

Recent Developments in EU Public Law

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Presentation overview

1. Application and Interpretation of the EU Charter of Fundamental Rights

- When do national measures come 'within the scope' of EU law?
Recent guidance from the Court of Justice

1. Developments in EU Citizenship Law on Access to Benefits

1. Preliminary Reference on the Compatibility with EU Law of Proposed Legislation on Minimum Pricing for Alcohol

1. Charter of Fundamental Rights

- The post-Lisbon impact of the Charter continues to be strongly felt vis-à-vis judicial review of EU legislative acts:
 - **Joined Cases C-293/12 and C-594/12 Digital Rights Ireland**, judgment of 8 April 2014.
 - Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks invalidated viz. Articles 7 (respect for private and family life), 8 (protection of personal data), and 11 (freedom of expression and information) of the Charter.

1. Charter of Fundamental Rights

However: binding rights – and binding limits (1)

Article 51: Field of application

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.

Article 52: Scope and interpretation of rights and principles

...

3. 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.

4. In so far as this Charter recognises fundamental rights as they result from the **constitutional traditions common to the Member States**, those rights shall be interpreted in harmony with those traditions.

...

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

1. Charter of Fundamental Rights

Binding rights – and binding limits (2)

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, **in their respective fields of application**, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, **and by the Member States' constitutions**.

Article 4 TEU

...

2. **The Union shall respect the equality of Member States before the Treaties as well as their national identities**, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the **principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

1. Charter of Fundamental Rights

Article 51: When are Member States 'implementing Union law'?

Case C-617/10 Åkerberg Fransson, judgment of 26 Feb 2013, paras 20-21

That definition of the field of application of the fundamental rights of the European Union is **borne out by the explanations** relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it ... According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is **only binding on the Member States when they act in the scope of Union law**'.

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.

Outcome: within scope of Union law

1. Charter of Fundamental Rights

Case C-206/13 Siragusa, judgment of 6 March 2014, paras 24-31

Outcome: not within the scope of Union law

[I]t should be borne in mind that the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, **requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other** (see, to that effect, Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 16).

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** (see Case C-309/96 Annibaldi [1997] ECR I-7493, paragraphs 21 to 23; Case C-40/11 Iida [2012] ECR, paragraph 79; and Case C-87/12 Ymeraga and Others [2013] ECR, paragraph 41) →

1. Charter of Fundamental Rights

In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation **because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings** (see Case C-144/95 Maurin [1996] ECR I-2909, paragraphs 11 and 12).

...

In Annibaldi, cited in the explanations relating to Article 51 of the Charter, the Court held that **the fact that national legislation is capable of indirectly affecting the operation of a common organisation of the agricultural markets cannot in itself constitute a sufficient connection** between that legislation and EU law (Annibaldi, paragraph 22; see also Kremzow, paragraph 16).

...

It is also important to consider the objective of protecting fundamental rights in EU law, **which is to ensure that those rights are not infringed in areas of EU activity**, whether through action at EU level or through the implementation of EU law by the Member States.

1. Charter of Fundamental Rights

Similarly: Case C-265/13 Torralbo Marcos, judgment of 27 March 2014, paras 30-36 – not within the scope of Union law

Where a legal situation does not fall within the scope of Union law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction....

...

In the context of the present request for a preliminary ruling, the national legislation at issue in the main proceedings governs, in general, certain fees connected with the administration of justice. It is **not intended to implement provisions of European Union law. In addition, European Union law does not contain any specific rules in that area or any which are likely to affect that national legislation.**

Furthermore, the objective of the main proceedings does not concern the interpretation or application of a rule of Union law **other than those set out in the Charter**

...

[A]t the present stage of the main proceedings, **the situation at issue does not fall within the scope of that directive or, in general, of the scope of European Union law.**

1. Charter of Fundamental Rights

Are Member States ‘implementing’ Union law when they aim to justify restricting EU rights?

Case C-390/12 Pflieger, judgment of 30 April 2014, paras 35-36:

In that regard, the Court has already held 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.** Thus the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court (see, to that effect, Case C-260/89 ERT EU:C:1991:254, paragraph 43).

As follows from that case-law, where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it may benefit from the exceptions provided for by EU law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. **That obligation to comply with fundamental rights manifestly comes within the scope of EU law and, consequently, within that of the Charter.** The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded ... as ‘implementing Union law’ within the meaning of Article 51(1) of the Charter.

1. Charter of Fundamental Rights

Article 53: scope for higher standards of national fundamental rights protection?

Case C-399/11 Melloni, judgment of 26 Feb 2013, paras 56-62

The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law

Such an interpretation of Article 53 of the Charter cannot be accepted.

That interpretation of Article 53 of the Charter would **undermine the principle of the primacy of EU law** inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.

It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal ... **rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State** →

1. Charter of Fundamental Rights

It is true that Article 53 of the Charter confirms that, **where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.**

However... Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein.

It should also be borne in mind that the adoption of Framework Decision 2009/299, which inserted that provision into Framework Decision 2002/584, is intended to remedy the difficulties associated with the mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences as among the Member States in the protection of fundamental rights. **That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States** regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant.

Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, **in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.**

2. Citizenship Law and Access to Benefits

- Parameters of Primary Rights → Detail of the Directive
- Rights → Conditions and Limits
- **Article 24(2) of Directive 2004/38:** ‘the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, [for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged], nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families’.
- **Pending Case: C-333/13 Dano** (Opinion issued on 20 May 2014)

3. Minimum Pricing and the Free Movement of Goods

- Preliminary Reference on the Compatibility with EU Law of Proposed Legislation on Minimum Pricing for Alcohol
- The basis of the Commission's 2012 analysis viz. the technical standards notification procedure:
 - Do the rules **restrict** the free movement of goods (Article 34 TFEU)?
 - The specific case of 'selling arrangements'
 - If there is a restriction of Article 34, is it a **justifiable** one?
 - If it is a justifiable restriction, is it **proportionate**?
 - Suitability
 - Necessity (less restrictive measures?)