The Scope of Application of the EU Charter of Fundamental Rights Regarding National Climate Protection Law and its Potential for Climate Litigation

Felix Reimann*

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* This article is a slightly adapted version of the authors' master's thesis written as part of his LLM degree in European Union Law at the University of Amsterdam (UvA). Before his LLM in Amsterdam, Felix Reimann was a PhD student and prae doc assistant at the Institute for Austrian and European Public Law (Vienna University of Economics and Business); Mail: felixreimann@me.com.

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I. Problem Statement, Relevance and Structure

Tackling the urgent problem of climate change by legal means cannot only be done through objective principles but requires enforceable legal norms. Besides the general lack of sufficient legal frameworks tackling climate change, enforcement opportunities within the Member States' (MS) procedural systems are often insufficient, especially in 'rights-based' systems like the German or Austrian ones[1]. However, recent case law of the Court of Justice of the European Union (CJEU) has strengthened the enforcement of EU environmental law through members of the public, especially (environmental) non-governmental organizations (ENGOs), by virtue of Article 47 of the EU Charter of Fundamental Rights (CFR). The application of Article 47(1) CFR has helped increase the effectiveness of national review procedures to a certain extent, by granting ENGOs the right to bring proceedings or broadening the scope of claims. This development particularly affected the 'rights-based' German and Austrian systems.[2] Applying the CJEU's case law on Article 47(1) CFR in the field of national climate protection law could considerably strengthen (public) climate litigation efforts. This requires that national climate protection law falls within the scope of the CFR. Once a matter is within the scope of EU law, Article 47 CFR can apply.[3] The applicability of Article 47(1) CFR would be the 'key' to the scrutiny of judicial review, which could significantly contribute to the achievement of climate goals.

As mentioned, law is ultimately only as good as its enforcement mechanisms. The applicability of the CFR could form a catalyst of effectiveness for (national) climate protection law by opening opportunities for legal enforcement. Studies on the scope of application of the CFR have either dealt with the implementation of EU law in the

[1] See cases at <https://climatecasechart.com/non-us-jurisdiction/constitutional-court-austria/>, where most climate cases fail due to a *lack of legal standing*; see, *inter alia*, VfGH 30.09.2020, G 144-145/2020-13, V 332/2020-13; confirmed in VfGH 27.06.2023, G 106-107/2022-10, V 140/2022-10 (*Tax Benefits for Aviation*); for Germany see VG Berlin 31.10.2019 - 10 K 412.18 (*Klimaleistungsklage*).

[2] See – especially concerning Austria and Germany – *inter alia*, Case C-664/15 *Protect* [2017] ECLI:EU:C:2017:987; Case C-873/19 *Deutsche Umwelthilfe eV* [2022] ECLI:EU:C:2022:857.

[3] Scheppele, Kochenov and Grabowska-Moroz, 'EU Values Are Law, after All' (2020) 39(1) YEL 3 (45).

University of Vienna Law Review, Vol. 9 No 1 (2025), pp. 124-161, https://doi.org/10.25365/vlr-2025-9-1-124.

MS in general terms or have focused on specific judgments.[4] As far as can be seen, there has not yet been a study on the 'implementation' (Article 51(1) CFR) problematic with regard to the field of (national) climate protection law and the associated potential of the Charter for climate litigation.[5] This work seeks to fill the described gap in the academic literature. Ultimately, the work shall locate which areas of national climate protection law are covered by Article 51(1) in conjunction with 47(1) CFR and which (procedural) consequences follow thereby.

To understand the links and interactions between EU and national climate protection law, this work shall begin with an examination of EU and national climate protection regimes, especially their interplay (II.). This legal analysis shall shed light on the extent of margins for (legislative or executive) discretion following from EU climate protection law and the MS's exercise thereof. The work in Section II especially focuses on the German and Austrian legal systems (II.B.2.), since, first, their climate protection acts (and related court decisions[6]) are particularly interesting for this analysis and, second, their procedural systems have been notably affected by Article 47(1) CFR. To ascertain the limits of the scope of the CFR, it is necessary to analyse Article 51(1) CFR, according to which the MS are only bound by the Charter when they are ' implementing Union law', on the basis of the respective CJEU case law and literature (III.).[7] To draw the link to the topic of climate litigation, the role of Article 47(1) CFR in CJEU environmental case law is investigated (IV.). Combining the findings in the respective fields (II.-IV.), the potential (procedural) effects of the applicability of the Charter for the enforcement of national climate protection law shall be presented in the final chapter (V.).

[4] E.g., Wertheim, 'C-826/18, Stichting Varkens in Nood and others v College van burgemeester en wethouders van de gemeente Echt-Susteren – Case Note' (2021) 14(3) REALaw 47.

[5] On the (limited) role of the Charter in climate litigation see e.g., van Zeben, 'The Role of the EU Charter of Fundamental Rights in Climate Litigation' (2021) 22 GLJ 1499, which, however, does not deal with Article 51(1) CFR in detail.

[6] BVerfG 24.03.2021, 1 BvR 2656/18 ua (*Klimaschutz*); OVG Berlin-Brandenburg 30.11.2023, OVG 11 A 27/22 (*Klimaschutz-Sofortprogramm*); OVG Berlin-Brandenburg 16.05.2024, 11 A 22/21 (*Klimaschutzprogramm*); OVG Berlin-Brandenburg 16.05.2024, 11 A 31/22 (*Klimaschutzprogramm LULUCF-Sektor*); VfGH 27.06.2023, G 123/2023-12 (*Children of Austria v. Austria*).

[7] See, for example, the numerous articles relating to *Åkerberg Fransson* listed (under 'Doctrine') at: https://eur-lex.europa.eu/legal-content/ET/ALL/?uri=CELEX%3A62010CJ0617.

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II. EU and National Climate Protection Law

To apply the CJEU's case law on the applicability of the CFR, it is necessary to better understand the relationship between European and national climate protection law. To this end, the EU climate protection *acquis*, the national climate protection regimes and, finally, their interplay are analysed. The aim is to determine to what extent national climate protection law can be seen as 'implementing' or 'autonomous' in light of EU requirements.

A. The EU Climate Protection *Acquis*

EU climate law is described as 'all European Union legislation related to climate action' and considered as 'one of the most dynamic and fastest growing areas of EU law.'[8] Divided into 'climate mitigation law' and 'climate adaptation law', the main focus of the (union) legislator and jurisprudence has so far been on climate mitigation law, meaning the reduction ('mitigation') of GHG emissions to curb global warming.[9] As part of its leadership role in the fight against global warming, the EU has established three pillars of its climate protection policy, being the 1. Reduction of GHG emissions, 2. Increase of the use of energy from renewable sources and 3. Improvement of energy efficiency.[10]

1. Emission Reduction

The EU climate protection *acquis* – particularly the first pillar concerning the reduction of GHG emissions – is fundamentally based on the 2050 climate neutrality as well as the 2030 intermediate target (-55%) laid down in (Articles 2 and 4 of) the European Climate Law. The emission reduction pillar is, in principle, based on three legislative acts: the Emissions Trading Directive[11] (setting up the EU Emissions Trading System (EU-ETS)), the Effort Sharing Regulation[12] (ESR) and the LULUCF

[8] Woerdman, Roggenkamp and Holwerda (ed.), *Essential EU Climate Law* (2nd edn, Edward Elgar Publishing 2021) 2.

[9] Woerdman, Roggenkamp and Holwerda, *Essential EU Climate Law* 2; climate adaption, on the other hand, 'concerns the adjustment of society ('adaptation') to the [already incurred] consequences of global warming.'

[10] Handig and Stangl, 'Klimaschutz und Unionsrecht' in Ennöckl (ed.), *Klimaschutzrecht* (Verlag Österreich 2023) 39 (43); Woerdman, Roggenkamp and Holwerda, *Essential EU Climate Law* 25.

[11] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32, last amended by by Directive (EU) 2023/959.

[12] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030

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(Land Use, Land Use Change and Forestry) Regulation[13]. While the European Climate Law spans and thus primarily addresses the EU as a whole (see, however, Article 2(2) European Climate Law[14]), the latter (ESR, LULUCF Regulation) aim more directly at the MS (see for the resulting 'architecture' II.B.1.). Both the Climate Law and the ESR confirm that the MS are competent to adopt more stringent climate policy imposing minimum harmonisation (in accordance with Article 193 TFEU).[15]

The Emissions Trading Directive, originally enacted in 2003, establishes a 'market-based' system for GHG emissions allowance trading within the 'EU-ETS' to promote reductions of greenhouse gas emissions (Article 1(1) leg cit). The EU-ETS is based on a 'cap and trade' approach, which means that an upper limit of emission allowances and thus of emissions ('cap') is set in advance, a limit which is lowered each year. These emission allowances, especially surplus certificates, can be traded ('trade'), which creates a financial incentive for companies to reduce emissions. The EU-ETS as such therefore already effectively contributes to climate protection, while the other legal acts – as will be shown below – each contain mere targets and provisions on corresponding governance.[16] Emissions from sectors that are not part of the EU-ETS ('non-ETS sectors'), such as agriculture and waste management, are regulated by the ESR and the LULUCF Regulation.[17]

Implementing the Union's contributions under the Paris Agreement (PA), the ESR lays down national emission targets as well as rules for the determination of annual emission allocations (AEAs) and the evaluation of MS's progress towards meeting their contributions (Article 1 leg cti). The ESR thereby does not impose an emission

contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156/26, last amended by Regulation (EU) 2023/857.

[13] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, OJ L 156/1, last amended by Regulation (EU) 2023/839.

[14] 'The relevant Union institutions *and the Member States shall take the necessary measures* at Union *and national level*, respectively, to enable the collective achievement of the climate-neutrality [...]' (*emphasis by the author*).

[15] Eckes, 'Strategic Climate Litigation before National Courts: Can European Union Law be used as a Shield' (2024) 25 GLJ 1022 (1025).

[16] Handig and Stangl, 'Klimaschutz und Unionsrecht' 53.

[17] Woerdman, Roggenkamp and Holwerda, *Essential EU Climate Law* 74; Emissions from fuel combustion in buildings, road transport and additional sectors (mainly small industry not covered by EU-ETS) will fall under the EU-ETS II system, that will become operational in 2027.

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limit upon individual emitters, but an emission limit value upon individual MS.[18] Each MS shall, by 2030, limit its GHG emissions at least by the percentage set for that MS in Annex I in relation to its emissions in 2005 (Article 4(1) leg cit). For Austria, Germany and the Netherlands these are, after amendments to the ESR in 2023[19], (quite similarly) set at -48%, -50% and -48%.

When it comes to the means of achieving the various AEAs and the 2030 national emission target(s) the ESR 'grants considerable discretion to the [MS]'. It 'does not specify what measures [MS] should adopt to achieve their targets', leaving open a 'range from command-and-control measures to economic instruments and other initiatives, such as a campaign to stimulate a low-carbon lifestyle.'[20] However, it is stated in the literature, that 'it is hard to see how the introduction of the range of measures required in order to ensure compliance could be accomplished without either framing and/or elaboration through specific national legislation'.[21] This statement underlines the framework nature of the ESR, which is dependent on supplementing MS measures.

The MS's freedom regarding the means to achieve the targets is to an extent controlled by way of monitoring and reporting duties and a specific set of (procedural) enforcement provisions. Mainly through the Governance Regulation, that contains cross-sectoral monitoring mechanisms (particularly, Integrated National Energy and Climate Plans (NECP) for the EU climate *acquis* and is linked to the ESR. In addition, the ESR contains its own remedy in the form of a 'corrective action plan' laid down in its Article 8. If a MS is not making sufficient progress towards meeting its obligations under Article 4 ESR (AEAs, 2030 target), that MS shall, within three months, submit a corrective action plan to the Commission (Article 8(1)(c) ESR).

[18] Woerdman, Roggenkamp and Holwerda, *Essential EU Climate Law* 77.

[19] Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ L 111/1.

[20] Woerdman, Roggenkamp and Holwerda, *Essential EU Climate Law* 83.

[21] Peeters and Stallworthy, 'Legal Consequences of the Effort Sharing Decision for Member States Action', in Peeters, Stallworthy and de Cendra de Larragán (ed.), *Climate Law in the EU Member States – Towards National Legislation for Climate Protection* (Edward Elgar Publishing 2012) 15 (26).

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It is recognizable that the European Climate Law, the ESR and the LULUCF Regulation[22] operate with quantitative climate targets that are either directed at the EU or, predominantly, the MS. The *internal* compliance system related to these acts – which is primarily based on reporting and monitoring – is considered weak and makes enforcement through the *external* instrument of the infringement procedure (Article 258 f TFEU) challenging.[23] Lengthy and ineffective infringement proceedings could be preceded by – more effective – climate litigation within the MS's administrative systems.

2. Renewable Energy

The second pillar of the EU's climate protection *acquis* concerns increasing the use of energy from renewable sources. The central legal act is the Renewable Energy Directive, which was (re)issued in 2018 and amended in 2023 (RED III).[24] According to Article 3(1) RED III, the MS shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 42,5 %. In contrast to the ESR and the preceding RED I, the RED (II and) III does not set out individual renewable expansion targets for every single MS but only names a collective target at Union level. However, the MS shall set a national renewable expansion target within their NECP (Article 3(2) RED II(I)); this implies a certain degree of binding force of these targets.[25]

In line with the need to speed up authorisation procedures for renewable energy installations, RED III also stipulates that MS shall ensure that competent authorities adopt one or more plans designating 'renewables acceleration areas' (RAAs; Article 15c RED III). The acceleration effect is to be achieved by the fact that the environmental impacts of renewable energy projects in these areas are to be assessed at a planning level as part of a strategic environmental assessment (SEA) (15c(4)(b) RED III) and thus do not have to undergo a separate environmental impact

[22] The LULUCF Regulation contains provisions on the crediting and accounting of emissions and, in particular, the reduction of GHG as a result of activities in the sector of land use, land use change and forestry in order to exploit the potential of natural GHG sinks in the field.

[23] Peeters and Athanasiadou, 'The continued effort sharing approach in EU climate law: Binding targets, challenging enforcement?' (2020) 29 RECIEL 201 (207, 209) identify preliminary steps (the mentioned monitoring mechanisms) and the Commission's discretion as obstacles in this context.

[24] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328/82, last amended by Directive (EU) 2023/2413.

[25] Stangl, 'Klimaschutz und erneuerbare Energien' in Ennöckl (ed.), *Klimaschutzrecht* (Verlag Österreich 2023) 297 (301 ff).

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assessment (EIA)(Article 16a(3) RED III). The drawing up of RAA plans[26] as well as the following SEA provides points of action for climate litigation procedures.

3. Energy Efficiency

The central legal act of the third pillar of the EU's climate *acquis*, the Energy Efficiency Directive (EED)[27], follows a similar regulatory logic. The EED establishes a common framework of measures to promote energy efficiency within the Union to ensure that the Union's targets on energy efficiency (Article 4 leg cit) are met. The EED clarifies that it only provides minimum harmonisation; MS can introduce more stringent measures (Article 1(2) leg cit).

The EED particularly lays down an 'energy efficiency first' principle according to which MS 'shall ensure that energy efficiency solutions [...] are assessed in planning, policy and major investment decisions', which exceed a certain investment volume (Article 3(1) EED); this applies to energy systems as well as non-energy sectors, where those sectors have an impact on energy consumption and energy efficiency. Understanding MS measures that are linked to the 'energy efficiency first' principle as 'implementing' measures within the meaning of Article 51(1) CFR could have significant consequences for climate litigation, as the principle covers a broad spectrum of 'planning, policy and major investment decisions' (Article 3(1) EED).

Parallel to the RED, the EED lays down a binding Union target (Article 4(1) EED), while merely obliging the MS to set an indicative national energy efficiency contribution. The MS 'shall notify those contributions to the Commission, together with an indicative trajectory for those contributions', as part of their (updated) NECP (Article 4(2) EED). The national energy efficiency contributions set by the MS remain – in contrast to the renewable targets – 'indicative', meaning non-binding.

B. Interplay with National Climate Protection Law

The EU's climate protection *acquis* and national climate protection laws are not to be understood as two independent regimes. A key structural feature of climate protection law is its distribution across interconnected legislative levels. It is based on provisions of international law, with the Paris Agreement serving a leading role, as well as EU law. It is then further specified by national law, which is strongly determined by these inter- and supranational regimes.

[26] See recently Commission Staff Working Document, Guidance on designating renewables acceleration areas, 13.05.2024, SDW(2024) 333 final, p. 2 ff.

[27] Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast), OJ L 231/1.

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1. Remarks on the Nature of EU Climate Law Architecture

The requirements flowing from EU climate protection law, especially the European Climate Law, the Governance Regulation, the EU-ETS and the ESR, are of a 'framework nature'. In the literature, this phenomenon is described as a 'climate [target] architecture'[28] prescribed by the EU. This image illustrates that the directly applicable targets defined by EU regulations must further be carried out through more specific measures on MS level (see Article 2(2) European Climate Law). The direct applicability of emission targets hence does not preclude further implementation but rather presupposes it.

2. National Climate Protection Acts and Other Climate Laws (In Light of EU Law)

Key objectives and targets of the EU's climate *acquis* result from regulations (European Climate Law, ESR). These are directly applicable (Article 288(2) TFEU) and – in contrast to the directives in renewable energy and energy efficiency law (RED, EED) – do not need to be transposed into national law. There is, thus, no direct obligation under EU law to enact a national climate protection act (like the German Federal Climate Protection Act (B-KSG)[29] or the Austrian Climate Protection Act (KSG)[30]). However, national climate protection acts (such as the B-KSG and KSG) are linked to Union law. The 'limping' nature of the overarching EU framework law requires national provisions for effective, target-oriented implementation, which are typically defined in national climate acts. Even though no direct transposition obligation arises from EU law, further national implementation practically takes place within these national climate protection acts.

The German B-KSG is intended to provide an overarching framework for climate measures in all sectors. This binding legal regulation guarantees a sufficient degree of development pressure and planning security (particularly for businesses) required by German constitutional law since the BVerfG's *Klimabeschluss*.[31] The B-KSG clarifies the relationship between national and European climate law at the outset (§ 1(1) B-

[28] Schlacke, 'Klimaschutzrecht im Mehrebenensystem' (2022) NVwZ 905 (907); Schlacke, Wentzien, Thierjung and Köster, 'Implementing the EU Climate Law via the 'Fit for 55' package' (2022) 1 Oxford Open Energy 1 (2 ff); see also Bocquillon and Maltby, 'The challenge of ratcheting up climate ambitions' (2024) 8 Environmental Politics 1 (3) 'polyarchic EU framework'.

[29] German Federal Climate Protection Act (B-KSG), Federal OJ I 2019/2513, last amended by Federal OJ I 2024/235.

[30] Austrian Climate Protection Act (KSG), Federal OJ I 2011/106, last amended by Federal OJ I 2017/58.

[31] BVerfG 24.03.2021, 1 BvR 2656/18 ua, *Klimaschutz*, for the relevant passage on planning security see guiding principle 4., para. 249.

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KSG), stating that the purpose of the act is to ensure the fulfilment of national climate protection targets and compliance with European targets. The BVerfG explicitly recognized the 'Union law background' of the B-KSG in its *Klimabeschluss*. In the decision, the BVerfG noticed that the B-KSG could be regarded in part as implementing EU law within the meaning of Article 51(1) CFR, because the legislator assumed that the act would create the framework for implementing the obligations of the Federal Republic of Germany under the ESR.[32] The B-KSG is not fully harmonised under EU law, as the EU targets only represent minimum targets, which means that a review is possible both against the standard of the CFR and – complementarily – the Basic Law for the Federal Republic of Germany.

The older Austrian KSG, enacted in 2011, makes fewer references to EU law. According to its first paragraph, the act is intended to enable the coordinated implementation of effective climate protection measures (§ 1 KSG). The KSG is, however, materially linked to Union law. The KSG relates to those sectors which are not included in the EU-ETS, i.e., waste, building, mobility and agriculture as well as, in part, energy,.[33] The act furthermore establishes a negotiation mechanism, at the end of which the binding national distribution of GHG emissions ceilings – predetermined by (international and) EU law – are set in detail (§ 3(1) KSG). The KSG ties in with the target set by the ESR and more precisely defines the maximum quantities of (yearly) GHG emissions applicable to the Republic of Austria (see its Annexes).[34] These maximum quantities can also be broken down by sector (§ 3(1) KSG). In this respect, the KSG provides a concretization of EU law requirements providing GHG emission ceilings for *individual years* and *individual sectors*. However, the KSG materially expired in 2020, as no (annual) emission ceilings were set in the Annexes from this date on. Nevertheless, the KSG could be understood as implementing EU law, especially with regards to the determination of annual and sectoral emission ceilings.[35]

[32] BVerfG 24.03.2021, 1 BvR 2656/18 ua, *Klimaschutz*, para. 141 with reference to BT-Drs. 19/14337.

[33] Hollaus, 'Country Report: Austria. Climate(-Related) Action – of Progress and Delays' (2022) 12 IUCN AEL Journal of Environmental Law 139 (142).

[34] Bertel, 'Climate change law and the Austrian federal system' (2023) 37 REAF-JSG 61 (80 ff); Bertel and Cittadino, 'Climate Change at Domestic Level. National Powers and Regulations in Italy and Austria' in Cittadino ea (ed.), *Climate Change Integration in the Multilevel Governance of Italy and Austria* (Brill Nijhoff 2023) 44 (62 f).

[35] See this indication in VfGH 27.06.2023, G 123/2023-12 (*Children of Austria v. Austria*), para. 13.

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Many other fields of national climate protection law are based on directives, especially the Emissions Trading Directive, the RED and the EED. The extent to which an implementation of Union law follows from a directive is often easier to determine than a regulation since implementing laws (ought to) exist. In Austria, e.g., the EU-ETS is implemented by the Carbon Emissions Certificate Act (EZG 2011)[36], which is the second main federal climate act next to the KSG. According to domestic literature, this instrument has the highest degree of 'communitarisation'.[37] The measures for the allocation of free certificates are fully harmonised.[38] At the outset, the EZG 2011 states that it contributes to the realisation of the Union's climate neutrality objective and the Union's climate targets set out in the European Climate Law (§ 1 EZG 2011). There are thus considerable indications of an 'implementation' situation under Article 51(1) CFR.

Within the field of renewable energy, the Austrian legislator has enacted the Renewables Expansion Act (EAG) in transposition of the RED II.[39] The aim of the EAG is to contribute to the realisation of the Union goal of covering at least 32% of the Union's gross final energy consumption with renewable energy by 2030 and to achieve climate neutrality in Austria by 2040 (§ 4(1) EAG). To this end, it sets the goal to cover 100% of Austria's total electricity consumption from renewable energy sources until 2030 (§ 4(2) EAG). The EAG explicitly states that the law serves the implementation of the RED as well as the Governance Regulation (§ 3(1) and (2) EAG), even though the latter is already directly applicable. Furthermore, the Austrian Federal Energy Efficiency Act (EEffG)[40] fulfils an implementation obligation (Article 288(3) TFEU) flowing from the EED. The EEffG specifically lays down that it serves the implementation of the EED (§ 36 EEffG). The EED only provides minimum harmonisation (Article 1(2) EED), however.

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[36] Austrian Carbon Emissions Certificate Act (EZG 2011), Federal OJ I 2011/118, last amended by Federal OJ I 2023/196.

[37] Schwarzer and Niederhuber, 'Emissionshandel als Flaggschiff des Europäischen Klimaschutzrechts?' in Kirchengast, Schulev-Steindl and Schnedl (ed.), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (Böhlau Verlag 2018) 77 (95).

[38] See COM DELEGATED REGULATION (EU) …/... amending Delegated Regulation (EU) 2019/331 as regards transitional Union-wide rules for harmonised free allocation of emission allowances, C(2024) 441 final, 1.

[39] Austrian Renewables Expansion Act (EAG), Federal OJ I 2021/150, last amended by Federal OJ I 2025/18.

[40] Austrian Federal Energy Efficiency Act (EEffG), Federal OJ I 2014/72, last amended by Federal OJ I 2024/29.

3. Shades of Interplay: 'Implementing' or 'Autonomous' Climate Law

It can be noted at this point that there are different shades or intensities of interplay between the EU climate *acquis* and national climate law. The following section will analyse whether and to what extent the provisions of national climate protection law 'implement' EU requirements or (merely) 'autonomously' stand alongside them. The initially descriptive differentiation between 'implementing' or 'autonomous' national climate law shall function as basis for the normative question of whether national climate protection law falls under the scope of the CFR (see III.).

i. Full Implementation

A situation of 'full implementation' and thus a strong link to EU law exists when MS directly apply or implement regulations (Article 288(2) TFEU). A regulation shall have general application, is binding in its entirety and directly applicable in all MS (Article 288 (2) TFEU). Regulations automatically form part of the MS's legal systems without it being necessary to transpose them (which is, in principle, even impermissible).[41] When MS measures are directly based on a regulation – like the creation of a 'corrective action plan' (Article 8 ESR) or the creation of a NECP (Article 3 Governance Regulation) – it is to be considered 'full implementation'. This is also the case if the MS measure that is based on a regulation is not a legally binding act within the national system (such as, e.g., the NECP).[42]

A situation of 'full implementation' can also be present when directives are transposed by MS. Climate relevant obligations arise, above all, from the Emissions Trading Directive, the RED and the EED. For one, assessing if an EU directive is implemented in national law is rather straightforward, because they obtain their full legislative status only after they have been implemented in national law, meaning there ought to be an implementing act (see EZG 2011, EAG, EEffG). However, directives shall leave the choice of form and methods to the national authorities (Article 288(3) TFEU). Often, directives only lay down minimum harmonisation measures, meaning that the directive allows the MS to adopt or maintain stricter rules in its national legislation than those required[43], making the assessment of which part of the national rule is directly implementing or gold-plating challenging. Which level

[41] Lenaerts, van Nuffel and Corthaut, *EU Constitutional Law* (OUP 2021) para. 27.015.

[42] Acting in accordance with a non-binding Union act (e.g., a recommendation; Article 288(5) TFEU), should, however, not be considered 'implementation', unless there is another connecting factor to binding (secondary) Union law.

[43] Lenaerts, van Nuffel and Corthaut, *EU Constitutional Law* para. 7.110.

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of interplay is present depends on whether a directive entails minimum or exhaustive harmonisation. A fully harmonising directive implies 'full implementation'.

ii. Semi-Implementing

Of particular interest for this work are situations in which national law does not fully implement Union law – e.g., because the MS are given a margin of (legislative or executive) discretion – but a national measure has a sufficient connection to Union law. This category is described as 'semi-implementing' in the following.

The presented EU climate regulations lay down targets which – in contrast to the basic idea of the regulation – do not directly regulate specific cases. They often serve as benchmarks for further implementing measures and are used to assess whether these measures achieve or fail to achieve the climate targets.[44] The national measures taken to achieve them do not directly implement them, but rather do so in a mediating way. This follows from their 'framework' character. Their direct applicability does not preclude a power on the part of the MS to take the necessary implementing measures. MS may adopt such measures if they do not obstruct the direct applicability of the regulation, do not conceal its Union nature, and specify that discretion granted under that regulation is being exercised. Sometimes national implementing measures may even be necessary in respect of some provisions of regulations.[45] This applies to target-setting EU regulations (like the ESR). Domestic measures that do not directly 'implement', but serve to achieve EU climate targets, can thus be regarded as 'semi-implementing' climate law given a certain degree of connection is established.

The intensity of the connection to EU law, however, differs depending on legal points of reference. E.g., it could play a role to what extent the regulatory purpose of a national measure overlaps with that of a Union act. Overarching planning laws, like (national) climate protection acts, could rather satisfy that condition than sector-specific acts which may pursue third purposes or take greater account of national circumstances. The stage of implementation a national measure is carried out in could influence the intensity of the corresponding connection to EU law. A link between national and Union law can further result from descriptive factors, e.g., if the legislator (in the law itself or in preparatory materials) refers to Union law.

[44] Franzius, 'Prävention durch Verwaltungsrecht: Klimaschutz' (2022) 81 VVDStRL 383 (394 f).

[45] Lenaerts, van Nuffel and Corthaut, *EU Constitutional Law* para. 27.015.

University of Vienna Law Review, Vol. 9 No 1 (2025), pp. 124-161, https://doi.org/10.25365/vlr-2025-9-1-124.

iii. Autonomous

'Autonomous' measures of national climate protection law may be vaguely connected to a Union objective. However, these tend to fill a space that is not regulated at all or explicitly exempted by EU law, either due to political reasons or reasons of limited EU competences (see Article 194(2) subpara 2 TFEU[46]).

An example of 'autonomous' national climate protection law could be the Austrian National Emissions Allowances Trading Act 2022 (NEHG 2022)[47]. Even though the Act refers to the PA and the EU targets for the reduction of GHG emissions (European Climate Law, ESR), the scope of application of the Act explicitly points to 'sectors not subject to EU-ETS' (§1 NEHG 2022).[48] Which implementing measures MS use to reduce GHG to fulfill their ESR obligations remains, outside of the areas harmonised under EU law, within their decision-making authority.[49] As there is currently no obligation under EU law to introduce carbon pricing (outside of the EU-ETS), the measure must be considered as 'autonomous' national climate law.

If the national legislator creates planning instruments that are not prescribed by EU law (see 'climate protection program' under § 9 B-KSG) and avoids references to EU law, these instruments also remain in the 'autonomous' sphere. As descriptive factors may play a role in determining the level of interplay of a national measure with EU law, MS could try to avoid references to Union acts to circumvent an 'implementation' situation. The German legislator has, with that in mind, abolished the immediate action program under § 8 B-KSG[50] and weakened the associated references to EU law.[51] If other factors indicate a strong connection to EU law, these

[46] EU energy policy measures 'shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, [...]'; the EU Energy Governance is a result thereof.

[47] Austrian National Emissions Allowances Trading Act 2022 (NEHG 2022), Federal OJ I 2022/10, last amended by Federal OJ I 2024/137.

[48] However, it should be noted that the national trading system is to be transferred to the European system of the EU-ETS II from 2027 onwards (§ 1 third sentence NEHG 2022).

[49] Schwarzer, Hartlieb and Nigmatullin, *Nationales Emissionszeritfikatehandelsgesetz 2022* (Manz 2022) § 1 NEHG, para. 26.

[50] § 8 B-KSG as amended by Article 1 G. of 15.07.2024 Federal Law Gazette 2024 I No. 235.

[51] Welker, 'Rechtsbruch im Klimaschutz', VerfBlog 30.11.2023 <https://verfassungsblog.de/rechtsbruch-im-klimaschutz/>.

attempts could turn out to be unsuccessful and nevertheless bring these instruments within the ambit of Union law or, respectively, the Charter's scope.[52]

III. The Scope of Application of the CFR

In the following, the previous findings on the interplay between EU and national climate law shall be linked to the provision(s) on the scope of application of the CFR. The concept of 'implementation', which has so far been used in a descriptive manner (see II.B.3.), will now be linked to its normative meaning in Article 51(1) CFR. While the provisions of the Charter are binding on the institutions, bodies, offices, and agencies of the Union without limitation[53], they only bind the MS 'when they are *implementing* Union law' (Article 51(1) CFR). The CJEU has given an interpretation on how to understand 'implementing Union law' within the meaning of Article 51(1) CFR in Case *Åkerberg Fransson* and subsequent cases (III.A.). The aim is to filter and systematise indicators that suggest an 'implementation' situation falling within the scope of the CFR (III.B.). Of particular interest are limits to the broad understanding of 'implementing Union law' (III.C.). Subsequently, these indicators shall be applied to national climate protection law. The question of the scope of the CFR is also a question about the jurisdiction of the CJEU, especially under Article 267 TFEU. Through its jurisdiction the CJEU can oblige national courts to understand their national law in a unionized way, shaping (procedural) national climate protection law.

A. Article 51(1) CFR After *Åkerberg Fransson*

In its landmark decision in *Åkerberg Fransson*, the CJEU gave the term 'implementing' in Article 51(1) CFR a very broad interpretation, understanding the CFR as being 'applicable in all situations governed by European Union law', in line

[52] See OVG Berlin-Brandenburg 16.05.2024, 11 A 22/21 (*Klimaschutzprogramm*), paras. 114-120.

[53] Lock, 'Art 51 CFR', in Kellerbauer, Klamert and Tomkin (ed.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2024) Art 51 CFR para. 3.

with the Explanations and pre-Charter case law.[54] Subsequent case law[55] has confirmed and specified this interpretation of Article 51(1) CFR.[56]

Connecting the applicability of the Charter with the broad notion of 'implementation', the CJEU made clear that there are no areas of EU law to which the Charter cannot apply and that there are no areas of domestic law of the MS that are *per se* immune to it.[57] The Charter rights 'must be complied with where[ever] national legislation falls within the scope of European Union law [...]'.[58] Consequently, *a connecting factor* under EU law (see indicators III.B.) is required that brings the case into the scope of application of Union law and thus also within the CFR's scope.[59]

The MS are bound by the CFR when they – whether through general or individual (legal) acts – implement Union acts, particularly where they apply or implement regulations or transpose directives into national law.[60] Thereby, the enforcement of national transposition law is also subject to the CFR.[61] The CJEU has also affirmed implementation in more 'unorthodox' constellations, e.g., when national measures were adopted 'within a framework' formed by two directives.[62]

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[54] Case C-617/10 *Åkerberg Fransson*, paras. 17-20; Tobias Lock, 'Art 51 CFR', para. 6; Hafner, Kumin and Weiss, *Recht der Europäischen Union* (2nd edn, 2019) 39; also Wendel, 'Das pluralistische System des Grundrechtsschutzes' in Bast and von Bogdandy (ed.), *Unionsverfassungsrecht* (Nomos 2025) 607 (628 ff).

[55] See Ward, 'Art 51 CFR', in Peers ea (ed.), *The EU Charter of Fundamental Rights. A Commentary* (2nd edn, Hart Publishing 2021) para. 51.84 ff; recently Joined Cases C-29/22 P and C-44/22 P *KS and KD* [2024] ECLI:EU:C:2024:725, para. 67.

[56] The literature has so far made a distinction between 'implementing' and 'derogating' situations that fall under Article 51(1) CFR, which has, however, become more and more blurred in later decisions. The following analysis primarily focuses on the 'implementing' situation.

[57] Lock, 'Art 51 CFR', para. 7; see in more detail Sarmiento, 'Who's Afraid of the Charter?' (2013) 50 CML Rev 1267 (1278).

[58] Case C-617/10 *Åkerberg Fransson,* para. 21 '[...] situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable'.

[59] Holoubek and Oswald, 'Art 51 GRC', in Holoubek and Lienbacher (ed.), *GRC-Kommentar* (2nd edn, Manz 2019) para. 17.

[60] Lenaerts, van Nuffel and Corthaut, *EU Constitutional Law* 666.

[61] Holoubek and Oswald, 'Art 51 GRC', para. 20; VfSlg 19.632/2012, para. 47; Case C-404/15 *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198, para. 84; Case C-222/84 *Johnston* [1986] ECLI:EU:C:1986:206.

[62] Case C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA* [2013] ECLI:EU:C:2013:598, para. 49.

Implementation not only occurs in cases where MS are expressly required to act in a certain manner, but also where they are given a degree of legislative or executive discretion.[63] The Charter can also apply in the context of 'non-exhaustive harmonisation', meaning cases not entirely determined by EU law.[64] The Charter furthermore covers situations in which the MS comply with obligations under Union law in the sense that they provide for organisational or procedural rules as necessary domestic accompanying measures (as part of Article 4(3) TEU) to the implementation of directives or in connection with regulations.[65]

B. Indicators

The CJEU has developed certain indicators to delimit the CFR's scope regarding MS action more precisely. The CJEU recalls 'that the concept of 'implementing Union law', as referred to in Article 51(1) of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'. To determine whether national legislation involves the implementation of Union law, the CJEU has given indicators intended to illustrate that degree of connection to Union law.[66]

Firstly, it plays a role whether national legislation is intended to implement a provision of EU law. Even though it is not necessary that the national rules were specifically adopted to bring national law in compliance with EU law, this is a strong indicator.[67] Following a functional understanding, it is even more important whether the national rule serves the implementation of obligations under EU law in terms of content.[68] This first indicator may also be influenced by the nature of the Union provision. In

[63] Lock, 'Art 51 CFR', para. 11; Case C-258/14 *Eugenia Florescu* [2017] ECLI:EU:C:2017:448, para. 48; Joined Cases C-411/10 and C-493/10 *N.S.* [2011] ECLI:EU:C:2011:865, para. 65 ff; on national discretionary powers in administrative enforcement already Case C-5/88 *Wachauf* [1989] ECLI:EU:C:1989:321.

[64] In this context BVerfG 06.11.2019, 1 BvR 16/13, BVerfGE 152, 152, *Recht auf Vergessen I*; 06.11.2019, 1 BvR 276/17, BVerfGE 152, 216, *Recht auf Vergessen II*; again Case C-617/10 *Åkerberg Fransson*, para. 29.

[65] Holoubek and Oswald, 'Art 51 GRC', para. 22; Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial' in Bobek and Adams-Prassl (ed.), *The EU Charter of Fundamental Rights in the Member States* (2020) 371 at 373; de Mol, 'Article 51 of the Charter in the Legislative Processes of the Member States' (2016) 23(4) MJ 640 (654 f); see in the environmental context Case C-243/15 *Lesoochranárske zoskupenie VLK* [2016] EU:C:2016:838, para. 52.

[66] Case C-206/13 *Siragusa* [2014] ECLI:EU:C:2014:126, para. 24, see the indicators in para. 25.

[67] Lock, 'Art 51 CFR', para. 10.

[68] See Case C-218/15 *Paoletti* [2016] ECLI:EU:C:2016:748, para. 18.

terms of nature, regulations, that are binding in their 'entirety', and directives, that are only binding, 'as to the result to be achieved', can be differentiated. It may also be relevant whether the targets laid down in these legal acts or by the MS are of a binding nature (cf. differences in Article 3(2) RED and Article 4(2) EED).

Directives that aim at maximum harmonisation or only lay down minimum standards can furthermore be differentiated. Fully harmonising directives that entail a shift of governance to the EU level in matters of multi-level (climate) governance [69] make the CFR fully applicable. In cases of minimum harmonisation, national legislation no longer falls within the Charter's scope if the national transposition goes beyond what is required by a directive.[70] It can furthermore be observed that even though a directive 'shall leave to the national authorities the choice of form and methods' – thereby implying room for manoeuvre – discretion can, by reference to the directives' substance, be reduced to zero.[71] This increases the regulatory density of the Union provision, which the CJEU attributes value to in the context of the examination of the degree of connection between EU and national law.[72]

A second indicator is the nature of the (domestic) legislation, meaning its binding character, and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law. The literature states that it is of central importance to the CJEU whether national legislation pursues a different objective than the relevant Union act, which the MS are competent to regulate 'outside the framework of' Union law.[73]

A third indicator is whether there are specific rules of EU law on the matter or which are capable of affecting it.[74] A factor that could be relevant here or used as an aid to interpretation is whether – along the lines of the direct effect of EU law – a provision is 'clear and unconditional' and would thus also pass the test of direct applicability.[75] The question of whether provisions of Union law are capable of affecting the situation

[69] Woerdman, Roggenkamp and Holwerda, *Essential EU Climate Law* 244.

[70] Case C-198/13 *Hernández* [2014] EU:C:2014:2055, para. 45.

[71] Case C-348/20 P *Nord Stream 2* [2022] ECLI:EU:C:2022:548, para. 95 ff.

[72] Holoubek and Oswald, 'Art 51 GRC', para. 31.

[73] Holoubek and Oswald, 'Art 51 GRC', para. 31; see, e.g., Case C-198/13 *Hernández*, paras. 44-5; Joined Cases C-609/17 and C-610/17 *TSN* and *AKT* [2019] ECLI:EU:C:2019:981, para. 49.

[74] Case C-206/13 *Siragusa*, para. 25; Case C-309/96 *Annibaldi* [1997] ECLI:EU:C:1997:631, paras. 21-23.

[75] Case 26-63 *Van Gend & Loos* [1963] ECLI:EU:C:1963:1; Schütze, *European Constitutional Law* 158.

will depend on how closely the provisions are related and how much influence Union law can exert on a national measure. Furthermore, a point of reference to fundamental rights could strengthen weaken the degree of connection between EU and national law, while limits on Union competences (Article 51(2) CFR) could weaken the degree of connection.

Lastly, it should be noted that the list of these indicators given in *Siragusa* is not exhaustive, giving the CJEU room for manoeuvre as well as making it possible to find other connecting factors which can concretise the broad formula.

C. Limitations

The following section shall present the limitations that must be considered when applying the abovementioned indicators. The Charter rights cannot be applied in relation to national legislation as far as the 'provisions of EU law in the subject area concerned do not impose any obligation on MS regarding the situation at issue'.[76]

Thus, the Charter does, by principle, not apply in areas in which the EU has no competences (Article 51(2) CFR). It is also not sufficient that the EU has legislative competence in an area *per se* for it to fall within the scope of EU law.[77] The Charter is also narrower than Art 19(1) second subpara TEU[78], since it is limited by Article 51(1) CFR.[79]

The Charter also does not apply to MS activities that are expressly excluded from the scope of EU law.[80] This is relevant in cases of minimum harmonisation and subsequent national provisions that are 'more favourable' than the Union standard.[81] The CJEU's case law suggests, however, that the CFR is only not applicable in cases where that (more favourable) excess is clearly separable from the EU minimum requirement.[82] The Charter is still intended to apply and provide protection where

[76] Case C-206/13 *Siragusa*, para. 26.

[77] Case C-198/13, *Hernández*, para. 36; Lock, 'Art 51 CFR', para.13.

[78] Following Art 19(1) second subpara TEU 'Member States shall provide remedies sufficient to ensure effective legal protection *in the fields covered by Union law*' (*emphasis by the author*); cf. Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, particularly para. 29 ('irrespective of whether the Member States are implementing Union law').

[79] Scheppele, Kochenov and Grabowska-Moroz, 'EU Values Are Law, after All', 45.

[80] Lock, 'Art 51 CFR', para. 8; again Case C-198/13 *Hernández*, para. 45.

[81] Cf. Matthias Wendel, 'Das pluralistische System des Grundrechtsschutzes', 631.

[82] Lock, 'Art 51 CFR', para. 12; Joined Cases C-609/17 and C-610/17 *TSN* and *AKT* [2019] ECLI:EU:C:2019:981, paras. 41-55, to the last point see para. 51; instructive and favouring a broad

the Union legislator defines the *framework* within which the MS exercise their discretionary powers in terms of implementation and design.[83]

It is furthermore stated in the literature that an 'implementation' situation should not be deduced from the mere fact that national legislation pursues the same objectives as EU law[84] (see Article 191(1) TFEU on the general objectives of environmental Union policies or also, more specifically, the 'energy efficiency first' principle in Article 3(1) EED). That does, however, rather apply to less specified policy objectives. Pursuing a *quantitative* target laid down by specific secondary legislation (Articles 2 and 4 European Climate Law, Art 4 ESR, Article 3(1) and (2) RED) will form a (stronger) indicator for an 'implementation' situation.

D. General Remarks on the Application of these Indicators

The indicators developed by the CJEU are not specifically ranked or weighted but are to be applied in the sense of a balanced system. Thus, each individual Union rule and its context must be considered. For this reason, the previous and following explanations can only present a general framework, which can, however, be applied to selected provisions. Under V. these indicators (and limitations) for the applicability of the CFR shall be applied to the climate protection law presented in II. To this end, the findings on the ('shades of') interplay between EU and national climate protection law under II.B.(3.) will be used as a basis. Special focus will be placed on the question of whether the national climate protection acts (in Austria (KSG) and Germany (B-KSG)) can be regarded as 'implementing Union law' within Article 51(1) CFR.

Prior to that, the potential (procedural) effects of the applicability of the Charter shall be illustrated in more detail. To this end, the core procedural right of the Charter – Article 47(1) on the right to an effective remedy and its impact within the field of environmental law – will be presented in the following section (IV.).

IV. The Role of Article 47(1) CFR in Environmental Case Law

The reason why this article focusses on Article 47(1) CFR as a procedural right (and less on substantive rights (such as Articles 2 or 7 CFR) is because Article 47(1) CFR has had a significant impact within the Austrian and German administrative

understanding Opinion of AG Bobek Case C-826/18 *Stichting Varkens in Nood* [2020] ECLI:EU:C:2020:514, paras. 101-109.

[83] Matthias Wendel, 'Das pluralistische System des Grundrechtsschutzes', 632.

[84] Lock, 'Art 51 CFR', para. 14.

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system(s)[85], especially in the field of environmental protection.[86] The CJEU has emphasized the procedural right in the environmental field far more than substantive guarantees (like Articles 2, 3 and 7 CFR). This work will try to draw a line from the CJEU's environmental case law to climate litigation, since climate mitigation is a component of environmental protection.[87] The applicability of Article 47 of the Charter could provide avenues for judicial review on whether a national climate protection measure is sufficiently aligned with (EU) climate targets.

A. 'Catalyst' Role in Environmental Case Law

Article 47(1) CFR grants everyone whose rights and freedoms guaranteed by the law of the Union are violated the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. According to Article 52(3) CFR and the Explanations, Article 47(1) CFR is based on Article 13 ECHR and Article 47(2) CFR corresponds to Article 6(1) ECHR, although its scope of application goes beyond Article 6(1) ECHR.[88] Because of its wide scope of application, Article 47 CFR can also encompass the area of environmental law.

The CJEU has extensively ruled on the enforceability of secondary law based on Article 47(1) CFR within the environmental field.[89] The right to access to court guaranteed in this Article has had particular pertinence in the CJEU's case law concerning environmental protection, due to Article 9(2) and (3) of the Aarhus Convention (AC).[90] Article 9(3) AC, the more open-textured of the two provisions, states that 'each party shall ensure that [...] members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.' The CJEU reads Article 47(1) CFR in conjunction with Article

[85] See e.g., Grabenwarter and Pesendorfer, 'Austria: United in Consistent Interpretation' in Bobek and Adams-Prassl (ed.), *The EU Charter of Fundamental Rights in the Member States* (2022) 69.

[86] Raschauer and Stangl, 'Unionsrecht' in Ennöckl, Raschauer and Wessely (ed.), *Handbuch Umweltrecht* (3rd edn, Facultas 2019) 104 (134 f).

[87] Hardiman, 'Climate, Energy – and Environment? Reconciliation of EU Environmental Law with the Implementation Realities of EU Climate Law' (2022) 12(3-4) Climate Law 242 (271 f).

[88] Kröll, 'Art 51 GRC', in Holoubek and Lienbacher (ed.), *GRC-Kommentar* (2nd edn, Manz 2019) para. 42; see Case C-334/12 RX-II *Arango Jaramillo* [2013] ECLI:EU:C:2013:134, para. 42.

[89] Schwarzer, 'Umweltverfassungsrecht' in Holoubek ea (ed.), *Wirtschaftsverfassungsrecht* (Verlag Österreich 2022) 619 (671).

[90] Hofmann, 'Art 47 CFR', in Peers ea (ed.), *The EU Charter of Fundamental Rights. A Commentary* (2nd edn, Hart Publishing 2021) para. 47.128; Lenaerts, Gutman and Nowak, *EU Procedural Law* (2nd edn, OUP 2023) para. 4.28.

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9(3) AC, which has led to a considerable expansion of its area of application and thus to a 'catalysing effect' in EU environmental procedural law.

The CJEU regularly states that 'in order to ensure effective judicial protection in the fields covered by EU environmental law, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the [AC] and with the objective of effective judicial protection of the rights conferred by EU law.'[91] This has increased the effectiveness of national review procedures to an extent, by granting ENGOs the right to bring proceedings[92] or broadening the scope of claims in such lawsuits.[93]

B. Details of Article 47(1) CFR (In Conjunction with Article 9(3) AC)

In accordance with the general explanations on the Charter's scope, the MS must only comply with Article 47(1) CFR when they are 'implementing Union law.'[94] Subsequently, the specific conditions of the procedural fundamental right must be fulfilled. The following will show, however, that in certain situations there is an automatism between Article 51(1) and 47(1) CFR.

The scope of Article 47(1) CFR is linked to the 'rights or freedoms guaranteed by the law of the Union'. For the question of whether an enforceable right exists, Article 47(1) CFR refers to the applicable substantive law. These 'rights or freedoms' include all rights guaranteed by Union law (i.e., by primary, secondary and tertiary law) as well as rights arising from national legislation, if enacted in implementation of Union law. Whether a provision of Union law or of national law implementing Union law grants a (subjective) right within the meaning of Article 47(1) CFR must, if this has

[91] See, *inter alia*, Case C-243/15 *Lesoochranárske zoskupenie VLK* [2016] ECLI:EU:C:2016:838, paras. 50-51.

[92] Case C-826/18 *Stichting Varkens in Nood* [2020] ECLI:EU:C:2020:514; Case C-197/18 *Wasserleitungsverband Nördliches Burgenland* [2019] ECLI:EU:C:2019:824; Case C-664/15 *Protect* [2017] ECLI:EU:C:2017:987; Lenaerts, Gutman and Nowak, *EU Procedural Law* para. 4.28.

[93] See again Case C-873/19 *Deutsche Umwelthilfe eV*, para. 64.

[94] See Lock and Tomkin, 'Art 47 CFR', in Kellerbauer, Klamert and Tomkin (ed.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2nd edn, OUP 2024) para. 22.

not been expressly done[95], be determined by interpretation considering the protective purpose of the legal provision as well as the legal or factual concern of the applicant.[96]

If Union law is aimed at protecting life and health of humans – as is the case in some areas of environmental law – the existence of a subjective right is given. However, in cases of mere nature, species or climate protection law, this assessment is more complex. In the literature, it is stated that in the case of climate protection laws, a sufficient reference to personal legal interests should generally be affirmed (as e.g., life, health, property).[97] Regarding the Effort Sharing Decision[98] and Regulation, German as well as Austrian courts have, however, until now denied the existence of a subjective right, especially due to the lack of definiteness of the MS obligations flowing from these Union acts.[99]

There have been arguments in the literature lately that the Effort Sharing provisions provide for a right to generally require the MS to enact appropriate and effective measures that ensure compliance with their reduction obligations, given that the GHG reduction obligation therein indirectly protects the legal interests of individuals (especially life and health). The choice of specific national climate protection measures would, according to that reading, remain within MS discretion and would not be legally enforceable in front of a court, though.[100]

This result is supported by the ECtHR's recent judgment in *KlimaSeniorinnen*[101], which basically follows a similar logic. There, the ECtHR derived a right for individuals to enjoy effective protection by the State from serious adverse effects

[95] Like in the Austrian KSG; § 4 para. 1 (6th sentence) B-KSG – on the contrary – even states that '[t]his Act does not establish any subjective rights or enforceable legal positions' (*translated by the author*). This has to be read in light of EU law, however, and has to be disapplied if necessary.

[96] Kahl, 'Subjektives öffentliches Recht und Unionsrecht' in Kahl and Ludwigs (ed.), *Handbuch des Verwaltungsrechts IV* (C.F. Müller 2022) § 94 para. 31.

[97] Kahl, 'Subjektives öffentliches Recht und Unionsrecht', paras. 31-34.

[98] The Effort Sharing Decision Decision No 406/2009/EC was the predecessor of the ESR.

[99] VG Berlin 31.10.2019 - 10 K 412.18 (*Klimaleistungsklage*), para. 97 f; VwG Wien 25.04.2022 (*Fliegenschnee ea*), p. 37; see, supporting this reading, Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu* [2011] ECLI:EU:C:2011:348, paras. 96-8 ('individuals cannot rely directly before a national court upon') Article 4 NEC Directive, that is similar to Article 1 ESR.

[100] Wallner and Nigmatullin, 'Climate-Related Individual Rights Under EU Secondary Law and Limitations to their Material Scope' in Bäumler ea (ed.), *European Yearbook of Internation Economic Law 2022* (Springer 2023) 443 (452 ff); Wallner and Nigmatullin, 'Durchsetzbares „Recht auf saubere Energie" im Gewerberecht?' (2022) 1 NR 78 (79 ff).

[101] ECtHR 09.04.2024 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* -53600/20.

caused by climate change from Article 8 ECHR.[102] Since Article 7 CFR corresponds to Article 8 ECHR (Article 52(3) CFR), the – newly extended – meaning and scope of this right could serve as a basis for claims against MS that aim to adopt a sufficient general legal framework to protect its citizens from the negative effects of the climate crisis.[103] The judgment in *KlimaSeniorinnen* – following the logic mentioned at the end of the previous page – distinguishes between a reduced margin of appreciation applying to the State's general commitment to combating climate change and its adverse effects, and a wide margin of appreciation applying to the 'choice of means designed to achieve those objectives'.[104]

While it can be difficult to derive individual rights for natural persons from 'framework' climate legislation, that are subsequently enforceable through Article 47(1) CFR, the situation is easier for ENGOs. From a combined reading of Article 47 CFR and Article 9(3) AC the CJEU follows that a duly constituted ENGO must be able to challenge a decision taken following an administrative procedure[105] that may be contrary to EU environmental law before a court.[106] The review standard (addressed in Article 9(3) AC) also encompasses Union law and should extend to law relating to climate protection, as climate protection is part of environmental protection.[107] According to recent case law, MS may not reduce the material scope of Article 9(3) AC by excluding certain categories of provisions of national environmental law[108], opening up legal action for a broad range of acts (e.g., plans and programs, for which administrative procedures, such as SEAs, are already provided for under EU law).

An ENGO can therefore demand an *objective* legal review of a broad range of (administrative) acts and omissions with EU environmental (and climate protection) law on the basis of Article 47 CFR/ Article 9(3) AC, as the potential violation of an

[102] ECtHR *KlimaSeniorinnen*, paras. 519, 544.

[103] Eckes, '"It's the democracy, stupid!" in defence of KlimaSeniorinnen' (2025) ERA 451 (454).

[104] Eckes, '"It's the democracy, stupid!"' 465; ECtHR *KlimaSeniorinnen*, paras. 543, 550, 561.

[105] The term 'administrative procedure' is to be interpreted autonomously and not only covers individual, but also general acts, for which national law does not always provide generalised procedures. These are usually subject to more specialised procedural rules, not least under EU law.

[106] Case C-240/09 *Lesoochranárske* [2011] EU:C:2011:125, para. 52; C-664/15 *Protect*, paras. 548.

[107] Eckes and Trapp, 'The Aarhus Convention's Relevance for Climate Litigation Through the Lens of KlimaSeniorinnen' European Law Blog 11.09.2024.

[108] Case C-873/19 *Deutsche Umwelthilfe eV*, para. 64.

individual right is *not a condition* for their standing.[109] Whether subjective rights can be derived does not change the objective binding nature and therefore the enforceability of these provisions. However, enforceability of objective environmental law will also depend on whether the relevant provisions are 'unconditional and sufficiently precise'[110]. The precision of an EU law provision thus determines what exactly a climate claim can demand. The ESR, for instance, certainly requires general national implementation measures (such as the translation of the target into a national legal framework, possibly broken down by sector), but will be too vague to judicially enforce individual measures (following up on this cf. V.C.).

The CJEU's case law regarding the standing of ENGOs in environmental cases ultimately creates a *quasi-automatism* between Article 51(1) and Article 47(1) CFR for these. Should a national (administrative) measure implement environmental Union law, ENGOs are entitled to challenge the measure before a national court without having to prove the potential violation of an individual right.

V. Charter Application Within National Climate Law and its Effects

Based on the results of the previous chapters (II.-IV.) the final arguments will be developed in the following section. It will be shown which (procedural) effects the applicability of the CFR, especially its Article 47(1), could have for climate litigation. The results will be subdivided into categories of 'clearer' and – more demanding – 'special cases' of 'implementation'.

A. Clearer Cases of Implementation

Clearer cases in which MS 'implement Union law' within the meaning of Article 51(1) CFR are those where – following the 'shade' of 'full implementation' – precise obligations under regulations are applied or implemented, e.g., when the MS enact and submit a NECP in accordance with (Article 3 ff) the Governance Regulation.[111]

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[109] See Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] EU:C:2011:28, para. 46; Case C-664/15 *Protect*, para. 79 'given that only such organisations are orientated towards the public interest, rather than towards the protection of the interests of individuals.'

[110] See, *inter alia*, Case C-237/07 *Janecek* [2008] ECLI:EU:C:2008:447, para. 36; more recently Case C-61/21 *JP* [2022] ECLI:EU:C:2022:1015, para. 46.

[111] Reimann, *Die Governance-Verordnung für die Energieunion* (Verlag Österreich 2025) 41, 250 f; also Verheyen and Pabsch, 'The role of non-governmental organizations for climate change litigation' in Kahl and Weller (ed.), *Climate Change Litigation* (C. H. Beck 2021) 507 (526 f) 'NECP are part of the implementation of EU environmental law and are therefore subject to judicial review

The same applies to the creation of the 'corrective action plan' based on Article 8 of the ESR. Furthermore, the transposition of the contents of the Emissions Trading Directive, the RED and the EED, is, in principle, covered by the scope of the Charter.

Because the subsequent enforcement of law that transposes directives is covered by the term 'implementation' (Article 51(1) CFR), the mapping as well as the adoption of RAA plans (Article 15b, 15c RED III) also falls under the Charter's scope. The same applies to administrative procedures for plans/programmes or installations that are subject to a SEA or an EIA. However, it cannot be considered a clear case of implementation if the national legislator creates strategies, plans or programmes that are not prescribed by Union law (see old version of § 8 B-KSG, § 9 B-KSG; these will be covered under V.B.1.).

B. Special Cases

The question whether national climate protection measures that are not directly prescribed by Union law, but which are related to Union law, can be regarded as 'implementation' within the meaning of Article 51(1) CFR (taking up on the 'semi-implementing' shade of interplay II.B.3.ii.) is of particular interest. These 'special cases', for which a certain degree of connection to Union law must be demonstrated, shall be presented in individual sub-categories (V.B.1.-3.).

1. National Climate Acts, Targets, Budgets and Plans

Union law does not provide for an obligation to adopt a national climate protection act (see II.B.1.). The Union targets within the European Climate Law as well as the targets addressed to the MS within the ESR are directly applicable, irrespective of an implementation act. However, due to the framework character of the European Climate Law, the Governance Regulation and the ESR, it is assumed in the literature that implementation of these is nonetheless necessary and regularly takes place in the form of national climate protection acts.

In that sense, the BVerfG has ruled that, the B-KSG must be regarded *in part* as implementing Union law within the meaning of Article 51(1) CFR, although its provisions are not entirely determined by Union law.[112] This can particularly be derived from the purpose of the law set out in the B-KSG, that is to also ensure compliance with European targets (§ 1 S 1 B-KSG; see also Article 2(2) European

for environmental NGOs'; this does not mean, however, that the national measures outlined within the NECP – irrespective of another connecting factor under EU law – fall within the CFR's scope.

[112] BVerfG 24.03.2021, 1 BvR 2656/18 ua, *Klimaschutz*, para. 141.

University of Vienna Law Review, Vol. 9 No 1 (2025), pp. 124-161, https://doi.org/10.25365/vlr-2025-9-1-124.

Climate Law). The B-KSG therefore does not pursue objectives different than those prescribed by Union law, since the national climate targets are regularly congruent with the MS's share laid down in the ESR.[113]

Although national climate protection acts are not mandatory under EU law, they can thus be regarded *in part* as implementing Union law within the meaning of Article 51(1) CFR. The 'parts' implementing EU law are most likely the national (intermediate) climate protection targets (see § 3(1) B-KSG, § 4(1) EAG) as well as more specific, possibly annual, sectoral targets and a carbon budget resulting from these.[114] In this context, implementation within the meaning of Art 51 CFR is not necessarily precluded if national climate targets go beyond those prescribed by (older) Union law, given that Union targets are continuously raised.[115]

Furthermore, national plans or programs that are not prescribed by Union law or only in outline, but which are implemented in the exercise of the MS's obligation to implement the measures necessary to achieve the climate protection targets under Union law, can also fall under Article 51(1) CFR.[116] In these cases, it is still a prerequisite, though, that Union law sets a sufficiently substantive framework and that the MS legislator determines the national measures to be suitable and necessary for the Union objectives. In that regard, it will be relevant if the MS legislator draws attention to its intention to implement Union law (cf. § 3(2) EAG). Purely political climate protection strategies will not fulfil these requirements.

However, not all parts of the national climate protection acts should be regarded as 'implementing' EU law, e.g., not those that are concerned with general organisational matters or decision-making bodies (cf. § 4 KSG), those that divide responsibility in the federal context or regulate the financial consequences of exceeding targets within the (federal systems of the) MS (cf. federal accountability mechanism in § 7 KSG).[117]

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[113] OVG Berlin-Brandenburg 30.11.2023, OVG 11 A 27/22, p. 24-25.

[114] Cf. ECtHR 09.04.2024 *KlimaSeniorinnen*, para. 550 for these elements (following from Article 8 ECHR).

[115] See OVG Berlin-Brandenburg 16.05.2024, 11 A 22/21, para. 120.

[116] OVG Berlin-Brandenburg 30.11.2023, OVG 11 A 27/22, p. 24-7; OVG Berlin-Brandenburg 16.05.2024, 11 A 22/21, paras. 116-20; see likewise for the LULUCF sector OVG Berlin-Brandenburg 16.05.2024, 11 A 31/22, paras. 70-75.

[117] These are phenomena where national law takes account of national circumstances (see p. 14). When MS are definitely competent to regulate outside the framework of Union law, it weakens the degree of connection to EU law (rather 'autonomous' climate law, cf. II.B.3.iii.).

2. Discretionary Powers, Minimum Harmonisation and Gold-Plating

As stated, 'implementation' within the meaning of Article 51(1) CFR also takes place where the MS are given a certain degree of (legislative or executive) discretion, i.e., in particular in areas that are not fully harmonised under EU law. The BVerfG has stated that domestic provisions may be judged to be provisions implementing EU law within the meaning of Article 51(1) CFR in cases where EU law affords MS latitude in the design of such provisions, but also provides for a sufficiently substantial framework for this design; additionally, it must be ascertainable that the framework is to be specified in consideration of EU fundamental rights.[118] This subsection is intended as a catch-all category for situations in which MS fill in regulatory margins which are opened by Union law that have not already been discussed under V.B.1..

As shown, the main climate protection acts of the Union all depend on (ambitious) implementation by the MS. However, not every MS climate protection measure that is enacted within the scope of the mentioned discretion should fall within the scope of the CFR. Going back to the two elements described by the BVerfG, the Union law must lay down a 'sufficiently substantial framework' for the national measure and it must be 'ascertainable that the framework is to be specified in consideration of EU fundamental rights'.

The framework provided by Union law is more substantive for general measures that lie in the realm of legal policy planning, compared to sector-specific measures. The question of whether national measures in discretionary areas fall under Article 51(1) CFR will thus be determined by the (policy) level at which the implementation takes place. Discretionary implementation measures on higher (policy) levels are more likely to fall under Article 51(1) CFR and thus be subject to the provisions of the Charter than the ones at regional or local implementation stages. This solution also serves the principle of subsidiarity (Article 5(3) TEU).

This result is confirmed with regard to the assumption that it has to be 'ascertainable that the framework is to be specified in consideration of EU fundamental rights', since the fundamental rights that have to be considered for the specification of Union requirements (e.g., Article 7 CFR) can – after *KlimaSeniorinnen* – primarily be used to derive general planning measures. On the other hand, the choice of means – including operational choices and policies – remains within a wider margin of MS discretion, making successful judicial claims regarding specific policies less likely.

[118] BVerfG *Recht auf Vergessen* I, para. 44; as far as can be seen, the Austrian Constitutional Court (VfGH) has not addressed this point in such detail yet.

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For the area of minimum harmonisation, it should be noted that the implementation of such provisions falls under the CFR's scope, insofar as it does not exceed the minimum. The CFR does, in principle, not apply to such excess measures by the MS ('gold-plating'). However, that excess must be clearly separable from the minimum requirement stipulated in EU law.[119] That would be the case if the MS pursues a different purpose from the relevant Union law. Implementing national (intermediary) climate targets could be seen as a form of 'vertically superobligatory transposition', by which MS supplement the legal consequences of the Union act, and thus fall within the Charter's scope.[120] This, however, only applies to more favorable substantive national provisions and not to provisions that are – in light of Article 4(3) TEU – necessary to implement Union law in an organizational or procedural way (V.B.3.).

3. Organisational or Procedural Rules

It is particularly interesting with regard to procedural effects that procedural measures that – following 'national procedural autonomy'[121] – in principle fall within the MS's competences may qualify as implementation of EU law for the purposes of Article 51(1) CFR when they are used to guarantee the application and effectiveness of EU legislation.[122] Where a MS lays down rules of procedural law applicable to the matters referred to in Article 9(3) AC concerning the exercise of the rights that an ENGO derives from secondary (environmental) law, the MS is implementing an obligation stemming from that law. The MS must therefore be regarded as implementing EU law, with the Charter being applicable as a result.[123] On this basis, national provisions on competences, procedures or public participation that are not directly prescribed by Union law (e.g., via SEA or EIA) – but ensure its enforcement – fall within the CFR's scope and form a standard for legal review via Article 47(1) CFR. A failure in the observation of such organisational or procedural rules in the legislative process could lead to the annulment of a measure.

[119] Lock, 'Art 51 CFR', para. 12; Joined Cases C-609/17 and C-610/17 *TSN and AKT*, paras. 41-55, to the last point see particularly para. 51; more precisely de Ceco, 'Minimum Harmonization and the Limits of Union Fundamental Rights Review: *TSN* and *AKT'* (2021) 58 CML Rev 187.

[120] On this notion Latzel and Reichert, 'Superobligatory transposition of directives and the scope of EU fundamental rights' (2025) 31(1) MJ 28, especially 40 ff on constraints of minimum harmonization competences.

[121] Cf. Schütze, *European Constitutional Law* 348-50, 412 f; see regarding the interplay with Article 47 CFR Arnull, 'Article 47 CFR and national procedural autonomy' (2020) 45(5) EL Rev 681.

[122] Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial', 373.

[123] Case C-243/15 *Lesoochranárske zoskupenie VLK* para. 52; Case C-664/15 Protect, para. 44.

C. As a Conclusion: Consequences for National Climate Litigation

The consequences of the results for national climate litigation shall now be presented. Admissibility aspects will be dealt with first, then effects related to merits.

The existence of *legal standing* is a central condition for climate litigation because it is a prerequisite for a court to rule on the merits of a claim. Since the availability of access to a court forms part of the essence of Article 47(1) CFR, the procedural fundamental right can serve as the key to unlocking the admissibility criterion of legal standing that the MS cannot shape in an unduly restrictive way.[124] Article 47(1) CFR in conjunction with Article 9(3) AC particularly provides a right to judicial review regarding the violation of – unconditional and sufficiently precise – climate law for ENGOs, as these do not have to claim a violation of individual rights. A *rights-based strategy* – meaning that the violation of the law and its effects must be individualized[125] – turns out to be more difficult, as EU climate framework law only indirectly protects individual legal interests. This approach is, however, by no means impossible, and has gained traction through *KlimaSeniorinnen*, where an individual right to state protection from the negative consequences of climate change was derived from Article 8 ECHR (that corresponds to Article 7 CFR), on which the individual's legal standing could be based. The ECtHR further derived from Article 6 ECHR (that corresponds to Article 47(1) CFR) that national courts must adequately address the issue of standing of applicants at the level of admissibility, which involves addressing scientific evidence related to climate change and what it means for legal standing.[126]

Further aspects placed upstream of the merits level are questions of the appropriate review standard and the admissible review subject in the context of climate litigation. Both regarding legal action by individuals as well as ENGOs, it is necessary that the law – which is used as the standard for the review – is 'unconditional and sufficiently precise'. If a provision of secondary climate law is purely programmatic in nature in that it merely lays down an objective, it does not allow a court to derive obligations for a defaulting MS from it. However, the question of the standard of review must be seen in relation to the specific claim, as, e.g., no specific measures can be derived from fundamental rights, but general (planning) measures may be required from their perspective. Concerning the subject matter of the claim, it must further be considered that it is unclear whether Article 47(1) CFR guarantees a right to judicial review of

[124] Lock and Tomkin, 'Art 47 CFR', para. 28.

[125] Cf. Meguro, 'Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy' (2020) 33(4) Leiden Journal of International Law 933 (934 f).

[126] ECtHR 09.04.2024 *KlimaSeniorinnen*, paras. 629-40, especially paras. 635, 636, 639.

legislation.[127] While Article 47(1) CFR can likely not be invoked to challenge policy decisions of the legislator (through constitutional review), effective implementation of the mitigation measures under existing law can form the subject matter of an action.

Regarding the merits of climate litigation cases seen in light of Article 47(1) CFR, it has to be noted that the procedural fundamental right is primarily concerned with the access to court itself and does not always require substantive review of an administrative decision, notably where complex technical assessments are made by an authority. It will therefore hardly be possible to derive substantive review standards from Article 47(1) CFR; for this purpose, reference should be made to other EU laws, such as substantive fundamental rights like Article 7 CFR or secondary climate law. Consequently, whether one follows an *obligation* or *rights* (based) *strategy* changes the room for discretion for MS action, as secondary law can often function as a more precise control standard than fundamental rights. This is due to the fact that secondary law lays down more specific obligations, such as quantitative targets that cannot be derived from fundamental rights in detail. Within the context of substantive examination, courts will also have to consider the nature of a Union target, as it is more convincing to derive follow-up measures if the benchmark is a binding (Union or MS) target rather than an indicative one (Article 4(2) EED). Though it is primarily executive climate protection measures that can be subject to scrutiny based on Article 47(1) CFR, certain MS obligations can – especially after *KlimaSeniorinnen* – be derived. Subsequent climate protection measures must be geared towards achieving the climate targets, meaning they must be in tune with interim targets, the reduction path and the carbon budget. A complete lack of implementation measures, or their postponement to the future without considering the consequences of delayed action, is not appropriate. The necessary coordination between planning and implementation levels can thus form the subject matter of judicial review.[128]

In conclusion, the applicability of (Article 47(1) of) the Charter and the potential procedural and the substantive consequences resulting therefrom could facilitate private enforcement of EU and MS climate targets. The Charter's applicability would increase the effectiveness of Union law, a factor that regularly plays a significant role in its interpretation. The potential described can be put to full effect in systems that, like the Austrian, recognise CFR rights as standard for (constitutional) review.[129]

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[127] Lock and Tomkin, 'Art 47 CFR', para. 13; Kröll, 'Art 47 GRC', para. 16.

[128] Cf. Hollaus, 'Das Urteil des EGMR im Fall KlimaSeniorinnen und seine Implikationen für den europäischen Grundrechtsschutz' (2024) JBl 485 (498).

[129] See for Austria VfGH 14.03.2012, U 466/11 ua - VfSlg 19.632/2012 (*Charta-Erkenntnis*).

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