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The Scope of Application of the EU Charter In the National Legal Orders



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OUTLINE

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I. The Scope of EU Fundamental Rights Before the Charter

- Development of a “praetorian system” of protection of fundamental rights
- Progressive identification by the case law of the CJEU of situations in which EU fundamental rights apply to MS:
 - The “Agency Situation”
 - The “Derogation Situation”

PROBLEM: more complex situations. Not 100% clear-cut

I. The Scope of EU Fundamental Rights Before the Charter

EXPLANATIONS TO THE CHARTER:

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493).

The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

2. THE STRUCTURE OF FUNDAMENTAL RIGHTS UNDER TREATY OF LISBON

Article 6 (ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

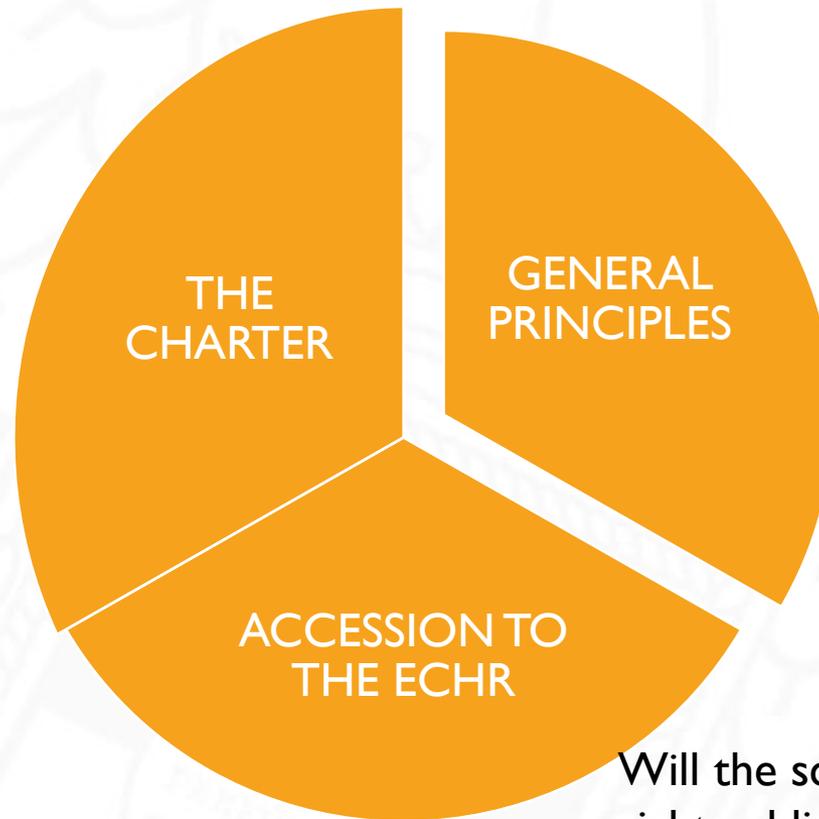
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

2. The Structure of Fundamental Rights under Treaty of Lisbon

Do all Charter rights have the same scope?



Do general principles have the same scope as the Charter?

Will the scope of the fundamental rights obligations of the EU and its MS change with the accession to the ECHR as a matter of EU law?

3. General Remarks on the Scope of the Charter

- Primary addressees: the EU, its institutions, bodies, offices
 - Validity cases (e.g. preliminary rulings, annulment: e.g. *Kadi, Volker und Schecke; Schrems; Digital rights Ireland*)
 - Liability cases (e.g. *Ledra Advertising C-8/15 P*) (European Stability Mechanism)
- Only secondarily?: the Member States – the radical difference when compared with EU institutions (*Ledra Advertising vs. Pringle*)
 - Attributes of EU law: primacy, direct effect, conform interpretation, ...
 - WARNING: difference between rights and principles (no direct effect)
- What about private parties: the horizontal effect of the Charter
 - Max Planck (C-684/16); Bauer (C-569/16) and Cresco
 - This is also application of the Charter to the MS: national courts must apply FR horizontally.

3. The Charter and Its application to the Member States

a) The debate on the wording of Article 51(1)

Article 51

Field of application

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.

3. The Charter and Its application to the Member States

- Important criteria already present in *lida* (C-40/11, para 79; reiterates Annibaldi):
 - “among other things
 - whether the national legislation at issue is intended to implement a provision of [EU] law,
 - what the character of that legislation is,
 - and whether it pursues objectives other than those covered by [EU] law,
 - even if it is capable of indirectly affecting that law,
 - and also whether there are specific rules of [EU] law on the matter or capable of affecting it”

3. The Charter and Its application to the Member States

- However:
 - Criteria not exhaustive nor cumulative
 - If a situation is not explicitly regulated by EU law: irrelevant
 - If a rule is not transposition of an EU law act: irrelevant
 - If a rule falls outside the competences of the EU: irrelevant
 - If Member State are acting using their margin of appreciation: irrelevant

3. The Charter and Its application to the Member States

a) *The clarification: Akerberg Fransson C-617/10*

- The question: interpretation of the ne bis in idem principle (Article 50 of the Charter) in the framework of national proceedings of criminal/administrative nature involving sanctions for VAT fraud.
- Opinion of AG Cruz Villalón: situation NOT in the scope of EU law
- The ruling of the Court (paras 21-22)

“Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction”

5. The Practical Identification of the National Scope of the Charter

- Different “taxonomies” of situations
- Function of national law in the normative relationship with EU law:
 - Implementing (the Agency situation)
 - Derogation situations
 - Situations where MS use their margin of appreciation
 - More favourable provisions?
- Content of the normative obligation imposed by EU Law
 - Transposition
 - Enforcement
 - Remedies and procedural safeguards
 - Pre-emption due to ‘affectation’ of EU competences

5. The Practical Identification of the National Scope of the Charter

- Different “taxonomies” of situations
- Intensity of the normative connection
 - Complete predetermination
 - Remoteness
- Function of the Charter in a given case
 - Interpretation
 - Where the scope of EU law must be interpreted in light of the Charter, it helps defining its own scope (Case C-571/10 *Kamberaj*; *Chavez Vilchez* C-133/15)
 - Parameter of review

IMPLEMENTING The Agency Situation

- Standard test: acting upon an obligation which ultimately has its origins in EU law
- Some of the most difficult cases are in this category!!
- **Examples:**
 - Procedural implementation of EU obligations: e.g. *Ispas* C-298/16 (and Opinion of AG Bobek); *Berlioz Investment Fund* (C-682/15)
 - Application of rules of mutual recognition, or criminal law directives:
 - E.g. *Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru*
 - But see *Moro* C-646/17 (and Opinion of AG Bobek);
- **The limits:** “the concept of ‘implementing EU law’... 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” (*Siragusa*, C-206/13 para 24):
 - *Julian Hernández*, C-198/13
 - *Torralbo Marcos*, C-265/13

...there must be a rule of EU law which is applicable, independent and different from the fundamental right itself.

The provisions of the Charter (or a specific fundamental right) cannot be relied on in themselves to form the basis of the Court's jurisdiction.

In other words, a shadow cannot cast its own shadow.

AG Bobek in Ispas

40. There is no shortage of intriguing, not to mention absurd, examples: would the question of whether a Member State is obliged to provide for the possibility of filing electronic (as opposed to paper) VAT declarations fall within the scope of EU law? What about various austerity measures touching upon a given national tax administration, such as a considerable reduction in the number of tax commissioners processing VAT declarations, which is likely to slow down VAT collection? Or the modification of the territorial jurisdiction of courts which impacts upon the speed of judicial review of tax cases? Finally, what about the closing down of a cafeteria in a regional tax office in a Member State that leads to a decrease in productivity of the staff working in that office, because they now have to leave the building to get their sandwiches?

41. In all of these cases, the argument could be made that the national measure in question impacts on the 'proper collection of VAT' and thus falls within the scope of EU law. Is this the approach to the definition of the 'scope of EU law' in VAT cases flowing from Åkerberg Fransson? Assuming that it is not, the actual difficult question arises: where and how is the line to be drawn?

AG Bobek in Ispas

56. There appears to be, however, at least one limit to such an incidental, umbrella logic. That limit operates as a rule of exclusion from the abovementioned ‘umbrella’. It is the rule of (reasonably foreseeable) functional necessity. It could be captured as follows: any national rule instrumental to the effective realisation of an EU law-based obligation on the national level, even if not specifically adopted for that purpose, will fall within the scope of EU law, unless the adoption and operation of that national rule is not reasonably necessary in order to enforce the relevant EU law.

AG Bobek in Ispas

IMPLEMENTING The Agency Situation

- A particularly difficult framework: austerity measures in fulfilment of conditionality requirements for financial aid to the MS under various schemes
 - *Sindicato de Bancários do Norte* (C-128/12) (and others...)
 - *Pringle*, C-370/12
 - *Florescu*, C-258/14
 - *Associação de Juizes Portugueses* (C-64/16); Opinion of AG Saugmandsgaard Øe
 - The last episode: *BPC Lux 2 Sàrl* (C-83/20)

DEROGATION

Examples: exceptions, derogations, obstacles, justifications to restrictions to Fundamental Freedoms

- Case C-390/12 *Pfleger and Others*
 - Case C-165/14 *Rendón Marín* *** triggered by art. 20 TFEU
 - Case C-78/18 *Commission v Hungary* (Transparency of associations)
 - Case C-66/18 *Commission v Hungary* (Higher Education)
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- Is it necessary that a fundamental freedom is infringed in order to trigger the scope of the Charter?

 - Can a national measure be in compliance with the fundamental freedoms and yet violate EU fundamental rights?

MARGIN OF APPRECIATION / MORE FAVOURABLE PROVISIONS

Margin of appreciation

- Joined Cases C-411/10 and C-493/10 *NS and ME*
 - *Where an EU law act gives MS a discretionary power and they exercise it [carve out rule]*
- *Stefan* C-329/13
- *Tele Sverige 2* C-203/15

More favorable provisions:

- exclusion of more favorable provisions: TSN and AKT, C-610/17
- *However: Department for Communities: C-709/20*

6. SOME FUNDAMENTAL RIGHTS WITH A SPECIAL SCOPE?

- For the Charter to apply: we always need another “relevant” EU law rule that acts as a “trigger” [... the Charter as the “shadow of EU law”]
- BUT, some provisions very closely related to fundamental rights do not need that trigger: they work as their own trigger. Some examples
 - Article 19 TEU (judicial Independence enshrined in the notion of effective legal protection)
 - Article 20 TFEU (the essence of EU citizenship rights)
 - The prohibition of discrimination on the basis of nationality
 - Equal pay for equal work or work of equal value for men and women
- Furthermore, there the scope of application of some fundamental rights is determined by specific criteria:
 - The greatest example: Article 47 > requires that it is invoked for the protection of a right granted by EU law
 - Preference in cases regarding judicial Independence > Article 19 TEU even if within the scope of EU law

7. Final remarks: why is relevant the scope of the Charter in national proceedings

- When the Charter applies, national courts must abide by the standard of protection of EU fundamental rights (Melloni / Akerberg Fransson)
 - In situations fully determined by EU law: MS cannot apply their higher constitutional standard
 - In situations not fully determined by EU law: MS can apply their higher constitutional standard, if it does not undermine the primacy, unity and effectiveness of EU law
- The Charter has primacy, which entails:
 - Conform interpretation
 - Direct effect (except for the rules containing principles)
 - Obligation to disapply conflicting national law (with directly effective EU fundamental rights)
 - State liability for damages
 - The obligation to correct the national legal system

7. Final remarks: why is relevant the scope of the Charter in national proceedings

- What is the situation of the application of the Charter in the MS?
(Book by M. Bobek and Jeremias Adams-Prassl, Hart 2020)
- Can MS apply the Charter out of its scope?
 - This is something that happens often:
 - Interpretative potential of the Charter
 - Reverse discrimination
 - The Charter may apply only to one part of the case
(possibility to apply different standards in one case!)
 - However: potential problems

THANKS FOR YOUR ATTENTION