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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?

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.

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

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 Joined Cases C-609/17 and C-610/17

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

Key question: does the Charter apply where a MS exceeds minimum harmonization requirements contained in a Directive?

- Finnish legislation = minimum requirement for annual leave in the Working Time Directive
- Additional entitlement in collective agreement
 - Does Charter also apply to that additional entitlement?

Case 3

Answer by the Court:

- It is in the discretion of the MS to decide *whether* to grant additional leave and, if so, to determine the conditions for granting and extinguishing those additional days of leave
 - This decision is a matter of national law - Charter does not apply
- Court also points to Article 15 of the Directive:

‘This Directive **shall not affect** Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.’

Such “shall not affect”–clauses have in the past been used to conclude that the Charter does not apply where MS have made use of that option (see e.g. Case C-198/13 *Hernández*)

Discussion



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