

Teacher's Notes

Quiz 1: basic notions of EU law such as direct effect, primacy

Presentation 1.1. When does the Charter apply

This first session will serve as a revision of when the Charter applies.

The protection of fundamental rights in the EU legal order dates back to much earlier than the Treaty of Lisbon and the entry into force of the Charter. Think for instance of the 1969 Stauder case or slightly later Internationale Handelsgesellschaft. The CJEU developed its doctrine throughout its case law and fundamental rights were protected under the medium of the general principles of EU law. Then with the Treaty of Lisbon the Charter came into force and with it the ambition to make fundamental rights more 'visible' and to integrate human rights at the core of the EU's values, as proclaimed in Article 2 TEU.

We still have however this issue of when is the Charter applicable since its application is triggered by the application of EU law by the Member States. So we review the different options: Member States acting as agents of EU law, either strictly speaking implementing, or more broadly applying EU law; and Member States derogating from EU law.

We should also keep in mind that fundamental rights themselves may justify derogating from other rules of EU law, like in the Schmidberger case.

All this was developed by the CJEU in the pre-Lisbon setting but remains relevant for identifying situations where the Charter is applicable.

Presentation 1.2. Relationship between the Charter and the domestic law of the Member States

Small revision of the notion of primacy

Small revision of the notion of direct effect – discussion of horizontal versus vertical direct effect

Focus on the prohibition on discrimination

Presentation 1.3. The relationship between the Charter and the European Convention on Human Rights

Presentation of the Convention, the Protocols, the Court

Discussion of the relationship between the ECHR and the EU legal order, including the Matthews case and the Bosporus case

Example: the dialogue between the two courts on the application of the Dublin Regulation

Discussion of the perspectives on potential/ future accession of the EU to the ECHR

Presentation 1.4. Judicial cooperation, mutual trust and fundamental rights challenges

Overview of the origins of the principle of mutual trust

Discussion of the particular relevance of mutual trust in the AFSJ – mutual trust as a presumption of fundamental rights compliance

Exceptions to the principle of mutual trust

Particular value of the principle of effective judicial protection

Case studies 1

Emphasis on Article 53 and what to do when potentially different standards might be applicable

Quiz 2: Revision of notions of Day 1

Presentation 2.1. Mutual recognition instruments in civil matters and fundamental rights challenges

Explanations on the terminology

Development of mutual recognition instruments in the EU's judicial cooperation in civil matters

Overview of the existing legislation + of the e-justice tools

Case study: Avotins v Latvia

Opening on other fundamental rights issues that may arise in judicial cooperation in civil matters

Presentation 2.2. The right to marry and to found a family (EU Charter Article 9)

- The right to marry and the right to found a family are not connected to a specific competence of the Union. This may explain why those rights have not been the focus of much case law by the CJEU thus far. However, Article 9 may be relevant in certain areas where the Union has competence, especially equal treatment and non-discrimination, cross-border recognition of families (marriage, partnerships, parenthood), and the regulation of health services (in terms of access to reproductive treatment and services).
- Article 9 is phrased more openly than the corresponding Article 12 of the ECHR,[1] so that it more clearly covers cases in which national legislation recognises arrangements other than marriage for founding a family.
- Article 9, unlike Article 12 of the ECHR, is phrased in a gender-neutral way: it neither excludes nor expressly allows same sex marriage, leaving space for a variety of national legislative approaches. More generally, since the terms of Article 9 indicate that the right is subject to the national laws of the Member States, those may also provide for limitations – in so far as those limitations are in pursuit of legitimate aims and are proportionate.
- According to the Explanations to the Charter, Article 9 is a modernised version of Article 12 of the ECHR, which reads: 'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.' As per the Explanations, 'This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.'
- Article 9 in CJEU case law:
- Same sex couples C-673/16, Coman (Citizenship of the Union – freedom of movement and residence for EU citizens and their family members: the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation – the right to marry is mentioned in the judgment but is not decisive in the CJEU's reasoning)

- Right to marry Case 490/20, V.M.A. v Stolichna obshtina, rayon (each Member State must comply with EU law, in particular the provisions of the FEU Treaty on the freedom conferred on all Union citizens to move and reside within the territory of the Member States, by recognising, for that purpose, the civil status of persons that has been established in another Member State in accordance with the law of that other Member State.)
- Article 9 Charter and Article 8 and 12 ECHR in EU secondary law
- EU legislation and Charter
 - Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, ('Bxl II bis')
 - Council Regulation (EC) 2019/1111 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and international child abduction ('Bxl II ter')
- International instruments and ECHR
 - Hague Convention of 25 October 1980 on civil aspects of international child abduction
- In the Neulinger case the ECtHR ruled that there would be a violation of Article 8 of the ECHR in respect of the two applicants if the decision ordering the child's return were to be enforced.
- Two limbs of the child's interests; 1) that the child's ties with its family must be maintained save for very exceptional circumstances, but also that 2) the child must be ensured development in a sound environment and that a parent is not entitled to measures that would harm the child's health and development.
- In return cases, national courts to conduct an 'in-depth examination' of the whole family situation
- The Neulinger case was strongly criticised. In 2013 in the case X v Latvia in 2013, the ECtHR modified some of the statements in Neulinger. It held that the child's best interests cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return under the Hague Convention or an application for custody or parental responsibility.
- X v Latvia still holds that the two limbs of the child's interests must be maintained; 1) that the child's ties with its family must be maintained save for very exceptional circumstances, but 2) also that the child must be ensured development in a sound environment, so that a parent is not entitled to measures that would harm the child's health and development.
- However, in X v Latvia, the ECtHR clarified that the child's best interests cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return under the 1980 Hague Convention or an application for custody or parental responsibility.

Presentation 2.3. The rights of the child (EU Charter Article 24)

- Article 24 focuses on the rights of the individual child (person below 18 years old). Paragraph two encompasses a horizontal principle on the rights of the child: the importance of the child's best interests. Considered in the context of family life, this

provision is usually accompanied by Article 7 (on the right to private and family life), as well as in conjunction with Article 33(1) when considering the impacts to the legal, social, and economic protection of the family.

- Article 24(1) encapsulates a child's right to be heard, which holds the capacity of children to form their own opinion in high regard. Due weight to this right is given in accordance with the child's age and maturity.
- Article 24(3) recognises the child's right to maintain contact with both parents based on certain criteria (on a regular basis, personal and direct contact) but only if it is according to the best interest of the child pursuant to Article 24(2).
- This provision is directly inspired by UN Convention on the Rights of the Child (CRC) which is commonly referred or alluded to by the CJEU when determining how EU law should be interpreted regarding children's rights. The impact of the CRC is also visible in the reasoning of the ECtHR, notably when addressing claims on behalf children, like the right to a fair trial in Article 6 of the ECHR or the treatment of children in conflict with the law.
- Article 24 also interacts with other provisions, further expanding its scope and coming into play depending on the context. It should also be read in conjunction with and by different provisions such as the prohibition of abuse in Articles 4 to 6, the right to education in Article 14, the prohibition to discriminate on the grounds of age in Article 21, respecting the rights of persons with disabilities in Article 26, as well as the protection of young people at work in Article 32.

The right to be heard is reflected in various EU legislative acts

- Article 21 of the Brussels IIa Regulation (recast)

- Council Regulation (EC) 2019/1111 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and international child abduction ('Bxl II ter')
- EU Directive 2016/800 of the European parliament and of the Council of 11 May 2016 on minimum procedural safeguards for children who are suspects and accused in criminal proceedings

Three aspects of the hearing of the child:

- 1) the obligation of the court to assess the capability of the child to form his or her own views;
- 2) the provision of a genuine and effective opportunity for the child to express those views and
- 3) the obligation to give due weight to them in accordance with the child's age and maturity.

- Article 24 in CJEU case law

Right to be heard: C-491/10, Joseba Andoni Aguirre Zarraga v Simone Pelz (Right to be heard by a minor is not an absolute right, but gives the court discretion in determining whether it is necessary. If so, the courts must offer the child a genuine and effective opportunity to express his or her views

Presentation 2.4. The right to an effective remedy and to a fair trial (EU Charter Article 47)

- Article 47 is interrelated with all Charter provisions as well as with all 'rights and freedoms guaranteed by the law of the Union'. Individuals must indeed have a



remedy against any violation of any of those rights and freedoms. Article 47 of the Charter is also closely connected with Article 19(1), second paragraph TEU, which requires national courts of the Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'. In addition, this responsibility for ensuring judicial review is also grounded in the value of the rule of law stated in Article 2 TEU.

- Hence, the right to an effective remedy and the right to a fair trial together are instrumental in upholding the rights protected under the Charter.
- The first paragraph of Article 47 provides for a right to an effective remedy before a tribunal for everyone whose rights and freedoms under EU law are violated. This right requires that national courts must ensure an effective remedy and a fair trial when EU law derived rights and freedoms are violated in order to provide sufficient legal protection in fields covered by Union law.
- As mentioned in the Charter Explanations to Article 47, its first paragraph is based on Article 13 ECHR but provides more extensive protection; it is not limited to civil and criminal cases and ensures the right of effective remedy before a tribunal as well. Therefore, the case law of the ECtHR is relevant but not limitative. In the EU context the right of effective remedy also means that in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals. While national legal orders enjoy procedural autonomy, it is on the condition that procedural rules are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (the principle of effectiveness).
- The second paragraph of Article 47 ensures the right to a fair trial before an independent and impartial court. The underlying rationale for the right to a fair trial is to ensure effective protection against arbitrariness, to keep the exercise of public power under control, and guarantee the enjoyment of rights against the encroachment of the State.
- As also mentioned in the Charter Explanations to Article 47, the second paragraph guaranteeing the right to fair trial corresponds to Article 6(1) ECHR, but unlike these provisions, its applicability is not limited to disputes relating to civil law rights and obligations. As mentioned above the right to a fair trial under the Charter encompasses a set of rights and principles.
- The third paragraph of Article 47, in accordance with ECtHR case law ensures the provision of legal aid where the absence of such aid would make it impossible to ensure an effective remedy.
- Limitations to the exercise of the rights under Article 47 are possible if they respect the essence of the right and the principle of proportionality, i.e. if they are provided by law and are no more restrictive than necessary to meet the aim pursued.

Case studies 2

Focus on custody rights and their connection with fundamental rights.

