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# The scope of application of the EU Charter in national legal orders – Case Studies

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## Case 1

Inspired by Case C-620/19 *D.H.T.*

Does the Charter apply, i.e. can the Portuguese tax authorities be deemed to be 'implementing Union law' when refusing to share information?

In other words: are we in the scope of EU law/does EU law govern this case?



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## Case 1

Inspired by Case C-620/19 *D.H.T.*

1. Does the GDPR apply?
  - Article 1 GDPR: ‘Regulation lays down rules relating to the protection of **natural persons ...**’
  - *BETA* is a legal person, however, so that GDPR does not apply
2. Reference to the GDPR in domestic law?
  - Can EU law (and thus the Charter) be applicable if domestic law refers to EU law and declares it applicable?
  - There is some precedent to this effect: see case law cited in C-620/19, para 34
  - Rationale for ECJ jurisdiction in such cases: to ensure a uniform interpretation of EU law, so that future differences in interpretation are avoided.

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## Case 1

- Limits, however: Court’s jurisdiction is confined to EU law; it cannot have regard to national law (including the general system of national law)
  - Here: exception contained in Portuguese law (as to the duty to share information) is not based in EU law
- Also: necessary to check that the references to EU law do not alter the objective and scope of the provisions made applicable in domestic law
  - E.g. in Case C-620/19: GDPO protects the fundamental right to data protection found in Article 8 CFR
  - By contrast the domestic rules (making reference to the GDPR) protect information concerning legal persons, but in a manner that is not equivalent or comparable to the protection of the personal data of natural persons under EU law
- And if the latter is the case: the Court of Justice has no jurisdiction to interpret the legislation at issue
- Hence the case is not in the scope of EU law and the Charter does not apply

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## Case 2

Inspired by *Benkharbouche and Janah v Sudan/Lybia* [2015] EWCA Civ 33 (England and Wales Court of Appeal)

1. Does the Charter apply, Art. 51 (1) CFR?
  - unlawful dismissal & failure to pay minimum wage?
  - = "implementing EU law"?
    - not at present (NB: there is a Directive on adequate minimum wages on the way)
  - Working Time Legislation & race discrimination/harassment
    - both pieces of German legislation = based on EU directives (Directive 2003/88 and 2000/43)
    - hence: 'implementing' happened; hence Charter applies

NB: This shows that a case may need to be split up into those aspects to which the Charter applies and other aspects, which are fully determined by domestic law

## Case 2

2. State immunity = violation of Article 47 CFR?
  - ECtHR case law: restrictions on the access to court of embassy staff engage Article 6 ECHR (=Art 47 CFR), but can be justified with reference to 'the legitimate aim of complying with international law to promote comity and good relations between States'
  - But: a blanket restriction such as the one found in the (fictitious) German State Immunity Act is not required by the international law on state immunity
  - Hence it goes too far and Article 47 CFR has been violated
  - State Immunity Act to be disapplied so far as it is contrary to Article 47 CFR

## Case 3

Inspired by Case C-673/19 *M, A and T*

Does the Charter apply, Article 51 (1) CFR?

1. Does the Return Directive (Directive 2008/115) apply?
  - Article 2 (1) of the Directive: third country nationals staying illegally on the territory of a MS?
  - But then: return decisions (Article 6 Directive):
    - return decisions to third countries
    - if TCN has a residence permit from another MS: duty to return there; if s/he doesn't, then MS can issue a return decision (to return to the third country of origin/safe third country)
  - Does this mean that a (forced) transfer to another MS (where the individual enjoys refugee status) and associated detention is determined by national law only?

## Case 3

2. Answer by the CJEU in Case C-673/19

- aim of the Directive (recital 2): common removal and repatriation policy that ensures respect for fundamental rights&dignity
- Directive applies to illegally staying third country nationals
- Problem here: Article 6 (2) applies (generally), but because A refuses to leave France, France would have the right to issue a return decision
  - but: France cannot do so because there is no safe third country for A to be returned to (see principle of non-refoulement, Article 19 CFR and Art 5 of the Directive)
- So what about a 'return' to Italy where A has refugee status?
  - Directive is not intended to harmonise national rules on the stay of foreign nationals
    - only prescribes common standards for return decisions
    - the Directive is not about illegal residence as such
  - hence Directive does not apply; EU law does not govern the situation
- Charter cannot be invoked

# Discussion