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# The Charter of Fundamental Rights as a tool for judges and prosecutors

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# Overview

1. Added value: additional rights (maybe: overview of the Charter rights - or session 1)
2. Added value: EU-specific remedies
  - a) Primacy and disapplication
  - b) Consistent interpretation
  - c) State liability?
3. Added remedies: Article 47 CFR
4. Limits of the Charter's effectiveness: rights and principles?
5. European Arrest Warrants and the Charter

# Added value: additional rights?

## Compared with the ECHR:

- Some rights have been updated
- Other rights have been added

### Article 6 (1) ECHR

**In the determination of his civil rights and obligations or of any criminal charge against him**, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

### Article 47 (2) CFR

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

### Article 8 CFR – Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.



# Added value: additional rights?

## Compared with ECHR/some national constitutions:

- Express guarantee of certain workers' rights
  - E.g. the right to paid annual leave (Article 31 CFR)
- Express (and possibly more sophisticated) non-discrimination rights
  - E.g. the general (and openly worded) non-discrimination clause in Article 21 CFR
- Express guarantee of certain social rights
  - E.g. the right to social security (Article 34 CFR)
  - **CAVEAT: some of these provisions may only be “Charter principles” (more on this later)**

# Added value: EU-specific remedies

1. The Charter comes with the special features of EU law
  - Direct effect: i.e. the Charter is applicable in domestic courts, wherever the MS are ‘implementing Union law’
    - Exception (perhaps): Charter principles (more on this later)
  - Primacy
    - Duty of consistent interpretation (or indirect effect)
    - Duty of disapplication of domestic law
  - State liability (damages for violation of EU law)
2. The Charter can also create new remedies
  - Article 47 CFR – the right an effective remedy and to a fair trial

# Added value: primacy

- Long established principle that EU law prevails over conflicting national law (Case 6/64 *Costa v Enel*)
  - This includes national constitutional law (Case 11/70 *Internationale Handelsgesellschaft*)
  - And every national court (no matter how low in the hierarchy of courts) is under an obligation to disapply national law and apply EU law instead (Case 106/77 *Simmenthal*)
- **REMEDY**
  - **Consistent interpretation**
  - **if consistent interpretation is impossible: disapplication**

# Primacy - consistent interpretation

- The primacy of EU law does not necessarily mean disapplication of national law
- Preferred alternative (if possible): consistent interpretation
  - E.g. Case C-441/14 *Dansk Industri*

“EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age”.

# Primacy - disapplication

- If consistent interpretation is impossible
  - Particularly if the wording of national law is such that it cannot be interpreted in a way that would be compatible with the Charter
- **DISAPPLICATION of national law and application of EU law in its place**
  - This does not mean invalidity of national law, only that national law is not applied in the case before the court
  - Disapplication differs from invalidity in that the national legislation stays in place and is e.g. applied in purely domestic cases (where the Charter does not apply)



# Added value: state liability?

- The Charter could form the basis of a state liability claim
- Conditions for EU state liability are (see Joined Cases 46/93 and 48/93 *Brasserie du Pêcheur* and *Factortame*):
  - rule of law infringed must be intended to confer rights on individuals
    - This is the case with every Charter right (by definition)
  - the breach must be sufficiently serious
    - Difficult to show in practice
  - there must be a direct causal link between the breach and the damage sustained

# Further remedies: Article 47 CFR

## Article 47 (1) CFR - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

- This right applies whenever the Charter applies, i.e. whenever a MS is deemed to be ‘implementing Union law’
- Crucially: whenever a national court applies EU law, it must comply with the procedural right to an effective remedy
- In that sense: Article 47 differs from the substantive rights in the CFR (e.g. to non-discrimination, etc) as it often comes into play not as part of the substantive issue before the court, but as a question of the appropriate remedy for a violation of EU law.

# Further remedies: Article 47 CFR

## *Case C-30/19 Braathens Regional Aviation*

- Passenger had been subjected to racial discrimination (singled out for an additional security check)
- Braathens agreed in court to pay compensation (ca €1,000) and court ordered it to pay this and bear the costs.
  - However, despite an application by the applicant (the Equality Ombudsman), the judgment did not mention the discrimination at all.
- Question: does Article 47 CFR require the formal recognition of discrimination as an ‘effective remedy’?

# Further remedies: Article 47 CFR

## Case C-30/19 *Braathens Regional Aviation*

- Question: does Article 47 CFR require the formal recognition of discrimination as an ‘effective remedy’?
  - Basis was the Race Equality Directive 2000/43 and Article 21 CFR (non-discrimination clause): neither expressly requires ‘recognition of discrimination’ to form part of a judgment
- CJEU, however:
  - MS may choose the appropriate remedies [procedural autonomy]
  - But these must result in ‘real and effective judicial protection of the rights that are derived from [the Race Equality Directive]’

# Further remedies: Article 47 CFR

## Case C-243/09 *Fuß*

- Firefighter requested that his working hours comply with the Working Time Directive
  - Employer transferred from his previous job as a firefighter to an operational role (regular 9-5 office job)
- CJEU:
  - the effect of a compulsory transfer such as that in the main proceedings deprives of all [...] the right to a maximum working week of 48 hours in that post
  - In addition [...] Article 47 [CFR] would be substantially affected if an employer [...] were entitled to adopt a measure such as that at issue in the main proceedings. Fear of such a reprisal measure, where no legal remedy is available against it, might deter workers [...] from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive.

# Further remedies: Article 47 CFR

## Case C-414/16 *Egenberger*

- Discrimination on the basis of religion or belief
- Ethos exception: Article 4 (2) Directive 2000/78: allows churches (and similar) to treat persons differently if that ‘person’s religion or belief constitute a genuine, legitimate and justified occupational requirement’
- German transposition: judicial review of such a decision by a church was severely restricted to a review of the ‘plausibility on the basis of the church’s self-perception’.
- CJEU: “it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case”

# Limits of the Charter's effectiveness: rights and principles

## Article 51 (1) CFR

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.

## Article 52 (5) CFR

The provisions of this Charter which contain principles **may be implemented** by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. **They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.**

# Limits of the Charter's effectiveness: rights and principles

Question 1: what is the significance of the distinction

Question 2: which provisions contain rights and which contain principles?

Article 52 (5): [Principles] shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

- there is therefore less intensive judicial review where principles are concerned compared with rights
- rights violations can ultimately lead to the annulment of EU acts (incl legislation) and the disapplication of national law



# Limits of the Charter's effectiveness: rights and principles

Charter explanations:

“For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34”.

Example:

Case C-356/12 *Glatzel*

- Mr Glatzel had lost his driving licence and applied to be issued with a new licence (including lorries)
- was rejected because he was (practically) blind in one eye
- EU Directive 2006/126 on driving licences stipulates that those applying for a lorry licence must undergo a medical fitness test
  - requirements for visual acuity defined in the Directive, which Glatzel failed to meet

# Limits of the Charter's effectiveness: rights and principles

## Case C-356/12 *Glatzel*

- Challenged the validity of Directive 2006/126: violation of Article 26 CFR (inter alia)  
“The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”.
- Article 26 CFR is a Charter principle (see explanations)
- Directive 2006/126 aims to implement the principle (mentioned in preamble)
  - hence the requirement in Article 52 (5) is met
- Consequence?
  - In order for [Art 26] to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such.

# European Arrest Warrants and the Charter

Joined Cases C-404/15 and 659/15 *Aranyosi and Caldaru*

- EAWs issued by Hungarian and Romanian courts for arrest in Germany and subsequent surrender
- detention conditions allegedly contrary to Article 4 CFR
- Court:
  - reiterates the importance of mutual recognition/trust
  - but: recognises that the principle has limits
    - absolute prohibition contained in Art 4 CFR (based on 3 ECHR)
  - however, “a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant”.
  - further assessment needed further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.

# Discussion



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