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Fundamental rights in European Union civil service law

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Abstract Sometimes neglected by lawyers, European Union civil service law represents an area where fundamental rights issues are particularly likely to arise: the official confronts the administration which he or she works for, and which may adopt measures specifically addressed to him or her. The role of judicial review is then of the utmost importance. However, the relationship European Union personnel have with the administration is a public law one, and this is the case mainly because the European Union administration has the responsibility of ensuring the achievement of the tasks conferred on the European Union institutions by the Treaties. The Staff Regulations, which are the main source of European Union civil service law, reflect the nature of this relationship in their provisions and procedures. It is against this backdrop that one has to assess the ways in which the European Union Charter of Fundamental Rights can be of relevance in European Union civil service law.

Keywords European Union civil service law · European Union Charter of Fundamental Rights · Civil Service Tribunal · General principles of interpretation of the Charter · Staff Regulations of Officials and Agents of the European Union · Articles 336 and 270 TFEU · Right to good administration · Right to judicial protection · Rule of concordance · Review procedure before the Court of Justice · *Locus standi* under Article 91 of the Staff Regulations

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1 Introduction

Can an unmarried heterosexual couple, with no right to receive the household allowance provided for in Article 1(2)(c) of Annex VII to the Staff Regulations[1] claim that the principle of equality of treatment, enshrined in Article 21(1) of the Charter of Fundamental Rights (the "Charter"), is breached because an unmarried homosexual couple enjoys this right?[2] And to which extent, in order to be consistent with the Charter, must the unmarried homosexual couple prove themselves deprived of access to marriage in order to claim the right to this allowance?[3] Can a candidate in a competition assert his right to the protection of personal data under Article 8 of the Charter in order to have access to his written test?[4] Can an official assert his right to respect for private and family life under Article 7 of the Charter in order to object to questions on his place of residence, asked by the administration in order to know whether he may receive the daily subsistence allowance provided for in Article 10 of Annex VII to the Staff Regulations?[5]

These are only some of the questions that may arise in the field of European Union civil service law when it comes to the issue of fundamental rights, which are now enshrined in the form of written provisions in the Charter of Fundamental Rights of the European Union, which is part and parcel of primary law under Article 6(1)(1) TEU since the entry into force of the Treaty of Lisbon.[6] Indeed, the Charter has inevitably become a key reference in assessing the legality not only of administrative measures adopted by the European Union administration towards its personnel but also, to some extent (and within the limits pointed out in the following paragraphs), of the constitutionality of legislative provisions contained in the Staff Regulations. This is particularly interesting in the field of European Union civil service law (so far the sole field of European Union law with a specialised court, the Civil Service Tribunal) given that European Union civil service law represents an area where fundamental rights were keenly protected well before the time of the Charter.[7] European Union civil service law, it can be added, has represented a pioneering area for litigation and judicial review, where the European Union Courts have adopted solutions and principles which have then come to the fore in adjudicating on other better-known areas of European Union law, such as European Union employment law.[8]

[1] Regulation 31 (EEC) and (Euratom) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Community and the European Atomic Energy Community, OJ 45, 14.06.1962, p. 1385 as further amended, lastly, by Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013 (OJ L 287, 29.10.2013, p. 15).

[2] Case F-153/12 *Forget v Commission*, ECLI:EU:F:2014:61, paragraph 27 and ff. An apparently similar issue was raised in Case F-79/14 *EG v Parliament*, ECLI:EU:F:2015:63, paragraph 56 and ff. but no decision was made on it as the Civil Service Tribunal held that it was inadmissible ("*irrecevable*") according to Article 50(1)(e) of the Civil Service Tribunal's Rules of Procedure for lack of precision.

[3] Case F-86/09 *W v Commission*, ECLI:EU:F:2010:125.

[4] Case F-127/11 *De Mendoza v Commission*, ECLI:EU:F:2014:14, paragraph 101.

[5] Case F-10/12 *Infante Garcia-Consuegra v Commission*, ECLI:EU:F:2013:38, paragraphs 22 and 52.

[6] 1 December 2009.

[7] *Bradley* [1], p. 563.

[8] *O'Leary* [8], p. 775.

2 European Union civil service law and the Charter of Fundamental Rights

2.1 The inescapable link between European Union civil service law and fundamental rights

As the Court pointed out on several occasions, the legal link between an official and the administration is based upon the Staff Regulations and not upon a contract. This means that the rights and obligations of the European Union personnel—be it an official or a temporary or a contract agent—are set out in a piece of European Union legislation and may, in the words of the Court, "be altered at any time by the legislature".[9] Thus, the employment relationship between European Union personnel and their employer is one of public law. This is based not only on the fact that the rights and obligations of European Union personnel are laid down in a legislative measure in order to protect their independence—i.e., the Staff Regulations, which are a European Union regulation—but also on what European Union personnel actually do, that is performing tasks conferred by the Treaties in the general European interest on the European Union institutions, each of which is a separate employer.[10] This last remark is particularly significant because, even in a case brought by a member of the personnel of the European Central Bank, whose status does not fall within the scope of the Staff Regulations but is subject to distinct provisions which make it contractual in nature, the Civil Service Tribunal has held that the performance by members of the ECB of duties in the European public interest means that their status is similar to that of European Union officials.[11]

An initial consequence of the public law nature of this link is that the handling of the relationship between European Union personnel and their employer involves a case of direct administration,[12] given that all measures which can affect the former are adopted by the latter unilaterally, following the rules and procedures contained in the Staff Regulations and/or in other general provisions, adopted by the single institution towards the whole of its personnel.[13] In other words, everything is decided in Brussels (or wherever else the employer has its seat). What is more, every decision taken is an administrative measure, one which is certainly limited to the official or agent or his family members as the case may be, but which is adopted following the same procedural rules as those generally provided for and in force for the rest of the staff.

[9] Case C-443/07 P *Centeno Mediavilla v Commission*, ECLI:EU:C:2008:767, paragraph 60 and the case law quoted therein.

[10] Joined Cases T-34 and T-163/96 *Connolly v Commission*, ECLI:EU:T:1999:102, paragraphs 127–128.

[11] Case F-73/13 *AX v ECB*, ECLI:EU:F:2015:9, paragraph 147 and ff.

[12] On the distinction from the indirect administration see Opinion of AG Trstenjak in Case C-19/05 *Commission v Denmark*, ECLI:EU:C:2007:418, paragraph 61, footnote 26.

[13] Referred to in the Staff Regulations as "General Implementing Provisions". (See—just to mention the Staff Regulations and not its Annexes—Articles 32(2), 42a(1), 110(2) and 110(4) of the Staff Regulations. General Implementing Provisions cannot alter the meaning of legal concepts used in the Staff Regulations: Case T-44/89 *Gouvras-Laycock v Commission*, ECLI:EU:T:1990:33, paragraph 25.)

The ultimate consequence of all this is that the judicial review carried out by the Civil Service Tribunal is not that of a labour court but rather a control of the legality of administrative measures, which ensures a check both of whether facts have been correctly stated and of whether the challenged measure is legal.[14]

Against this backdrop, the relevance of fundamental rights is self-evident: faced with administrative measures which may concern different aspects of his or her personal life, which the administration has to know in order to decide whether an advantage must be granted or a disciplinary measure adopted, a member of the European Union staff might argue that these measures affect his or her fundamental rights. Conversely, for the administration, the approach adopted in a case where a breach of a fundamental right is asserted by a member of the staff may well condition the attitude which will be followed in other identical or similar cases, because, being a public employer, the administration is also in charge of the implementation of the Staff Regulations *vis-à-vis* the rest of the personnel, who must be treated on a footing of equality.

2.2 The autonomy of European Union civil service law

The Staff Regulations are a self-contained regime: they provide for a set of rules which apply solely to European Union personnel, and this basically for two reasons. First, European Union officials and agents are not workers like any others: above all, they are almost exclusively expatriates. Their situation is specific according to their place of origin, their personal situation, their previous professional experience and so on. In turn, this specificity cannot give rise to a difference of treatment: a uniform body of rules is needed in order to tackle all possible consequences of these specific situations. Second, as already hinted at above, in their daily job, European Union personnel carry out tasks in the European public interest and implement the objectives of European integration as laid down in the Treaties. This explains why the content of the Staff Regulations is specific. And this specificity is mirrored in the Treaties, which, at Article 336 TFEU, provide for a specific legal basis for the Staff Regulations. This basis does not allow a change in the Staff Regulations unless the same legal basis is used.[15] Moreover, as the General Court pointed out, the specific nature of the Staff Regulations also means that provisions of secondary law, such as European Union directives relating to social policy, cannot have consequences for the administration, unless they express a general principle of European Union law, or the administration has deliberately implemented them or a general measure (whether one adopted by the administration itself or by the legislator acting on the basis of Article 336 TFEU) refers to it.[16] The Civil Service Tribunal has also stated that, pursuant to the duty of loyal cooperation (now enshrined in Article 4(3) TEU), European Union institutions have to ensure so far as possible consistency between their own internal policy and legislative action at European Union level, in particular

[14]Case T-17/08 P *Andreasen v Commission*, ECLI:EU:T:2010:374, paragraph 146.

[15]Case T-118/99 *Bonaiti Brighina v Commission*, ECLI:EU:T:2001:44, paragraph 47.

[16]Case T-325/09 P *Adjemian v Commission*, ECLI:EU:T:2011:506, paragraph 56.

as addressed to Member States.[17] According to the Civil Service Tribunal,[18] this entails an obligation for the judge to interpret Staff Regulations insofar as possible in the light of the wording and purpose of European Union social directives. However, as has been correctly pointed out,[19] this would mean that such directives rank more highly than the Staff Regulations, which is actually excluded, given that both are sources of equal rank.

That said, as far as the Charter is concerned, it is certainly primary law and ranks higher than the Staff Regulations, which cannot be interpreted in a manner in breach of the Charter. However, as the *Strack* case shows,[20] things might well not be so clear-cut, because other provisions of European Union secondary law can nevertheless become relevant in the interpretation of the Staff Regulations, for it is to these provisions that the Charter refers.

The autonomous nature of the Staff Regulations does not stop there. Given the specificity of the provisions contained therein, Staff Regulations also shape the right to judicial protection of European Union officials. Indeed, in the judicial review which a member of the European Union staff may seek pursuant to Article 91 of the Staff Regulations, he or she has to rely upon the general grounds of legality of administrative measures,[21] and this because, according to this provision, the judge has "jurisdiction only to review the lawfulness of an act adversely affecting an official".[22] In this respect, Article 91 of the Staff Regulations is a key provision in defining judicial protection in European Union civil service law, as the Court and the General Court have recently held, for it is precisely to the "limits and conditions" set out in the Staff Regulations that Article 270 TFEU refers in order to define the right to judicial protection in EU civil service law.[23] In particular, even when seeking damages for a behaviour on the part of the administration which does not result in an act, the concerned agent or official has to file a request in order to obtain such an act, which will then be the possible subject of judicial review.[24]

2.3 The Charter as "jus ex scripto" ranking higher than the Staff Regulations

Protection of fundamental rights has been one of the main elements of the European Union system of judicial protection since the 1970s, when the Court decided that these rights had to be regarded as general principles of Community law (now Union law), the material content of which corresponded to the common constitutional traditions of the Member States and to the provisions of the European Convention on

[17] Case F-65/07 *Aayhan v Parliament*, ECLI:EU:T:2009:397, paragraph 118; see on this *Petrlík* [9], p. 807.

[18] *Ibidem*, paragraph 121.

[19] *Kraemer* [4], p. 1911.

[20] Case C-579/12 RX-II *Commission v Strack*, ECLI:EU:C:2013:570, on which see below, at Sect. 3.2.1.

[21] Case T-49/08 P *Michail v Commission*, ECLI:EU:T:2009:456, paragraph 73 and case law quoted therein.

[22] Case T-110/89 *Pincherle v Commission*, ECLI:EU:T:1991:44, paragraph 30 (emphasis added).

[23] Case C-417/14 RX-II *Missir v Commission*, ECLI:EU:C:2015:588, paragraph 30; Cases T-104/14 P *Commission v Verile and Giergij*, ECLI:EU:T:2015:776, paragraphs 80 and 81; T-131/14 P *Teughels v Commission*, ECLI:EU:T:2015:778, paragraphs 77 and 78; T-103/13 P *Commission v Cocchi and Falcione*, ECLI:EU:T:2015:777, paragraphs 70 and 71.

[24] *Gattinara* [2], p. 686 f.

Human Rights. Historically linked also with the concern of the Court to ensure uniform protection at European Union level and, subsequently, to defuse possible conflicts with national constitutional and supreme courts, this case law was then codified in Article 6(2) of the old TEU, as modified by the Treaty of Maastricht.

That said, the Charter introduced some novelties, one of the most relevant ones being the rule found in Article 52(3) of the Charter that the provisions concerning fundamental rights corresponding to rights enshrined in the European Convention on Human Rights have to be interpreted in accordance with the case law of the Strasbourg Court. This is certainly to ensure more legal certainty in comparison with the past, when the Community Courts could refer either to the common constitutional traditions of the Member States or to the international treaties binding upon the European Community as a source of the general principles they applied to protect fundamental rights.[25] Yet, until the Treaty of Lisbon, the case law demonstrated hesitance in using the Charter as a reference, even if solely for the sake of interpretation. In particular, there was a different view among the two jurisdictions, i.e., at that time, the Court of First Instance (the predecessor of the General Court) and the Court of Justice, with the notable exception of some Advocates General.[26] Only since the Treaty of Lisbon has the Court explicitly taken the Charter into account, in cases where the legality of European Union measures has been challenged as well as in cases involving the interpretation of European Union law.

In the pre-Lisbon era, the Civil Service Tribunal was keen on interpreting the Staff Regulations consistently with the fundamental freedoms provided for in the Treaties, as had occurred in relation to the free movement of workers,[27] but only where this was allowed, i.e., where the situation of the official or the agent concerned *also* fell within the scope of the Treaty.[28] On the other hand, when more general issues of fundamental rights were raised, the Civil Service Tribunal held that Staff Regulations provisions which had the purpose of ensuring respect for fundamental rights had to be construed in the same way as provisions providing for these rights, such as the European Convention on Human Rights. That is to say they had to be "interpreted in such a way as to make those rules as effective as possible, so that the right in question is not theoretical or illusory, but practical and effective".[29]

In one of the first cases brought following the entry into force of the Treaty of Lisbon, the Civil Service Tribunal also mentioned the Declaration on the Charter in order to point out its binding character—but also its declaratory content.[30] As for the General Court, as the court of appeal on European Union civil service law, it also exercised prudence in mentioning fundamental rights without making any explicit

[25] *Lenaerts/De Smijter* [6], p. 278.

[26] *Mengozzi* [7], p. 492.

[27] Joined Cases F-69/07 and F-60/08 *O v Commission*, ECLI:EU:F:2009:128, paragraphs 103–133.

[28] In the sense that the official or agent had to be—in these cases—also a migrant worker within the meaning of what is now Article 45 TFEU.

[29] Case F-86/09 *W v Commission*, quoted above, paragraph 43; the issue at stake in this case was the consistency with the principle of non-discrimination of the Staff Regulations provisions applicable to the entitlement to the household allowance claimed by a homosexual couple.

[30] Case F-116/07 *Tomas v Parliament*, ECLI:EU:F:2010:77, paragraph 9, partially annulled on appeal in Case T-317/10 P.

reference to the Charter.[31] However, if it is true that fundamental rights were protected well before the entry into force of the Treaty of Lisbon (which granted the Charter the status of primary law), it is also true that it was only with this Treaty that they became a written source of primary law. In European Union civil service law, this has entailed a slightly reduced discretion for the judge of first instance, which has then become easier to review in the framework of an appeal procedure, just as the discretion of the appeal jurisdiction has become easier to review within the framework of a review procedure. More importantly, the Charter has particular relevance for the administration, given that the consistent interpretation of the Staff Regulations which the administration has to follow may contribute to an amicable settlement, thus preventing the case from going to the Civil Service Tribunal. Indeed, this is the purpose of the pre-litigation procedure, as the General Court has recently pointed out in the *Moschonaki* judgment.[32]

3 The Charter and European Union civil service law: a state-of-the-art appraisal of the case-law

The Charter can be relevant in different ways in European Union civil service law. It can be used merely as an interpretative instrument, in order to let the judge define the precise content of some rights or principles. On the other hand, there can be issues of European Union civil service law which are not settled in the Staff Regulations, as is the case concerning the language of publication of the Notices of Competition for the recruitment of new personnel.[33]

Perhaps the most radical way in which the Charter can be relied upon is to claim on the basis of it either the illegality of an administrative measure which adversely affects an official or agent, or the unconstitutionality of the legal basis of this measure, which is normally a provision of the Staff Regulations.

The effects of invoking the Charter depend much on the nature of the provision at stake, i.e., whether it is a procedural or a substantive provision. In the first place, the Charter can be used as a general parameter to assess the consistency with it of certain requirements laid down in internal general rules or procedures. In the second, it may be the basis of rights that correspond to obligations on the administration. This form of relevance of the Charter does not of course affect situations in which an official avails himself of a specific remedy that is mentioned in the Charter, such as the right of access to documents, mentioned in Article 41(3) of the Charter, or the right to petition, laid down in Article 44. In both cases, the official or agent acts in his general capacity as a European Union citizen and any potential application will go to the General Court and not to the Civil Service Tribunal.[34]

[31] Case T-213/11 P (I) *Collège des représentants du personnel de la Banque européenne d'investissement and ors. v Bömcke*, ECLI:EU:T:2011:397, paragraphs 19–22.

[32] Case T-476/11 P *Commission v Moschonaki*, ECLI:EU:T:2013:557, paragraph 72.

[33] Case C-566/10 P *Italy v Commission*, ECLI:EU:C:2012:752.

[34] On access to documents, see Joined Cases T-197/11 P and T-198/11 P *Commission v Strack* and *Strack v Commission*, ECLI:EU:T:2012:690, paragraphs 53 and 54; on the right of petition see Case C-261/13 P

3.1 Procedural provisions

3.1.1 Article 41 of the Charter and good administration

Article 41 of the Charter is one of the provisions of the Charter most frequently applied by the Civil Service Tribunal. This provision provides, *inter alia*, that the right to good administration includes the right of every person to be heard before any individual measure is taken which would affect him or her adversely; the right of access to the file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. Having provided for these Rights in the Charter allows the Civil Service Tribunal to carry out a review of the administrative procedures provided for in the Staff Regulations. This holds particularly true where the Appointing Authority—i.e., the European Union institution as employer—has a wide discretion, for in this case "the review of observance of guarantees conferred by the Union legal order in administrative procedures is of fundamental importance".[35] Insofar as concerns the interpretation of Article 41 of the Charter, according to the "explanations" mentioned in Article 52(7) of the Charter (henceforth the "explanations"),[36] Article 41 builds on the case law that established the general principle of good administration.[37]

In particular, as regards the right to be heard, this is often considered together with respect for the rights of the defence and, in these terms, it may be a ground for judicial review even independently from the existence of procedural provisions.[38] The Civil Service Tribunal also pointed out that the right to be heard applies only when an individual measure is to be adopted as against an official or agent, but not when he or she is the addressee of an automatic consequence of the application of a new statutory provision.[39] It should be added that the measure must affect the person "adversely". Thus for instance, a reassignment in the interest of the service is not regarded as affecting an individual as adversely as a transfer to another post.[40] This explains why, in the event of a reassignment in the interest of the service being challenged, the court may also refer to a concurrent yardstick to assess the legality of the measure, such as the duty of care owed on the part of the administration towards its personnel.[41] As regards the extent to which a breach of the right to be heard may entail the annulment of a challenged measure, the Civil Service Tribunal has always exercised tight control regarding respect for this principle. Not having the chance of being heard cannot be,

Schönberger v Parliament, ECLI:EU:C:2014:2423; as for access to documents, this rule has an exception for candidates to a competition: see Case Case T-374/07 *Pachtitis v Commission*, ECLI:EU:T:2012:188, paragraph 13; Joined Cases T-515/14 P and T-516/14 P *Alexandrou v Commission*, ECLI:EU:T:2015:844, paragraphs 60–63.

[35] Case Case F-46/09 *V v Parliament*, ECLI:EU:F:2011:101, paragraph 74.

[36] OJ C 303, 14.12.2007, p. 17.

[37] Case F-84/12 *CN v Council*, ECLI:EU:F:2013:128, paragraph 50.

[38] Case T-491/08 P *Bui Van v Commission*, ECLI:EU:T:2010:191, paragraph 7.

[39] Case F-83/05 *Ezerniece Liljeberg v Commission*, ECLI:EU:F:2010:158, paragraph 106.

[40] See for this difference Order in Case F-16/12 R *Kimman v Commission*, ECLI:EU:F:2012:52, paragraph 20.

[41] Case F-8/13 *CP v Parliament*, ECLI:EU:F:2014:44 paragraphs 79–83.

as such, a reason to annul a measure.[42] But an annulment is possible when it cannot be reasonably excluded that this irregularity could have had a particular influence on the content of the measure,[43] in other words, when, had the affected person been heard, his hearing might have brought about a measure with a different content.[44]

Insofar as the right of access to a file is concerned, European Union civil service law provides for several situations where this right may become relevant, such as, for instance, access to the file in disciplinary proceedings or access to the medical file mentioned in Article 26a of the Staff Regulations, which can give rise also to other claims, such as the protection of medical secrecy as a component of the right to protection of one's private life in accordance with Article 8 of the Charter.[45] Thus far, the Civil Service Tribunal has not ruled out the possibility of adjudicating on the respect of this provision of the Charter even when the challenged measure is different from a refusal of access to the file.[46]

Turning now to the administration's obligation to give reasons for its "decisions", as laid down in Article 41(2)(c) of the Charter, this is certainly the provision with the most far reaching consequences before the Civil Service Tribunal, given that, according to the wording of the Charter, this obligation applies to all such acts, whatever their content may be, and not only to decisions that "adversely" affect the official or the agent, as clearly provided for in Article 25 of the Staff Regulations. A case in point is that of a candidate of a competition, whose application had been considered by the Civil Service Tribunal as inadmissible for lack of interest, her score being below the threshold to be admitted to the tests, and this both before and after the neutralisation of some questions asked in the previous stage of this competition.[47] Despite her lack of interest in challenging the decision, and the fact that none of the questions she received had been neutralised, the Civil Service Tribunal considered that the applicant had the right to invoke a breach of the obligation to state reasons, because, on one hand, the general provisions applicable to the competition—namely, the Notice of Competition and the Guide for the attention of candidates—had not been clear on the issue of neutralisation of questions and, on the other, her request for review had remained unanswered.[48] The Court did not annul the challenged decision but granted damages to the applicant, because she had not been duly informed of the criteria used in neutralisation. In another case, the Civil Service Tribunal stated that, as regards the relationship between Article 41(2)(c) of the Charter and Article 25 of the Staff Regulations, the Charter sets out a general principle, so that all derogations

[42] *Ibidem*, paragraphs 23–26.

[43] *Bui Van*, quoted above, paragraph 24.

[44] Case F-78/13 *De Loecker v EEAS*, ECLI:EU:F:2014:246, paragraphs 34–37.

[45] Case F-55/10 *AS v Commission*, ECLI:EU:F:2011:94, paragraph 40, not annulled on this point by the General Court in Case T-476/11 P. This holds true, for instance, in case of the transfer of medical data from an institution to another for the purpose of recruitment: Case F-46/09 *V v Parliament*, quoted above, paragraph 123.

[46] Joined Cases F-7/11 and F-60/11 *AX v ECB*, ECLI:EU:F:2012:195, paragraph 100.

[47] "Neutralisation" is the procedure according to which the Selection Board can annul the questions in case they are ambiguous: see Case F-2/07 *Matos Martins v Commission*, ECLI:EU:F:2010:22.

[48] Case F-116/11 *Vacca v Commission*, ECLI:EU:F:2013:92, paragraphs 52–64.

have to be construed narrowly.[49] However, this approach appears open to question, since it seems to assume that the Charter can be a new source of rights, whereas Articles 51(2) and 52(2) of the Charter clearly present the Charter as a sort of codification of existing rights. In any event, even assuming that the wide interpretation of Article 41(2)(c) followed in *Tzirani* is correct, its effect appears to be limited, since the Civil Service Tribunal recognises, following settled case law, that damages cannot be awarded solely for a breach of the obligation to state reasons.[50]

Lastly, as regards the principle according to which every person has the right to have his or her affairs handled within a reasonable time, referred to in Article 41(1) of the Charter, this is enforced by the Civil Service Tribunal as a ground for damages more than as a ground for annulment. This may occur, for instance, in the case of a procedure seeking to establish the origin of the invalidity from which an official is suffering, i.e. his or her incapacity to work that can be due to a disease.[51] On the other hand, a breach of the principle of reasonable time in the conduct of administrative proceedings can also lead the Civil Service Tribunal to require the institution to bear a part of the costs.[52]

3.1.2 Article 47 of the Charter and the right to judicial protection

The right to an effective judicial review enshrined in Article 47 of the Charter is also often relied on in European Union civil service law and this has given rise to an interesting series of cases, in which the precise meaning of this provision has been indicated. First of all, Article 47 of the Charter may not change the nature of the judicial review carried out by the European Union Courts. Hence, this provision does not allow the judge to apply the Charter on its own motion, at least as far as the substantial provisions of the Charter are concerned.[53]

Moreover, in case a plea is raised by the Court on its own motion, it is the Charter itself that—at Articles 41 and 47—requires the rights of the defence be respected, and both parties have to be given the chance to express their views; this is precisely the meaning of the ruling of the Court of Justice in the review proceedings in *X v Emea*.[54]

Moreover, in the specific field of European Union civil service law, case law has confirmed that Article 47 cannot alter the interpretation of the requirements of admissibility for an application, in the sense that a reference to the Charter cannot make an application admissible.[55] This means that Article 47 cannot make a challenged measure an "act affecting [the applicant] adversely" (an "*acte faisant grief*") within the meaning of Article 91(1) of the Staff Regulations, i.e., a measure amenable to judicial

[49] Case F-46/11 *Tzirani v Commission*, ECLI:EU:F:2013:115, paragraph 163.

[50] Case F-14/10 *Marcuccio v Commission*, ECLI:EU:F:2011:99, paragraph 38 and the case law of the Court quoted therein, upheld on appeal in Case T-491/11 P.

[51] Case F-79/09 *AE v Commission*, ECLI:EU:F:2010:99, paragraph 99 ff.

[52] Case F-53/09 *J v Commission*, ECLI:EU:F:2011:52, paragraph 131.

[53] Case C-272/12 P *Commission v Ireland and ors*., ECLI:EU:C:2013:812, paragraph 28.

[54] Case C-197/09 RX II *X v EMEA*, ECLI:EU:C:2009:804, paragraphs 41 and 56 and 57.

[55] Case F-81/10 *Coedo Suárez v Council*, ECLI:EU:F:2011:102, paragraph 43 and case law quoted therein.

review according to the Staff Regulations, when this is not otherwise the case.[56] In turn, this means that in European Union civil service law Article 47 of the Charter cannot derogate to the requirements of admissibility of applications that stem from the Staff Regulations, for the Staff Regulations also shape the right to judicial review of the European Union staff on the basis of Article 270 TFEU, which is primary law just like Article 47 of the Charter, as noted above.[57] This also means, for instance, that the rule of concordance between the administrative complaint and the application, which stems from the very purpose of the pre-litigation procedure laid down in Article 90 of the Staff Regulations,[58] could not be derogated from by Article 47 of the Charter. However, the Civil Service Tribunal held the contrary to be the case in the *Cerafogli* case as regards the obligation to follow the rule of concordance in the event a plea of illegality of a Staff Regulations provision is raised.[59] The issue is now the subject-matter of a pending appeal.[60]

Finally, it is worthwhile mentioning that in European Union civil service law, the reference to the words "reasonable time" in Article 47(2) of the Charter, which provides for the right to judicial remedy, is as such an element that counterbalances the right to judicial protection itself, because it means, *inter alia*, that legal positions cannot be undermined without temporal limits.[61] On the other hand, this reference contained in Article 47(2) of the Charter also means that, absent the breach of an express deadline which can result in an application being time-barred, the judge has to look at the concrete circumstances of the case to decide whether an application is late in time or not. This occurred in the *Arango Jaramillo* case,[62] where, upon review, the Court held that agents of the European Investment Bank could not have an application dismissed as time-barred if they lodged it just some minutes before the expiry of a three months deadline that was, however, not set out as such in their Staff Regulations but applied by analogy on the basis of Article 91(3) of the Staff Regulations, given also that their application arrived at the Registrar only some minutes after the expiry of this deadline.

3.2 Substantive provisions

When it comes to substantive provisions, the rights of European Union personnel correspond to obligations on the part of the administration. In this respect, the provision in Article 51(2) of the Charter that the Charter does not lay down new obligations is particularly relevant, because it prevents the Charter from being interpreted as a source of obligations that are not provided for in the Staff Regulations.

[56] Case T-261/09 P *Commission v Violetti*, ECLI:EU:T:2010:215, paragraphs 50 and 51.

[57] See above, at II, point 2.

[58] See above, at II, point 3.

[59] Case F-26/12 *Cerafogli v BCE*, ECLI:EU:F:2014:218.

[60] Case T-787/14 P *ECB v Cerafogli*, pending.

[61] Case C-334/12 RX-II *Arango Jaramillo and ors. v European Investment Bank*, ECLI:EU:C:2013:134, paragraphs 41 to 43; Case F-95/09 *Skareby v Commission*, ECLI:EU:F:2011:9, paragraphs 41 to 45.

[62] Case C-334/12 RX-II *Arango Jaramillo and ors*., quoted above, paragraph 33 f.

Besides this interpretative rule, even if provisions of the Charter might in the abstract correspond to rights enshrined in the Staff Regulations, there is another requirement that Charter provisions have to meet in order to be successfully invoked: they have to be sufficiently precise in order to be judicially enforceable; in other words, these provisions must have direct effect, and this is a question that it is up to the judge to decide on a case-by-case basis, according to the wording and purpose of the invoked provision of the Charter. For instance, according to the General Court, Article 30 of the Charter on the prohibition of unjust dismissal does not have direct effect, because it does not entail an obligation to look for a possible reassignment of an official before putting an end to his contract.[63] Conversely, according to the Civil Service Tribunal, Article 31(1) of the Charter has direct effect, so that "the [European Union] staff can rely on a right to working conditions that respect their health, safety and dignity, as recalled in Article 31(1) of the Charter of Fundamental Rights of the European Union".[64] Finally, as the Court has pointed out,[65] the conclusion that an Article of the Charter does not have direct effect cannot change according to the content of the European Union directive on which the Article of the Charter may possibly be based.[66]

3.2.1 The Strack case

Mr. Strack, a former Commission official, asked the Appointing Authority to carry over to 2005 38.5 days of paid leave that he had not been able to take in 2004 because he had been on sick leave. The request had been rejected by the administration pursuant to Article 4(1) of Annex V to the Staff Regulations, which limited a carry-over to twelve days, whilst beyond this ceiling carry-over was possible only if the reason for not using up all the days of paid leave was a requirement of the service.

Mr. Strack challenged this decision before the Civil Service Tribunal, which upheld the application,[67] on the ground that according to Article 1e(2) of the Staff Regulations officials in active employment have to be given "working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties".[68] Hence, according to the Civil Service Tribunal, it was up to the administration to ensure that the minimal requirements of health and safety laid down in Directive 2003/88/EC on certain aspects of the organisation of working time were taken into account in the interpretation and application of the Staff Regulations provi-

[63] Case T-107/11 P *ETF, supported by the Commission and 8 Agencies v Schuerings*, ECLI:EU:T:2013:624, paragraphs 99–100; Case T-108/11 P *ETF supported by the Commission and 6 Agencies v Michel*, ECLI:EU:T:2013:625, paragraphs 100–101.

[64] Case F-50/09 *Missir v Comission*, ECLI:EU:F:2011:55, paragraph 126.

[65] Case C-176/12 *Association de médiation sociale*, ECLI:EU:C:2014:2, paragraph 49.

[66] In this case it was Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29), mentioned in the explanations on Article 27 of the Charter.

[67] Case F-120/07 *Strack v Commission*, ECLI:EU:F:2011:22.

[68] *Ibidem*, paragraph 55.

sions,[69] given that the purpose of this Directive was that of laying down these minimal requirements precisely in the field of working time.[70] On this basis, the Civil Service Tribunal recalled that the right to paid leave was a "particularly important principle of Union social law", the implementation of which had to take place within the limits laid down in Directive 2003/88/EC and that, on the other hand, this right was guaranteed by Article 31(2) of the Charter. The Civil Service Tribunal then turned to the case law of the Court on the interpretation of Article 7 of this Directive and, in particular, to its *Schultz-Hoff* case, where the Court had dealt with a situation identical to that of Mr. Strack,[71] and concluded that, in order to be consistent with Article 7 of Directive 2003/88/EC, the possible loss of the right to paid leave is subject to the condition that the worker has had the chance of effectively using this right.[72] The Civil Service Tribunal held that this had not been the case for Mr. Strack, who had been on sick leave, and it annulled the decision. Tellingly enough, shortly before deciding the case of Mr. Strack, the Civil Service Tribunal had already considered the provisions of Directive 2003/88/EC as applicable to the case of a contractual agent having to perform his duties as a security officer:[73] just as in *Strack*, Directive 2003/88/EC had come into play on the basis of Article 31(2) of the Charter, even though, contrary to *Strack*, the Civil Service Tribunal had considered Article 1e(2) of the Staff Regulations to be a provision mainly of a confirmatory nature.[74]

On appeal, the General Court stated, *inter alia*, that the requirements of health and safety mentioned in Article 1e(2) of the Staff Regulations were only technical standards, so that this provision could not be taken as a reference to general provisions, like those provided for in Directive 2003/88/EC.[75] The General Court also stated that the issue raised in the challenged decision was specifically dealt with in Article 4 of Annex V, the clear content of which then prevented the interpreter from applying by analogy—and on the basis of a general provision like Article 1e(2) of the Staff Regulations—the provisions of Directive 2003/88/EC, and thus from having recourse to the case law of the Court of Justice related to Article 7 of Directive 2003/88/EC.[76] The General Court therefore annulled the judgment of the Civil Service Tribunal, pointing out that only an activity carried out for the institution could be a requirement of the service within the meaning of Article 4(1) of Annex V, and then justify a carry-over of days of paid leave for more than twelve days; the General Court held that this was not the case of Mr. Strack, who had not been in active employment due to his sick leave.[77] Hence, adjudicating in the case after having annulled the judg-

[69] OJ L 299, 18.11.2003, p. 9.

[70] Case F-120/07, quoted above, paragraph 57.

[71] Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and ors*., ECLI:EU:C:2009:18, paragraphs 45, 50 and 51.

[72] Case F-120/07, quoted above, paragraph 64.

[73] Case F-27/10 *Begue v Commission*, ECLI:EU:F:2011:20, paragraph 55.

[74] *Ibidem*, last sentence.

[75] Case T-268/11 P *Commission v Strack*, ECLI:EU:T:2012:588, paragraphs 51–53.

[76] *Ibidem*, paragraphs 51–54.

[77] *Ibidem*, paragraphs 64–67.

ment of the Civil Service Tribunal,[78] the General Court rejected the application of Mr. Strack.

The review judgment of the Court of Justice to some extent reconciled the Charter-oriented reading by the Civil Service Tribunal of Articles 1e(2) of the Staff Regulations and 4(1) of Annex V with the more rigorous approach of the General Court. In particular, having recalled that the right to paid leave is not only a right but also "a particularly important principle of European Union social law, affirmed by Article 31(2) of the Charter", the Court highlighted that, according to the explanations relating to Article 31(2) of the Charter, this right is "based" on the provisions of the Directive 93/104/EC, which was later replaced by Directive 2003/88/EC.[79] The Court then recalled its *Schultz-Hoff* judgment,[80] according to which the loss of the right to paid leave is admitted under European Union law if the worker has had the chance of effectively using this entitlement, but that this is not the case when the absence in the relevant period is due to a sick leave. In this case, should this entitlement be lost, this "would undermine the substance of the social right directly conferred by Article 7 of the directive [2003/88/EC] on every worker".[81] Having said this much on the social right to paid leave, and having also recalled that the Charter was addressed to European Union institutions according to Article 51(1) thereof,[82] the Court then turned to the Staff Regulations provisions, and took the view that the words "health" and "safety" mentioned in Article 1e(2) of the Staff Regulations should have been interpreted by the General Court as a reference to Article 7 of the Directive 2003/88/EC, thus ensuring an interpretation of the Staff Regulations consistent with the wording and purpose of the Charter.[83] According to the Court, the General Court

> "should have favoured an interpretation of Article 1e(2) of the Staff Regulations which ensured the consistency of that provision with the right to paid annual leave as a principle of the social law of the European Union now affirmed by Article 31(2) of the Charter. That required an interpretation of Article 1e(2) to the effect that it allows the inclusion in the Staff Regulations of the substance of Article 7 of Directive 2003/88 as a rule of minimum protection which could, as necessary, supplement the other provisions of the Staff Regulations dealing with the right to paid annual leave and, in particular, Article 4 of Annex V to those regulations".[84]

The Court then annulled the judgment of the General Court but concluded that the carry-over of the unused paid leave of Mr. Strack could be transferred to the following year within the limits set out in Article 57 of the Staff Regulations, i.e., 30 days, and

[78] *Ibidem*, paragraphs 61 f.

[79] Case C-579/12 RX-II, quoted above, paragraphs 26 and 27.

[80] Quoted above.

[81] Case C-579/12 RX-II, quoted above, paragraph 32.

[82] *Ibidem*, paragraph 39.

[83] *Ibidem*, paragraphs 52 to 60.

[84] *Ibidem*, paragraph 47.

this "in the absence of other relevant provisions in the Staff Regulations as regards the carry-over of paid annual leave which is not taken because of long term illness".[85]

3.2.2 … and its relevance in European Union civil service law

As Advocate General Kokott said in her Opinion, the *Strack* case is of the utmost importance for the development of European Union civil service law because, for the first time, the Court has established the extent to which the Charter can be applied in European Union civil service law in order to assess the constitutionality of a provision of Staff Regulations.[86] The judgment of the Court has provided important guidance for understanding how to handle the relationship between the Charter and the Staff Regulations. The starting point of the comparison between the two sources has to be the reference to the right that is invoked, which has to be the same in both instruments. When this is ascertained, it is necessary to look at the provisions of European Union secondary law on which the provision of the Charter is based, and this because the Charter does not impose new obligations on the institutions, as Article 51(2) of the Charter states. In this respect, the explanations play a key role. Further, according to the principle of consistent interpretation, all Staff Regulations provisions that allow the content of European Union secondary law to be taken into account—like Article 1e(2) of the Staff Regulations—have to be interpreted widely, whilst those that stand in the way of such integration—like Article 4(1) of Annex V—have to be interpreted restrictively.[87] As for the consequences to be drawn from a possible inconsistency between the Charter and the Staff Regulations, these have to be settled in the sole light of the Staff Regulations provisions. This confirms the autonomy of the Staff Regulations, as it does the view of the Court that on appeal the General Court should have seen in the words "health" and "safety" contained in Article 1e(2) of the Staff Regulations a reference to Article 7 of the Directive 2003/88/EC. Indeed, even though the Court annulled the judgment of the General Court on its merits, it confirmed the General Court's view that the provisions of an act of European Union secondary law other than the Staff Regulations could be integrated *only* following a reference from the Staff Regulations to this act. In particular, the Court accepted that, as was said by Advocate General Kokott, the provisions of Directive 2003/88/EC "have in fact become applicable to the European civil service by virtue of Article 1(e)(2) of the Staff Regulations".[88]

A first conclusion that both the Civil Service Tribunal and the General Court have drawn from *Strack* is a very general one, and is in the sense that some provisions contained in the Charter are directly applicable in the relationship between European Union staff and their employer. This has been the case, for example, as regards Articles 27 and 28 of the Charter on workers' right to information and consultation and on right to collective bargaining and action.[89]

[85] *Ibidem*, paragraph 68.

[86] View of AG Kokott, Case C-579/12 RX-II *Commission v Strack*, ECLI:EU:C:2013:573, paragraph 8.

[87] *Gattinara* [3], p. 576.

[88] View of AG Kokott, Case C-579/12 RX-II, quoted above, paragraph 35.

[89] Order in Case T-22/14 *Bergallou v Parliament* and Council, ECLI:EU:T:2014:954, paragraph 33; Case F-124/14 *Petsch v Commission*, ECLI:EU:F:2015:69, paragraph 44.

A second, and more specific, conclusion which the Civil Service Tribunal derived from *Strack* emerged from a case brought by an applicant against a reassignment decision as special advisor. The Civil Service Tribunal rejected the application on the merits, but applied the guidance provided by the Court of Justice in *Strack*, although with reference to Article 31(1) of the Charter on the right of the worker to working conditions which respect his or her health, safety and dignity,[90] which the Civil Service Tribunal had already considered as having direct effect.[91] Following the explanations on this provision, the Civil Service Tribunal took into account the provisions of Directive 89/391/EC mentioned therein, which would have become applicable, in its view, on the basis of the words "health" and "safety" used in Article 1e(2) of the Staff Regulations.[92] This gave rise to a rather wide ground for judicial review, because, unlike in *Strack*—where the issue at stake was the number of days to be carried over—here a reassignment decision could be judicially reviewed as well as regards whether or not it had respected the health conditions of the applicant.[93]

4 Conclusion

The case law reviewed above shows a constant endeavour to strike the right balance between, on the one hand, the autonomous character of European Union civil service law and its main source, the Staff Regulations, and, on the other, the constitutional relevance of a source of law like the Charter. This balance is all the more necessary in European Union civil service law, given that the provisions of the Charter that can be applied in EU civil service law are often based on European Union social directives, the content of which—as interpreted by the Court—may sometimes be more far-reaching than that of the provisions of the Charter themselves.[94] Accordingly, the interpreter has to deal with the relationship between the Staff Regulations and the Charter without neglecting the point that the Treaties have explicitly taken into account the specific nature of the Staff Regulations and, in the end, of European Union civil service law in Articles 270 and 336 TFEU.

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[90] Case F-157/12 *BN v Parliament*, ECLI:EU:F:2014:164, paragraph 104 f.

[91] Case F-50/09 *Missir*, quoted above, paragraph 130.

[92] Case F-157/12, quoted above, paragraph 109.

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