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The scope of application of the EU Charter in national legal orders (Part 1)

Academy of European Law, 12 October 2021

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Funded by the European Union's Justice Programme (2014-2020).

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Overview

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Part 2: The Detail

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Warm-up question

POLL

- Have you ever applied the EU Charter of Fundamental Rights in your judicial practice?

The Charter: field of application

Article 51 (1) CFR

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.

- **Charter therefore always applies to the EU**
- **but only applies to the MS when ‘implementing EU law’**

The Charter: field of application

Why does it matter if the Charter is ‘addressed to the Member States’?

- It means that Charter can be invoked before a MS court.
- The MS court is therefore obliged to consider compliance of the MS measure in question with the Charter.
- If the MS court finds non-compliance with the Charter, **the doctrine of primacy of EU law** means that any MS court is obliged to disapply contravening domestic law (no matter what status it has).
- Thus question whether Charter applies or not **may determine the outcome of domestic proceedings.**

Implementing Union Law

What does ‘implementing’ mean?

- Explanations to the Charter: when MS are ‘acting in the scope of EU law’
- Reference to two pre-Charter cases
 - Case 5/88 Wachauf: where national authorities act as ‘agents’ of the EU:
 - implementation/application of EU law
 - Case C-260/89 ERT: where MS derogates from EU law, in particular free movement rights
 - Possible reasons e.g. public policy, public security, public health (contained in derogation provisions)

Implementing Union Law

Leading Case: C-617/10 *Åklagaren v Hans Åkerberg Fransson*

- fisherman prosecuted for income tax fraud, VAT fraud, and social security fraud
- had already been given an administrative fine by the tax authorities
 - now being criminally prosecuted

Does this violate his right under Article 50 CFR?

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Implementing Union Law

POLL

- Does the Charter apply in Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ?

Implementing Union Law

ECJ: Charter applies so far as the VAT fraud is concerned

- **Question is: is the case ‘within the scope of EU law’**, because
 - pre-Charter case law (Case 5/88 *Wachauf*)
 - this is what the Charter explanations say
- Is the case in the scope of EU law?
 - as far as income tax fraud and social security fraud are concerned: no
 - VAT fraud? - YES
 - VAT Directives: these require MS to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion
 - Article 325 TFEU obliges MS to counter illegal activities affecting the interests of the EU
 - EU receives a share of VAT revenue so that VAT fraud affects its interests

Implementing Union Law

Case C-390/12 *Pfleger*

- Facts:
 - prohibition of games of chance in Austria
 - authorities seized gaming machines and imposed fines on the operators
- interference with freedom to provide services and also Charter rights?
 - in particular right to conduct a business and right to property (Art 15-17 CFR)?
- **Court: Charter applies where national legislation falls within the scope of EU law**

It follows that “where a Member State relies on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter”.

Implementing Union Law

Consequences of *Fransson* and *Pfleger*:

- ‘implementing EU law’ = ‘within the scope of EU law’
 - two situations:
 - MS applies EU law/carries out duties under it
 - MS deviates from fundamental freedoms (see Case C-390/12)
 - **“The Charter applies, where EU law applies”**
- where implementation: Charter applies with full force of EU law (primacy)
 - this implies that domestic cases may need to be split up as far as fundamental rights protection is concerned
 - parts of the case fall within the scope of the Charter
 - others don’t (as we had in *Fransson*)

Implementing EU Law: criteria

Case C-206/13 *Siragusa*

- constructed buildings without planning permission and was ordered to remove them
- challenge in the Italian courts; invoked Article 17 CFR (right to property)

Is this case within the scope of EU law?

“In 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**”

Implementing EU Law: criteria

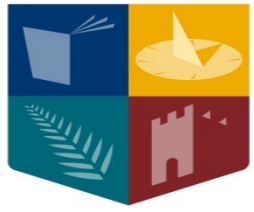
Case C-206/13 *Siragusa*

- in this case: there was no connection to EU law whatsoever
- the applicant invoked numerous EU environmental law provisions, but none of them had been relied upon by the national authority when making the removal order
- hence: not within the scope of EU law

Discussion



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The scope of EU law

Recap – threshold criterion for the Charter to apply to national measures:

- the measure must be within the scope of EU law
 - MS is either ‘implementing’/applying EU Law
 - or deviating from EU free movement law

What kinds of cases fall within the scope of EU law?

- In order to know whether the Charter applies, one needs to know when EU law applies to domestic measures.

The scope of EU law

Not relevant: whether the EU has competence to legislate in a particular area

- MS are acting in the scope of EU law when using MS competences, but deviating from EU free movement law
 - e.g. Case C-208/09 *Sayn-Wittgenstein*
 - MS rules on names (which names are permissible etc) are a MS competence, but must still comply with EU law constraints (notably: EU citizenship law)
- Also: “[T]he mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law.”
 - Case C-198/13 *Hernández*

Simple cases

Simple cases:

- A MS measure is adopted on the basis of EU law
 - e.g. a decision to return an asylum seeker to the 'Member State responsible' under the Dublin Regulation (604/2013; 'take back request'), e.g. Joined Cases C-411/10 and C-493/10 *NS and ME*
- A MS measure is adopted on the basis of MS legislation transposing an EU Directive or Framework Decision
 - e.g. arrest/surrender on the basis of a European Arrest Warrant e.g. Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*

MS Discretion I: “as defined by national law”

Case C-571/10 *Kamberaj*

“Article 11(1) of Directive 2003/109 (Long-term residents directive)

‘Long-term residents shall enjoy equal treatment with nationals as regards:

(d) social security, social assistance and social protection **as defined by national law**

80. when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, **the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof.**

MS Discretion II: "MS may provide for..."

Case C-329/13 *Stefan*

Flooding caused by negligent operation of locks. Lock keeper investigated criminally. Stefan (member of the public) sought information on rainfall, authorities refused, to preserve integrity of criminal trial.

Argument: this is contrary to Art 47 CFR.

Article 4.2 of Directive 2003/4 (access to environmental info): exceptions

'Member States **may provide** for a request for environmental information to be refused if disclosure of the information would adversely affect: (c) the course of justice, the ability of any person to receive a fair trial ...'

Court: that discretion must be exercised in compliance with Article 47 CFR.

Broader “scope of EU law”

Case C-555/07 *Kücükdeveci*

- employee was dismissed by her employer; she was 28 and had worked for the employer for 10 years.
- dispute over length of notice period
 - normally: 10 years employment = 4 months
 - according to Germany law: time served up to age of 25 is not counted; hence notice period = 1 month
- she argued age discrimination (Article 21 Charter)

- Is the case in the scope of EU Law?

Court: Directive 2000/78 (Framework Directive) deals with the conditions of dismissal of employees

hence the case is in the scope of EU law [even though the Directive itself had been insufficiently implemented by Germany and even though this was a horizontal case]

Broader “scope of EU law”

Joined Cases C-203/15 and C-698/15 *Telesverige & Watson*

Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector

- Article 1 (3): This Directive shall not apply ... to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.
- Article 15: MS “may adopt legislative measures” to restrict data subjects’ ... to safeguard national security ... and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised.

Sweden adopted legislation on the retention of electronic communications data and on access to that data by the national authorities (for intelligence gathering and criminal law enforcement).

Broader “scope of EU law”

72 Admittedly, the legislative measures that are referred to in Article 15(1) of Directive 2002/58 concern activities characteristic of States or State authorities, and **are unrelated to fields in which individuals are active** [...]. Moreover, the objectives which, under that provision, such measures must pursue, such as safeguarding national security, defence and public security and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, overlap substantially with the objectives pursued by the activities referred to in Article 1(3) of that directive [i.e. those that are excluded from the scope of the Directive].

73 However, having **regard to the general structure** of Directive 2002/58, the factors identified in the preceding paragraph of this judgment **do not permit the conclusion that the legislative measures referred to in Article 15(1) of Directive 2002/58 are excluded from the scope of that directive**, for otherwise that provision would be deprived of any purpose. Indeed, Article 15(1) necessarily presupposes that the national measures referred to therein, such as those relating to the retention of data for the purpose of combating crime, fall within the scope of that directive, since it expressly authorises the Member States to adopt them **only** if the conditions laid down in the directive are met.

Too remote

E.g. Case C-309/00

- 21 Against that background, it is clear, first of all, that there is nothing in the present case to suggest that the Regional Law was intended to implement a provision of Community law either in the sphere of agriculture or in that of the environment or culture.
- 22 Next, even if the Regional Law be capable of affecting indirectly the operation of a common organization of the agricultural markets, it is not in dispute that, the park having been created to protect and enhance the value of the environment and the cultural heritage of the area concerned, the Regional Law pursues objectives other than those covered by the common agricultural policy, or that the Law itself is general in character.

Consequence: procedural rights

- Domestic procedure must be compliant with Article 47-50 CFR if the case is in the scope of EU law
 - e.g. cases seeking an EU law remedy (e.g. state liability): Case C-279/09 *DEB*
 - European Arrest Warrant cases (e.g. Case C-216/18 PPU *LM*)
 - Brussels Regulation cases
 - Data protection cases
 - EU free movement law
- And so on

Conclusion

If a party requests you to apply the Charter/request a preliminary ruling, enquire what norm of EU law is decisive in the case.

If the party points to the Charter, inquire –

- what OTHER norm of EU law applies to the case, or at least
- which domestic measure that the party wants set aside comes within the scope of OTHER norms of EU law.

Use the *Siragusa* checklist first, and be aware of the expansive force of EU law (you can breach it by exercising exclusive MS competences)

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