Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
Delivered on 4 June 2015 [1]

Case C-650/13

Thierry Delvigne
v
Commune de Lesparre Médoc
and
Préfet de la Gironde
(Request for a preliminary ruling from the

Tribunal d'instance de Bordeaux (France))

(Articles 10 and 14(3) TEU — Article 20(2)(b) TFEU — Article 223(1) TFEU — Articles 39 and 49 of the Charter of Fundamental Rights of the European Union — Article 52(1) of the Charter of Fundamental Rights of the European Union — Act concerning the election of the members of the European Parliament — Scope of EU law — Representative democracy — Direct representation — Participation in the democratic life of the Union — European Parliament — Right to vote and stand as a candidate in elections to the European Parliament — Limitation of a fundamental right — National legislation providing for permanent deprivation of civil and political rights — More favourable criminal legislation not applicable to persons convicted by a final judgment before that legislation entered into force — Equal treatment for nationals of Member States — Inadmissibility)

1. In connection with court proceedings concerning the exclusion from the electoral roll of a citizen deprived for an indefinite period of his right to vote and stand as a candidate as an ancillary consequence of his conviction for the offence of murder, the Court is seised of two questions concerning the compatibility with EU law of the national legislation enabling that situation, with specific reference to two articles of the Charter of Fundamental Rights of the European Union ('the Charter') relating to two fundamental rights: the right to the retroactive effect of the more favourable criminal law (third sentence of Article 49(1)) and the right to vote and stand as a candidate in elections to the European Parliament (Article 39(2)). [2]

2. As is frequently the case, every time the question arises of the possible application of provisions of the Charter (Article 51(1)) to an act of a national public authority, this occasion also calls for an examination, based essentially on the case-law laid down in *Åkerberg Fransson*, [3] of the prior question whether the national statutory provisions concerned were adopted in order to implement Union law.

1 — Original language: Spanish.

2 — For the sake of convenience, 'the right to vote'.

3 — Case C-617/10, EU:C:2013:105.

3. I shall suggest different replies to that prior question, which will then allow me to deal exclusively with the issue raised in the second question, which is whether the national legislation is consistent with the right to vote and stand as a candidate ('the right to vote') in elections to the European Parliament, at this point with important assistance from the case-law of the European Court of Human Rights.

I – **Legislative framework**

A – *International law*

4. Article 3 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed at Rome on 4 November 1950, provides as follows:

'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

B – *EU law*

1. Treaty on European Union

5. Article 10 TEU provides as follows:

'1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

…

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

…'

6. In accordance with Article 14(3) TEU, '[t]he members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.'

2. Treaty on the Functioning of the European Union

7. Article 20 TFEU reads as follows:

'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

…

b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

…

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.'

8. Under Article 22(2)TFEU, '[w]ithout prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.'

3. Charter of Fundamental Rights of the European Union

9. Article 39 of the Charter provides as follows:

'1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.'

10. In accordance with Article 49 of the Charter, '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

11. Article 51 of the Charter is worded as follows:

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

12. Article 52 of the Charter reads:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

…'

4. Act concerning the election of the members of the European Parliament [4]

13. Article 1 of the 1976 Act provides:

'1. In each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.

…

3. Elections shall be by direct universal suffrage and shall be free and secret.'

14. In accordance with Article 8 of the 1976 Act, '[s]ubject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions ...'

C – *French law*

15. In accordance with Article 28 of the Criminal Code, laid down by Law No 1810-02-12 of 12 February 1810 (the 'old Criminal Code'), a sentence for a serious criminal offence will entail the loss of civic rights; under Article 34 of the old Criminal Code, this is defined as loss of the right to vote, of the right to stand for election and, in general, all civic and political rights.

16. The old Criminal Code was repealed with effect from 1 March 1994 by Law No 92-1336 of 16 December 1992 concerning the entry into force of the new Criminal Code and the amendment of certain provisions of criminal law and criminal procedure.

17. Article 370 of the Law of 16 December 1992 (the '1992 Law'), as amended by Article 13 of Law No 94-89 of 1 February 1994, provides that, without prejudice to the provisions of Article 702-1 of the Criminal Procedure Code, the penalties of deprivation of civic, civil and family rights and of exclusion from jury service, resulting from a criminal conviction by judgment given at last instance before the entry into force of that Law, are to be maintained.

18. Article 702-1 of the Criminal Procedure Code, as amended by Law No 2009-1436 of 24 November 2009 on imprisonment, provides that anyone subject to deprivation, ban or legal incapacity resulting from a principal or ancillary criminal conviction may apply to the court for that deprivation, ban or legal incapacity to be lifted in whole or in part.

19. Article 2 of Law No 77-729 of 7 July 1977 on the election of representatives to the European Parliament provides that the election of such representatives is to be governed by the Electoral Code.

4 — Annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, concerning the election of the members of the European Parliament by direct universal suffrage (OJ 1976 L 278, p. 1), amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ 2002 L 283, p. 1). The '1976 Act'.

20. Book I, Title I, Chapter 1 of the Electoral Code laying down the conditions for eligibility to vote in elections, provides in Article L 2 that those eligible to vote are French citizens having reached the age of 18 who enjoy civil and political rights and are not subject to any legal incapacity laid down by law.

21. In accordance with Article L 6 of the Electoral Code, persons who have been deprived by law of the right to vote by the courts may not be registered in the electoral roll for the period fixed in the judgment.

II – **Facts**

22. The reference for a preliminary ruling has its origin in judicial proceedings brought by Mr Delvigne against an administrative decision ordering his exclusion from the electoral roll as a consequence of the penalty of deprivation of the right to vote, ancillary to his sentence by final judgment to 12 years' imprisonment for the crime of murder.

23. At the time of Mr Delvigne's conviction by final judgment, on 30 March 1988, the old French Criminal Code provided that those sentenced for a serious criminal offence would be permanently deprived of the right to vote. The Law of 1992 abolished the automatic, indefinite nature of that ancillary penalty but only in the case of sentences passed after the entry into force of the new Code.

24. Mr Delvigne challenged his exclusion from the electoral roll before the Tribunal d'instance de Bordeaux, requesting that a preliminary ruling be sought on the grounds that the national legislation applied entails discriminatory treatment contrary to the Charter. The Tribunal d'instance granted that request, so giving rise to the present proceedings.

III – **The questions referred**

25. The questions referred by the Tribunal d'instance de Bordeaux on 9 December 2013 are worded as follows:

'Is Article 49 of the Charter of Fundamental Rights of the European Union to be interpreted as preventing a provision of national law from maintaining a ban, which, moreover, is indefinite and disproportionate, on allowing persons convicted before the entry into force of a more lenient criminal law, namely, Law No 94-89 of 1 February 1994, to receive a lighter penalty?

Is Article 39 of the Charter of Fundamental Rights of the European Union, applicable to elections to the European Parliament, to be interpreted as precluding the Member States of the European Union from making provision for a general, indefinite and automatic ban on exercising civil and political rights, in order to avoid creating any inequality of treatment between nationals of the Member States?'

IV – **The procedure before the Court of Justice**

26. Written observations were submitted by Mr Delvigne, the Commune de Lesparre-Médoc, the German, United Kingdom, Spanish and French Governments, the European Parliament and the Commission. All those parties attended the hearing, held on 20 January 2015. In accordance with Article 61(1) and (2) of the Rules of Procedure, the parties were invited at the hearing to answer various questions: (1) Is Article 370 of the 1992 Law an instance of the implementation of Union law within the meaning of Article 51(1) of the Charter? (2) What are the 'objectives of general interest', within the meaning of Article 52(1) of the Charter, that are met by the restriction of the right to vote as a result of a criminal conviction? (3) As a question addressed in particular to the French

Government, what persons fall within the scope of Article 370 of the 1992 Law and under what conditions may they obtain the total or partial lifting of the deprivation of the right? (4) As a question addressed in particular to Mr Delvigne, has he applied for the total or partial lifting of the deprivation of the right to vote and, if so, what was the outcome?

V – **Submissions**

A – *The admissibility of the reference for a preliminary ruling and the jurisdiction of the Court*

27. The French Government argues, at the outset, that the order for reference is manifestly inadmissible, for it provides no information about the reasons why the questions referred are necessary for the outcome of the main proceedings, nor does it outline sufficiently the factual and legislative context of those questions.

28. The Spanish and French Governments submit that the Court does not have jurisdiction to answer the questions referred. The French Government contends that the national legislation concerned does not fall within the scope of EU law, for the provision involved is by nature a transitional provision of criminal law pursuing objectives that are not covered by the EU legislation. The Spanish Government states that the Member States have competence when it comes to the definition of those who are entitled to vote in elections to the European Parliament.

29. The German Government, for its part, maintains that the Court lacks jurisdiction to give a ruling on the first question, given that the referring court has supplied no evidence to suggest that the subject-matter of the main proceedings concerns the interpretation or implementation of a provision of EU law other than those in the Charter.

30. Mr Delvigne, the Commission and, solely as regards the second question, the European Parliament argue that the Court does have jurisdiction. The Commission takes the view that the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter, when they adopt provisions of general or individual scope for the purpose of determining who the beneficiaries are of the right to vote in elections to the European Parliament. The Commission submits that EU law, in particular Article 8 of the 1976 Act, requires Member States to exercise their powers for that purpose and that, in that sense, they are bound by the rights recognised in the Charter.

31. The European Parliament submits that the Charter is applicable and that, as a consequence, it is appropriate to give a reply to the second question. In its opinion, in the light of Article 14(3) TEU, Article 223(1) TFEU, and Articles 1(3) and 8 of the 1976 Act, France implemented Union law within the meaning of the Charter by adopting national provisions on the right to vote in elections to the European Parliament. Such provisions constitute provisions of Union law distinct from the Charter and, by virtue of those provisions, France is performing a specific obligation derived from EU law, namely, that of guaranteeing the election of members of the European Parliament by universal suffrage. In addition, as regards Article 8 of the 1976 Act, although electoral procedure is governed by national provisions, those provisions fall within the scope of EU law. The fact that French law governs the procedure for elections to the European Parliament by reference to the provisions of the Electoral Code applicable to other elections held in France does not mean that the conduct of European elections is a competence not attributed to the Union.

B – *The first question*

32. Mr Delvigne submits that Article 49 of the Charter precludes a provision like Article 370 of the 1992 Law, which prohibits a more favourable criminal provision from having a particular retroactive effect, thereby creating a situation of inequality between persons convicted before 1994 and persons convicted after that date.

33. The Commune de Lesparre-Médoc, the United Kingdom Government, the French Government — in the alternative — and the Commission argue that Article 49(1) of the Charter does not preclude the application of the legislation at issue in the main proceedings, because, when Mr Delvigne was convicted by a final judgment, the more lenient legislation was not in force. That follows from the wording of Article 49(1) of the Charter and from the case-law of the European Court of Human Rights.

C – *The second question*

34. Mr Delvigne maintains that Article 39 of the Charter also precludes Article 370 of the 1992 Law, in that the latter creates inequality on grounds of nationality, relying for that purpose upon the infringement of Article 3 of Protocol No 1 to the ECHR.

35. The Commune de Lesparre-Médoc submits that there is no unequal treatment, given that the penalty provided for in the Electoral Code before the 1992 Law was applicable, on the same terms, to any citizen of the Union wishing to vote in France.

36. The French Government proposes, in the alternative, that the answer should be that Article 39 of the Charter does not prohibit the Member States from providing for indefinite deprivation of the exercise of the right to vote in the event of a criminal conviction for a serious crime, on condition that there is provision for the possibility of revoking that deprivation. In the first place, the French Government explains that the national legislation does not provide for a general, indefinite deprivation. On the one hand, the deprivation affects those who, like Mr Delvigne, have been sentenced to a custodial sentence of between five years and life imprisonment; it is not an automatic penalty independent of the duration of the sentence and the gravity of the offence. On the other hand, a person subject to the deprivation may apply for it to be lifted, which Mr Delvigne does not appear to have done.

37. Second, the French Government argues that, under Article 52(1) of the Charter, Member States may limit the exercise of the rights and freedoms recognised by the Charter provided that they comply with conditions which, in the French Government's opinion, are satisfied in the case of the national legislation at issue.

38. The German Government proposes that the reply should be that Article 39(2) of the Charter must be interpreted as meaning that the principle of universal suffrage allows the deprivation of the right to vote for overriding reasons, such as ensuring that representation of the electorate is not entrusted to persons who have been convicted by a final judgment. A reason of that kind justifies the deprivation of the right to vote in the event of a criminal conviction by a final judgment, provided that the provision draws a sufficient distinction based on the severity of the penalty and the duration of the deprivation, and it is for the national court to determine whether the legislation applied satisfies those requirements.

39. The United Kingdom Government submits that Article 39 of the Charter does not preclude Member States from adopting a measure which, like that applied in the main proceedings, does not discriminate between nationals of the Member States. In the United Kingdom Government's opinion, it is clear that EU law does not recognise a right to vote that could be relied upon against that

measure on any grounds other than discrimination on grounds of nationality. First, the Court has ruled that the determination of the right to vote in European elections comes within the sphere of competence of the Member States and that Article 39 of the Charter may not be interpreted otherwise without the risk of extending the competences of the Union in violation of Article 6 TEU. In the second place, the United Kingdom Government contends that Mr Delvigne cannot rely upon Article 39(1) of the Charter, because he is a French citizen and has not exercised freedom of movement as a citizen of the Union. Article 39 reflects the rights granted in Articles 20 TFEU and 22 TFEU and applies within the limits and subject to the conditions laid down in those provisions. Thus, the right recognised in Article 39 of the Charter is reserved to Union citizens resident in a Member State other than their Member State of nationality. The fact that, in exceptional circumstances, citizens of the Union may rely upon their citizenship of the Union before the Member State of which they are nationals does not affect the prohibition of discrimination in the context of the right to vote.

40. The European Parliament argues that Article 39 of the Charter contains subjective rights laid down for the benefit of individuals. In the European Parliament's opinion, the right to vote recognised therein is not only guaranteed for citizens of the Union who vote in a Member State other than their Member State of nationality but also for nationals of the Member State in which they cast their vote.

41. In that regard, the European Parliament maintains, in the first place, that, it is apparent from the wording of Article 39 of the Charter and from the Explanations relating to the Charter, that that article concerns two distinct fundamental rights: the right of citizens of the Union who are not nationals of their Member State of residence to vote in that State in European elections (paragraph 1) and, in addition, the right to elect members of the European Parliament by direct universal suffrage in a free and secret ballot (paragraph 2).

42. In the second place, the European Parliament contends that the scope of Article 39(2) is not limited by the phrase 'under the same conditions as nationals of that State', because citizenship of the Union, to which that right is linked, entails a status whose legal effects apply even when there is no cross-border element.

43. In the third place, the European Parliament submits that, in order for practical effect to be given to Article 39(2) of the Charter, that provision must be construed as encompassing a subjective right which supplements Article 14(3) TEU. In that connection, universal suffrage, which is the central notion for the purpose of defining the substance of that right, entails a *ratio personae*, in principle general, which affords unconditional protection not only for a citizen of the Union who votes in a Member State which is not his State of origin, but also for nationals of the Member State of the place where that citizen casts his vote.

44. For the European Parliament, any restriction of the right to vote in European elections constitutes interference with the right of Union citizens to universal suffrage guaranteed by the Charter and, in accordance with Article 52(1) of the Charter and with the case-law, Member States may limit a right only if they comply with certain conditions. In the light of the case-law of the European Court of Human Rights, the European Parliament believes that a restriction would be disproportionate if it were cumulative, general, automatic and did not differentiate by reference to the seriousness of the offence committed. However, a restriction could be regarded as proportionate if it applied to certain offences which were sufficiently differentiated and if it could be reviewed; it falls to the national court to carry out that examination of proportionality in the light of the use made of the possibility of review.

45. Finally, the Commission observes, in the first place, that contrary to the apparent view of the referring court, the provisions on which Mr Delvigne's exclusion from the electoral roll is based do not involve a difference in treatment between nationals of different Member States but rather between different types of voter. That difference must be assessed in relation to the requirement of universal suffrage for elections to the European Parliament.

46. On that basis, the Commission proposes a reply to the question on the same lines as that proposed by the European Parliament.

VI – **Assessment**

47. Pleas of inadmissibility have been raised against the present reference for a preliminary ruling from two very different perspectives. First, as the participants explain with varying degrees of intensity, the order for reference is drafted so succinctly that it is difficult to accept that it satisfies the requirements laid down in case-law, to the effect that there must be a proper account of the factual and legislative context of the questions referred to the Court and an explanation of the reasons why a reply to those questions is needed for the purpose of disposing of the main proceedings.

48. On the other hand and, in my view, much more significantly, a problem of jurisdiction too has been raised from that same perspective of admissibility. The issue is whether the Court may answer the questions asked by the referring court, concerning the observance by a Member State of various fundamental rights laid down in the Charter. That is at issue inasmuch as, as observed by certain of the parties, the acts concerned are not acts adopted for the purpose of implementing EU law, with the logical consequences which that has for the jurisdiction of the Court. Those two points must be dealt with separately as preliminary issues.

A – *The admissibility of the reference for a preliminary ruling*

49. As I have pointed out above, the French Government argues that, in the terms in which it is framed, the present reference for a preliminary ruling is manifestly inadmissible. In its opinion, the inadequate account of the factual and legislative context of the questions given by the referring court does not enable an accurate understanding of the dispute in the main proceedings; in addition to preventing the Court from being able to give a reply that will be helpful in resolving the dispute, this deprives the Member States and other interested parties of the opportunity of submitting observations under Article 23 of the Statute of the Court of Justice.

50. With the exception of the parties to the main proceedings, all the participants in these proceedings agree, to a greater or lesser extent, with the French Government's complaint, although they do not go so far as to claim that the questions should be ruled inadmissible on those grounds.

51. In reply to those objections, it should be stated, first, that there have been few occasions where the Court has been seised of a reference for a preliminary ruling in which there is such a dearth of argument but which is at the same time so revealing with regard to the problem of interpretation of Union law which it specifically raises.

52. The referring Court has practically confined itself to conveying to the Court the terms in which, in the main proceedings, Mr Delvigne framed his uncertainties concerning the compatibility of the national legislation applicable to the case with Articles 39 and 49 of the Charter, doing so very concisely and barely developing any lines of argument. From that perspective alone, it is necessary to acknowledge that some of the complaints directed at the order for reference in the present preliminary-ruling proceedings are well founded.

53. However, at the same time, despite its paucity of expression, the two questions of which the Court is seised are so simple and revealing in themselves that no great effort of imagination is required to 'reconstruct' sufficiently the fundamental rights issues with which the present case is concerned, at least for the purposes of providing a reply to the national court. The statements of the United Kingdom Government at point 2 of its written observations demonstrate that it is not difficult to grasp properly what the substantive issue raised by the Tribunal d'instance is.

54. On the other hand, in the present case the substantive issue raised in the main proceedings, which involves fundamental rights, appears to have been resolved already from the point of view of national law, and with the procedural instruments available thereunder. It is now upon two provisions of the Charter that the applicant seeks to rely against acts of the public authorities of the Member State concerned, in so far as, implicitly and by reference to elections to the European Parliament, those acts are deemed to have been adopted to implement Union law. On that basis, and without seeking to excuse the shortcomings of the order for reference, I believe it necessary to examine with particular care whether or not the shortcomings described actually prevent the Court from dealing with the questions referred. It should be recalled that, in accordance with settled case-law, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [5]

55. With that aim in mind, I believe that the information and considerations set out by the referring court are sufficient for the issue of compatibility with Union law raised by the application of the national legislation concerned, more specifically Article 370 of the 1992 Law to be identified.

56. As far as the first question is concerned, the Tribunal d'instance points out that '[t]hat provision maintained a permanent ban on a person exercising civic rights following his or her criminal conviction by a final judgment delivered before 1 March 1994', and goes on to state that Mr Delvigne — in an assessment which the court adopts as its own by stating that it 'is allowing [his] request for a preliminary ruling' — [6] 'claims that Article 370 of Law No 92-1336 is incompatible with several provisions of the Charter of Fundamental Rights of the European Union and with Article 3 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

57. That assertion is not completely unsupported by any argument, for the referring court explains that Mr Delvigne 'is mainly concerned with the resulting unequal treatment given to persons convicted after 1 March 1994, who benefit from a more lenient law (he himself was convicted by a final judgment delivered on 30 March 1988), and the [resulting] contradiction between French law and Community law'.

58. In the wording of the first question it has referred to the Court, the Tribunal d'instance de Bordeaux crystallises into Article 49 the general reference by Mr Delvigne to 'several provisions of the Charter', and it asks whether that particular provision 'prevent[s] a provision of national law from maintaining a ban, which, moreover, is indefinite and disproportionate, on allowing persons who were convicted before the entry into force of a more lenient criminal law, namely, Law No 94-89 of 1 February 1994, to receive a lighter penalty'.

59. The order for reference is not much more revealing — quite the opposite, in fact — when it comes to the second question. However, that does not mean that its considerations are completely incapable of expressing the legal problem to be resolved in the main proceedings. Thus, shortly before formulating its two questions, the referring court states that 'it is appropriate to refer both the questions … — one relating to a criterion of time, the other relating to a criterion of nationality — to

5 — See, in that connection, *Rüffler*, C-544/07, EU:C:2009:258, paragraph 38; *Melloni*, C-399/11, EU:C:2013:107, paragraph 29; and *Di Donna*, C-492/11, EU:C:2013:428, paragraph 25.

6 — That statement appears to me to be sufficient to dispel the uncertainty raised by the Commission at point 20 of its written observations, where it points out that the wording of the questions referred is identical to that proposed by Mr Delvigne, from which it follows that some assertions concerning the French legislation do not reflect the 'definitive view of the referring court' on the matter. In my view, since the referring court states that it is 'allowing' Mr Delvigne's request, it must be assumed that it has adopted the reasons put forward by that party in support of his request that a preliminary ruling be sought and, to that extent, those reasons have also become the referring court's reasons.

the Court of Justice of the European Union for a preliminary ruling'. Admittedly, the 'criterion of nationality' is revealed only in the wording of the second question, which asks whether 'Article 39 of the Charter …, applicable to elections to the European Parliament, … preclude[es] the Member States of the European Union from making provision for a general, indefinite and automatic ban on exercising civil and political rights, in order to avoid creating any inequality of treatment between nationals of the Member States'.

60. Therefore, it is possible to identify sufficiently from the order for reference the two relevant legal issues on which the Court's opinion is required, so that the Tribunal d'instance may determine whether or not the national legislation applicable to the main proceedings is compatible with EU law. The first is whether, in accordance with Article 49 of the Charter, the retroactive application of a more lenient criminal law may be excluded in circumstances like those in this case. The second is whether, in accordance with Article 39 of the Charter, the indefinite deprivation of the right to vote is possible as an ancillary penalty.

61. Accordingly, I believe that the Court is in a position to grasp, with the minimum degree of sufficiency, the problem which the referring court is required to resolve concerning the compatibility of the national legislation concerned in the main proceedings with EU law and, to that extent, to assist the referring court in resolving those proceedings by providing the relevant interpretation of EU law.

62. In my opinion, therefore, the reference for a preliminary ruling meets the necessary conditions for admissibility from the perspective of the alleged inadequacy of the order for reference as far as the formal requirements are concerned. Accordingly, I shall propose that the Court dismiss the pleas of inadmissibility of the order for reference.

B – *The jurisdiction of the Court: the scope of the Charter in the circumstances of the case*

63. The parties have also put forward diverse and varied considerations as to whether the acts of the national authorities amounted to 'implementing Union law' within the meaning of Article 51(1) of the Charter, with the consequent effect on the jurisdiction of the Court to provide the referring court with an answer. In some cases, such as that of the German Government, the reply to that question draws a distinction between the fundamental rights relied upon: the right to vote in elections to the European Parliament (Article 39 of the Charter), and the right to the subsequent, more lenient penalty (third sentence of Article 49(1) of the Charter). For the reasons I shall set out, I believe that separate analyses of the questions referred are required in the circumstances of the case. However, it is appropriate first to give a very brief outline of the Court's interpretation of the clause concerned.

1. The scope of application of the clause providing that the Charter is addressed to the Member States 'only when they are implementing Union law' (Article 51(1) of the Charter). Analysis

64. The wording I have reproduced above created problems of interpretation from the outset, giving rise to an important doctrinal debate,[7] fuelled in part by the attempt to emphasise a certain *tension* between the previous case-law and the wording of that provision.[8]

65. Confirming the earlier settled case-law, the judgment in *Åkerberg Fransson*[9] held that 'in essence, … the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. On the other hand, if such legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures'.[10]

66. As a statement of principle, the Court declared at paragraph 21 of that judgment that '[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of EU law, situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.'

67. Lastly, as another statement of principle, paragraph 29 of the judgment refers to the case of situations governed by national law which are not 'entirely determined by EU law'. In such cases, the national public authorities may legitimately 'apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[11]

68. In that connection, it should be noted that on this point the Court cites the judgment in *Melloni*, paragraph 60 of which, referring to Article 53 of the Charter and, therefore, to the possibility of Member States establishing higher standards of protection, states that 'Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[12]

7 — For example, Groussot, X., Pech, L., and Petursson, G.T., 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', *Eric Stein Working Paper* 1/2011; Nusser, J., *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte*, Ed. Mohr Siebeck, Tübingen, 2011, p. 54 et seq.; Kokott, J., and Sobotta, C., 'The Charter of Fundamental Rights of the European Union after Lisbon', *EUI Working Papers*, Academy of European Law, No 6, 2010; Alonso García, R., 'The General Provisions of the Charter of Fundamental Rights of the European Union', *European Law Journal*, No 8, 2002; Eeckhout, P., 'The EU Charter of Fundamental Rights and the federal question', 39 *Common Market Law Review*, 2002; Jacqué, J.P., 'La Charte des droits fondamentaux de l'Union européenne: aspects juridiques généraux', REDP, vol. 14, No 1, 2002; Egger, A., 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited', *Yearbook of European Law*, vol. 25, 2006; Rosas, A., and Kaila, H., 'L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice — un premier bilan', *Il Diritto dell'Unione Europea*, 1/2011; and Weiler, J., and Lockhart, N., '"Taking rights seriously" seriously: The European Court and its Fundamental Rights Jurisprudence — Part I', No 32, *Common Market Law Review*, 1995.

8 — See, on the one hand, *Wachauf*, C-5/88, EU:C:1989:321, and *Bostock*, C-2/92, EU:C:1994:116, and, on the other, *ERT*, C-260/89, EU:C:1991:254, and *Familiapress*, C-368/95, EU:C:1997:325, in contrast with *Maurin*, C-144/95, EU:C:1996:235, *Kremzow*, C-299/95, EU:C:1997:254, and *Annibaldi*, C-309/96, EU:C:1997:631.

9 — C-617/10, EU:C:2013:105.

10 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19. The Court goes on to cite *ERT*, C-260/89, EU:C:1991:254, paragraph 42; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 15; *Annibaldi*, C-309/96, EU:C:1997:631, paragraph 13; *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 25; *Sopropé*, C-349/07, EU:C:2008:746, paragraph 34; *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 72; and *Vinkov*, C-27/11, EU:C:2012:326, paragraph 58.

11 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29.

12 — *Melloni*, C-399/11, EU:C:2013:107.

69. The 'scope of EU law' is therefore defined as encompassing 'all situations governed by EU law'. At the same time, the application of the Charter may not lead to an extension of the competences attributed to the Union by the Treaties, for, as observed in *Åkerberg Fransson*,[13] in accordance with Article 6(1) TEU, 'the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties'.[14]

70. At this juncture, therefore, it must be determined whether the present case concerns a 'situation governed by EU law'.

2. The need of separate analysis of this question

71. As I have pointed out above, I believe that the question whether the act of the national public authorities was adopted 'to implement Union law' should be answered differently in relation to each of the fundamental rights invoked.

72. My suggestion in that regard requires some explanation. It may not appear evident that a particular situation occurring within a Member State is both *analysable* and *non-analysable* from the point of view of the Charter, depending on the provision relied upon.

73. However, in the circumstances of the case, there is an unusual situation which lies at the very heart of the claim put forward in the main proceedings. The situation of which Mr Delvigne complains could be remedied by two different, and, in essence, alternative, methods: on the one hand, by a finding that the criminal law which was — and continues to be — actually applied to him infringes the right to vote in elections to the European Parliament (Article 39 of the Charter); or, on the other, by the alternative finding that, at all events, the later criminal law, which was *not* applied to him, ought to have been, in accordance with the guarantee in Article 49 of the Charter (right to retroactive application of the more favourable criminal law). As can be seen, the two methods could lead to the same outcome.

74. The difficulties raised by the analysis of whether this case involves the implementation of EU law are very different depending on which form of order is sought; that is, depending on whether the form of order sought is a declaration that the law applied to Mr Delvigne infringes — substantively — the right to vote or whether the form of order sought is the specific retroactive application of a criminal law which was *not* applied to Mr Delvigne.

75. I shall therefore deal separately and in the order in which the national court raises it, with the question of whether this case involves a national law adopted in order to implement EU law.

3. Whether the right to retroactive application of the more favourable criminal law, recognised in the third sentence of Article 49(1) of the Charter, may be validly relied upon against the criminal sentence passed in the circumstances of the case

76. It should be noted that, in the present case, there was a legislative amendment of the national criminal law that can undoubtedly be categorised as a case of *reformatio in mitius*, but that was excluded from applying to convictions before the law entered into force. None the less, before proceeding to analyse the scope of the guarantee afforded by the Charter, and in particular whether that guarantee extends also to convictions made by a final judgment already delivered when the

13 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 23.

14 — In that connection and on the same lines, see *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 71.

amendment entered into force, it is necessary, as I have just explained, to examine whether the criminal sentence in question was passed 'in implementation of EU law'. Should the opposite conclusion be reached, it is clear that it would not be appropriate to deal with the various possible issues relating to the substantive ambit of that fundamental right. [15]

77. I can say now that the case-law of the Court suggests quite readily that that is not the case. It should be recalled that in *Åkerberg Fransson*, in the context of a dispute undeniably similar to that in the present case, where there was a specific examination of whether a guarantee laid down in criminal law, such as the principle *ne bis in idem*, applied to a sentence imposed in the case of a VAT offence, the Court identified the existence of a situation involving the implementation of EU law where the proceedings concerned were connected 'in part to breaches of … obligations to declare VAT'. [16]

78. Similarly, the Court found on that occasion that the situation in the main proceedings was governed by a law adopted in order to implement EU law, inasmuch as the latter imposed on the Member States 'an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion', [17] as follows from Article 4(3) TEU, on the one hand, and Directive 2006/112 on the common system of value added tax and the Sixth Directive, on the other.

79. In addition to those provisions, the Court referred to 'Article 325 TFEU[, which] obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests'. [18]

80. The Court held that '[g]iven that the European Union's own resources include, as provided in Article 2(1) of … Decision 2007/436 … on the system of the European Communities' own resources .., revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules, there is thus a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second'. [19]

81. In short, *Åkerberg Fransson* concerned a situation in which a Member State was required to adopt the legislative and administrative measures appropriate to perform an obligation imposed by EU law.

82. In clear contrast to the above situation, there are no provisions of Union law in the present case — and certainly none has been invoked — that, in the same way as the provisions in *Åkerberg Fransson*, could act as a basis for, and give rise to, the Member State's power to impose penalties. Rather, the Member State's *ius puniendi* was exercised in a field completely outside the Union's competence, that is to say, in relation to the imposition of a penalty for the offence of murder. Therefore, in the present case there is no provision of EU law that would make it possible to assert that the penalty was imposed thereunder.

15 — In general, Lascuraín Sánchez, J.A., *Sobre la retroactividad penal favorable*, Civitas, Madrid, 2000.

16 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 24.

17 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 25.

18 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 26.

19 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 26.

83. From that perspective, it remains only for me to point out that the fact that a different interpretation of the scope of the right to *reformatio in mitius*, in the terms proposed by Mr Delvigne, could have given rise to the application to him of the legislative reform which took place after his conviction, with consequences, ultimately, for his enjoyment of the right to vote, is not sufficient to alter that conclusion.

84. The Court has held that the mere fact that a field falling within the scope of EU law is indirectly affected is not sufficient to support the conclusion that the situation covered by the national provision producing that effect is governed by EU law. [20]

85. On the same lines, the Court has also held that 'the concept of "implementing Union law", as referred to in Article 51 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'. [21] The Court has also observed that '[i]n order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it'. [22]

86. In short, following that same line of argument, the fact that any retroactive effect of that reform could have had the collateral, and to a certain extent fortuitous, effect of recovery of the right to vote does not make it possible to assert that the third sentence of Article 49(1) of the Charter 'governs' that situation or, in other words, that the act of the national authorities was adopted in order to implement EU law.

87. I believe, therefore, that a national provision like that at issue in the present case, which precludes a particular retroactive effect as regards a provision of criminal law which was not adopted to implement EU law, cannot be regarded as a provision of national law adopted to implement EU law either.

88. In conclusion, it is my view that the Court lacks jurisdiction, in the circumstances of the case, to give a ruling on the compatibility of the national legislation invoked by the Tribunal d'instance with the right recognised in the third sentence of Article 49(1) of the Charter.

4. Whether the right to vote in elections to the European Parliament, as recognised in Article 39(2) of the Charter, may be relied upon against a provision of national criminal law under which the right to vote in elections to the European Parliament is definitively lost

89. By its second question, the Tribunal d'instance de Bordeaux asks whether the definitive deprivation of the right to vote, originally imposed on Mr Delvigne — and which he continues 'to serve' — in accordance with the criminal law in force at the time of the offences he was found to have committed, is compatible with the Charter.

90. Again, it is necessary to consider whether the requirements for linking the acts of the public authorities of the Member States to the provisions of the Charter, laid down in Article 51(1) of the latter, are met. Again, the question arising is, essentially, whether it may be stated that the situation is one in which EU law governed or determined the application of the criminal law at issue.

20 — *Annibaldi*, C-309/96, EU:C:1997:631, paragraphs 21 to 23.

21 — *Siragusa*, C-206/13, EU:C:2014:126, paragraph 24.

22 — *Siragusa*, C-206/13, EU:C:2014:126, paragraph 25, citing *Annibaldi*, C-309/96, EU:C:1997:631, paragraphs 21 to 23; *Iida*, C-40/11, EU:C:2012:691, paragraph 79; and *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 41.

91. The conclusion to be reached in this context is clearly different. The situation of the loss of the right to vote in elections to the European Parliament in which Mr Delvigne finds himself as a result of the French law which, as we shall see, pursuant to EU law, governs elections to the European Parliament — by reference to the national general electoral law (Article 2 of Law 77-729 of 7 July 1977), which refers in turn to the relevant criminal law (Article L 2 of the Electoral Code) — is the consequence of a law adopted in order to implement EU law.

92. I believe that in this context there is a clear link between the national legislation at issue and EU law. That *link* follows first and foremost from the assumption by the primary legislation of competence for laying down the provisions necessary to enable the election of Members of the European Parliament 'in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States'. On the same lines as its immediate precursor, Article 190 TEC — albeit with some differences — Article 223(1) TFEU provides that, while the European Parliament is responsible for drawing up 'a proposal to lay down the provisions necessary' for the attainment of that objective, the Council, 'acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament,' is responsible for laying down those provisions, which will only 'enter into force following their approval by the Member States in accordance with their respective constitutional requirements'. [23]

93. That requirement in Article 223(1) TFEU implies that the Union legislature must assume responsibility for laying down rules governing the election of its members by choosing between two options: either by establishing a uniform procedure or by laying down common principles. Regardless of the differences between the two options, what matters for the purposes of the case in point is that both are concerned with a field included within the ambit of the Union's competences, and the Union legislature has the status of 'co-legislator' in that regard, to say the least.

94. It is clear that, whether by establishing *a procedure* for the election of members of the European Parliament or by laying down the *common principles* on the basis of which that election should take place, the Union legislature participates in the exercise of a particular competence that could perhaps be described as 'shared', but which at all events involves the Union legislature directly. The competence in question is 'shared' in two senses. In the first sense, because, while the initiative for and drafting of the provisions governing the procedure or, as the case may be, the determination of the common principles on which that procedure is to be based, is the sole responsibility of the Union legislature, the decision relating to the 'entry into force' of those provisions is reserved to the Member States. In the second sense, because, once the uniform procedure has been established or, alternatively, the common principles on which European electoral procedures must be based have been laid down, there will always remain some latitude when it comes to the exercise of the Member States' powers with regard to the rules governing elections to the European Parliament.

95. The first conclusion to be drawn from that consideration is that, under the TFEU, the Union legislature already has a specific competence making it possible to reject the complaint that application of the Charter may lead to the amendment of the Union's competences, contrary to the second subparagraph of Article 6(1) TEU. That conclusion is not altered by the fact that, as we know, the provision in Article 223(1) TFEU has not been given effect.

23 — In general, on the subject of Article 190 EC and Article 223(1) TFEU, see González Alonso, L.N., 'El Parlamento Europeo ante las elecciones de junio de 2009: reflexiones a la luz del Tratado de Lisboa', *Revista Unión Europea Aranzadi*, May 2009, pp. 7 to 13.

96. The procedure referred to in Article 223(1) TFEU has not yet been established.[24] However, although the requirement in that provision still remains to be complied with, it reveals the wish of the primary legislature to make the election of the members of the European Parliament a 'situation governed by EU law' within the meaning of the *Åkerberg Fransson* judgment, albeit not exclusively but rather with the participation of the laws of the Member States in the context of the uniform procedure established by the Union or, as the case may be, the common principles laid down by it.

97. The Union's interest in the procedure for appointment of the members of the European Parliament underwent a qualitative change as soon as MEPs began to be elected by direct universal suffrage by the citizens of the Member States.[25] At that time, it was necessary to adopt initially the 1976 Act concerning the election of the members of the European Parliament, Article 1(3) of which stipulated that elections must be 'by direct universal suffrage and shall be free and secret'.

98. Admittedly, there were few other stipulations in the 1976 Act, Article 8 of which stipulated that, '[s]ubject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.' However, elections to the European Parliament by direct universal suffrage meant at all events that the composition of that chamber would be the image and reflection of that of the parliaments of the Member States. It is to be borne in mind that the Court of Justice upheld the action brought by the party 'Les Verts' in its judgment in '*Les Verts*' v *Parliament*[26] on the basis of that Act, for the first time classifying the Treaties as a constitutional charter.

99. The gradual increase in the powers of the European Parliament and the growing similarity of its institutional and political position to that of the national parliaments in the legal systems of the Member States have merely made it ever more essential for its election procedure to reflect its status as a body representing the will of the citizens 'of the Union'. In other words, as I stated in the Opinion in *Åkerberg Fransson*, it appears to be indisputable that this case involves 'a *specific interest* of the Union in ensuring that [the] exercise of public authority [by the Member States when they are implementing Union law] accords with the interpretation of the fundamental rights by the Union'.[27]

24 — There has been no shortage of attempts by the European Parliament to fulfil that requirement. Attention should be drawn to the first report on the Proposal to amend the 1976 Act, drawn up by Andrew Duff MEP on 28 April 2011 (PE 440.210v04-00), which suggested the creation of pan-European electoral lists, the creation of a single constituency covering the whole territory of the European Union, the obligation to ensure female representation on the lists, and the allocation of seats according to the d'Hondt corrective proportional system; since that proposal did not achieve a satisfactory majority in the Committee on Constitutional Affairs, it led to a second report by the same MEP on 2 February 2012, which did not achieve a satisfactory majority in the Committee on Constitutional Affairs either and, consequently, was not considered in a plenary sitting. Following those failed attempts, the Resolution of 22 November 2012 on Elections to the European Parliament in 2014 (P7_TA(2012)0462, report by Carlo Casini MEP) was adopted. By that resolution, the Parliament approved Council Directive 2013/1/EU **of 20 December 2012 amending** Directive 93/109/EC **as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals** (OJ 2013 L 26, p. 27). That amendment concerned the improvement of exchanges of information between the Member States and the registration on the electoral roll of non-national EU citizens. In addition, on 10 June 2013, the European Parliament adopted a Recommendation approving the Council's Proposal establishing the composition of the European Parliament (PE 513.240v01-00), a proposal which was in turn based on another Resolution of the Parliament adopted at a plenary sitting on 13 March 2013 (P7_TA(2013)0082). Later, in July 2013, the Parliament also adopted a Resolution on improvement of the organisation of the 2014 elections (P7_TA(2013)0323), which also provided for an increase in the Parliament's powers relating to the election of the president of the Commission.

25 — On the importance which academic writing at the time attached to that innovation, see, for example, Lodge, J., 'The significance of direct elections for the European Parliament's role in the European Community and the drafting of a common electoral law', *Common Market Law Review* 16, 1979, pp. 195 to 208; Paulin, B. and Forman, J., 'L'élection du Parlement Européen au suffrage universel direct', Cahiers de Droit Européen 5-6, 1976, pp. 506 to 536; and Charpentier, J., *et al.*, *La signification politique de l'élection du parlement européen au suffrage universel direct*, Centre Européen Universitaire de Nancy, Nancy, 1978.

26 — Case 294/83, EU:C:1986: 166, paragraph 23.

27 — Opinion in *Åkerberg Fransson*, C-617/10, EU:C:2012:340, point 40. Emphasis added.

100. On the same lines, abandoning the previous wording contained in Article 189 EC, Article 14(2) TEU and, in keeping with that provision, Article 39(1) of the Charter. no longer refer to members of the European Parliament as 'representatives of the peoples of the States brought together in the Community' but, much more directly, as 'representatives of the Union's citizens'. [28]

101. With that new status of a chamber directly representative of the citizens of the Union, it is clear that the European Parliament can hardly be the mere aggregation of members elected in accordance with national electoral procedures that might be completely different in their approaches and basic premisses. Unity in the representation of citizens requires the adoption of a uniform electoral procedure or, at least, a procedure founded on common principles. To my mind, that is the meaning of Article 223(1) TFEU.

102. The fact that the stipulation now included in that provision has never become reality in the sense indicated above makes it necessary for the Union to continue relying upon the assistance of the national electoral procedures, as provided for in the 1976 Act. At the moment, the Member States are — still — responsible for determining the entry into force of such a procedure. However, while the Member States thus have the power to, as it were, determine the entry into force of the procedure, they have ceased to have the unconditional power they previously had to lay down the rules governing the procedure for the election of those standing as candidates for the European Parliament in their constituencies. The almost complete reliance on national electoral procedures which is still necessary today is not, therefore, a consequence of the existence of so wide a power of the Member States in that regard but is rather the result of the necessity of filling the vacuum which would otherwise be created by the failure to satisfy the requirement laid down in Article 223(1) TFEU.

103. The important point for the present purposes is, at all events, that it follows from the above that the present case involves a sphere to which EU law must necessarily be applied.

104. Accordingly, the Court has jurisdiction to answer the second question submitted by the referring court, inasmuch as this question concerns the application of EU law. There is an important clarification to be made, however, in relation to that assertion, as a result of the limited scope of the competence attributed to the Union legislature with regard to the rules governing elections to the European Parliament.

105. It is important to recall the words of the Court at paragraph 29 of the judgment in *Åkerberg Fransson*, reproduced above: in situations governed by national law which are 'not entirely determined by EU law', the national public authorities may legitimately 'apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'. [29]

106. In that connection, it is clear from the foregoing that, as a whole, the electoral law governing elections to the European Parliament is not 'entirely determined', in law or in fact, by EU law. In other words, even in a situation in which the stipulation in Article 223(1) TFEU is complied with, the competence of the Union legislature does not encompass all electoral law in relation to elections to

28 — On this point, the status of citizenship of the Union has made significant progress with regard to the fact that it is 'destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for', as the Court pointed out in *Spain* v *United Kingdom*, C-145/04, EU:C:2006:543, paragraph 74. Moreover, as Advocate General Tizzano observed in his Opinion in the same case (C-145/04, EU:C:2006:231, point 68), no Community provision at that time 'openly and directly state[d] that [the right to vote in European elections] [was] included among those enjoyed by citizens of the Union under Article 17(2) EC. I might point out however that Article 19(2) EC, by allowing the citizens of a Member State to vote in European elections in another Member State in which they reside on the same basis as citizens of that State, in any event takes it for granted that the right in question is available to citizens of the Union. I could likewise base the same argument on Articles 189 and 190 EC, which provide that the European Parliament is to be made up of representatives of the "peoples" and therefore (at least) of the citizens "of the States brought together in the Community"'.

29 — *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 29.

the European Parliament but only the establishment of a uniform procedure or common principles. That situation means that the national law laid down in that regard is not 'entirely determined' by EU law. That is all the more true in a situation in which the provision in Article 223(1) TFEU has not been given effect. That is why the Member States are free to apply standards of protection other — and, in accordance with *Melloni*,[30] higher — than those provided for in the Charter, subject, of course, to the condition to which I referred at the end of the previous point.

107. I therefore consider, as an interim conclusion, that a national law like that at issue in this case, which governs, directly or by reference to other provisions, elections to the European Parliament, is a law adopted 'to implement' EU law, regardless of the fact that it is not 'entirely determined' by EU law, within the meaning of, and with the consequences set out in paragraph 29 of the judgment in *Åkerberg Fransson*.

C – *The substance*

1. Preliminary consideration

108. The wording of the question submitted by the referring court suggests that its focus is paragraph 1 of Article 39 of the Charter, for it is only that paragraph that refers to the principle of equality, albeit solely to guarantee that citizens of the Union residing in a Member State other than that of which they are nationals may participate in elections to the European Parliament under the same conditions as nationals of the State of residence. However, it is clear that the equal treatment invoked by Mr Delvigne and referred to by the Tribunal d'instance in its order for reference is not that under Article 39(1) of the Charter, but that under Article 39(2).

109. The referring court asks precisely whether 'Article 39 of the Charter …, applicable to elections to the European Parliament, [is] to be interpreted as precluding the Member States of the European Union from making provision for a general, indefinite and automatic ban on exercising civil and political rights, in order to avoid creating any inequality of treatment between nationals of the Member States'. As we shall see, the reference to 'a general, indefinite and automatic ban' brings to mind immediately the case-law of the European Court of Human Rights in relation to deprivation of the right to vote in purely domestic contexts;[31] in other words, in relation to the very definition of the right to vote as a political right. Therefore, when the Tribunal d'instance talks of 'inequality of treatment between nationals of the Member States', I believe that it is referring only to French nationals and not to the latter as compared with nationals of other Member States.

110. Attention must, therefore, be turned to Article 39(2) of the Charter, that is to say, to the exercise of the right to vote, *sensu stricto*, for the question of fundamental rights raised in the case of Mr Delvigne is not, properly speaking, whether, in the same circumstances as him, nationals of other Member States may participate in elections to the European Parliament, either in France or in other Member States. The question is whether, as a citizen of the Union, the national legislation applied to Mr Delvigne is compatible with a fundamental right granted in the Charter to all European citizens even when they exercise that right in their Member State of nationality.

30 — *Melloni*, C-399/11, EU:C:2013:107, paragraph 60.

31 — *Hirst* v. *United Kingdom* (No 2) [GC] No 74026/01, 2005-IX; *Frodl* v. *Austria*, No 20201/04; *Scoppola* v. *Italy* (No 3) [GC], No 126/05; *Greens and MT* v. *United Kingdom*, No 60041/08 and 60054/08.

111. The question being thus defined, it should be pointed out that it has arisen in proceedings concerning the exclusion of Mr Delvigne from the electoral roll as a result of his being sentenced in 1988 to a principal penalty of 12 years' imprisonment and an ancillary penalty of permanent deprivation of the right to vote. Mr Delvigne claims in the main proceedings that the criminal legislation which, in 1992, abolished the automatic and indefinite nature of that ancillary penalty, albeit only in the case of convictions rendered after the entry into force of that legislation, ought to be applied to him retroactively.

2. Whether the national legislation respects the right to vote in elections to the European Parliament (Article 39(2) of the Charter)

112. The present case is concerned with definitive ineligibility attaching to the imposition of a specific sentence. It is concerned, in particular, with a situation that may be described as a 'limitation' of the exercise of a fundamental right, within the meaning of Article 52(1) of the Charter. Under that provision, such a limitation is allowed only when it is 'provided for by law and respect[s] the essence' of the right concerned, and it must, at all events, be a limitation that respects the 'principle of proportionality' and, in addition to being 'necessary', 'genuinely meet[s] objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

113. It is necessary to examine whether, in accordance with the case-law on the subject, the conditions necessary for the limitation concerned to be regarded as compatible with the requirements of the Charter are satisfied in the circumstances of the case.

114. It is not disputed that that limitation was provided for by law, since it is the result of the combined application of the Criminal Code, the 1992 Law and the Electoral Code. The question is whether it also respects the essence of the right to vote, and it is necessary to agree with the German Government's observation that 'automatic and long-term' deprivation of the right to vote in the event of a criminal conviction is contrary to the essence of universal suffrage, for it renders the exercise of that right impossible for certain citizens of the Union. [32]

115. In the context of the Charter, respect for the essence of the rights recognised therein acts as an absolute, insuperable limit, as a 'limit of limits'. [33] In other words, failure to respect the essence of the fundamental right in question leads to that right becoming 'unrecognisable as such' so that it will not then be possible to refer to a 'limitation' of the exercise of the right but rather, purely and simply, to the 'abolition' of the right.

116. Applying that consideration to the present case, and owing to the nature of the limitation at issue, it is necessary to determine whether that limitation is proportionate, for, if it is not, the limit imposed by the Charter on any possible limitation of the fundamental rights, that is to say, their essence, will have been disregarded.

117. In order to assess whether the limitation examined is proportionate or disproportionate, it is necessary to take as the starting-point the wide variation identifiable in this regard between the different national laws, which are so diverse that, from the point of view of EU law, regard may be had only to the common minimum shared by the Member States and, consequently, to the case-law of the European Court of Human rights concerning Article 3 of Protocol No 1 to the European Convention.

32 — Point 31 of the German Government's written observations.

33 — On that concept, see De Otto, I., 'La regulación del ejercicio de los derechos fundamentales. La garantía de su contenido esencial en el artículo 53.1 de la Constitución', *Obras Completas*, Universidad de Oviedo y Centro de Estudios Políticos y Constitucionales, Oviedo, 2010, pp. 1471 to 1513. In German legal literature, responsible for the concept in question, see, for example, Häberle, P., *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG*, 3rd ed., C.F. Müller, Karlsruhe, 1983, and Schneider, L., *Der Schutz des Wesensgehalts von Grundrechten nach Art. 19 Abs. 2 GG*, Duncker & Humblot, Berlin, 1983.

118. A comparative-law analysis confirms that there is indeed a wide variation between the laws of the Member States on deprivation of the right to vote as a result of a criminal sanction,[34] while the European Court of Human Rights has established, as the minimum common denominator acceptable in the context of Article 3 of Protocol No 1 to the European Convention, that permanent deprivation of the right to vote is possible provided that such deprivation is not the result of a system based on general, automatic criteria applied indiscriminately. The European Court of Human Rights has held to be contrary to that provision legislation in the form of a 'blunt instrument' which strips a large number of individuals of the right to vote 'in a way which is indiscriminate' and applies 'automatically … irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances', concluding that '[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.'[35]

119. In particular, the European Court of Human Rights attaches considerable importance to the possibility that the deprivation may be reviewed and has held that a national system is not excessively rigid and incompatible with the European Convention when it allows recovery of the right to vote by means of an application submitted three years after a person has finished serving his principal sentence, on condition that evidence is provided of genuine and consistent good conduct.[36]

120. In those circumstances, I believe that Member States may provide for a criminal conviction to be a ground for deprivation of the right to vote, without such a provision's being incompatible with EU law, even if solely in terms which render such a deprivation acceptable in accordance with the case-law of the European Court of Human Rights. That follows quite clearly from the case-law of the Court of Justice, which has observed, in the context of the case-law of the European Court of Human Rights, that 'the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote. However, those conditions may not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness[,] [t]hey must pursue a legitimate aim and the means employed must not be disproportionate'.[37]

121. In my opinion, the national legislation at issue in the main proceedings is not, in principle, incompatible with the case-law of the European Court of Human Rights because, even though at the hearing serious doubt was cast on the effectiveness of the possibility of review, French law provides for the possibility of review of the permanent deprivation of the right to vote. That appears to be provided for in Article 702-1 of the Criminal Procedure Code, as amended by Law No 2009-1436 of 24 November 2009 on imprisonment, pursuant to which any person subject to a deprivation, ban or legal incapacity resulting from a principal or ancillary criminal conviction may apply to the court for the total or partial lifting of that deprivation, ban or legal incapacity.

122. That alone, together with the fact that it is not clear that the legislation in question is general, automatic and indiscriminately applied, characteristics criticised by the European Court of Human Rights, given that it does not appear to apply to any offence whatsoever but only to offences of a certain level of gravity, could mean that that legislation is not incompatible with EU law, provided always that it is subject to review by the courts.

34 — That variation was referred to in 1993 in the Commission's proposal which led to Council Directive 93/109/EC **of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals** (OJ 1993 L 329, p. 34). For the views of academic writers, see, for example, Rottinghaus, B., *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform*, International Foundation for Election Systems, Washington DC 2003; and Ewald, A. and Rottinghaus, B., *Criminal Disenfranchisement in an International Perspective*, Cambridge University Press, 2009.

35 — *Hirst* v. *United Kingdom* (No 2) [GC] No 74026/01, 2005-IX, paragraph 82; *Frodl* v. *Austria*, No 20201/04, paragraph 25; *Scoppola* v. *Italy* (No 3) [GC], No 126/05, paragraph 96.

36 — *Scoppola* v. *Italy* (No 3) [GC], No 126/05, paragraph 109.

37 — *Spain* v *United Kingdom*, C-145/04, EU:C:2006:543, paragraph 94.

123. In short, and on all the foregoing grounds, it will fall to the referring court to determine definitively whether the possibility of review available under national law proves, in practice, to be sufficiently accessible to prevent the deprivation of the right to vote from becoming irrevocably permanent, with the result that it is disproportionate and, in short, infringes the essence of the right. In that respect, relevant evidence may include the degree of genuine difficulty of the review procedure with regard to the conditions required to initiate the procedure; the reasonableness of the costs, having particular regard to the fact that, if legal assistance or representation is required, legal aid may be available; and the practices of the authorities that have to rule on the application for review as regards the stringency of the conditions required for granting the application.

124. In conclusion, it is my view that Article 39 of the Charter of Fundamental Rights of the European Union does not preclude national legislation such as that at issue in the case in the main proceedings, provided always that it does not prescribe general, indefinite and automatic deprivation of the right to vote, without a sufficiently accessible possibility of review, the latter particularly being a matter which it is for the national court to establish.

VII – **Conclusion**

125. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling:

1. The Court lacks jurisdiction, in the circumstances of the case, to give a ruling on the compatibility of the national legislation invoked by the Tribunal d'instance with the right recognised in the third sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union.

2. Article 39 of the Charter of Fundamental Rights of the European Union does not preclude national legislation such as that at issue in the case in the main proceedings, provided always that it does not prescribe general, indefinite and automatic deprivation of the right to vote and stand as a candidate, without a sufficiently accessible possibility of review, the latter particularly being a matter which it is for the national court to establish.