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 **The application of the Charter to national measures**



 Co-funded by the European Union's Justice Programme (2014-2020).
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 **Outline**

- Flash Quiz
- Forget all you've been told
- The dreadful truth about Article 51.1
- The survival kit: how to hack Article 5.1
- A gallery of cases
- [After the break]: case studies

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Article 51

Scope

1. The provisions of this Charter are addressed to the institutions and bodies 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.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

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Flash Quiz (Case C-710/20)

Does a provision of a national law that annuls directly – without a decision of a national court – the decision of a national court discontinuing criminal proceedings, which is, under national legislation, a final decision entailing acquittal and on the basis of which the criminal proceedings have been definitively discontinued as a result of the amnesty granted in accordance with a national law, comply with the right to a fair trial, guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, and with the right not to be tried or punished twice in criminal proceedings for the same criminal offence, guaranteed in Article 50 of the Charter of Fundamental Rights of the European Union and with Article 82 of the Treaty on the Functioning of the European Union? **If the answer to this question is in the negative, is the national court bound by such a provision of national law?**

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Let's be real

- The Charter of Fundamental Rights of the EU states.
 - There is no right to a fair trial in a human court
 - There is no right to a fair trial in a human court
 - There is no right to a fair trial in a human court

Member States regulate
 indispensable
 →



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“implementing EU law”

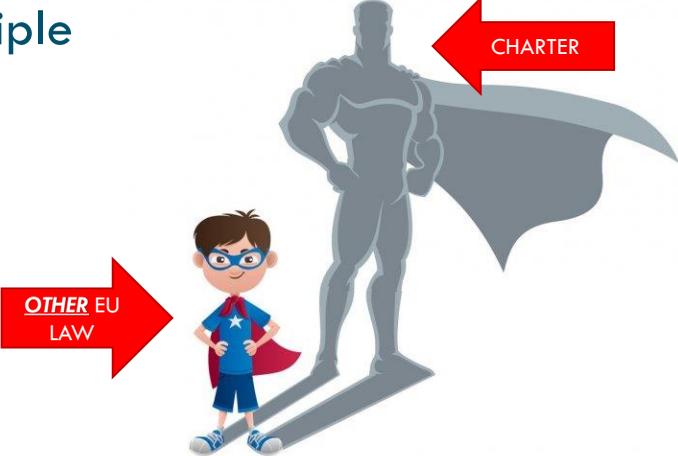
- EU cannot tell MS how to behave on HR
- EU can control how MS deal with other EU law (i.e., act as EU agent)
- Charter cannot create obligations alone
- Charter requires **OTHER** EU law
 - No EU law, no Charter



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The shadow principle



The diagram illustrates the 'shadow principle' in EU law. It features a small superhero figure on the left and a large shadow of a superhero figure on the right. A red arrow labeled 'OTHER EU LAW' points to the small figure, while another red arrow labeled 'CHARTER' points to the shadow. This visualizes how the Charter of Fundamental Rights influences the interpretation of other EU laws.

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Flash Quiz (Case C-548/15)

[If the Directive does not apply, must the principle of non-discrimination on the grounds of age, as a general principle of EU law, be applied to a tax concession on the basis of which training expenditure is only deductible under certain circumstances, even when that concession falls outside the material scope of Directive 2000/78/EC and when that arrangement does not implement EU law?]

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It is not the CJEU

51 In those circumstances the Kammarrätten i Stockholm (Administrative Court of Appeal of Stockholm, Sweden) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Is a general obligation to retain traffic data covering all persons, all means of electronic communication and all traffic data without any distinctions, limitations or exceptions for the purpose of combating crime ... **compatible with Article 15(1) of Directive 2002/58/EC, taking account of Articles 7 and 8 and Article 52(1) of the Charter?**



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The shortcut

What is the rule of EU law (other than the Charter) that must be applied to solve this case?



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The dreadful truth

To know whether the Charter applies, one needs to know when EU law applies to domestic measures.



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How do you tell whether EU law applies?

- Checking EU competences? No, MS are always obliged to respect EU law, even when they exercise reserved competences
 - ▣ Remember *Sayn-Wittgenstein*: even rules on titles of nobility can breach EU law.
- Not just **execution**, but also **respect** of EU law.

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How do you tell whether EU law applies?

- Checking EU competences? No, mere power to pass law is not the same as EU law (that applies)
- Case C-198/13, *Víctor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante) and Other*, EU:C:2014:2055, para. 36. (“[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.”)

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How do you tell whether EU law applies?

Super-easy cases:
Does the domestic measure incorporate/execute EU law?

Easy cases:
Does the outcome in the main proceedings depend on the interpretation/application of EU law?

Hard cases:
Does EU law apply to the subject-matter? (no need to be decisive, mere scope-of-application check)

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The last uncomfortable truth

the Charter has never been used to indicate that domestic acts were in breach of EU law*

- Unless these were already in breach of OTHER EU law.



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COPE WITH THE SCOPE

The difficult cases are those in which the other source of EU law does not preclude the domestic measure, but applies → triggering the Charter.

Example: *Fransson*. Art. 325 TFEU respected, but Charter as add-on standard.

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The “scope”

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.

Fransson, para. 21.

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Implementation formats

- *comply with obligation*: think of Art. 47 cases
- *incorporation*: transposing a Directive
- *specification*: *Kamberaj*, “in accordance with domestic law” clause
- *derogation*: e.g., Directive 2000/78, Art. 2.5 on public security
- *exercise of discretion*: *Stefan*, slaughter case
- *general “scope”*: *Kucukdeveci*, *Dansk*, *Max Planck*

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Specification: *Kamberaj C-571/10*

Article 11(1) of Directive 2003/109
 '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

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Discretion: *Stefan C-329/13*

Flooding caused by failure to operate locks well. Lock keeper investigated criminally. Stefan sought information on rainfall, authorities refused, to preserve integrity of criminal trial.

Article 4.2 of Directive 2003/4: 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 ...'

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Discretion: *Stefan C-329/13*

Easy point: discretion must be exercised in compliance with Charter (as implicit in discretion clause).

Interesting point: Austria had expressly **not** exempted environmental info. So Stefan was right! Austrian *law* breaches Charter, but Austrian *measure* (the refusal) did not.

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Discretion: *Slaughter C-571/10*

Regulation 1009/2009, Art. 4

“Animals shall only be killed after stunning ... in the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 **shall not apply**”.

Art. 26: “This Regulation **shall not prevent Member States** from maintaining any national rules aimed at ensuring more extensive protection of animals at the time of killing in force at the time of entry into force of this Regulation.”

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Discretion: *Slaughter* C-571/10

Belgium required reversible stunning even for kosher slaughtering.

Scope of EU law, or expressly left out of EU law?

“in accordance with Article 51(1) of the Charter, Member States are required to respect the fundamental rights enshrined in the Charter when they are implementing that power.”

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“scope”: horizontal application of 2000/78 (and 2003/88)

Borderline cases. EU law **does not** have horizontal effect of Directive. But is Directive within the scope of EU law, triggering Charter?

Mangold, Kucukdevci

Dansk (C-415/11) – partially excluding a whole category of persons from the severance allowance, ... the Law on Severance Allowance affects the conditions regarding the dismissal of workers for the purposes of Article 3(1)(c) of Directive 2003/88. It follows that the national legislation at issue in the main proceedings falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on grounds of age.”

Ineffective application is good for marking the «scope» of EU law

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“scope”: *Telesverige*

Directive 2002/58 on data protection

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’ rights, ordering data retention to pursue public interests

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“scope”: *Telesverige*

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 [WHICH EXCLUDES THEM FROM SCOPE OF DIRECTIVE]

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.

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Any guidance?

Checklist in *Siragusa*:

- **Sufficient connection with EU law**, mere commonality of topic is not enough
- Check certain points:
 - Does domestic law **intend** to implement EU law?
 - What's the **nature** (specific v. general) of the domestic measure?
 - Does the measure have **other purposes** besides implementing EU law?
 - Does EU law contain **rules that govern** or can affect the matter regulated domestically?
- There must be some **EU law obligation** to the facts of the main proceedings.
- Preserve "**unity, primacy and effectiveness**" of EU law.

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Too remote

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.

(implements EU law, and therefore) must

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The "Scope"

If a party requests you to raise a preliminary question, inquire what norm of EU law is decisive in the case.

If the party points to the Charter, inquire –

- what OTHER norm of EU law is decisive or at least
- which domestic measure of EU law is decisive or at least
- which domestic measure of EU law is decisive or at least

Use the Siragusa checklist (you can breach it by exceptions)

Good luck!