Scope of application of the Charter:

Challenging national measures on the basis of the Charter

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Scope of Application of the Charter

OUTLINE

1. BRIEF OVERVIEW OF SOME OF THE MOST CONTROVERSIAL FEATURES OF EUCFR
   1.1 NEW RIGHTS OR RE-STATEMENT OF EXISTING RIGHTS?
   1.2 DIRECT EFFECT OF EUCFR AND THE DISTINCTION RIGHT/PRINCIPLE (ART. 52(5) CFR)
   1.3 SCOPE OF APPLICATION OF EUCFR (ART. 51(1) CFR)

2. SPECIAL FOCUS ON THE CHARTER’S SCOPE OF APPLICATION AND MEMBER STATE ACTION: WHEN CAN NATIONAL MEASURES BE CHALLENGED ON EU FUNDAMENTAL RIGHTS GROUNDS?
   2.1 REMINDER: CHALLENGING EU MEASURES V. NATIONAL MEASURES
   2.2 SITUATION PRE-LISBON
   2.3 SITUATION POST-LISBON
1.1 NEW RIGHTS OR RE-STATEMENT OF EXISTING RIGHTS?

• “This Charter reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the [CJEU] and of the [ECtHR].”

(Charter’s Preamble)
1.2 Distinction Rights/Principles

- PREAMBLE: “THE UNION THEREFORE RECOGNISES THE RIGHTS, FREEDOMS AND PRINCIPLES SET OUT HEREAFTER.”

- ART. 52(5): “THE PROVISIONS OF THIS CHARTER WHICH CONTAIN PRINCIPLES MAY BE IMPLEMENTED BY LEGISLATIVE AND EXECUTIVE ACTS TAKEN BY INSTITUTIONS ... OF THE UNION, AND BY ACTS OF MEMBER STATES WHEN THEY ARE IMPLEMENTING UNION LAW ... THEY SHALL BE JUDICially COGNISABLE ONLY IN THE INTERPRETATION OF SUCH ACTS AND IN THE RULING ON THEIR LEGALITY.”
1.3 Scope/Field of Application (Art. 51(1))

"THE PROVISIONS OF THIS CHARTER ARE ADDRESSED TO THE INSTITUTIONS, BODIES, OFFICES AND AGENCIES OF THE UNION ... AND TO THE MEMBER STATES ONLY WHEN THEY ARE IMPLEMENTING UNION LAW ..."

Three problems remain post-Lisbon:

① What does “implementing” mean?
② Are private persons bound by the Charter?
③ Should the General Principles of EU law (Art. 6(3) TEU) be subject to Art. 51(1) CFR?
2.1 REMINDER: CHALLENGING EU MEASURES V. CHALLENGING NATIONAL MEASURES ON FUNDAMENTAL RIGHTS GROUNDS

CHALLENGING EU MEASURES

OPTION 1: DIRECT ACTION

OPTION 2: PRELIMINARY REFERENCE

CHALLENGING NATIONAL MEASURES

• MAIN PROBLEM: DEMONSTRATE TO NATIONAL COURT THAT NATIONAL MEASURE IN DISPUTE FALLS WITHIN SCOPE OF EU LAW

• IF OUTSIDE SCOPE OF EU LAW = LITIGANT CANNOT RELY ON EU FUNDAMENTAL RIGHTS BEFORE NATIONAL COURT: E.G. C-328/04 ATTILA VAJNAI [2005]
2.2 WHEN CAN A NATIONAL MEASURE BE CHALLENGED ON EU FRTS GROUNDS? SITUATION PRE-LISBON

**SCENARIO no. 1**: When national authorities act as ‘agents’ of the EU or more generally, when they adopt measures which implement/apply EU law (*Wachauf* line of cases)

**Controversial development in 2005**: national measures, whose subject-matter is ‘simply’ governed by substantive provisions of EU law, may also fall within the scope of EU law (*Mangold*)

**SCENARIO no. 2**: When national authorities invoke reasons of public interest pursuant to EU law to justify a national measure which limits any of the rights contained in the EU Treaties/legislation and in particular, when they adopt measures which obstruct or are liable to hamper the exercise of EU free movement rights (*ERT* line of cases)
# Scope of Application of the Charter

## Category 1: Wachauf-type situations

**Vertical situation:** Dispute between a private party and a state authority

- Wachauf [1989]
- Klensch [1986]
- Bosphorus [1996]
- Molenheide [1997]
- Lindqvist [2003]
- Rundfunk [2003]
- BookerAquaculture [2003]
- Steffensen [2003]
- Eiterköpfе [2005]
- DEB [2010]

## Category 2: ERT-type situations

- ERT [1993]
- Familiapress [1997]
- Carpenter [2002]
- Baumbast [2002]
- Schmidberger [2003]
- Omega [2004]
- Sayn-Wittgenstein [2010]
- Ruiz-Zambrano [2011]

## Category 3: Wachauf à l’horizontale

**Horizontal situation:** Dispute between private parties

- Mangold [2005]
- Kücükdeveci [2010]

## Category 4: ERT à l’horizontale

- Defrenne II [1975]
- Bosman [1995]
- Angonese [2000]
- Karner [2004]
- Viking [2007]
- Laval [2007]
2.3 **SITUATION POST-LISBON**

**WHAT IS CLEAR:**

- In situations which fall **outside** the scope of EU law, compatibility of national measures with EU fundamental rights cannot be examined by National courts.
- National authorities are however bound by EU fundamental rights when they **implement** EU law.

**NEW CONTROVERSIAL POINTS:**

1. Should the notion of “implementation” be restrictively interpreted?
2. Should Art. 51(1) CFR be interpreted as precluding a private party from invoking the Charter when challenge is directed at a national measure derogating from EU requirements?
3. Should Art. 51(1) CFR be interpreted as precluding a private party from invoking the Charter in the context of a dispute against another private party?
SCENARIO 1: NATIONAL MEASURES WHICH DIRECTLY “IMPLEMENT”/APPLY EU LAW OR MORE GENERALLY FALL WITHIN THE MATERIAL SCOPE OF EU LAW

- Example of national measure which “implements” EU law: C-411/10 N.S.

69 ... the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

- Example of national measure which falls within the scope of EU law: Joined Cases C-297/10 and C-298/1:

The measures at issue fall within the scope of EU law as they affect the employees’ conditions of pay within the meaning of Dir. 2000/78 and they can be therefore examined inter alia in the light of principle of non-discrimination on grounds of age proclaimed in Art. 21 CFR which is given expression in Dir. 2000/78.
Scope of Application of the Charter

SCENARIO 2: NATIONAL MEASURES WHICH “DEROGATE” FROM EU LAW OR MORE GENERALLY WHICH RESTRICTS EU RIGHTS OF NATURAL AND LEGAL PERSONS

• Case C-249/11 Byankov [2011]:
  “In that regard, it should be noted at the outset that a situation like that of Mr Byankov, who is prevented from travelling from the Member State of which he is a national to another Member State, falls within the scope of the freedom to move and reside within the territory of the Member States which is conferred by the status of citizen of the Union”

• Case C-40/11, Yoshikazu Iida [2012]:
  “81 In those circumstances, the German authorities’ refusal to grant Mr Iida a ‘residence card of a family member of a Union citizen’ does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.”