



# THE SCOPE OF APPLICATION AND INTERPRETATION OF THE EUCFR IN DOMESTIC LEGAL PROCEEDINGS

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## ERA training seminar on EUCFR

### **I – Brief Overview of Title VII of the EUCFR**

- (1) Field of Application
- (2) Scope and interpretation of rights and principles
- (3) Level of protection
- (4) Prohibition of abuse of rights

### **II – Two Recurrent and Controversial Issues**

- (1) When do national measures fall within the scope of EU Law (including the EUCFR)?
- (2) The potential for vertical/horizontal effect of EUCFR provisions



## Field of Application: Art. 51 EUCFR

- The provisions of Charter bind EU institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity
- They also bind **the Member States but only when they are implementing Union law** [most controversial aspect to be discussed later]
- The Charter cannot justify any extension of the field of application of EU or the allocation of any new power/task for the EU [this is already made clear by Article 6 TEU]



## Scope and interpretation of rights and principles: Article 52 EUCFR

- Contains no less than 7 paragraphs (with last one added in 2004)
- Among other things, this provisions makes clear that:
  - EU FRts can be limited in accordance with traditional requirements;
  - the EU must take into account the ECHR and case law of Strasbourg Court when interpreting and applying provisions of the EUCFR based on provisions of ECHR
  - A distinction must be made between directly enforceable rights and non directly enforceable principles [to be discussed later on]
  - The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by EU courts & national courts



## Level of protection: Article 53 EUCFR

- Known as the anti-regression clause
- Explanations: EUCFR cannot undermine the level of protection afforded within their respective scope by EU law, national law and international law (in particular the ECHR)
- Controversial issue: Does Article 53 EU give MS the option to go further than the rights granted by EU law if their constitution requires so, and if needed, to give priority to their national law?
- See answer provided by CJEU in case of Melloni (C-399/11): In areas governed/regulated by EU law, the application of non-EU standards of protection of fundamental rights is only possible *'provided that the level of protection provided for by the CFR ... and the primacy, unity and effectiveness of EU law are not ... compromised.'*



## Prohibition of abuse of rights: Article 54 EUCFR

- 'Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.'
- Article 54 merely reproduces Article 17 of the ECHR.
- ECtHR has (rarely) relied on this provision to dismiss complaints it had received from applicants deemed to have promoted or engaged in actions aimed at the destruction of democratic and liberal constitutional orders



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### II.1 SCOPE OF APPLICATION OF EUCFR

REMINDER: CHALLENGING EU & NATIONAL MEASURES ON EU FUNDAMENTAL RIGHTS GROUNDS **BEFORE LISBON**

#### CHALLENGING EU MEASURES

OPTION 1: DIRECT ACTION

OPTION 2: PRELIMINARY REFERENCE

#### CHALLENGING NATIONAL MEASURES

- MAIN ISSUE: DEMONSTRATE TO NATIONAL COURT THAT DISPUTE CONCERNS A NATIONAL MEASURE WHICH FALLS **WITHIN** SCOPE OF EU LAW
- IF **OUTSIDE** SCOPE OF EU LAW = LITIGANT **CANNOT** RELY ON EU FRTS BEFORE NATIONAL COURT: E.G. C-328/04 *VAJNAI* [2005]



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### SITUATION POST-LISBON

What is settled:

- ✓ 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 (SEE ARTICLE 51(1) EUCFR)

CONTROVERSIAL ISSUES:

- ① SHOULD THE NOTION OF "IMPLEMENTATION" BE RESTRICTIVELY INTERPRETED?
- ② SHOULD ART. 51(1) 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?
- ④ SHOULD THE GENERAL PRINCIPLES OF EU LAW (ART. 6(3) TEU) BE SUBJECT TO ART. 51(1) CFR?

*Answer to first 2 Qs can be found in C-617/10 FRANSSON [2013]*



KEY PARAGRAPHS IN CASE C-617/10 FRANSSON [2013]

- 17. [...] THE CHARTER'S FIELD OF APPLICATION **SO FAR AS CONCERNS ACTION OF THE MEMBER STATES** IS DEFINED IN ARTICLE 51(1) THEREOF [...]
- 18. THAT ARTICLE OF THE CHARTER THUS **CONFIRMS THE COURT'S CASE-LAW** RELATING TO THE EXTENT TO WHICH ACTIONS OF THE MEMBER STATES MUST COMPLY WITH THE REQUIREMENTS FLOWING FROM THE FUNDAMENTAL RIGHTS GUARANTEED IN THE LEGAL ORDER OF THE EUROPEAN UNION.
- 19. THE COURT'S SETTLED CASE-LAW INDEED STATES, IN ESSENCE, THAT THE FUNDAMENTAL RIGHTS GUARANTEED IN THE LEGAL ORDER OF THE EUROPEAN UNION **ARE APPLICABLE IN ALL SITUATIONS GOVERNED BY EUROPEAN UNION LAW** [...]
- 21. 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.**
- 22. 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.



II-2. The potential for (vertical and/ or horizontal) direct effect of Charter provisions

Problems:

- Key EUCFR provision:
- Article 52(5) makes a distinction between rights/freedoms and principles
  - **Rights are directly enforceable**
  - **Principles can be 'judicially cognisable' only** in the interpretation of EU acts which implement them and/or when EU courts have to rule on their legality

- (1) EUCFR does not spell out clearly which of its articles are rights and which are principles
- (2) Notion of "judicially cognisable" is not particularly clear but suggests that **EUCFR principles** cannot be directly effective
- (3) **EUCFR rights** can be directly effective but does Art. 51(1) preclude them from being directly effective in the context of national civil proceedings between private parties (see e.g. AG Trestenjok in *Dominguez*) whereas EU General Principles of Law can be invoked in a private dispute...



## Does EUCFR rights apply to private disputes?

### EU case law

- Case C-282/10 *Dominguez* [2012]: Court avoided answering question of status of right to an annual period of paid leave (Art. 31 EUCFR) – is it a right or principle within meaning of Art. 52 CFR? – and its eventual horizontal direct effect
- Case C-176/12 *Association de Mediation Sociale* [2014]: Right of workers to information and consultation (Art. 27 EUCFR) **is not capable of being directly effective** in horizontal disputes as it lacks requisite clarity, precision and unconditionally to ground standalone claims

### UK case law:

- *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33:
  - CoA: the right of access to justice contained in Article 47 of the Charter **is sufficiently precise to have horizontal direct effect** =
  - Employment claims falling within scope of EU law can be brought by service staff of foreign embassies notwithstanding the restrictions laid down in UK State Immunity Act 1978

