the past three years. In addition, the restriction to cases before the highest courts is justified, because these courts deal with the most high-profile cases and have the final say in outcomes. Their judgments on fundamental rights can therefore be regarded as authoritative and representative. It must be mentioned that in the Polish review some cases were also analysed that fell outside the abovementioned research criteria, see Section 6.5.3.

107 *Handelingen II*, 1975/1976, 13872, no. 3, p. 11; Kortmann, *supra* note 22, p. 371.

108 HR 16 October 1987, ECLI:NL:PHR:1987:AC9997 (*Tape recording*).

(Article 9)¹⁰⁹ have successfully been claimed by private legal entities. In these cases, the legal entities did not invoke the fundamental rights for their own interests, but to protect the privacy and assembly rights of the persons within the legal entities. The development that private legal entities invoke constitutional rights extensively in order to protect their own (economic) interests does not (yet) appear in Dutch constitutional case law. This may have to do with the fact that fundamental rights that are suitable for the protection of these interests – for example the right to a fair trial or the right to conduct a business – are not (yet) included in the Dutch Constitution. This might change if a proposal for amending the Constitution is accepted which aims to include the right to a fair trial.¹¹⁰ In the Explanatory Memorandum to this proposal the government stated that this right could be claimed by natural persons *and private legal entities*.¹¹¹

It is the prevailing opinion in the Netherlands that the fundamental rights of the Dutch Constitution are not to be relied on by public authorities.¹¹² This follows from the history and objective of fundamental rights, which is held to be the protection of the individual human being against abuse of power of the State.¹¹³ Despite this consensus, in 1992 the Supreme Court¹¹⁴ delivered its *Rost van Tonningen* judgment, in which it allowed the Dutch government to invoke the protection of the right to freedom of expression (Article 7 of the Constitution).¹¹⁵ This judgment is generally considered to be a one-off case, however, that does not reflect the general opinion on the applicability of constitutional rights to public authorities and has not been followed in later case law.¹¹⁶

6.2.2 Dutch application of the ECHR

The ECHR can be directly invoked before the Dutch courts, as follows from Article 93 of the Constitution. The position of the highest courts in the Netherlands is that private legal entities can rely on the ECHR, although there has also been the occasional deviation from this.¹¹⁷ Private legal entities are allowed to invoke ECHR rights on behalf of individuals or in favour of the interests of individuals they represent, but also to protect their own (economic) interests. The first is illustrated by a 2017 ruling in which the Supreme Court allowed an association of general practitioners to claim Article 8 of the ECHR as a basis to challenge their duty to exchange the medical data of patients. With this claim, the association wanted to protect the privacy of the patients of the general practitioners.¹¹⁸ The latter was the case in the *Tele-2* judgment, in which internet and telephone providers successfully invoked Article 6 of the ECHR in order to fight the legality of a decision that had an adverse impact on their financial position.¹¹⁹

With regard to the applicability of the ECHR to public authorities, the *Aral* case has set the tone.¹²⁰ In this judgment, the Supreme Court held that a municipality could not invoke the ECHR, since the sole goal of the

109 HR 25 June 1982, *NJ* 1983, 295 and 296 with commentary by Alkema (*Schans*), para. 4.1.

110 A legislative proposal was submitted that concerns the inclusion of the right to a fair trial in the Dutch Constitution (*Kamerstukken II*, 2015/16, 34517, no. 2). The article in which this right will be included would be the national equivalent of Arts. 6 of the ECHR and 47 of the Charter. Perhaps claims with an economic interest will increase when this proposal is adopted.

111 *Kamerstukken II*, 2015/16, 34517, no. 3, p. 11.

112 M.C. Burkens et al., *Beginselen van de democratische rechtstaat* (2012), pp. 128-129. See also D.J. Elzinga & R. de Lange, *Van der Pot, Handboek van het Nederlandse staatsrecht* (2006), pp. 264-265 (see also text under footnote 33 at p. 264); Kortmann, *supra* note 22, pp. 372-373; A.J. Nieuwenhuis et al., *Hoofdstukken Grondrechten* (2014), pp. 35-36. But also consider E.J. Dommering in his commentary for *Castells v Spain*, Application No. 11798/85, 23 April 1994.

113 See Nieuwenhuis, *supra* note 112, p. 35; Elzinga & de Lange, *supra* note 112, p. 264; Kortmann, *supra* note 22, p. 373; Burkens, *supra* note 112, p. 128.

114 The Supreme Court (HR) is the highest court in the Netherlands for cases in criminal law, civil law and tax law. The Administrative Jurisdiction Division of the Council of State (ABRVs), the Court of Appeal for Trade and Industry (Cbb) and the Central Council for Appeal (CRvB) are the highest courts that deal with cases in administrative law. There is no Constitutional Court in the Netherlands.

115 HR 22 January 1993, ECLI:NL:HR:1993:ZC0833, with commentary by Van der Burg (*Rost van Tonningen*).

116 C.A.J.M. Kortmann, 'Vrijheid van meningsuiting voor de regering?' (1993) 10 *NJB*, p. 333; Commentary by L. Verhey for HR 22 January 1993, ECLI:NL:HR:1993:ZC0833 (*Rost van Tonningen*) in *NJCM-Bulletin* 1993, p. 410; A.W. Hins, 'Uitingsvrijheid voor de staat?' (1993) 10 *Mediaforum*, p. 37.

117 See e.g. Cbb 19 January 2017, ECLI:NL:CBB:2017:4; HR 3 April 2015, ECLI:NL:HR:2015:841 and HR 1 December 2017, ECLI:NL:HR:2017:3053 for cases in which private legal entities have been able to invoke the ECHR. See Rb. Leeuwarden 8 February 1990, ECLI:NL:RBL:1990:AC0221 for a case in which a private legal entity was not allowed to invoke the ECHR.

118 HR 1 December 2017, ECLI:NL:HR:2017:3053.

119 Cbb 21 July 2015, ECLI:NL:CBB:2015:260 (*Tele-2*).

120 HR 6 February 1987, *NJ* 1988, 926, with commentary by Scheltema (*Gemeente Den Haag/Aral*).

ECHR is to protect citizens against the power of government.¹²¹ In more recent case law of the Administrative Jurisdiction Division of the Council of State, this reasoning was repeated.¹²² In this case law it was added that because of this objective of the ECHR, with regard to public authorities, Article 34 is taken as a guiding principle for the applicability of ECHR provisions before the Dutch courts.¹²³ This is, however, a decision of the Dutch courts themselves, taken in the light of the background of the ECHR. Article 34 itself does not oblige them to do this. In the recent and much discussed *Urgenda II* case the Dutch Court of Appeal in The Hague clearly defended this point of view.¹²⁴ It ruled that the requirements of Article 34 of the ECHR (in this instance, Article 34's requirement of victimisation) do not apply before the Dutch courts.¹²⁵ This position is also defended in Dutch scholarly literature.¹²⁶ In theory, thus, it would be possible for Dutch judges to allow public authorities to invoke Convention rights before national courts. So far, however, Dutch courts do not appear to be ready to follow up on this line of thought.¹²⁷ Nonetheless, courts do sometimes apply the ECtHR's case law on Article 6 of the ECHR by analogy; that is, they apply the general principles that are underlying Article 6 and interpret these principles using the ECtHR's case law.¹²⁸ This analogous application is also used in proceedings between public authorities.¹²⁹

6.2.3 Dutch application of the Charter

In order to draw conclusions about the application of the Charter before the Dutch courts, 266 judgments delivered between January 2015 and December 2017 have been analysed.¹³⁰ In these cases the Charter was mostly claimed by natural persons, but there were also some cases in which the courts allowed private legal entities to make an appeal to the protection of the Charter.¹³¹ In none of the cases included in this study did a public authority claim the protection of the Charter.

Private legal entities relied on Charter provisions in order to protect the interests of human beings as well as their own commercial interests. The first was visible in a case decided by the Supreme Court on 13 November 2015.¹³² The Brein Foundation, a private legal entity under Dutch law that defends copyright interests of creative actors, invoked Articles 16 and 17 of the Charter to have the court order internet providers to block certain IP-addresses. Brein made this appeal in order to protect the copyrights of the creators of films and games that have been put on the web illegally. The Supreme Court granted this protection and asserted the claim was not contrary to the principle of proportionality as enshrined in Article 52(1) of the Charter. The second type of situation occurred in a case before the Administrative Jurisdiction Division of the Council of State.¹³³ In this case, a decorating company was fined for employing undocumented foreigners. A fine was imposed for each undocumented foreigner. The company complained that the *ne bis in idem* principle of Article 50 of the Charter was violated. This claim was not made in

121 Ibid.

122 ABRvS 29 July 2011, ECLI:NL:RVS:2011:BR4025; ABRvS 29 April 2008, ECLI:NL:RVS:2008:BD0782; ABRvS 19 November 2003, ECLI:NL:RVS:2003:AN8364 and ABRvS 19 November 2003, ECLI:NL:RVS:2003:AN8364.

123 Ibid.

124 *Urgenda II*, supra note 72. In this judgment, the Court of Appeal, following the judgment of the District Court, summoned the Dutch government to increase its actions to prevent climate change. Some restraint concerning this ruling must be exercised, though, since there is still a theoretical possibility that this judgment will be overruled by the Supreme Court if one of the parties decides to appeal in cassation.

125 *Urgenda II*, supra note 72, para. 35.

126 See Maris, supra note 9.

127 Although there has been an occasional deviation. See e.g. HR 8 July 2005, ECLI:NL:PHR:2005:AO9273 (*Gemeente Uden*) in which a municipality could invoke Art. 6 of the ECHR against a higher government. According to the court, Art. 6 was directed at 'everyone' and therefore also at public bodies.

128 See e.g. HR 10 June 2011, ECLI:NL:HR:2011:BO5087 and ABRvS 1 October 2014, ECLI:NL:RVS:2014:3547.

129 See e.g. ABRvS 12 May 2010, ECLI:NL:RVS:2010:BM4166, para 2.8.1, in which the court applied the principle of a decision within a reasonable time to the State of the Netherlands.

130 Researchers entered the search term 'Handvest van de grondrechten' in the publicly available case law database <http://uitspraken.rechtspraak.nl> (last visited 24 July 2018). This resulted in a dataset of 1410 cases in which the Charter was mentioned. Between January 2015 and December 2017 this resulted in 733 cases. 266 of these cases were dealt with by the highest courts. This number also includes opinions of Advocate-Generals that are part of the Supreme Court.

131 In total there were 24 cases between 2015 and 2017 in which a private legal entity made a clear appeal to the Charter and this was approved by the Supreme Court (that is not to say that the court also constituted a violation of a Charter provision).

132 HR 13 November 2015, ECLI:NL:HR:2015:3307.

133 ABRvS 22 November 2017, ECLI:NL:RVS:2017:3186.

order to protect the foreigners, but only to reduce the financial costs for the company. The Administrative Jurisdiction Division allowed the claim, but did not find a breach.

As stated before, in the case law reviewed there have been no cases in which a public authority claimed the protection of the Charter. Barkhuysen and Bos have mentioned one ruling, however, that falls outside the research scope, but is pertinent to the topic.¹³⁴ It concerns a 2011 ruling of the Administrative Jurisdiction Division of the Council of State.¹³⁵ The municipality of The Hague had claimed that the exclusion of decentralised authorities to appeal decisions made on the basis of the so-called Crisis and Recovery Act (*Crisis-en herstelwet*, *Chw*) was in conflict with the right to an effective remedy as protected by Articles 47 of the Charter and 13 of the ECHR.¹³⁶ The Administrative Jurisdiction Division held that the ECHR was not applicable, since the claim came from a public authority, but it did not answer the question whether the municipality could invoke the Charter. Since the course of proceedings under the *Chw* was in accordance with the right to an effective remedy as a general principle of EU law, the Administrative Jurisdiction Division stated that it would not be necessary to consider this.¹³⁷ The Division thus avoided applying Article 47 of the Charter with a similar reasoning as the Court of Justice recently did in *Spain v Council and Commission*.¹³⁸ Based on this limited information, the Dutch courts thus do not seem to diverge from the CJEU with respect to the application of the Charter to public authorities.

6.3 Portugal

6.3.1 Portuguese Constitution

The Portuguese Constitution provides for a broad protection of fundamental rights. These rights are divided into two categories: (a) rights, freedoms and guarantees (Articles 24-57) and (b) economic, social and cultural rights and duties (Articles 58-79). The rights, freedoms and guarantees are directly applicable.¹³⁹ The protection of the economic, social and cultural rights, which are programmatic rights, can also be claimed before the Portuguese courts, but they depend on the existence of social, economic or even political conditions to be effective.¹⁴⁰

According to Article 12 of the Portuguese Constitution, both natural persons (clause 1) and legal entities (clause 2) can invoke the fundamental rights of the Constitution. For legal entities, two conditions must be fulfilled: the nature of the right must allow it and the application must be appropriate to the particular purpose that the entity pursues. Article 12(2) is formulated broadly – it does not specify whether the legal persons have a private or a public nature (public authorities). It is, however, certain that private legal entities are included by this term, since these entities have been able to invoke the right to access to justice (Article 20 of the Constitution),¹⁴¹ the right to a good reputation (Article 26 of the Constitution)¹⁴² and the freedom of expression and press (Articles 37 and 38 of the Constitution)¹⁴³ before the Portuguese courts.¹⁴⁴ The purpose of private legal entities claiming the protection of these constitutional rights was both the protection of the commercial interests of the private legal entities themselves, as well as the protection of the individuals inside the entity. The first was distinguishable amongst others in the cases where the right to access to justice was invoked. In these cases, commercial enterprises invoked this right to fight actions that would cause them pecuniary damages. The same purpose was at issue in the case regarding the freedom of expression

134 T. Barkhuysen & A.W. Bos, 'De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht: een actualisatie anno 2014', (2014) *JBplus*, p. 108.

135 ABRvS 7 December 2011, ECLI:NL:RVS:2011:BU7093.

136 *Ibid.*

137 *Ibid.*, para. 2.7.2.

138 *Spain v Council and Commission*, *supra* note 12.

139 J.J.G. Canotilho, *Direito Constitucional e Teoria da Constituição* (2003), pp. 437-467.

140 J.R. Novais, *Direitos Sociais – Teoria jurídica dos direitos sociais enquanto direitos fundamentais* 1.^ª ed (2010), pp. 100-101.

141 See e.g. the cases Acórdão no. 591/2016, Acórdão no. 86/2017 and Acórdão no. 266/2017 of the Constitutional Court.

142 See e.g. the cases Acórdão no. 80/2018 and Acórdão no. 292/2008 of the Constitutional Court.

143 See e.g. case 1454/09.5TVLSB.L1.S1 of the Supreme Court of Justice, ECLI:PT:STJ:2017:1454.09.5TVLSB.L1.S1.

144 In a simplified way, the Portuguese court system consists of the courts of first instance, the courts of second instance and the supreme courts (Supreme Court of Justice for criminal and civil matters, the Supreme Administrative Court for administrative and fiscal matters and the Constitutional Court for constitutional matters).

and press,¹⁴⁵ but here the protection of the interests of individuals was also a point of concern. This case and the purposes that are protected shall be elaborated on in Section 6.3.2., since the ECHR was also invoked.

As already mentioned, Article 12(2) Constitution does not specifically exclude public authorities from claiming the protection of fundamental rights in the Portuguese Constitution. The possibility of public authorities invoking fundamental rights is controversial.¹⁴⁶ The dominant position in literature is that public authorities shall not be considered potential victims of violations of constitutional rights.¹⁴⁷ Due to their special position of power, public authorities should instead take on the role of guardians of the protection of these rights. Nonetheless, some authors state that public professional associations, such as the Bar Association and public universities, should be able to invoke some constitutional rights, because from a sociological perspective these entities have specific interests and have a certain autonomy from the State.¹⁴⁸ These semi-public entities should, for example, be able to claim the freedom to choose a profession (Article 47 of the Constitution) in order to protect this right for the individuals within them.¹⁴⁹

6.3.2 Portuguese application of the ECHR

The Portuguese legal system is a monist system (Articles 8 and 16 of the Constitution). Therefore, the ECHR is directly applicable before the Portuguese courts. Private legal entities are able to make use of this applicability. In most cases in which the protection of the ECHR is claimed by a private legal entity, the right to freedom of expression (Article 10 of the ECHR) and the right to a fair trial (Article 6 of the ECHR) were invoked.

The applicability of Article 10 of the ECHR to private legal entities occurred in several cases where TV stations and publishers claimed the protection of this article in order to fight defamation convictions.¹⁵⁰ These appeals were the result of the fact that for some time the Portuguese courts protected the right to reputation at the expense of the freedom of expression.¹⁵¹ After the ECtHR condemned Portugal for this violation of the freedom of expression,¹⁵² the private legal entities that were convicted for defamation on the basis of the old Portuguese jurisprudence could invoke Article 10 of the ECHR in order to fight their defamation convictions. An example of such a defamation case is a ruling of the Supreme Court in July 2017.¹⁵³ In this case, a private legal entity (a publisher) was allowed to successfully invoke the ECHR to protect the fundamental rights of an individual that authored a book (and, arguably, thereby violated the reputation of the plaintiff). At the same time, the applicability of Article 10 of the ECHR was also beneficial for the economic interests of the publisher, since it resulted in the annulment of its obligation to pay compensation costs for defamation. This latter interest was also often the point of concern in the cases where private legal entities invoked the protection of Article 6 of the ECHR.¹⁵⁴

It is not possible to draw a clear conclusion concerning the question of whether public authorities are able to invoke ECHR provisions before the Portuguese courts. There is no scholarly discussion in literature on this matter and a random sample of case law in which the ECHR was mentioned did not provide examples of public authorities invoking the ECHR.

145 Case 1454/09, supra note 143.

146 In the case Acórdão no. 496/2010, the Constitutional Court gave a detailed overview of this controversy.

147 J.B. Gouveia, 'Os direitos fundamentais na Constituição Portuguesa de 1976', (2015) MS, Edição Especial, Jan./Jun *Revista de Direito UFMS*, p. 66.

148 J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada* (2010) Tomo I, p. 211. The public professional associations are part of the autonomous administration of the State. The State supervises the autonomous administration. Cf. J.B. Gouveia, 'As Associações Públicas Profissionais no Direito Português', https://portal.oa.pt/media/117223/jbg_ma_14420.pdf (last visited 25 July 2018).

149 See Miranda & Medeiros, *ibid.*, p. 211.

150 F.T. Mota, 'Liberdade de expressão – a jurisprudência do TEDH e os tribunais portugueses', (2017) *Julgar*, no. 32; F.P. Coutinho, 'O TEDH e a liberdade de imprensa: os casos portugueses', (2013), http://www.fd.unl.pt/docentes_docs/ma/FPC_MA_24220.pdf, (last visited 2 May 2018).

151 According to Coutinho, this can be explained by the lack of knowledge of the ECHR and the case law of the ECtHR due to educational gaps on these subjects. See Coutinho, supra note 150, p. 38.

152 *Publico – Comunicação Social, S.A. and others v Portugal*, Application No. 39324/07, 7 December 2010; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v Portugal*, Application Nos. 11182/03 and 11319/03, 26 April 2007.

153 Case 1454/09, supra note 143.

154 See e.g. case no. 0122/10 of the Supreme Administrative Court, where a company invoked the right to a decision in a reasonable time (Art. 6 of the ECHR) in order to obtain compensation for the delay of justice. The company was a creditor in an insolvency procedure. According to the court, there was a violation of Art. 6 of the ECHR since more than seven years had passed between the credit claim and the decision that there was not enough money to pay.

6.3.3 Portuguese application of the Charter

In order to understand the application of the Charter before the Portuguese courts, the case law of the Portuguese Supreme Courts between January 2015 and December 2017 has been analysed.¹⁵⁵ This timespan delivered 75 cases in which the Charter was mentioned.¹⁵⁶ In most of the cases, the Charter was mentioned only as a non-decisive ‘ornament’ next to other sources of fundamental rights.¹⁵⁷ Nevertheless, the case law analysis also identified cases in which the courts included Charter provisions in their consideration and applied them directly.¹⁵⁸ In this latter category the Charter was mostly claimed by natural persons, but there were also three cases where private legal entities were able to invoke the protection of the Charter successfully.¹⁵⁹ Since the facts and eventual decisions were comparable, only the first of these rulings is discussed.¹⁶⁰ In this case, rendered in 2017, a private legal entity requested the protection of Article 47 of the Charter in order to obtain legal aid. The company wanted to object to injunctions that were being moved against it by a debt collector before the National Injunction Counter. This request was rejected by the Social Security Institution¹⁶¹ with a reference to national legislation stating that private legal entities with profit motives could not benefit from legal aid protection.¹⁶² The Constitutional Court concluded on the basis of the CJEU’s *DEB* ruling that this legislation was not in accordance with the right to legal aid under Article 47 of the Charter.¹⁶³ According to the Constitutional Court, the inability of a company to discuss with the Portuguese authorities its economic inadequacy for the purpose of obtaining legal aid was contrary to Article 47 of the Charter. This provision was thus violated. With its appeal to Article 47 of the Charter, the company stood up for its own interests. Legal aid would not only be necessary to object to the injunctions the company faced (rule of law interest), but the company would also attain a better financial position if the injunctions were denounced (economic interest).

In the case law analysed, there have also been cases where private legal entities made an appeal to the Charter in order to defend the fundamental rights of individual persons within the legal entity. In all these cases, however, the Charter was held to be not applicable since the disputed acts fell outside the scope of EU law (Article 51 of the Charter).¹⁶⁴ Therefore, no clear conclusions can be drawn with regard to this matter. The same applies for the applicability of the Charter to public authorities, since in the case law reviewed there have been no cases in which a public authority claimed the protection of the Charter.

6.4 Spain

6.4.1 Spanish Constitution

Fundamental rights and liberties are included in Articles 14-29 and 30(2) of the Spanish Constitution. These provisions are susceptible to the remedy of *amparo*.¹⁶⁵ This encompasses the possibility to lodge

155 The researchers entered the term ‘Carta dos Direitos Fundamentais da União Europeia’ (the Portuguese translation of ‘Charter of Fundamental Rights of the European Union’) in the publicly available case law data bases of the three supreme courts in Portugal: the Constitutional Court (<http://www.tribunalconstitucional.pt/tc/acordaos/>, last visited 2 May 2018) the Supreme Court of Justice and the Supreme Administrative Court (<http://www.dgsi.pt/>, last visited 2 May 2018). After this, cases were selected that were dealt with in between 2015-2017. The reference to the ECLI number is only provided for the cases of the Supreme Court of Justice since the platform (<https://jurisprudencia.csm.org.pt/>, last visited 2 May 2018) only provides numbers for the decisions of that court.

156 From these 75 cases, 12 were from the Supreme Administrative Court, 26 from the Supreme Court of Justice and 37 from the Constitutional Court.

157 See e.g. the cases no. 0870/17 of the Supreme Administrative Court, no.1405/07.1TCSNT.L1.S1 (ECLI:PT:STJ:2017:1405.07.1TCSNT.L1.S1) and no. 60/09.9TCFUN.L1.S1 (ECLI:PT:STJ:2016:60.09.9TCFUN.L1.S1) of the Supreme Court of Justice.

158 In 13 of the 75 cases in which the Charter was mentioned, the court applied the Charter directly.

159 See cases *supra* note 141.

160 Acórdão no. 591/2016.

161 The Social Security Institution, part of the Ministry of Solidarity, Employment and Social Security, decides on requests for legal aid in Portugal, see <https://www.portaldocidadao.pt/en/web/instituto-da-seguranca-social/instituto-da-seguranca-social> (last visited 20 July 2018).

162 Art. 7^o, no. 3 of the Law no. 34/2004, of 29 July (altered by the Law no. 47/2007, of 28 August).

163 See *DEB*, *supra* note 37.

164 This was at stake for example in case no. 0438/14 of the Supreme Administrative Court. An association of judges invoked Article 47 of the Charter in order to request the annulment of several administrative acts that lowered the salaries of the judges. According to the association of judges, this salary reduction would violate the independence of judges. The court decided the Charter was not applicable, because the Union did not have any competence regarding the remuneration of judges. This was also stated in case law of the CJEU (Case-128/12, 7 March 2013, ECLI:EU:C:2013:149).

165 Art. 53(2) of the Constitution and Art. 41 of the Organic Law 2/1979 on the Constitutional Court, of 3 October 1979.

an individual appeal before the Constitutional Court of Spain.¹⁶⁶ Private legal entities can make use of this remedy as long as they have a legitimate interest.¹⁶⁷ Thus, private legal entities are able to claim the protection of the constitutional rights in Articles 14-29 and 30(2) of the Constitution. In the Constitutional Court's case law, it can be seen that private legal entities make use of this possibility in order to protect both the interests of individuals and their own interests. In a ruling from October 2017, for example, the federation of industries and agrarian workers of the General Union of Workers of Spain claimed the protection of the right to equality (Article 14 of the Constitution) in order to achieve respect for the right to equal remuneration of the workers that were united in the federation.¹⁶⁸ In a case from November 2016, the protection of commercial interests was at stake. Here, company Sporafrik S.L. was allowed to invoke the right to effective judicial protection (Article 24 of the Constitution) in order to annul proceedings in a foreclosure procedure.¹⁶⁹

Debate exists about the possible ownership of constitutional rights by public authorities. According to the Constitutional Court, the ownership of these rights should not be extended to public authorities for protecting their own interests. Fundamental rights function as a counterweight to the exorbitant powers of public administration in order to protect the individual.¹⁷⁰ Only the Public Prosecutor and the Ombudsman may invoke constitutional fundamental rights, since their claims protect the interests of individuals.¹⁷¹ Despite this clear stance taken by the Constitutional Court, in legal doctrine the position is defended that before the ordinary courts (courts of first instance, courts of appeal, supreme courts),¹⁷² it must in theory be possible for public authorities to invoke constitutional rights for their own interests. The reason for this is the 'equality of arms' principle that applies before these courts. As a result of this principle, equal opportunities must be given to all those involved in the process. In other words, all parties in the proceedings should have access to the same remedies and appeals.¹⁷³ Therefore, if a public authority is involved in proceedings with a party that is able to invoke constitutional rights (individuals or private legal entities), the public authority must also be able to make an appeal to these rights. In practice, however, public authorities hardly ever invoke the fundamental rights of the Constitution. This is due to the fact that, at least in administrative proceedings, public authorities can also claim the protection of their interests via provisions of the Contentious-Administrative Jurisdiction Law. This law renders public authorities other, more expedited, ways to achieve the same goals as the constitutional rights. Thus, in administrative proceedings, it is not necessary for public authorities to invoke constitutional rights.¹⁷⁴

6.4.2 Spanish application of the ECHR

By virtue of Article 96 of the Constitution, the ECHR is part of the internal legal system of Spain. It can be invoked directly before the Spanish courts.¹⁷⁵ It is possible for private legal entities to make appeals to the ECHR. In this regard, the right to property (Article 1 of Protocol No. 1 to the ECHR) is invoked most often. An example of a case in which this happened is a 2017 ruling of the *Tribunal Superior de Justicia*, where a company tried to fight an expropriation decision of the State that concerned property belonging to the

166 The *amparo* remedy is a protection that can be used only once the ordinary remedies before the ordinary courts have been exhausted (Art. 43(1) of the Organic Law 2/1979). The ordinary courts are the courts of first instance, the courts of appeal (Audiencia Provincial and Tribunal Superior de Justicia) and the supreme courts (Tribunal Supremo and the Tribunales Superiores de Justicia (there is one for each 'comunidad autónoma')). The entities that are able to lodge an *amparo* appeal before the Constitutional Court are also able to invoke Arts. 14-29 and 30(2) of the Constitution before these courts.

167 Art. 162(2) of the Constitution and Art. 46 of the Organic Law 2/1979.

168 STC 112/2017, 16 October 2017, ECLI:ES:TC:2017:112.

169 STC 200/2016, 28 November 2016, ECLI:ES:TC:2016:200.

170 P. Ruiz Jarabo, 'Los derechos fundamentales en los poderes públicos: de la legitimación en el proceso a la limitación en el poder', (2003) 9 *Revista Jurídica*, p. 150. See also STC 64/1988, 12 April 1988, ECLI: ES:TC:1988:64.

171 Art. 162(1) of the Constitution and Art. 46 of the Organic Law 2/1979.

172 See supra note 166 (court system).

173 See Ruiz Jarabo, supra note 170, p. 142.

174 Ibid.

175 Since it is essential to make an appeal to a constitutional provision in order to make use of the *amparo* remedy, the Constitutional Court primarily decides on matters relating to the fundamental rights in the Constitution. Claims concerning ECHR provisions are dealt with to a lesser extent. The ordinary courts are not susceptible to this limitation. Therefore, in order to gain information on the Spanish application of the ECHR, case law and literature of the position of these courts (especially that of the Tribunal Supremo) was reviewed.

company.¹⁷⁶ The company made this appeal in order to defend its own economic interests. The loss of the property would negatively affect the company's financial position.

There are also cases before the Spanish courts in which private legal entities invoke ECHR provisions to protect the interests of individuals. An example is a decision of the *Tribunal Supremo*, where the Association of Attorneys of Madrid relied on the prohibition of slavery and forced labour to fight a decision that obliged attorneys to represent people who were entitled to free legal assistance.¹⁷⁷ The association invoked Article 4(2) of the ECHR arguing that this obligation constituted 'compulsory or forced labour'. This argument was not accepted by the Supreme Court. It stated that the obligation to represent people with low resources is inherently connected with the profession of an attorney and can therefore not be considered forced labour.¹⁷⁸

As is the issue regarding Constitutional provisions, thus far the Spanish courts have only allowed public authorities to invoke ECHR provisions to protect the interests of individuals.¹⁷⁹ There is no case law where public authorities have been able to invoke the ECHR for their own interests. Though it must be mentioned that the 'equality of arms doctrine' opens the theoretic possibility for public authorities to invoke ECHR provisions for their own interests, if the other party in the procedure is also allowed to do this.

6.4.3 Spanish application of the Charter

Between 2015 and 2017, there have been 203 cases before the Spanish Supreme Court (*Tribunal Supremo*) which mentioned the Charter.¹⁸⁰ In 36 of these cases, private legal entities have made an appeal to this instrument. These entities relied on the Charter, both for protection against harm to individuals as well as for the safeguarding of their own – economic – interests. The first was at stake in a judgment of 1 January 2017, in which a union claimed the protection of Articles 21 and 23 of the Charter (non-discrimination and equality between men and women) in order to safeguard the equal treatment of individuals that were represented by the union.¹⁸¹ Moreover, in the *El País* case, the protection of the freedom to receive information for individuals was the main concern for the applicant, newspaper *El País*.¹⁸² It was accused of violating the rights to privacy and data protection, since it digitised and publicly disclosed its archives on the internet. The archives contained items that damaged the reputation of certain individuals. The court was asked to summon *El País* to remove this data from the internet. The court granted this appeal to that extent that the newspaper could be forced to remove specific data on request. It nevertheless followed *El País* in its defence that a disproportionate infringement of the freedom of information of the public (individual human beings), as protected by Article 11 of the Charter, would be implied if *El País* had to remove this data on its own initiative.

The protection of the own interests of a private legal entity can be seen in a 2017 ruling of the *Tribunal Supremo*.¹⁸³ An electronics company invoked Articles 20 and 21 of the Charter (equality before the law and non-discrimination) in order to fight the tax rates it had to pay. According to the company, these rates were discriminatory.

There have been no cases in which public authorities have claimed the protection of the Charter for defending their own interests.¹⁸⁴ Again, however, this does not alter the fact that, in theory, nothing can prevent public authorities from claiming Charter protection for their own interests due to the principle of equality of arms.

176 STS 3264/2017, 13 September 2017, ECLI: ES:TS:2017:3264.

177 STS 413/2016, 29 January 2016, ECLI:ES:TS:2016:413.

178 Ibid.

179 See e.g. STS 2718/2016, 9 June 2016, ECLI: ES:TS:2016:2718, in which the Public Prosecutor invoked the ECHR for an individual.

180 Researchers entered the term 'Carta de los Derechos Fundamentales de la Unión Europea' in the publicly available case law database: <http://www.poderjudicial.es/search/>. This resulted in a database where the Charter was mentioned 203 times between 1 January 2015 and 31 December 2017. Cases before the *Tribunales Superior de Justicia* (the Supreme Courts that deal with cases of the 'comunidades autónomas') have not been reviewed.

181 STS 84/2017, 1 January 2017, ECLI:ES:TS:2017:84.

182 STS 4132/2015, 15 October 2015, ECLI:ES:TS:2015:4132.

183 STS 3000/2017, 18 July 2017, ECLI:ES:TS:2017:3000.

184 In six of the cases under study, the Public Prosecutor made an appeal to the Charter. This was, however, always to protect the interest of the suspect or the convicted person. See e.g. STS 4719/2015, 18 November 2015, ECLI:ES:TS:2015:4719.

6.5 Poland

6.5.1 Polish Constitution

Fundamental rights and liberties are listed in Chapter II (Articles 30-86) of the Constitution of the Republic of Poland. According to Article 8 of the Constitution, these fundamental rights shall apply directly before the Polish courts.¹⁸⁵ The general opinion in Polish legal doctrine is that individuals as well as private legal entities can make use of this applicability.¹⁸⁶ This opinion is also manifested in case law. Polish courts allow private legal entities to invoke constitutional rights both to protect their own economic interests and to protect the rights of the individuals inside the legal entity. As regards the first interest, mostly the right to property (Article 64 of the Constitution) is invoked. In 2015, for example, UPC (a limited liability company active in the field of internet communication) successfully complained against legislation affecting its constitutional right to property.¹⁸⁷ UPC violated copyrights of the Polish Filmmakers Association, and, according to the Act on Copyright and Related Rights, it had to pay a large remuneration for this infringement.¹⁸⁸ UPC argued that this payment demand constituted a disproportionate interference in its property rights. The Constitutional Tribunal agreed and decided that Articles 64 (right to property) and 31(3) (limitation of rights) of the Constitution had been violated.

The fundamental rights of individuals were protected in a case in 2015 before the Constitutional Court.¹⁸⁹ Trade union *Solidarność* (a private legal entity) contended that the exclusion in the Labour Code of the possibility for members of the civil service corps to conclude collective labour agreements was a violation of the right to the freedom of association as protected in Article 59(2) and (4) of the Constitution. With this complaint, *Solidarność* wanted to protect the interests of the individual members of the civil service corps. The Constitutional tribunal acknowledged the claim to the freedom of association, but it found that there was no violation of this right.

As regards public authorities, certain bodies with a quasi-public status (semi-public authorities) are allowed to invoke constitutional rights to protect individuals. This applies, for example, to the Jewish Religious Communities.¹⁹⁰ In a case rendered in 2015, the Constitutional Tribunal made it clear that these communities can invoke the freedom of religion (Article 53 of the Constitution) to fight legislation that prohibits their ritual slaughter rites.¹⁹¹ As a result of this judgment, the religious rituals of Jewish individuals were protected. Furthermore, it is not uncommon in Poland that local governments (e.g. municipalities) can claim the protection of the Constitution in order to serve their economic property interests. This was at stake, for example, in a case before the Supreme Administrative Court in which the capital city Warsaw could invoke Article 45 of the Constitution (right to access to court) to complain against a decision of the Mazovia Governor concerning a building permit.¹⁹²

6.5.2 Polish application of the ECHR

Since Poland ratified the ECHR in 1992, it has been a part of the Polish legal order. It can be directly invoked before the Polish courts (Articles 9 and 91 of the Constitution). The ECHR is applied regularly; not only with

185 With regard to the application of constitutional fundamental rights, in the Polish justice system, the common courts (ultimate appeal at the Supreme Court), the administrative courts (ultimate appeal at the Supreme Administrative Court) and the Constitutional Tribunal (Arts. 173-201 of the Constitution) must be mentioned. The common courts have general competence on fundamental rights issues (e.g. penal law, civil law, labour law). The administrative courts decide on the constitutional conformity of administrative decisions. The Constitutional Tribunal decides on matters concerning the constitutionality of statutes and international agreements and constitutional complaints of persons (and private entities).

186 L. Bosek, 'Art. 31', in M. Safjan & L. Bosek (eds.), *Konstytucja RP Vol. I, Komentarz Art. 1-86* (2016), p. 762.

187 Constitutional Tribunal SK 32/14, 23 June 2015.

188 Art. 79(1), point 3, lit. b of the Act of 4 February 1994 on Copyright and Related Rights (Journal of Laws of 2006 No. 90, item 631).

189 Constitutional Tribunal K 5/15, 17 November 2015.

190 The status of Jewish Religious Communities is regulated in the statute on the relations between the State and the Religious Jewish Communities in the Republic of Poland, Official Journal 'Dziennik Ustaw', 1997, N. 41 item 251. The term 'communities' must be understood in the meaning of 'Qahal', the Jewish term corresponding to autonomous and self-governing communities. These communities have a significant degree of autonomy. The legislation criticised was Art. 34 (1) of the statute of 21 August 1997 on the protection of animals (Journal of Laws of 2003 No. 106, item 1002, as later amended).

191 Constitutional Tribunal P 34/13, 24 February 2015.

192 Supreme Administrative Court (NSA) II OSK 3270/17, 11 January 2018.

respect to individual affairs, but also with respect to the affairs of private legal entities. Sometimes these entities invoke the ECHR to protect the individual fundamental rights of human beings inside the entity. In this respect, the aforementioned *Solidarność* case can be referred to. Here, the ECHR protection of the freedom of assembly and association (Article 11 of the ECHR) was also invoked by the trade union.¹⁹³ Furthermore, private legal entities can make appeals to the ECHR to protect their own economic interests. This happened, for example, in a case before the Court of Appeal of Warsaw in 2015.¹⁹⁴ A limited liability company invoked the ECHR to annul an order placed on it to pay a fine for not living up to the obligations of a lease agreement. Although the court did not go along with the company's demand, it did accept the applicability of the ECHR as such.¹⁹⁵

In addition to private legal entities, public authorities seem to be able to invoke the ECHR. First of all, this is possible in order to protect the interests of individuals. An illustrative example is a case from May 2014, in which the Court of Częstochowa (a public entity) invoked Article 6 of the ECHR to fight a decision of the Court of Katowice to exclude a judge (working for the Court of Częstochowa) from a case.¹⁹⁶ The reason for this exclusion was that the judge had unnecessarily delayed proceedings since he aimed to present questions to the Constitutional Tribunal before giving a judgment. It was held that the questions were useless and therefore the judge was dismissed from the case. The Court of Częstochowa asserted that the removal of the judge interfered with the requirement of the independence of the judge while adjudicating, and invoked amongst others Article 6 of the ECHR. By virtue of this appeal the Court of Częstochowa protected the interest of the individual judge who had been removed from the case.

Case law further demonstrates that public authorities are allowed to make an appeal to the ECHR in order to protect their own (economic or legal) interests. In this regard, it can be mentioned that local governments (municipalities) are not only able to invoke the Constitution, but they can also invoke the ECHR to protect their property rights.¹⁹⁷ In addition, public hospitals (which are regarded as public entities) have been able to rely on the ECHR in proceedings against national health funds for their own economic interests. A striking example of this is a case before the Court of Appeal of Wrocław in 2013.¹⁹⁸ In this case, the Public Hospital of Wrocław was able to claim the protection of Article 2 of the ECHR (right to life) in order to demand more money from a national health fund than had previously been agreed.¹⁹⁹

6.5.3 Polish application of the Charter

Also in Poland, a systematic case law review has been carried out to draw conclusions on the use of the Charter before the Polish courts. In this Polish review, some cases were analysed that technically speaking fell outside the agreed research scope, i.e., rulings of *lower courts* and rulings *before* 1 January 2015. As the country rapporteur of Poland provided some of these cases to explain the application of the Charter in Poland, contrary to the analyses with regard to the Netherlands, Portugal and Spain, cases of lower courts and cases handed down before 1 January 2015 are discussed below as well.

As is the case with respect to the Polish Constitution and the ECHR, private legal entities are able to rely on the Charter to protect both the interests of human beings and their own (economic) interests. As regards the latter, Polish case law on abusive consumer contracts is relevant to mention.²⁰⁰ In this case law, it was decided that companies that are accused of using abusive clauses in their consumer contracts and do not have legal means at their disposal to fight these accusations are able to invoke Article 47 of the Charter (right to a fair trial). These claims will ultimately serve the protection of the commercial interests of these companies, since the accusations of using abusive clauses negatively affect the commercial positions of the companies and Article 47 of the Charter claims are aimed at fighting these accusations.²⁰¹

193 See K 5/15, *supra* note 189.

194 Court of Appeal of Warsaw VI ACa 1321/14, 26 May 2015.

195 *Ibid.*

196 District Court of Częstochowa IV U 1663/10, 29 May 2014.

197 See NSA II OSK 3270/17, *supra* note 192, in which not only an appeal was made to the Constitution, but also to the ECHR.

198 Court of Appeal of Wrocław I Aca 1205/13, 11 December 2013.

199 *Ibid.* In Poland, national healthcare is financed by means of contracts between the national health funds and hospitals.

200 See e.g. the cases VI Aca 78/15 of 26 April 2017 and the similar case VI ACa 81/15 of 26 April 2017 before the Court of Appeal of Warsaw.

201 *Ibid.*

The reviewed case law further shows that public authorities are able to make appeals to the Charter. Again, these entities can rely on this instrument to protect the fundamental rights of individuals as well as their own economic interests. To demonstrate these different applications, the case law that was mentioned in order to illustrate the Polish application of the ECHR can be used. In some of these cases, the Charter was namely also invoked. In the *Court of Częstochowa* case, for example, where the Court of Częstochowa wanted to protect one of its judges, Article 47 of the Charter was invoked alongside Article 6 of the ECHR.²⁰² In addition, the case law concerning public hospitals and national health funds shows that public hospitals are not only able to rely on the ECHR to protect their economic interests, but also on the Charter. In this respect, it can be mentioned that in the *Wroclaw Hospital* case, the public hospital in Wroclaw invoked Article 35 of the Charter (right to health care) along with Article 2 of the ECHR in order to gain more money from the health fund.²⁰³

6.6 National application v CJEU and ECtHR application

The personal scope application of the Charter and the ECHR by the national courts in the selected Member States yield only small differences when compared to the personal scope application of these instruments by the CJEU and the ECtHR.

Concerning the application of the Charter in relation to private legal entities, it is clear that until now the Member States investigated have generally ruled in line with the CJEU. In all Member States private legal entities are allowed to claim the protection of the Charter for their own – legal or financial – interests. This is in conformity with the CJEU's application. As regards the application of the Charter to public authorities, the Netherlands, Portugal and Spain also generally comply with the stance of the CJEU in the sense that in none of these Member States has a public authority been able to make an effective appeal to the Charter in order to protect its own interests. In Spain and Portugal there have been no appeals at all from public authorities to the Charter.²⁰⁴ In the Netherlands, a municipality tried to invoke Article 47 of the Charter in proceedings against another public authority, but the competent court only allowed an appeal to the general EU principle underlying this provision. Only in Poland have the courts given more protection than the CJEU has granted so far. In this country, public authorities have been able to rely on the protection of Charter provisions; not only to protect against harm to individuals (which is in line with the CJEU's position), but also to protect their own interests (which has not been accepted yet by the CJEU).

With respect to the personal scope of the ECHR, in all Member States private legal entities can claim the protection of the ECHR not only for protection against harm to individuals represented in the entity, but also for protection of their own interests. This matches the ECtHR's approach. When it comes to public authorities, in the Netherlands, Portugal and Spain, these authorities have not been able to directly invoke the ECHR in order to protect their own interests. This is similar to the ECtHR's viewpoint. In Spain and Portugal there have been no instances of a public authority invoking the ECHR before a national court for its own interests.²⁰⁵ In the Netherlands, public authorities have made claims to the ECHR, but the courts usually ruled that these entities could not invoke the ECHR provisions or they only applied the ECtHR's case-law by analogy. Poland, however, is an exception to the ECtHR's position. At times, Polish courts have allowed public authorities to invoke the ECHR. In some cases, this was to protect the fundamental rights of individuals, but there were also instances in which a public authority could rely on the ECHR to protect its own economic interests.

Finally, it can be concluded that the personal scope application of the constitutions of the Member States do not add anything significant to the way these Member States apply the ECHR and the Charter. In all Member States, private legal entities are allowed to claim the protection of constitutional fundamental

202 See IV U 1663/10, supra note 196.

203 See I Aca 1205/13, supra note 198.

204 It must be mentioned, though, that in Spain the equality of arms doctrine before the ordinary courts opens the possibility that public authorities are able to claim the protection of the Charter in theory.

205 Although again, the equality of arms principle in Spain provides the possibility that public authorities are not excluded from claiming the protection of the ECHR before the ordinary courts in the future.

rights before the national courts. They can do so in order to protect against harm to individuals, but also in order to defend their own interests.²⁰⁶ This complies with the way the Member States use the ECHR and the Charter. With regard to public authorities, there are also very few differences. In the Netherlands, public authorities are usually not allowed to invoke constitutional rights before the national courts. This is in line with the approach of the Dutch courts towards the application of the Charter and the ECHR. In Portugal it is argued that special public authorities such as universities are able to invoke constitutional rights in proceedings against other public authorities. However, since no case law has been reviewed in which this actually occurred, it is not possible to state that there is a difference in the Portuguese application of the Constitution on the one side and the Portuguese application of the Charter and the ECHR (which does not provide a possibility for public authorities to make an appeal towards these instruments) on the other side. In Spain, it is theoretically possible that public authorities can invoke constitutional rights for their own interests by virtue of the equality of arms principle. In practice, this rarely occurs. As this theoretic possibility also applies when courts apply the Charter and the ECHR, a difference in application cannot be distinguished. Finally, also in Poland, courts apply the Polish Constitution similarly to the way they apply the Charter and the ECHR. All instruments can be invoked by public authorities, not only to protect the fundamental rights of individual human beings, but also to protect their own interests.

Undoubtedly, what stands out most in this comparison is the fact that the courts in Poland, contrary to the other courts that were investigated in this research, clearly accept that public authorities may invoke fundamental rights to protect their own interests. The Polish country rapporteur explained that this application stems from the rule of law, according to which the Republic of Poland is ruled (Article 2 of the Constitution).²⁰⁷ Thus, in Poland, it appears that the rule of law does not only require that public authorities *rule on the basis of law*, but also requires public authorities *to apply the law (fundamental rights)* to fulfil their mission.

7. Conclusion

The personal scope of the Charter still has to be defined by the CJEU. The question of whether, and if so under what circumstances, private legal entities and public authorities can invoke Charter protection in particular needs to be addressed. It was the aim of this article to provide a detailed examination of the landscape the CJEU will have to take into account when dealing with this matter in the future. This landscape was mapped out using the background and objectives of the EU and the ECHR legal systems, the personal scope application of the Charter as interpreted by the CJEU so far, the personal scope application of the ECHR as interpreted by the ECtHR and the application of fundamental rights (Charter, ECHR and constitutional rights) by the national courts of Member States. Where does the examination of this *umwelt* leave us?

First of all, in the personal scope application of the Charter by the CJEU up to now, the CJEU has decided that certain provisions in the Charter can be relied on by private legal entities. Public authorities, however, have not been able to directly invoke Charter provisions. In the light of the background and objectives of the EU system, there is no reason why the CJEU cannot alter its personal scope application and also explicitly allow public authorities (e.g. Member States) to claim the protection of Charter provisions. However, this is different when one takes the personal scope application of the ECHR as interpreted by the ECtHR as a guiding principle. In line with the CJEU, the ECtHR allows private legal entities to claim the protection of the ECHR for their own interests, but it does not allow public authorities and semi-public authorities to invoke ECHR provisions. Since, however, the objective of the ECHR system differs significantly from the objective of the EU system, this does not have to be a reason for the CJEU to exclude public authorities from invoking Charter provisions for their own interests as well. When, finally, the personal scope application of fundamental rights by the national courts is considered and if the CJEU used this application as a navigator

206 Although in the Netherlands, the protection of the latter interest is not yet apparent since there are few constitutional rights suitable for invocation to serve these interests. When more suitable provisions are included (i.e. right to fair trial), however, it can be assumed that private legal entities may invoke them to serve their own interests.

207 The Polish country rapporteur is Pasquale Policastro, Professor in Constitutional and EU law at the University of Szczecin.

for its own application, it can be concluded that the CJEU should keep allowing private legal entities to make appeals to Charter provisions, but it should exclude public authorities from invoking the Charter for their own interests. All Member States investigated namely grant private legal entities the protection of fundamental rights (Charter rights, ECHR rights and constitutional rights), but most of them exclude public authorities from this possibility. Only Poland is an exception. However, since the CJEU always takes serious notice of the *common practice* in Member States, it is not to be expected that the practice in Poland will be taken as an example.

All things considered, it would appear to correspond to the various elements of the landscape if the Charter was applied to private legal persons; not only when they protect the interests of individuals, but also if their own – legal or economic – interests are at stake. For this, the CJEU does not have to change the current direction taken in its judgments. Conversely, in the case of public authorities, the various elements on the landscape provide some open space for the CJEU to decide whether it should alter its present jurisprudence and explicitly allow public authorities the possibility to directly invoke Charter provisions. The objectives of the EU system do not oppose this. However, the applicability of fundamental rights to public authorities is not in line with the general mindset of the national courts when they apply the Charter (and other fundamental rights). It will be up to the CJEU to decide which element carries the most weight and to establish how the issue of the personal scope of fundamental rights in Europe will develop in the future. ■