



# **SCOPE OF APPLICATION OF THE EUCFR: CHALLENGING NATIONAL MEASURES ON THE BASIS OF THE EUCFR**

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## OUTLINE

### **1. BRIEF OVERVIEW OF SOME OF THE MOST CONTROVERSIAL FEATURES OF EUCFR**

- 1.1 NEW RIGHTS OR RE-STATEMENT OF EXISTING RIGHTS?
- 1.2 DIRECT EFFECT OF EUCFR AND THE DISTINCTION RIGHT/PRINCIPLE (ART. 52(5) CFR)
- 1.3 SCOPE OF APPLICATION OF EUCFR (ART. 51(1) CFR)
- 1.4 FURTHER COMPLICATION: UK/POLISH PROTOCOL

### **2. SPECIAL STUDY: THE CHARTER AND MEMBER STATE ACTION : WHEN CAN NATIONAL MEASURES BE CHALLENGED ON EU FUNDAMENTAL RIGHTS GROUNDS?**

- 2.1 REMINDER: CHALLENGING EU MEASURES V. NATIONAL MEASURES
- 2.2 SITUATION PRE-LISBON
- 2.3 SITUATION POST-LISBON



## 1.1 NEW RIGHTS OR RE-STATEMENT OF EXISTING RIGHTS?

- This Charter **reaffirms** ... the rights as they result, in particular, from:
  - The constitutional traditions common to the MS
  - The international obligations common to the MS
  - The ECHR
  - The Social Charters adopted by the EU and by the Council of Europe
  - The case-law of the Luxembourg and Strasbourg Courts

(Source: Charter's Preamble)



## 1.2 DISTINCTION RIGHTS/PRINCIPLES

- PREAMBLE: “THE UNION THEREFORE RECOGNISES THE **RIGHTS, FREEDOMS AND PRINCIPLES** SET OUT HEREAFTER.”
- ART. 52(5):
  - THE PROVISIONS OF THIS CHARTER WHICH CONTAIN **PRINCIPLES** MAY BE IMPLEMENTED BY EU LEGISLATIVE AND EXECUTIVE ACTS [AND MS WHEN THEY ARE IMPLEMENTING EU LAW]
  - THEY SHALL BE **JUDICIALLY COGNISABLE ONLY** IN THE INTERPRETATION OF SUCH ACTS AND IN THE RULING ON THEIR LEGALITY.”



## 1.3 SCOPE/FIELD OF APPLICATION (ART. 51(1))

THE PROVISIONS OF  
THIS CHARTER ARE  
ADDRESSED:

- TO EU INSTITUTIONS,  
BODIES, OFFICES AND  
AGENCIES

AND

- **TO THE MEMBER  
STATES ONLY WHEN  
THEY ARE  
IMPLEMENTING  
UNION LAW. ...”**

Three main problems  
remain post-Lisbon:

- ① What does  
“implementing” mean?
- ② Are private persons  
bound by the EUCFR?
- ③ Should the General  
Principles of EU law (Art.  
6(3) TEU) be subject to  
Art. 51(1) CFR?

# Scope of Application of the Charter



## 1.4 PROTOCOL ON THE APPLICATION OF THE EU CHARTER TO POLAND AND TO THE UK

- RECITAL 8: AIM OF PROTOCOL IS “TO CLARIFY CERTAIN ASPECTS OF THE APPLICATION OF THE CHARTER” = NO OPT-OUT PROTOCOL!
- CONTAINS 2 ARTICLES =
  - (I) CHARTER DOES **NOT** “EXTEND THE ABILITY” OF THE ECJ OR ANY BRITISH OR POLISH COURT TO FIND THE LAWS OF THESE 2 COUNTRIES INCONSISTENT WITH THE CHARTER
  - (II) EUCFR’S TITLE IV **CANNOT** CREATE “JUSTICIABLE” RIGHTS APPLICABLE TO POLAND/UK EXCEPT INsofar AS SUCH RIGHTS ARE PROVIDED FOR IN THEIR NATIONAL LAWS



## 1.4 KEY CASE: R (CLAIMANT) V SEC. OF STATE FOR THE HOME DPT (DEFENDANT)

- HIGH COURT [2010] EWHC 705 (ADMIN), CRANSTON J = CHARTER **CANNOT BE "DIRECTLY RELIED ON AS AGAINST THE UK"** BY VIRTUE OF THE UK/POLAND PROTOCOL
- COURT OF APPEAL (E&W), 12 JULY 2010 : "THE FUNDAMENTAL RIGHTS SET OUT IN THE CHARTER **CAN BE RELIED ON AS AGAINST THE UK AND ... [CRANSTON J] ERRED IN HOLDING OTHERWISE**".
- REFERENCE FOR A PRELIMINARY RULING



## CASE C-411/10: *N. S. V SECRETARY OF STATE FOR THE HOME DEPARTMENT*

- 120. Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and **does not intend to exempt** the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or **to prevent** a court of one of those Member States from ensuring compliance with those provisions.
- 121. Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).



## 2.1 REMINDER: CHALLENGING EU MEASURES V. CHALLENGING NATIONAL MEASURES ON EU FRTs GROUNDS

### CHALLENGING EU MEASURES

OPTION 1: DIRECT  
ACTION

OPTION 2: PRELIMINARY  
REFERENCE

### CHALLENGING NATIONAL MEASURES

- MAIN ISSUE: DEMONSTRATE TO NATIONAL COURT THAT NATIONAL MEASURE IN DISPUTE 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]

# Scope of Application of the Charter



## 2.2 WHEN CAN A NATIONAL MEASURE BE CHALLENGED ON EU FRTS GROUNDS? SITUATION **PRE-LISBON**

**SCENARIO no. 1:** When national authorities act as 'agents' of the EU or more generally, when they adopt measures which implement/apply EU law (**WACHAUF LINE OF CASES**)

**Controversial development in 2005:** national measures, whose subject-matter is 'simply' governed by substantive provisions of EU law, may also fall within the scope of EU law (*Mangold*)

**SCENARIO no. 2:** When national authorities invoke reasons of public interest pursuant to EU law to justify a national measure which limits any of the rights contained in the EU Treaties/legislation and in particular, when they adopt measures which obstruct or are liable to hamper the exercise of EU free movement rights (**ERT LINE OF CASES**)

# Scope of Application of the Charter



## *Category 1: Wachauf-type situations*

**Vertical situation:**  
Dispute between a private party and a state authority

- *Wachauf* [1989]
- *Klensch* [1986]
- *Bosphorus* [1996]
- *Molenheide* [1997]
- *Lindqvist* [2003]
- *Rundfunk* [2003]
- *Booker Aquaculture* [2003]
- *Steffensen* [2003]
- *Eiterköpfe* [2005]
- *DEB* [2010]

## *Category 2: ERT-type situations*

- *ERT* [1993]
- *Familiapress* [1997]
- *Carpenter* [2002]
- *Baumbast* [2002]
- *Schmidberger* [2003]
- *Omega* [2004]
- *Sayn-Wittgenstein* [2010]
- *Ruiz-Zambrano* [2011]

## *Category 3: Wachauf à l'horizontale*

**Horizontal situation:**  
Dispute between private parties

- *Mangold* [2005]
- *Küçükdeveci* [2010]

## *Category 4: ERT à l'horizontale*

- *Defrenne II* [1975]
- *Bosman* [1995]
- *Angonese* [2000]
- *Karner* [2004]
- *Viking* [2007]
- *Laval* [2007]



## 2.3 SITUATION POST-LISBON

### WHAT IS CLEAR:

- ✓ 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

### NEW CONTROVERSIAL POINTS:

- ① Should the notion of “implementation” be restrictively interpreted?
- ② Should Art. 51(1) CFR 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?

# Scope of Application of the Charter



## SCENARIO 1: NATIONAL MEASURES WHICH DIRECTLY "IMPLEMENT"/APPLY EU LAW OR MORE GENERALLY FALL WITHIN THE MATERIAL SCOPE OF EU LAW

- Example of national measure which "implements" EU law: C-411/10 *N.S.*

69 ... the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, **implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.**

- Example of national measure which falls within the scope of EU law: Joined Cases C-297/10 and C-298/1:

The measures at issue **fall within the scope of EU law** as they affect the employees' conditions of pay within the meaning of Dir. 2000/78 and **they can be therefore examined inter alia in the light of principle of non-discrimination on grounds of age proclaimed in Art. 21 CFR** which is given expression in Dir. 2000/78

# Scope of Application of the Charter



## SCENARIO 2: NATIONAL MEASURES WHICH "DEROGATE" FROM EU LAW OR MORE GENERALLY WHICH RESTRICTS EU RIGHTS OF NATURAL AND LEGAL PERSONS

- Case C-249/11 *Byankov* [2011]:

“In that regard, it should be noted at the outset that a situation like that of Mr Byankov, who is prevented from travelling from the Member State of which he is a national to another Member State, **falls within the scope of the freedom to move and reside within the territory of the Member States** which is conferred by the status of citizen of the Union”

- Case C-40/11, *Yoshikazu Iida* [2012]:

“81 In those circumstances, the German authorities’ refusal to grant Mr Iida a ‘residence card of a family member of a Union citizen’ **does not fall within the implementation of European Union law** within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights **cannot** be examined by reference to the rights established by the Charter.”