



Right to an effective remedy – Case studies

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Professor Tobias Lock

tobias.lock@mu.ie



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Case study 1

Based on Case C-682/15 *Berlioz*

1. *Does the Charter apply?*

Article 51 (1) CFR – was Luxembourg implementing Union law?

- yes because the tax authority was responding to a request made under Directive 2011/16
- “Since that penalty was based on a national provision which, as is evident from the answer to the first question, implements EU law within the meaning of Article 51(1) of the Charter, it follows that the provisions of the Charter, in particular Article 47 thereof, are applicable to the facts of the dispute in the main proceeding”
- This shows that “whenever EU law applies, Article 47 CFR applies”



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Case study 1

2. Substance of the right to an effective remedy:

- Does the right to an effective remedy require that Sinus can challenge the penalty or must they also be in a position to challenge the underlying information order?
- CJEU in Sabou: the Directive does not confer a right on the taxpayer.
 - Question therefore: is there a “right guaranteed by Union law” affected (as required by Article 47 (1)?)
 - EU Commission argued: no; otherwise the relevant person (Sinus) would be in a better position than the actual taxpayer (Cosinus).
- CJEU however distinguished the two cases:
 - the requested person (Sinus) is facing a penalty.
 - That penalty is based on a national law provision implementing EU law.
- They must therefore be able to challenge that decision (and thus the underlying information order).

Case study 2

Based on Case C-30/19 *Braathens Regional Aviation*

Question: Do Articles 7 and 15 of the Directive interpreted in light of Article 47 (1) result in a duty to make a declaration that discrimination has occurred?

CJEU: Article 15 imposes on Member States the obligation to introduce into their national legal systems measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts.

Case study 2

Problem 1: national procedural rule: acquiescence brings proceedings to an end

- In practice: the law does not ensure that the person who considers themselves to have been a victim of discrimination has a right to have the existence of the alleged discrimination examined and if appropriate upheld by a court.
- This is in violation of the Directive read in light of Article 47 CFR.

Case study 2

Problem 2: private law case – no horizontal direct effect of directives

- NB: Court did not spell this out in *Braathens*
- But says (para 57): Articles 7 and 15 of the Directive “merely give specific expression to the right to effective judicial protection, as guaranteed by Article 47 of the Charter, **which is sufficient in itself** and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.
- **Consequence?**
 - consistent interpretation not possible;
 - hence: disapplication of the national procedural rule preventing the national court from making the declaration.

Case study 3

Based on Case C-715/20 *KL v X*

- *Is the provision in Polish law contrary to the Directive/Framework Agreement?*
 - yes: unequal treatment of fixed term workers; no apparent justification for this.
- BUT: no horizontal direct effect of directives, so that we cannot rely on the directly in the private law dispute between Agnieszka and Big Business
- Difference to *Egenberger* (in particular):
 - no equivalent right to clause 4 of the Framework Agreement in the Charter
- *Can Article 47 CFR provide a way out?*

Case study 3

Can Article 47 CFR provide a way out? – Yes according to the CJEU

- Step 1: Does Charter apply?
 - Article 51 (1) CFR: “implementing Union law” because we are within the scope of the Directive.
- Step 2: Does Art. 47 CFR apply horizontally and ion its own?
 - Yes, *Egenberger* said so.
- Step 3: does the legislation interfere with the right to an effective remedy?
 - Yes: “since a fixed-term worker is deprived of the possibility, which is however available to a permanent worker, of assessing beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract and, where appropriate, to bring an action challenging in a precise manner the reasons for such a termination” (para 79)

Case study 3

- *Step 4: consequence?*
 - Consistent interpretation is probably not possible;
 - Hence: disapplication of the clause – at least partially, to read the Polish legislation as follows:

“The statement by the employer concerning the termination of an employment contract of ~~indefinite duration~~, with or without a notice period, shall state the reason justifying that termination.”

Any further remarks, questions, suggestions?