

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN THE REFERENCES FOR PRELIMINARY RULINGS SUBMITTED BY NATIONAL COURTS

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Abstract

One of the most important consequences of the entry into force of the Lisbon Treaty is the possibility to submit references for preliminary rulings to the Court of Justice of European Union ("ECJ") concerning the interpretation of the Charter of Fundamental Rights of the European Union ("The Charter"). This study aims to examine how various courts of the Member States of European Union understood to exercise this prerogative after the entry into force of the Lisbon Treaty and the ECJ's preliminary rulings, in order to identify the circumstances in which judicial review of the national legislative or administrative acts for compliance with the Charter may be exercised by the national courts. Also, by examining the judicial dialogue on the Charter in the context of preliminary reference procedure, this article attempts to delimit the roles of national courts and of ECJ in ensuring the protection of fundamental rights in the European Union.

Keywords: Charter of Fundamental Rights of the European Union, preliminary reference procedure, Member States, Lisbon Treaty, national courts

Introduction

Following the entry into force of the Lisbon Treaty, the legal status of the Charter has changed, becoming, according to Art. 6 (1) TEU, a list of fundamental rights that are binding on the institutions, bodies and agencies of the European Union and on Member States when they are implementing EU law.

As a consequence, after the entry into force of the Lisbon Treaty, many national courts¹ submitted references for preliminary rulings to ECJ on the interpretation of Charter, concerning the compatibility of national legislative acts with the provisions of the Charter, using the preliminary reference procedure in order to establish the circumstances in which the provisions of the Charter are applicable to acts adopted by national authorities.

According to the preliminary reference procedure governed by Art. 267 TFEU, national courts can, or, in some cases, they even have an obligation² to refer to the ECJ

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¹ European Commission, 2012 Report on the Application of the EU Charter of Fundamental Rights, Bruxelles, 8 May 2013, available at http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf, p. 15 (consulted at 20 August 2013).

² According to Art. 267 TFEU, „Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

preliminary questions concerning the validity or interpretation of EU law in order to ensure a harmonized application of EU law in Member States. This procedure represents an embodiment of the judicial cooperation between the ECJ and national courts of the Member States (which are the first responsible for implementing EU law) in order to ensure a certain internal coherence of the European normative and judicial system, by helping the national courts without constraining them³.

Considering that the ECJ's judgments with regard to the interpretation of EU law bind all the national courts confronted with a similar EU law issue⁴ and not only the national court which submitted the reference for a preliminary ruling⁵, it follows that the ECJ's judgments rendered after the entry into force of the Charter in the context of preliminary reference procedure are a very useful tool to determine those particular situations in which the national action can be reviewed for compliance with the provisions of the Charter.

Although the Charter entered into force recently, the ECJ has already rendered several rulings in the preliminary reference procedure with regard to the provisions of the Charter, especially in the area of social rights, freedom of movement, refugees and European citizenship⁶.

Analysis of judgments rendered in the context of preliminary reference procedure

An important decision regarding the scope of application of the Charter was the judgment rendered in Case Zambrano⁷. In this case, the national court referred the question for a preliminary ruling in order to determine whether third-country nationals may be granted residence and work rights under EU law (Art. 20 TFEU) after they became parents of a child – EU citizen – but who has never exercised his right of free movement within the Member States. Although the child of the plaintiff was a EU citizen, by acquiring Belgian nationality, Belgian authorities refused to recognize residence and work rights under EU law for the parents of the EU citizen, because the child has never left the territory of Belgium. To determine whether the provisions of EU

³ E.S. Tănăsescu, Trimiterea preliminară și cooperarea judiciară loială, Romanian Journal of EU Law, no. 3/2012, p. 32.

⁴ Pursuant to the principle of sincere cooperation laid down in Art. 4 (3) TEU, "the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." Likewise, in case C-61/79 Denkavit, ECJ: "the interpretation which, in the exercise of responsibilities under Article 267, the Court of Justice gives to a rule of law, clarifies and specifies, when necessary, the meaning and scope of that rule".

⁵ C-106/77, Simmenthal, ECJ: „Any national court, within its jurisdiction, is required to fully implement European law and protect the rights it offers to individuals”; Case C-52/76, Munari, ECJ: „the decision rendered in the preliminary reference procedure is binding for the national court with regard to the interpretation of EU law in question”.

⁶ Case C-391/09, Runcvi-Vardyn, ECJ; case C-434/09, McCarthy, ECJ; case C-208/09, Sayn-Witgensten, ECJ; case C-145/09, Land Baden-Vfrttemberg, ECJ; joined cases C-57/09 and C-101/09 Bundesrepublik Deutschland, ECJ.

⁷ Case C-34/09, Zambrano, ECJ; judgment delivered on 8 March 2011. In this case, the preliminary question concerned the interpretation of Art. 18, Art. 20 and Art. 21 TFEU in conjunction with Art. 21, Art. 24 and Art. 34 of the Charter. In Zambrano Case, the preliminary question was raised in proceedings between Mr. Zambrano, a Colombian national, and the National Office for Employment in Belgium, which came as a result of a refusal to grant unemployment benefits under Belgian law.

law and of the Charter invoked by the plaintiff were applicable in this case, it was essential to determine, first, whether the refusal of the Belgian authorities was an action within the scope of EU law.

The relevance of this case for the application of the Charter by the national courts of the Member States on the measures and actions of national authorities consists in setting the limits of the scope of fundamental rights in relation to the scope of EU law. The ECJ held that Member State's decision to refuse to grant a right of residence and work for a national of a third country, falls within the scope of EU law. Therefore, the ECJ held that Art. 18, Art. 20 and Art. 21 TFEU in conjunction with Art. 21, Art. 24 and Art. 34 of the Charter, must be interpreted as precluding a Member State from refusing to grant such rights under the specific circumstances of the case. In its reasoning, the ECJ argued that the refusal of the national authorities would deprive the children who are EU citizens to fully enjoy the substance of the rights conferred by citizenship of the European Union.

With this decision, the ECJ redefined the criteria used to define the actions of Member States which are implementing EU law in terms of Art. 51 (1) of the Charter and also, the actions of Member States which are not implementing EU law, using EU citizenship as an argument for applicability of EU law and of the Charter.

Another judgment of ECJ with important implications for the meaning of the concept of "implementing EU law" regarding the applicability of the Charter to the action of Member States is the judgment rendered in Case NS⁸.

In this case, the national court asked whether a decision taken by a Member State to examine an application for asylum which is not its responsibility falls within the scope of EU law in terms of Art. 6 TEU and/or Art. 51 of the Charter. In response, ECJ ruled that the decision of the Member State to examine an asylum application which is not its responsibility „is implementing EU law, in terms of Art. 6 TEU and/or Art. 51 of the Charter of Fundamental Rights of the European Union".⁹ In this case, ECJ held that national measures violated the Charter, because there was a link between the national measures and EU law. The most important conclusion arising from this judgment is that the Charter applies to acts adopted by Member States even when they exercise a "sovereignty clause" expressly provided for by EU law, if those acts of the Member States violate fundamental rights of EU citizens. Also, a similar judgment regarding asylum was rendered by ECJ in the case of GISTI¹⁰, in which the Court held that where an asylum application has been lodged in one of the Member States by a third-country national, the Member State in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers laid down in EU law, even if that Member State is not the one responsible for examining the application for asylum.

In Case Vinkov¹¹, the reference for a preliminary ruling concerned the question whether non-recognition in national law of the right to a judicial review was consistent

⁸ Joined Cases C-411/10 and C-493/10, ECJ, N.S. and others, judgment of 21 December 2011. The request for a preliminary ruling was made in proceedings between asylum seekers who were to be sent back to Greece under Regulation No. 343/2003 and, respectively, the UK and Irish authorities.

⁹ Joined Cases C-411/10 and C-493/10, N.S. and others, ECJ, judgment of 21 December 2011, paragr. 68 and 69.

¹⁰ Case C-179/11, CIMADE and Groupe d'information et de soutien des immigrés (GISTI), ECJ, judgment of 27 September 2012.

¹¹ Case C-27/11, Vinkov, ECJ, judgment of 7 June 2012.

with the EU law¹². Responding to the national court, the ECJ held that the Charter does not apply to the measure adopted by the member state, because "the requirements flowing from the protection of fundamental rights are binding on Member States when they are implementing EU law, and in this case, it appears that the contested national legislation is not a measure implementing EU law or is otherwise connected with EU law"¹³. With this decision, although it held that the Charter does not apply to the national legislative act at issue, the ECJ expressly reaffirmed that, in order for the Charter to be applicable to the measures and provisions adopted by the Member States, it is necessary that (i) the act adopted by the national authorities to represent a measure of implementation of EU law, or (ii) there is a link between the act adopted by national authorities and EU law¹⁴.

A similar position was adopted by the ECJ in the judgment rendered in Case *Corpul Național al Polițiștilor*¹⁵. The reference for a preliminary ruling concerned the question whether the reduction of salaries imposed by the Romanian Law no. 118/2010 and Law no. 285/2010 violates the rights enshrined in the Charter to property, equality and non-discrimination. Without analysing the details of the legal aspects raised by the national court, the ECJ ruled that it lacks jurisdiction to answer the referred questions, because "the reference contains no specific element under which it can be considered that Law No. 118/2010 and Law. 285/2010 aimed at implementing EU law"¹⁶.

The Case *DEB*¹⁷ concerned the content of the right to effective judicial protection of the rights conferred by EU law, stipulated by Art. 47 of the Charter, in an action filed against a member state for breaching EU law¹⁸. The question referred by the national court aimed to clarify whether national legislation which stipulated the refusal of legal aid for companies was compatible with the principle of effective judicial protection, as provided for in Art. 47 of the Charter. In other words, the national court wanted to know whether the principle of effectiveness of EU law can be considered a sufficient "connection" enough with EU law, for the national court to assess the legality of national legislation in relation to the Charter. Reformulating the referred question, the ECJ held that "the principle of effective judicial protection, as enshrined in Art. 47 of the Charter, must be interpreted as meaning that it is possible for the companies to rely on this principle and that legal aid granted under this principle may cover, among others, exemption from the costs of the procedure and/or assistance a lawyer"¹⁹, although

¹² The provisions of EU law referred by the national court were those governing the right to an effective judicial remedy enshrined in article 6 ECHR and article 47 and 48 of the Charter.

¹³ Case C-27/11, *Vinkov*, ECJ, paragr. 56, 58 and 59.

¹⁴ With a similar reasoning, Case C-370/12, *Pringle*, ECJ, judgment of 27 November 2012.

¹⁵ Case C-434/11, *Corpul Național al Polițiștilor*, ECJ, order of 14 December 2011.

¹⁶ Case C-434/11, *Corpul Național al Polițiștilor*, ECJ, order of 14 December 2011, paragr. 16.

¹⁷ Case C-279/09, *DEB*, ECJ, judgment of 22 December 2010.

¹⁸ *DEB*, a German company involved in supplying energy in Germany, claimed that following Germany's failure to transpose Directives 98/30/EC and 2003/55/EC, which were aiming to facilitate non-discriminatory access to the national gas, it suffered important economic loss that led to its inability to continue its business activities. Claiming that it was impossible to pay the costs of proceedings and costs to receive legal assistance from a lawyer, *DEB* company asked for legal aid in order to initiate an action for damages against Germany, alleged that it breached EU law. Application for legal aid was refused on the grounds that national law does not provide that a legal person can obtain legal aid.

¹⁹ Case C-279/09, *DEB*, ECJ, judgment of 22 December 2010, para 59.

national legislation whose compatibility with the Charter has been questioned in question was not part of the harmonization measures adopted at EU level and has not been adopted in order to implement EU law.

In this case, the ECJ considered that the German legislation restricting the possibility for companies to obtain legal aid represents a violation of the right to effective judicial protection, conferred by EU law and reiterated in the article 47 of the Charter, which is why the compatibility of German legislation with EU law had to be reviewed for proportionality²⁰.

Another recent argument in favor of a broad interpretation of the scope of the Charter regarding judicial review of the compatibility of acts and measures adopted by Member States in relation to the Charter is the judgment of the ECJ in Case Åklagaren²¹. In this case, the national court submitted a reference for a preliminary ruling, asking the ECJ to clarify whether the *ne bis in idem* principle, as provided by article 50 of the Charter precludes a member state, when faced with a breach of VAT legislation, to adopt laws or measures imposing both an administrative penalty and a criminal sanction on the same facts.

Following this reference for a preliminary ruling, the ECJ has defined the concept of implementing EU law by the Member States, as referred to in article 51 paragr. (1) of the Charter, because it had to determine whether national legislation which is imposing sanctions for failure to fulfill obligations under the legislation on VAT can be regarded as measures implementing EU law under article 51 paragr. (1) of the Charter. Thus, in Case Åklagaren, adopting the broad interpretation regarding the scope of the Charter, the ECJ ruled that it had jurisdiction to answer the questions raised and to review the compatibility of national legislation with the Charter, although national regulations in question had not been adopted in order to implement EU law.

To reach this conclusion, the ECJ held, concerning the applicability of the Charter, that "the fundamental rights guaranteed by the Charter must (...) be respected when national regulations fall within the scope of EU law" and "applicability of EU law entails the application of fundamental rights guaranteed by the Charter"²². The ECJ also held that, in that particular case, the Swedish state is implementing EU law under Art. 51 (1) of the Charter, even if the alleged national measures have not been adopted in order to transpose, directly, the provisions of a directive, since the application of those national regulations in question aims to sanction a violation of the provisions of the directive and aims to implement an obligation imposed under the Treaties to all Member States²³.

From recent case law of the ECJ rendered in the context of preliminary ruling procedure, with regard to the Charter, after the entry into force of the Lisbon Treaty, the following specific situations can be identified, in which judicial review of the national

²⁰ P. Mengozzi, *Ocrotirea pe cale judecătorească a drepturilor individuale și principiul proporționalității în urma Tratatului de la Lisabona*, Romanian Review of European Law, no. 6/2011, p. 48.

²¹ Case C-617/10, Åklagaren, ECJ, judgment of 26 February 2013. Facts of the case concerned the cumulation of an administrative and criminal sanctions imposed on Mr. Fransson by the Swedish tax authorities for unpaid VAT and for failure to comply with the obligations to provide tax information in Sweden. Mr. Fransson argued that such cumulation violated the principle of *ne bis in idem*, stipulated in article 50 of the Charter.

²² Case C-617/10, Åklagaren, ECJ, judgment of 26 February 2013, para 21.

²³ Case C-617/10, Åklagaren, ECJ, judgment of 26 February 2013, para 28.

legislative or administrative acts for compliance with the Charter may be exercised by the national courts:

- when Member States adopt acts or measures of effective implementation of EU law²⁴, acting as agents of the European Union, executing an EU decision, applying an EU regulation at national level or transposing an EU directive and when trying to obtain a derogation²⁵ from the application of EU law²⁶;
- when Member States are acting within the scope of application of EU law, adopting national law or administrative measures in a particular area governed by EU law, which violate a specific right under the Charter, being sufficient to determine that there is a connection between national act and EU law in order to apply the provisions of the Charter²⁷.

Although in the current jurisprudence of the ECJ there are both judgments that adopt a flexible approach and judgments that are maintaining the narrow concept of implementing EU law²⁸, the recent post-Lisbon judgments examined show that the interpretation of the ECJ on the notion of "implementation of EU law by the Member States" did not change significantly after the conversion of the Charter into a legally binding document. Despite the restrictive wording of Art. 51 (1) of the Charter, the ECJ tends to maintain the same broad interpretation expressed in pre-Lisbon case law on the protection of fundamental rights. Furthermore, recent case law of the ECJ can be considered as a possible anticipation of extending the scope of the Charter in relation to Member States, recognizing "the connection between national action and EU law" as a criterion that can be used to determine the application of the Charter at national level for certain situations that were previously considered as being outside the scope of EU law.

Conclusions

From the analyzed judgments rendered by the ECJ in the context of preliminary ruling procedure with regard to the interpretation and application of the Charter, after the entry into force of the Treaty of Lisbon, it follows that Member States are obliged to respect fundamental rights when acting within the scope of EU law. Also, it follows that the entry into force of the Charter does not alter or restrict this system²⁹ and does not substantially change the way in which the ECJ weighs or applies the fundamental rights with regard to Member States³⁰.

²⁴ Case C- 5/88, Wachauf, ECJ; case C-442/00, Caballero, ECJ; joined cases C-465/00, C-138/01 and C-139/01 Rechnungshof, Neukomm and Lauermaann, ECJ; case C-101/01, Lindqvist, ECJ; case C-555/07 Küçükdeveci, ECJ; case C-78/11, Anged, ECJ.

²⁵ Case C-260/89 ERT, ECJ; case C-60/00, Carpenter, ECJ; case C-71/02, Karner, ECJ; case C-208/09, Sayn-Wittgenstein, ECJ; case C-36/02, Omega, ECJ.

²⁶ L. Koen, The Court of Justice of the European Union and the Protection of Fundamental Rights, Polish Yearbook of International Law, vol. 31/2011, p. 83, available at <http://ssrn.com/abstract=2218538>

²⁷ Case C-309/96, Annibaldi, ECJ; case C-299/95, Kremzow, ECJ; case C-34/09, Zambrano, ECJ; Case C-33/07, Jipa, ECJ; case C-249/11, Byankov, ECJ; joined cases C-411/10 and C-493/10, N.S. and others, ECJ; case C-279/09, DEB, ECJ; case C-617/10, Åklagaren, ECJ.

²⁸ M. Safjan, Areas of Application of the Charter of Fundamental Rights of the EU: Fields of Conflict?, European University Institute, EUI Working Papers LAW, no. 22, 2012, p. 6, available at <http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf?sequence=1>.

²⁹ J. Kokott, C. Sobotta, The Charter of fundamental Rights of the European Union after Lisbon, Romanian Review of European Law, no. 5/2012, p. 106.

³⁰ H. Voogtsgeerd, The EU Charter of Fundamental Rights and its Impact on Labor Law: a Plea for a Proportionality-Test "Light", Goettingen Journal of International Law, no. 1/2012, vol. 4, p. 316.

Following the entry into force of the Charter, it can be noticed a significant increase in the number of requests for preliminary rulings with regard to the Charter, as well as an increased cooperation between national courts and the ECJ. This cooperation is of great importance for the uniform interpretation and application of EU law, particularly from the perspective of interdependence between the national legal orders and the EU legal order, which should be in a constructive cooperation based on the division of powers established by the treaties of the European Union³¹.

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³¹ T. Von Danwitz, Despre dezvoltarea ordinii juridice a Uniunii după Lisabona – Condiții, provocări și perspective, Romanian Review of European Law, no. 3/2011, p. 17.

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