

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

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## Article 51 of the Charter

- '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.'

*Åkerberg Fransson*  
C-617/10 (2013)

- Article 51(1) confirms the preexisting situation [pt 18]
- 'Since the fundamental rights guaranteed by the Charter must [...] 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.**' [pt 21]
- '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' [pt 22]

## Jurisdiction in proceedings based on Article 267 TFEU

- Limits imposed on the applicability of the Charter are reflected at the level of the jurisdiction of the Court to give a preliminary ruling → an element to be kept in mind when making a preliminary reference
- 'With regard to references for a preliminary ruling concerning the interpretation of the Charter..., it must nevertheless be clearly and unequivocally apparent from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case in the main proceedings. Since the Court has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.'
- (pt 10 of *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*)

# (Examples of) Relevant questions

- When do I apply the Charter?
  - Is there a relevant link with EU law?
  - Often the underlying question is simply: does EU law apply?
- Why do I want to apply the Charter?
  - Tool of (conform) interpretation
  - Yardstick for validity of EU law /applicability of national one
- What about other instruments of protection?
  - Particular relevance of the ECHR within the Union system for the protection of fundamental rights → Art. 52(3) of the Charter
  - Mirroring developments such as the level of protection under the principle of ne bis in idem

# When do I apply the Charter?

- **Different tests proposed**
  - Agency/derogation situations (see Explanations to the Charter, referring to *Wachauf* 5/88 (1989), *ERT* C-260/89 (1991))
  - See also the test in *Iida* C-40/11 (2012) pt 79, recalled e.g. in *Julian Hernández* C-206/13 (2014) pt 37 (but 'neither cumulative nor exhaustive', AG Bobek in *Ispas* C-298/16, pt 47)
- **Is there a link with EU law? ... But what kind of link?**
  - Application of a rule of EU law (typically a regulation)
  - Application of a national rule that implements EU law (typically a national law transposing a directive)
  - Derogation scenario – national law making use of the derogations provided for by EU law
    - > Opinion of AG Bobek in *Ispas* C-298/16, pt 32
- .... and other less clear-cut situations (e.g. consider the facts of *Åkerberg Fransson*)

Scale of links: recent  
exemple from the  
case-law

## From scenarios of direct application to less direct ones ...

- *Staatssecretaris van Justitie en Veiligheid (Refus de prise en charge d'un mineur égyptien non accompagné)* C-19/21 (2022) GC
  - Direct application of harmonised procedural rules, a possible gap identified by the national court
  - Article 27(1) Dublin III Regulation provides for the applicants' right to an effective remedy against a [transfer decision](#). Does it provide also for a remedy against a [refusal to take charge](#) of an unaccompanied minor?
- *Torubarov* C-556/17 (2019) GC
  - Obligation under Directive 2013/32 to put into place effective judicial remedy against decisions on applications for international protection
  - Can EU law affect the [modalities of the judicial review](#) and more specifically, does it empower a national judge to modify a decision of an administrative authority disregarding its previous judgment, although – under national law – the judge can only annul and remit?

Scale of links:  
recent examples  
from the case-law

- **Commission/Hungary** C-235/17 (2019) GC and C-78/18 (2020) GC:  
  
Can the Court decide on an alleged infringement of the Charter separately from an alleged infringement of the fundamental freedom? (see C-52/16 and C-113/16 'SEGRO' Kft (2018) GC)
- **MR** (C-365/21) the Opinion of AG Szpunar published on 20/10/2022  
  
Is a national declaration made under Article 55(1)(b) CISA and restricting the *ne bis in idem* principle set out in Article 54 CISA compatible with Article 50 of the Charter?



# The relevance of the ECHR

- **Art 52(3) of the Charter:** 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'
- The level of protection guaranteed under the Charter cannot be lower than the level of protection under the ECHR.
- A new expression of the pre-existing particular relevance of the ECHR within the EU legal order.

# Permissible limitations:

Example of *ne bis in idem*

- *Menci* C-524/15; *Garlsson Real Estate and Others* C-537/16; and *Di Puma and Zecca* C-596/16 and C-597/16 (2018) (GC)
- Reorientation of the approach to the principle *ne bis in idem*
- Duplication of proceedings and penalties is a limitation of the fundamental right guaranteed in Article 50 of the Charter, permissible under the conditions of Article 52(1) of the Charter.
- if the legislation at issue:
  - pursues an objective of general interest, it being necessary for both proceedings and penalties to pursue additional objectives,
  - ensures coordination limiting to what is strictly necessary the additional disadvantage, and
  - ensures that the severity of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence
- Applied in *bpost* C-117/20 and *Nordzucker* C-151/20 (2022) GC

## Approach adopted by the ECtHR

ECtHR, 15 November 2016, *A and B v. Norway*

- The test of sufficiently close connection in substance and time between both proceedings
- No (genuine) 'bis' occurs when the second set of the proceedings is sufficiently related in time and substance to the first one.
- **The material link:**
  - (i) complementary purposes pursued by both proceedings addressing different aspects of social misconduct;
  - (ii) the foreseeability of the duality of the consequences;
  - (iii) the coordination between both proceedings that have to be conducted so as to avoid duplication in the collection and assessment of the evidence; and
  - (iv) the proportionality of the overall penalties imposed.
- **The temporal link :**
  - '[t]he weaker the connection in time the greater the burden on the State to explain and justify any such delay'.

## Some additional reading ...

- Bobek M., Adams-Prassl J., *The EU Charter of Fundamental Rights in the Member States* (2020) Hart Publishing, 632 p.
- Dougan, M., 'Judicial Review of Member State Action Under the General Principle and the Charter: Defining the "Scope of Union Law"', *Common Market Law Review*, Vol. 52, 2015, pp. 1201 to 1245.
- Fontanelli, F., 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights', *Columbia Journal of European Law*, Vol. 20, 2014, pp. 193 to 247.
- Lenaerts, K., and Gutiérrez-Fons, J.A., 'The Place of the Charter in the EU Constitutional Edifice', in Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights: A Commentary*, C.H. Beck, Hart, Nomos, 2014, pp. 1560-1593.
- Sarmiento, D., 'Who's Afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, Vol. 50, 2013, pp. 1267 to 1304.
- Opinion of Advocate General Saugmandsgaard Øe of 31 May 2017 in 'SEGRO' Kft., C-52/16 and C-113/16
- Opinion of Advocate General Bobek of 7 September 2017 in Ispas C-298/16
- Opinion of Advocate General Saugmandsgaard Øe of 29 November 2018 in Commission v Hungary (Usufruct Over Agricultural Land) in C-235/17
- Opinion of Advocate General Bobek of 5 February 2019 in Moro C-646/17