



Charter  
courses

## CHARTER CASE STUDIES



## TRAINER'S MANUAL

EU CHARTER  
FUNDAM  
RIGHTS

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# ACRONYMS

<b>CFREU</b>	Charter of Fundamental Rights of the EU
<b>CJEU</b>	Court of Justice of the European Union
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECLI</b>	European Case Law Identifier
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>OJ</b>	Official Journal

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# FOREWORD

The Charter of Fundamental Rights of the European Union (CFREU) is the EU's bill of rights. It always binds the EU institutions and the Member States when they act within the scope of EU law. However, it is far from easy to assess whether a concrete case falls within the scope of EU law. This is why it is necessary to provide training and training material to legal professionals so that they can understand the field of application of the Charter as laid out in its Article 51.

The target audience in need for training on the Charter and its field of application goes beyond the judiciary and practicing lawyers. As the Council of the European Union pointed out: "Preventing fundamental rights violations demands adequate training of all the actors in the Charter enforcement chain, including NHRIs, equality bodies and civil society organisations. [...] The Council underlines the importance of universities and legal practitioners' training schools in the promotion of knowledge on the Charter, through academic research and training activities, also in cooperation with the Union institutions, national authorities and civil society organisations."<sup>1</sup>

The Council also called "on Member States to explore further avenues to improve the proficiency of the judiciary and other justice practitioners on the Charter, drawing on dedicated training material, including e-learning tools"<sup>2</sup>, suggesting that Member States encourage the various communities of legal practitioners to put a renewed emphasis on the application of the Charter at national level also by making use of training resources and material as developed by the EU Agency for Fundamental Rights (FRA).

FRA is the independent EU fundamental rights expert body offering fundamental rights assistance and advice to the EU and its Member States. FRA's findings show that the Charter's potential at national level is not yet fully used.<sup>3</sup> Against this background, FRA started to develop training material including e-learning courses that can be used by trainers when providing Charter trainings to relevant groups of legal practitioners. This trainer's manual aims at providing guidance on both the organisation and the implementation of such trainings based on a series of case studies, which will be extended in the future.<sup>4</sup> Comments and suggestions can be sent to [charter@fra.europa.eu](mailto:charter@fra.europa.eu). The manual is best used in combination with other [FRA Charter resources](#) and material such as the database [Charterpedia](#) (<https://fra.europa.eu/en/eu-charter>) and the Handbook "[Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level](#)".

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<sup>1</sup> Council of the European Union (2021), conclusions on strengthening the application of the Charter of Fundamental Rights in the European Union, 8 March 2021, page 5, URL: <https://data.consilium.europa.eu/doc/document/ST-6795-2021-INIT/en/pdf>

<sup>2</sup> Council of the European Union (2021), loc.cit., page 9 URL: <https://data.consilium.europa.eu/doc/document/ST-6795-2021-INIT/en/pdf>

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<sup>3</sup> FRA (2019), Ten years on: unlocking the Charter's full potential, available [here](#) in DE, EN, FR, PL, PT, SI.

<sup>4</sup> Thanks go to Dr. Mirjam de Mol who provided a first draft of the case studies used here. Thanks go also to the members of the FRA's Scientific Committee who provided comments on earlier drafts.

# TABLE OF CONTENTS

Acronyms	2
Foreword	3
Table of contents	4
<b>INTRODUCTION TO THE MANUAL</b>	<b>7</b>
Why case studies?	7
What do case study-based workshops allow for and require?	7
Who are the trainers?	7
Who is the target audience?	8
The structure of the manual	8
Advice for trainers	8
For more information	8
<b>TRAINING COURSE ORGANISATION AND IMPLEMENTATION</b>	<b>9</b>
The training material	9
Overall learning objectives	9
Designing and running a training workshop	10
Considerations in designing training	10
Running a training workshop	10
Learning evaluation	12
Other FRA material and resources related to the Charter	12
Further reading: article-by-article	
Charter Commentaries	13
<b>CASE STUDY 1 - CALCULATION OF THE NOTICE FOR DISMISSAL</b>	<b>14</b>
Handout for participants	14
Which EU law provisions are relevant here?	14
Which provisions of national law apply?	15
Questions	16
Background information for trainers	18
Questions and answers	18
Further reading	21

<b>CASE STUDY 2 - TERMINATION OF EMPLOYMENT RELATIONSHIP AND RIGHT TO PAID ANNUAL LEAVE</b>	<b>22</b>
Handout for participants	22
Which EU law provisions are relevant here?	22
Which provisions of national law apply?	22
Questions	23
Background information for trainers	25
Questions and answers	25
Further reading	27
 <b>CASE STUDY 3 - RETIREMENT AGE</b>	 <b>28</b>
Handout for participants	28
Which EU law provisions are relevant here?	28
Which provisions of national law apply?	29
Questions	29
Background information for trainers	31
Questions and answers	31
Further Reading	33
 <b>CASE STUDY 4 - INSTALLING ELECTRICITY METERS IN ROMA DISTRICTS</b>	 <b>34</b>
Handout for participants	34
Which EU law provisions are relevant here?	34
Which provisions of national law apply?	35
Questions	36
Background information for trainers	38
Questions and Answers	38
Further Reading	40
 <b>CASE STUDY 5 - USE OF PSYCHOLOGICAL TESTS TO CONFIRM SEXUAL ORIENTATION</b>	 <b>41</b>
Handout for participants	41
Which EU law provisions are relevant here?	41
Questions	42
Background information for trainers	44
Questions and Answers	44
Further Reading	46
 <b>CASE STUDY 6 - SUSPENSION OF A RETURN DECISION</b>	 <b>47</b>
Handout for participants	47
Which EU law provisions are relevant here?	47
Which provisions of national law apply?	48
Questions	48
Background information for trainers	50
Questions and Answers	50
Further Reading	52

<b>CASE STUDY 7 - AMATEUR JOURNALISM ON YOUTUBE</b>	<b>53</b>
Handout for participants	53
Which EU law provisions are relevant here?	53
Questions	54
Background information for trainers	57
Questions And Answers	57
Further Reading	59
 <b>CASE STUDY 8 - DUTY OF TELECOMMUNICATION PROVIDERS TO RETAIN METADATA</b>	 <b>61</b>
Handout for participants	61
Which EU law provisions are relevant here?	61
Which provisions of national law apply?	62
Questions	62
Background information for trainers	65
Questions and Answers	65
Further Reading	68
 <b>ANNEX: EVALUATION FORMS</b>	 <b>70</b>



# INTRODUCTION TO THE MANUAL

This manual is intended for use by (legal expert) trainers who provide face-to-face training workshops on the Charter of Fundamental Rights of the European Union (the Charter - CFREU). The workshop is based on a set of case studies that largely focus on the thematic areas of employment, non-discrimination, asylum and migration, and data protection and information society. The case studies are mainly concerned with the applicability of the Charter.

Case studies from other thematic fields of the Charter may be added in due course.

The case studies are drawn from relevant case law of the Court of Justice of the European Union (CJEU). The same case studies are used in the online course that is available on the Agency's e-learning platform <https://e-learning.fra.europa.eu/>.

Both the Charter face-to-face workshops and the online course can use the Charter case studies (and other FRA resources and training material). Face-to-face training can as well be combined with online sessions as blended learning solutions.

## Why case studies?

Given the adult and legal expert target audiences of the workshop, it is important that the trainer(s) take a participatory approach and use(s) interactive means of learning, e.g. through case studies. The purpose of the case studies is to present the participants scenarios that are as close as possible to those that they may encounter at work. This will allow the participants to analyse the problem and devise reasonable and workable solutions themselves. Allowing the participants to work through the decision-making process, they generate an action-oriented learning environment. This means that the participants must actively participate in the process in order to meet the learning

objectives. Furthermore, case studies are a learning method that requires a high level of interpretation and discussion among participants and between participants and the trainer(s). Through this process, much of the responsibility for learning is naturally transferred to the participants.

## What do case study-based workshops allow for and require?

Face-to-face training workshops are a powerful learning activity as they provide personal contact between the trainer(s) and the participants and allow customisation of seminars on topics relevant to the needs of a specific target audience. At the same time, they allow for a high level of interaction and participation. However, they are relatively time consuming and cost intensive (preparations, development of case studies, travel and accommodation, delivery, evaluation and follow-up). Hence, the outcome has to justify the investment, especially when resources are limited. In order to make best use of the workshops, the target group and the aims need to be well-defined. Furthermore, training needs analysis, training methodology, participatory methods, and ex-post evaluation forms have to be reviewed for each workshop to ensure a great level of focus on the participants and their interaction.

## Who are the trainers?

It is envisaged that the training can be provided by legal experts with profound knowledge of the Charter and with participatory and interactive facilitation skills.

## Who is the target audience?

The primary target audience for the training workshops are:

- The judiciary (e.g. judges, prosecutors, etc.)
- Officials involved in national legislative and administrative authorities such as governments, parliaments, regional and local authorities
- Legal staff working for human rights institutions and civil society organisations in the Member States
- Law students

## The structure of the manual

The manual provides a general introduction to the methodology for the case study-based workshops. It gives instructions and procedures for setting up and running workshops. Moreover, it describes eight case studies including introductory notes, questions and answers and a list of further readings. For each case study background information for trainers and a hand-out for participants are made available.

## Advice for trainers

The manual provides suggestions on the methods that can be used to design and run working group sessions with support of the case study material. In addition, it advises on the integration of the case studies into an overall training workshop on the Charter.

The advice includes:

- A general description of the training material
- How to incorporate the training material in a workshop
- Learning objectives for the participants in the workshop
- A proposed methodology for designing and running a workshop session
- A description of each of the eight case studies (background information for trainers)
- Other FRA resources and materials related to the Charter.

Furthermore, it is recommended that the trainer(s) involve(s) the target group upfront, meaning that the trainer(s) contact the registered participants before the course and before drafting a final programme. This should involve a learning needs analysis to identify individual learning requirements (as well as any specific needs in terms of accessibility or other issues). This process will ensure that the workshop meets the interest of every participant. This preliminary contact can also be used to ask questions about the background of each participant and test their current knowledge and skills on the Charter.

## For more information

More information on FRA's work on the Charter and available Charter resources can be found on the Agency's website under <https://fra.europa.eu/en/eu-charter>.

Should you have any queries about this manual or its content, please contact: [charter@fra.europa.eu](mailto:charter@fra.europa.eu).



# TRAINING COURSE ORGANISATION AND IMPLEMENTATION

## The training material

The training materials are structured around a set of eight case studies referring to the Charter. Each of these is based on cases decided by the CJEU and comprises background information for trainers and a handout for participants.

The case studies cover four policy areas: employment law, equality and non-discrimination, asylum and migration, and data protection and information society. Within these areas, various key dimensions are covered as appropriate, such as the relationship with the European Convention on Human Rights (ECHR) (Article 52(3) of the Charter), limitation of rights (Article 52 (1) of the Charter), direct effect and horizontal applicability.

The case studies are designed for the use in working group sessions of 30–45 minutes duration and with a maximum of 12 participants.

Each case study includes a question on the applicability of the Charter (Article 51 (1)), which is always the first question. The case studies are designed in a way that allows for the removal of that question. This might, for example, be relevant for training sessions with several working groups dealing with more than one case study.

The case studies are:

CASE STUDY	TITLE	THEME
1	<i>Kücükdeveci</i> (C-555/07)	Employment
2	<i>Bauer</i> (C-569/16 and C570-16)	Employment
3	<i>Soukupová</i> (C401/11)	Non-discrimination
4	<i>CHEZ</i> (C-83/14)	Non-discrimination
5	<i>F.</i> (C-473/16)	Asylum and migration
6	<i>Abdida</i> (C-562/13)	Asylum and migration
7	<i>Buivids</i> (C-345/17)	Data protection and information society
8	<i>Tele2 Sverige</i> (C-203/15 and C-698/15)	Data protection and information society

It is recommended that the trainer(s) - in addition to the background information and the handouts – use(s) the following material:

- The FRA handbook: [Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level](https://fra.europa.eu/en/eu-charter/fra-charter-resources) in law and policy-making at national level and other FRA Charter material and tools as appropriate (see a list here: <https://fra.europa.eu/en/eu-charter/fra-charter-resources>).
- [Full text of the Charter](#), including its Title VII (general provisions governing the interpretation and application of the Charter)
- [Explanations](#) of Article 52 (1) and Article 52 (3) and of any other Charter provision relevant to the case study at issue (the articles are mentioned under the heading EU law of each case study).

## Overall learning objectives

While each case study is intended to illustrate specific issues regarding the applicability of the Charter, there are overall learning objectives for the full set of case studies that the participants in the workshop are expected to achieve. Those are outlined as follows.

Following completion of a training course, participants should be able to:

- Recognise that the Charter does not apply in all cases; it applies only in cases falling within the scope of EU law (Article 51 (1) of the Charter)
- Understand how to use Article 51 (1) of the Charter in a specific case
- Explain the relationship between the Charter and the ECHR (including the case law of the European Court of Human Rights (ECtHR)) using Article 52 (3) of the Charter and the explanations of the Charter
- Understand and apply Article 52 (1) in a specific case
- Gain practice in analysing and assessing a specific case on the basis of the Charter
- Explain the added value of the Charter such as, for instance, the wider scope of Article 47 of the Charter compared to Article 6 of the ECHR
- Understand that the Charter can have horizontal direct effect
- Explain the direct effect of the principle of non-discrimination in national proceedings
- Use FRA Charter material such as the FRA handbook.

## Designing and running a training workshop

### Considerations in designing training

There are a number of considerations to take into account when designing a training workshop. These include:

- The number of participants in the training course
- The average knowledge and expectation of the participants in the workshop
- The availability of a moderator/facilitator for group work
- The availability of supportive digital technology such as online voting tools
- The number of case studies to be covered in the training.

The number of participants in a training course will influence the level of interaction that takes place as well as the design of the course itself. Ideally, courses should involve relatively small groups working together through the case studies with the aid of a moderator or facilitator. For smaller courses, this person could be the trainer, but for larger courses involving multi-

ple groups, additional trainers or facilitators would be desirable. It is also possible to run larger courses without the aid of facilitators for the groups, but this might reduce the quality of the learning experience for participants.

Facilitators have two roles: they act as moderators of the discussions that take place within the group and they can also act as a source of expertise to help guide the group through the work of the case studies.

The availability of supportive digital technology such as voting software can help in the management of a workshop. These tools are especially of added value when workshops are offered online, given that voting or contributing via participants' mobile phones allows the creation of an element of interactivity. Such tools may also be used in physical workshops as they enhance the learning experience for participants.

This set of FRA training material has been developed to be delivered in a modular way. Training for each case study can be delivered as a standalone course or they can be combined to cover some or all of the case studies over the course of multiple days.

The workshops should be preceded by an introductory presentation which should cover a number of important issues, i.e. the structure of the course, its learning objectives, an introduction to the Charter, presentations on specific policy areas, if appropriate, and any other issues specific to the group of participants undertaking training.

### Running a training workshop

A full module (including an introduction to the Charter) for a single case study should run for approximately half a day. If more than one case study is to be part of the course, there is no need to repeat the session on the introduction to the Charter. The module could use the following structure:

- Introduction to the Charter (45-90 minutes)
- Introduction to the workshop (15-20 minutes)
  - Structure and objectives of the course
  - Supporting material
  - Working methods
- Case study (30-45 minutes)
- Plenary session (30-45 minutes).

### Introduction to the Charter

Before starting working group sessions on the case studies, it is advisable to give an introduction to the Charter, including an overview of the EU system of fundamental rights, the field of application of the Charter, the reasons why it is important to check the applicabil-

ity of the Charter and to apply it etc. Educational FRA videoclips on the Charter can be used in this regard.

Make sure that considerable time is reserved for the analysis of Article 51 (1) of the Charter (applicability of the Charter) given that this aspect builds a central element of the case studies. The Charter's field of application could even be a separate presentation as this is an important and complex topic. Part 1 of the FRA Charter handbook could be of help in the preparation of such presentation(s). The trainer could provide participants with a paper version of the handbook as a reference work. (On request to the Publications Office of the EU, FRA material can be shipped free of charge to the training venue, e.g. the Charter handbook in EN: <https://op.europa.eu/en/publication-detail/-/publication/ed1f87aa-e244-11e8-b690-01aa75ed71a1/language-en>. Note that the handbook is available in 22 languages). Participants should also be made aware of the FRA Charter e-guidance, Charterpedia and other relevant FRA resources.

Depending on the subject matter of the training, its length and its addressees, presentations on specific policy areas/topics could be given. This will, however, not be necessary to be able to work with the case studies. The case studies are primarily drafted to recognise the CJEU reasoning concerning the horizontal issues of the Charter and do not presuppose any in-depth knowledge of the specific policy areas.

#### **Introduction to the Workshop (15–20 minutes assuming that the session concerns one case study only)**

The participants are instructed to work in groups on given cases according to the given questions and to present their findings in a plenary session. Each working group has to appoint a reporter.

Handouts containing facts and the legal context, together with multiple-choice question 1 on Article 51 (1) of the Charter are distributed. If the training uses more than one case study, it is possible to use the first question on Article 51 (1) of the Charter only in one case study, although this is not necessary as there are differences between the first questions of the different case studies.

The participants are invited to individually read the case study and answer multiple-choice question 1, preferably via an interactive online presentation tool (± 10–15 minutes). If they do not have access to such a tool, participants can make a note of their answer on paper. Explain that it is necessary to read the case thoroughly so that they are prepared for the working group session. Invite participants to leave the room in silence for a small break when they have finished reading the case study and answering question 1.

#### **Explanation of the reading time**

The levels of participants' knowledge of EU law and command of English will vary. As a result, some participants will need more time to master the facts and the legal framework of the case than others. It is recommended that the participants are given sufficient time to read the case. The advantage of reading the case at this stage, instead of during the working group sessions, is that the participants who need more time do not feel the pressure of the (smaller) working group and that the participants who finish quickly can leave in silence for a small break.

#### **Explanation of the individual and separate approach to question 1**

For the first question, the expected learning effect is best when it is answered in isolation. Moreover, it is better to distribute the other questions after the first question has been answered to avoid the other questions indicating to the participant that the Charter applies.

Where an interactive online presentation tool is used, it is recommended to shorten the question/answers. Below, the sequence and working methods are described in more detail.

#### **Case study workshop (30–45 minutes)**

There is no ideal number of participants per group, but as group size rises above 5 or 6 people the opportunity for interaction becomes more and more limited. Groups of 4 or less can also have drawbacks, e.g. dominant personalities can easily overwhelm small groups. If possible, groups of between 5 and 12 people should be formed.

#### **Working group session of up to 12 participants (30–45 minutes)**

Ideally there would be a moderator/facilitator for the group. This role can be filled by the trainer given the small numbers involved. A reporter for the groups should be appointed at the beginning of the working group session.

#### *Stage I (± 15–20 minutes) – assessing the applicability of the Charter – individual exercise*

Distribute the handout for the workshop to participants and give them time to read the first question on the applicability and to reflect individually.

#### *Stage II (± 15–25 minutes) – further analysis of the case in groups*

Distribute the other questions and instruct participants to discuss the handout and the course material. After each question, the reporter summarises the

findings of the group with a view to reporting them in the plenary session.

### Use in larger settings

For groups of more than 12 participants, it is possible to (partly) use the case studies in an interactive presentation with an online voting tool.

Question 1 (on Article 51 (1) of the Charter) of all cases can be used in a larger setting of more than 12 participants (e.g. during a presentation on Article 51). Suitable cases for this purpose are case 1, case 2 and case 3.

It is possible to use case 1 entirely in a larger setting, as the case is not too long and questions 1 and 3 have multiple choices. Question 2 can be taken out or transformed into an interactive online presentation tool question.

### Plenary session for discussion and feedback (30-45 minutes)

The length of this session will depend on the number of working groups.

Question 1 on Article 51 (1): Show the voting results by using an interactive online presentation tool via the mobile phones of the participants or, in the absence of such a tool, by holding up the relevant number of fingers or speak the numbers out loud. This is followed and accompanied by a plenary discussion (participants should be invited to explain their answer before giving the right answer). Finally, the trainer gives his/her feedback and provides the participants with additional explanations.

The other questions: a reporter from each group will report on the findings and conclusions of their group (four to five minutes for each reporter). This is followed and accompanied by a plenary discussion. Finally, the trainer gives his/her feedback and provides the participants with additional explanations (at this stage, using a digital presentation tool is advisable).

## Learning evaluation

Evaluation is an integral part of any training activity. Therefore, at the end of the workshop, it is recommended to follow an evaluation process on the transfer of learning (e.g. on the four levels of the Kirkpatrick Model<sup>5</sup>) to assess the effectiveness of the workshop and any possible improvements to the programme. At minimum, a first evaluation form on the first level (re-

action) should be handed out to the participants at the end of the training workshop. The first level evaluation asks the participants about their immediate feedback regarding relevance, usefulness, and interactivity of the training. The evaluation of the remaining three levels (learning, behaviour, results) could be done online some weeks or months later, since time is needed for the participants to apply their learning back at their work place. The annex provides two examples of training evaluation forms, one for face-to-face workshops and another one for online workshops.

## Other FRA material and resources related to the Charter

FRA contributes with a wide range of activities, material and e-learning courses to the implementation of the [EU strategy to strengthen the application of the Charter of Fundamental Rights](#). Capacity-building and awareness-raising activities for relevant national institutions and networks (e.g. in cooperation with the European Judicial Training Network, Equinet or the European Network for National Human Rights Institutions) include training workshops, e-learning courses, webinars and conferences such as the [2019 Charter conference](#) or the [2020 Charter debate](#), which were both co-organised with the European Commission (speeches and videos are available online).

The following material and e-learning courses can be especially useful for any Charter training activity.

The **Charter e-guidance** is an interactive course aimed at guiding judges step-by-step through the question of whether or not the Charter is applicable in a given case. It also includes concrete examples of cases. It can be found at: <https://e-learning.fra.europa.eu/local/customlogin/>.

[Charterpedia](#) is an online database of European (CJEU and ECtHR) and national case law that makes use of the Charter. In addition to case law, the tool also provides for each Charter article provisions of related national constitutional law, EU law and international law that may be relevant for the interpretation of the respective Charter article. Moreover Charterpedia collects references to the use of the Charter in parliamentary debates and academic references to the Charter, including references in less commonly used languages. The database is being constantly maintained and new types of data and information will be added.

[The FRA handbook](#) provides national law- and policymakers, legal practitioners and civil servants with practical guidance when examining if the Charter applies to a given bill or draft policy. The handbook also includes a practical checklist on the Charter's applicability and a Charter compliance check allowing

<sup>5</sup> Kirkpatrick (2016), 'Fours Levels of Training Evaluation', Alexandria (US), American Society for Training & Development. The four levels are: reaction, learning, behaviour, results.



legal practitioners to check if an interference with the Charter can be justified.

The FRA's annual **Fundamental Rights Report** always includes a **chapter dedicated to the national use of the Charter**. See, for example, the 2020 edition entitled '[Unlocking the Charter's full potential](#)', which is available in English, French, German, Polish, Portuguese and Slovenian.

**Twenty-seven country-specific Charter factsheets** are available in English and all national languages. They provide information about the Charter, its role and how it is used in the 27 EU Member States. They are available on FRA's website and can also be ordered from the Publications Office of the EU.

Awareness-raising tools such as a five-minute video entitled '[Apply the Charter, deliver our Rights](#)' can be useful. This video was produced in 2019 and provides information on all six themes of the Charter. FRA educational videoclips for use in workshops and training seminars are being produced. A Charter infographic is available at: <https://fra.europa.eu/en/publications-and-resources/infographics/charters-un-tapped-potential-nationally>.

Hard copies of all FRA Charter products can be ordered free of charge via the publications catalogue of the Publications Office of the EU (<https://op.europa.eu/en/web/general-publications/publications>).

For additional information, please contact us: [charter@fra.europa.eu](mailto:charter@fra.europa.eu).

## Further reading: article-by-article Charter Commentaries

Barriga, S. (2003), Die Entstehung der Charter der Grundrechte der Europäischen Union (The genesis of the Charter of Fundamental Rights of the European Union), Nomos

Bifulco, R., Cartabia, M. and Celotto, A. (2001), L'Europa dei diritti: Commento alla Carta dei diritti fondamentali dell'Unione Europea, il Mulino, Bologna

Holoubek, M. and Lienbacher, G. (eds.) (2019), Commentary on the Charter of Fundamental Rights of the European Union (GRC-Kommentar), 2nd edition, Manz, Vienna

Kellerbauer, M., Klamert, M. and Tomkin J. (eds.) (2019), Commentary on the EU Treaties and the Charter of Fundamental Rights, Oxford University Press, Oxford

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# CASE STUDY 1 - CALCULATION OF THE NOTICE FOR DISMISSAL EMPLOYMENT

## Handout for participants

### The facts of the case

A national labour court is facing a dispute between an employee, Ms Ross, and a private employer, Kingside, regarding the period of notice for dismissal. This period had been calculated on the basis of the length of service of the employee. In accordance with national employment law, no account was taken of periods of employment prior to the completion of the employee's 25th year of age. Ms Ross was employed from the age of 18 years for a total of 10 years, by Kingside. Kingside calculated the notice period as if she had three years' service. Ms Ross contested her dismissal before the national labour court, arguing that her period of notice should have been four months instead of three months – a period corresponding to 10 years' service. According to Ms Ross, the national law at issue, in so far as it provides that periods of employment completed before the age of 25 years are not to be taken into account in calculating the notice period, is discrimination on the grounds of age, contrary to EU law, and must be disapplied.

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

##### Article 21 – Non-discrimination

1. Any discrimination based on any ground such as [...] age [...] shall be prohibited.

### Equal Treatment Directive 2000/78/EC<sup>6</sup>

According to the Court of Justice of the European Union (CJEU), Directive 2000/78/EC gives expression to the principle of non-discrimination based on age. The present case occurred after the expiry of the transposition period of this directive.

Article 1 provides:

*"The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."*

Article 2 (1) and (2) state:

*"1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.*

*"2. For the purposes of paragraph 1:*

*"(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1".*

Article 3 (1) provides:

<sup>6</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

*"This Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: [...]"*

*"(c) employment and working conditions, including dismissals and pay".*

Article 6 (1) is worded as follows:

*"Notwithstanding Article 2 (2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*

*"Such differences of treatment may include, among others:*

*"(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*

*"(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*

*"(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."*

*"6. has lasted 15 years, is six months to the end of a calendar month,*

*"7. has lasted 20 years, is seven months to the end of a calendar month.*

*"In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account."*

This provision originates in a law of 1926. The explanatory notes to this provision clarify that the second sentence of Article 622 (2) of the Civil Code reflects the legislature's assessment that young workers generally react more easily and more rapidly to the loss of their jobs and that greater flexibility can be demanded of them. A shorter notice period for younger workers also facilitates their recruitment by increasing the flexibility of personnel management. The threshold of 25 years was the outcome of a compromise between (i) the government of the time, which wanted a uniform extension by three months of the notice period for the dismissal of workers aged over 40 years, (ii) the supporters of a progressive extension of that period for all workers, and (iii) the supporters of a progressive extension of the notice period without taking the period of employment into account, the purpose of the rule being to give employers partial relief from lengthy periods of notice for workers aged under 25 years.

## **Which provisions of national law apply?**

Article 622 of the Civil Code on the notice period for dismissal provides:

*"(1) Notice may be given to terminate the employment relationship of an employee with a notice period of four weeks to the 15th or to the end of a calendar month.*

*"(2) For termination by the employer, the notice period, if the employment relationship in the business or undertaking*

*"1. has lasted for two years, is one month to the end of a calendar month,*

*"2. has lasted five years, is two months to the end of a calendar month,*

*"3. has lasted eight years, is three months to the end of a calendar month,*

*"4. has lasted 10 years, is four months to the end of a calendar month,*

*"5. has lasted 12 years, is five months to the end of a calendar month,*

## Questions

Please answer question 1 before moving on to the next questions.

### Question 1. Does the Charter apply to Article 622 of the Civil Code?

- a. No, this provision dates from 1925 and is not a measure taken to transpose Directive 2000/78/EC.
- b. Yes, as this provision falls within the scope of Directive 2000/78/EC.
- c. No, notices of dismissal are not harmonised with EU law and fall within the competences of EU Member States.
- d. No, the Charter does not apply to situations that are confined in all respects within a single Member State.
- e. Yes, the Charter has the status of primary law and applies in all situations.

## Notes

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Assuming that the Charter applies:

### Question 2. How would you assess Article 622 of the Civil Code in the light of the Union principle of non-discrimination based on age (Article 21 (1) of the Charter)?

- a. Is there a difference in treatment on the grounds of age?
- b. If so, can the difference in treatment be justified? Do you consider the objectives of the national legislature legitimate and how would you assess the provision under the principle of proportionality?

## Notes

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## Background information for trainers

### Introductory notes

This case is based on CJEU, C-555/07, *Kücükdeveci*, 19 January 2010, ECLI:EU:C:2010:21.

The ground of examination in *Kücükdeveci* is the principle of non-discrimination based on age as a general principle of Union law. The case study uses Article 21 of the Charter, to which the same reasoning applies.

*Kücükdeveci* is a landmark case on the doctrine of horizontal direct effect.

## Questions and answers

This section explains the answers to the questions asked in the handouts for participants.

### Question 1. Does the Charter apply to Article 622 of the Civil Code?

- a. No, this provision dates from 1925 and is not a measure taken in order to transpose Directive 2000/78/EC
- b. **Yes, as this provision falls within the scope of Directive 2000/78/EC.**
- c. No, notices of dismissal are not harmonised with EU law and fall within the competences of EU Member States.
- d. No, the Charter does not apply to situations that are confined in all respects to a single Member State.
- e. Yes, the Charter has the status of primary EU law and applies in all situations.

### Introductory remarks

It is important to start the analysis of a Charter case by checking if the Charter applies, based on Article 51 (1) of the Charter. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook can be referred to; it contains a checklist for the application of Article 51 (1) of the Charter.

It is particularly important to remember that EU fundamental rights apply to Member States only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check based on Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which case the Charter

applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights (including the Charter) goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law (compare the wrong **option e**).

### Correct answer

**Option b** is the correct answer (see *Kücükdeveci*, paragraphs 25–27).

Article 622 of the Civil Code qualifies as a measure implementing Union law in the sense of Article 51 (1) of the Charter (see situation B.1 in Chapter 7 of the FRA handbook).

### Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

National measures falling within the material, personal and temporal scope of Union legal acts qualify as Article 51 implementation, even when they are not designed to implement that legislation (see situation B.1 in Chapter 7 of the FRA handbook). Therefore, options a and c are not correct. It must be noticed that the legislation at issue should truly fall within the scope of a particular Union legal act, be it regarding its personal scope (who is covered?), its material scope (what situations are covered?) or its temporal application. The mere interaction of the subject matter of national legislation with a Union legal act is not sufficient to bring that national legislation within the scope of EU law.

The present case occurred after the expiry of the period prescribed for the Member State concerned for the transposition of Directive 2000/78/EC, which ended on 2 December 2006. On that date, that directive had the effect of bringing within the scope of EU law the national legislation at issue, which concerns a matter governed by that directive, in this case the conditions of dismissal.

**Option d** is not correct. According to settled CJEU case law, the provisions of the Treaty on the Functioning of the European Union on freedoms of movement do not apply to situations that are confined in all respects within a single Member State. However, this does not apply to the Charter. In fact, the Charter can apply in situations with no cross-border element, for example when it concerns EU legislation that harmonises a specific field of law across Member States. Consequently, the rules contained in the EU legislation

concerned apply, irrespective of the purely internal nature of the situation at issue in the main proceedings.<sup>7</sup>

**Question 2. How would you assess Article 622 of the Civil Code in the light of the Union principle of non-discrimination based on age (Article 21 (1) of the Charter)?**

**Introductory remark**

An important element in dealing with non-discrimination cases is to distinguish two steps: (i) examination of the existence of a difference in treatment on the ground at issue and (ii) the assessment of a possible ground for justification.

**Correct answer**

The CJEU ruled that “the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation, such as that at issue in the main proceedings”.

**Explanation**

a. Is there a difference in treatment on the grounds of age?

Yes (*Kücükdeveci*, paragraphs 28–31)

Under Article 2 (1) of Directive 2000/78/EC, direct discrimination occurs if one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1.

Article 622 of the Civil Code affords less favourable treatment to employees who entered the employer’s service before the age of 25 years. That national provision thus introduces a difference in treatment between persons with the same length of service, depending on the age at which they joined the undertaking. In the case of two employees, each with 20 years’ seniority in service, the one who joined the undertaking at the age of 18 years will be entitled to a notice period of five months, whereas the period will be seven months for the one who joined at the age of 25 years.

Moreover, the national legislation at issue disadvantages younger workers generally compared with older ones, in that the former may, despite several years’ seniority in service in the undertaking, be excluded from benefiting from the progressive extension of notice periods in the case of dismissal according to the length of the employment relationship, from which

older workers of comparable seniority will, by contrast, be able to benefit.

b. Can the difference in treatment be justified?

No (*Kücükdeveci*, paragraphs 32–42)

**Framework of examination**

The first subparagraph of Article 6 (1) of Directive 2000/78/EC states that a difference in treatment on the grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a “*legitimate aim*”, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are “*appropriate and necessary*”.

*Legitimate aim*: yes (see *Kücükdeveci*, paragraph 36)

The objectives of the kind mentioned in the explanatory notes to the legislative act at issue belong to employment and labour market policy within the meaning of Article 6 (1) of Directive 2000/78/EC.

*Appropriate and necessary*: no (see *Kücükdeveci*, paragraphs 37–42)

With regard to the aim of affording employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility, the legislation is not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25 years, whatever their age at the time of dismissal.

Regarding the aim of strengthening the protection of workers according to their length of service in the undertaking, the extension of the notice period for dismissal according to the employee’s seniority in service is delayed for all employees who joined the undertaking before the age of 25 years, even if the person concerned has a long length of service in the undertaking at the time of dismissal. The legislation cannot therefore be regarded as appropriate for achieving that aim.

The national legislation affects young employees unequally, in that it affects young people who enter active life early after little or no vocational training but not those who start work later after a long period of training.

<sup>7</sup> CJEU, C-483/16, Sziber, 31 May 2018, ECLI:EU:C:2018:367, paras. 56–59.

**Question 3: If Article 622 of the Civil Code is contrary to Article 21 (1) of the Charter (principle of non-discrimination based on age), would the national court, under EU law, be required, in a dispute between private individuals, to disapply the relevant provision of national law?**

- a. Yes, because Directive 2000/78/EC also applies to the private sector (Article 3).
- b. No, because the private employer may rely on a provision of national law by virtue of the Union principles of legal certainty and legitimate expectations.
- c. No, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.
- d. **Yes, because the national court is obliged to provide the legal protection that individuals derive from Article 21 of the Charter.**
- e. No, the employee can get compensation of the state for the incorrect transposition of Directive 2000/78/EC.
- f. Yes, because the prohibition of discrimination based on age contained by virtue of Directive 2000/78/EC in itself suffices to confer on individuals a right that they can rely on as such.
- g. Yes, the Charter applies, as EU law always overrules national law.
- h. No, as it is possible to interpret the relevant provision of national law in a manner that is consistent with Directive 2000/78/EC.

**Correct answer**

**Option d** is the correct answer (see *Kücükdeveci*, paragraphs 50–56).

The national court is obliged to set aside the national provision that violates the principle of non-discrimination. In this case, that would be the setting aside of the following clause: “In calculating the length of employment, periods prior to the completion of the employee’s 25th year of age are not taken into account.” This setting aside of national law is a consequence of the direct effect of Article 21 of the Charter. The rule that directives do not have horizontal direct effect remains valid (see *options a, c, f and g*):

“46. In this respect, where proceedings between individuals are concerned, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, *inter alia*, Case 152/84 Marshall [1986] ECR 723, paragraph 48; Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 20; and Pfeiffer and Others, paragraph 108).”

It is, however, the Charter provision (or general principle of Union law) that is applied directly in a dispute between private individuals. The CJEU ruled as follows:

*“It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, dis-applying if need be any contrary provision of national legislation, [...]”.*

**Explanation**

*Mangold*<sup>8</sup> and *Kücükdeveci* form the starting point for the development of the doctrine of horizontal direct effect. Both cases concerned the effect of the prohibition of age discrimination as a general principle of EU law. The source of the discrimination was a provision in national legislation. The effect of the horizontal direct effect was that the national court had to disapply the discriminatory provision of national law. The effect of *Mangold* and *Kücükdeveci* is that private employers cannot rely on a national provision that turns out to be contrary to the principle of non-discrimination.

**Option b** is incorrect. In D.I.,<sup>9</sup> the Danish court asked about the role of the *principles of legal certainty and legitimate expectations*. According to the CJEU, those principles cannot be a ground for derogation from the obligation of the court to disapply national provisions. The national court may not give priority to the protection of the legitimate expectations of the private employer who has complied with national law.

In *Egenberger*,<sup>10</sup> horizontal direct effect was given for the first time to a provision of the Charter, namely the prohibition of discrimination on the grounds of religion or belief under Article 21 (1) of the Charter. It is also clear from this judgment that fundamental rights may have a binding effect on individuals, even if the discrimination arises from contracts concluded between individuals. This goes beyond *Mangold* and *Kücükdeveci*, which concerned discrimination contained in legislation.

In *Bauer*,<sup>11</sup> the court confers, for the first time, horizontal direct effect to a fundamental right other than non-discrimination, namely the right to paid annual leave (Article 31 (2) of the Charter). This judgment also provides a clear and structured assessment framework for the doctrine.

<sup>8</sup> CJEU, C-144/04, *Mangold*, 22 November 2005.

<sup>9</sup> CJEU, C-441/14, D.I., 19 April 2016.

<sup>10</sup> CJEU, *Egenberger*, C-414/16, 17 April 2018.

<sup>11</sup> CJEU C-569/16 and C-570/16, *Bauer*, 6 November 2018.

Finally, *Cresco*<sup>12</sup> is the first judgment explicitly instructing the national court, in a dispute between individuals, to grant subjective rights to individuals on the basis of fundamental rights. The consequence of horizontal direct effect in this case goes beyond setting aside a national legal provision. The employer faces an obligation arising from the Union fundamental right itself (instead of (the remainder of) the applicable national law). This case concerned non-discrimination on the grounds of religion and belief (Article 21 (1) of the Charter). The judgment shows how a private employer can be *directly bound* by a Charter provision.

**Option e** is incorrect. Based on the relevant case law of the CJEU, it can be concluded that the Charter can have horizontal direct effect. It can be binding on individuals and can create obligations for them. Apart from that, the employee has, in principle, a *right of compensation of the state* for the incorrect transposition of Directive 2000/78/EC. However, the CJEU – without dealing explicitly with this issue – was not satisfied with an answer based on the existence of a civil liability action against the state for incomplete transposition of the directive. The Advocate General (*Kücükdeveci*, paragraph 69) highlights the principal disadvantage of such an answer. It would cause *Kücükdeveci* to lose her case, with financial consequences, even though the existence of age discrimination contrary to Directive 2000/78/EC has been established. In addition, it would require her to initiate fresh judicial proceedings.

**Option f** is incorrect. If it would be possible to interpret the relevant provision of national law in a manner that is consistent with Directive 2000/78/EC, it would not be necessary to disapply the relevant national provision. However in this case, according to the referring court, it is not possible to interpret the relevant provision of national law in a manner that is consistent with Directive 2000/78/EC.

## Further reading

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4 and 7 of the FRA handbook.

Chapter 3.3.3 of FRA's *Handbook on European non-discrimination law – 2018 edition*.

de Mol, M. (2010), '*Kücükdeveci*: Mangold revisited – Horizontal direct effect of a general principle of EU law: CJEU (Grand Chamber), Judgment of 19 January 2010, Case C-555/07, Seda Küçükdeveci v. Swedex GmbH', *European Constitutional Law Review*, Vol. 6, pp. 293–308.

Frantziou, E. (2019), '(Most of) the Charter of Fundamental Rights is horizontally applicable: ECJ 6 November 2018, Joined cases C-569/16 and C-570/16, Bauer *et al*', *European Constitutional Law Review*, Vol. 19, pp. 306–323.

<sup>12</sup> CJEU, C-193/17, *Cresco*, 22 January 2019.



# CASE STUDY 2 - TERMINATION OF EMPLOYMENT RELATIONSHIP AND RIGHT TO PAID ANNUAL LEAVE EMPLOYMENT

## Handout for participants

### The facts of the case

Ms Brown is the sole legal heir of her husband, who had been employed by Mr Jones since 2003 and who had died on 4 January 2013, having been unable to work since July 2012 because of illness. Mr Jones rejected Ms Brown's request for an allowance in the amount of € 3,800, which corresponded to the 32 days of outstanding paid annual leave that her husband had not taken at the time of his death. Mrs Brown brought an action before the national labour court, seeking payment of this allowance. She argues that Article 31 (2) of the Charter of Fundamental Rights of the European Union (the Charter) has the effect of requiring the employer to pay an allowance to the worker's heirs in lieu of paid annual leave not taken. Mr Jones claims that the relevant provisions of national law preclude such a possibility. In addition, he argues that the purpose of the right to paid annual leave, which is to enable the worker to rest and to enjoy a period of relaxation and leisure, is no longer capable of being met once the person concerned has died.

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

Article 31 – Fair and just working conditions - “2. Every worker has the right to [...] an annual period of paid leave.”

The right to paid annual leave has its origins in various international instruments and must be regarded

as a particularly important principle of EU social law. The principle is also expressed in Article 7 of Directive 2003/88. According to the case law of the Court of Justice of the European Union (CJEU), entitlement to paid annual leave includes (i) entitlement to annual leave, (ii) entitlement to continued payment of normal remuneration for that period of rest and (iii) the right to an allowance in lieu of annual leave not taken upon termination of the employment.

#### Working Time Directive 2003/88/EC<sup>13</sup>

Article 7 is worded as follows:

*“1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.*

*“2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.”*

### Which provisions of national law apply?

Paragraph 7(4) of the Federal Law on leave provides:

*“If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.”*

<sup>13</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299, p. 9.

Section 1922(1) of the Civil Code on “universal succession” states the following:

*"Upon the death of a person (devolution of an inheritance), that person's property (inheritance) passes as a whole to one or more than one other persons (heirs)*

## Questions

Please answer question 1 before moving on to the next questions.

**Question 1: Does the Charter apply to Paragraph 7(4) of the law on leave in conjunction with Section 1922(1) of the Civil Code?**

- a. Yes, because it involves the implementation of Directive 2003/88/EC.
- b. No, because according to Article 7 of Directive 2003/88/EC, EU Member States, when allocating paid annual leave, may use their national laws and customs.
- c. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- d. No, the Charter does not apply to situations that are confined in all respects within a single Member State.

## Notes

[illegible]

Assuming that the Charter applies:

**Question 2: How would you assess the compatibility of the law on leave, in conjunction with quoted provision of the Civil Code, with Article 31 (2) of the Charter?**

## Notes

[illegible]

**Question 3: If the relevant national rules have to be considered incompatible with Article 31 (2) of the Charter, what should the national court do in a dispute between private parties? Is there a duty for the national court to oblige Mr Jones (a private individual) to grant to Ms Brown, as the legal heir, an allowance in lieu of paid annual leave by virtue of Article 31 (2) of the Charter?**

## Notes

This image shows a single sheet of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

For more information, please consult the EU Charter pages on the [FRA website](#)



## Background information for trainers

### Introductory notes

This case is based on CJEU, C-569/16 and C-570/16, *Bauer*, 6 November 2018, ECLI:EU:C:2018:871.

## Questions and answers

### Question 1. Does the Charter apply to paragraph 7(4) of the law on leave in conjunction with Section 1922(1) of the Civil Code?

- a. **Yes, because it involves the implementation of Directive 2003/88/EC.**
- b. No, because according to Article 7 of Directive 2003/88/EC, EU Member States, when allocating paid annual leave, may use their national laws and customs.
- c. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- d. No, the Charter does not apply to situations that are confined in all respects within a single Member State.

### Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook can be referred to; it contains a checklist for the application of Article 51 (1) of the Charter.

It is important to remember that EU fundamental rights apply to Member States only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which case the Charter applies? Article 51 (1) essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. The application of the Charter is always linked to the application of other provisions of EU law.

### Correct answer

**Option a** is the correct answer (see *Bauer*, paragraph 53).

Article 622 of the Civil Code qualifies as a measure implementing Union law in the sense of Article 51 (1) of the Charter.

### Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

In this case, according to the CJEU, the national legislation at issue is an implementation of Directive 2003/88/EC.

**Option b** is not correct: very often, EU legal acts allow Member States margins of appreciation. The clearest case is that of directives, which require states to achieve a particular result without dictating the means of achieving that result. However, other EU legal acts such as regulations often allow Member States some room for manoeuvre in their implementation. National measures making use of the margin of appreciation provided by the EU legislature qualify as “implementing Union law”, and the Charter should be respected.

**Option c** is not correct (see introductory remarks).

Option d is not correct. According to the settled case law, the provisions of the Treaty on the Functioning of the European Union on the freedoms of movement do not apply to situations that are confined in all respects within a single Member State. However, this does not apply to the Charter. The Charter can apply in situations with no cross-border element; for example when it concerns EU legislation that harmonises a specific field of law across Member States, as is the case here (Directive 2000/78/EC). Consequently, the rules contained in the EU legislation concerned apply irrespective of the purely internal nature of the situation at issue in the main proceedings.<sup>14</sup>

### Question 2. Assuming that the Charter applies, how would you assess the compatibility of paragraph 7(4) of the law on leave in conjunction with Section 1922(1) of the Civil Code, with Article 31 (2) of the Charter?

<sup>14</sup> CJEU, C-483/16, *Sziber*, 31 May 2018, ECLI:EU:C:2018:367, paras. 56–59.

### Introductory remarks

Chapter 8 of the FRA handbook gives a structured framework for the examination of whether or not a national provision is compatible with the Charter. To make sure all necessary steps are taken, it is advisable to use such a checklist. In this case, the assessment under Article 31 (2) of the Charter should involve Article 52 (1) of the Charter (the general clause for limitations of Charter rights).

The conditions set down in Article 52 (1) are as follows.

- Are the limitations provided for by law?
- Is respect for the essence of the fundamental right at issue guaranteed?
- Do the limitations serve a legitimate objective?
- Is the limitation appropriate to address the problem identified?
- Does the limitation go beyond what is necessary to achieve the objective pursued? Are there any measures available that would interfere less in fundamental rights?
- Are the limitations proportionate to the aim pursued?

In this case, the focus is on the failure to respect the *essence* of Article 32 (2) of the Charter.

### Correct answer

The relevant national provisions read together are not compatible with Article 31 (2) of the Charter (see *Bauer*, paragraphs 57–62).

### Explanation

The expression “annual period of paid leave” in Article 31 (2) of the Charter means that, for the duration of annual leave, remuneration must be maintained; in other words, workers must receive their normal remuneration for that period of leave. That fundamental right also includes, as a right that is consubstantial with the right to paid annual leave, the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship.

Limitations may be imposed on that right only under the strict conditions laid down in *Article 52 (1) of the Charter* and, in particular, of the essential content of that right. This means that the right to paid annual leave acquired cannot be lost at the end of the leave year or a carry-over period fixed by national law, when the worker has been unable to take their leave. Member States are similarly precluded from deciding that termination of the employment relationship caused by death leads retroactively to the complete loss of the right to paid annual leave acquired by the worker,

since such a right, aside from the right to leave as such, includes a second aspect of equal importance, namely the entitlement to a payment, justifying the payment to the person concerned or their legal heirs of an allowance in lieu of annual leave not taken upon termination of the employment relationship.

Therefore, in relation to situations falling within the scope of Article 31 (2) of the Charter, that provision has the effect, in particular, that it is not open to Member States to adopt legislation pursuant to which the death of a worker retroactively deprives them of the right to paid annual leave acquired before their death and, accordingly, their legal heirs of the allowance in lieu thereof by way of the financial settlement of those rights.

If an employment relationship is terminated by the death of a worker, it follows from Article 31 (2) of the Charter that, to prevent the fundamental right to paid annual leave acquired by that worker from *being retroactively* lost, including the financial aspect of those rights, the right of the person concerned to an allowance in lieu of leave that has not been taken may be passed on by inheritance to their legal heirs.

**Question 3. If the relevant national rules have to be considered incompatible with Article 31 (2) of the Charter, what should the national court do in a dispute between private parties? Is there a duty for the national court to oblige Mr Jones (a private individual) to grant to Ms Brown, as the legal heir, an allowance in lieu of paid annual leave by virtue of Article 31 (2) of the Charter?**

### Correct answer

Yes (see *Bauer*, paragraphs 64–91).

The right of every worker to paid annual leave (Article 31 (2) of the Charter) entails, by nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.

If a national court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31 (2) of the Charter, it will therefore be required to ensure the full effectiveness of the article by disapplying that national legislation.

The consequence in this case is that the private party Mr Jones has to pay compensation for untaken leave to the employee's heirs, irrespective of the fact that national law excludes such a possibility.

## Explanation

*Mangold*<sup>15</sup> and *Kücükdeveci* form the starting point for the development of the doctrine of horizontal direct effect. Both cases concerned the effect of the prohibition of age discrimination as a general principle of EU law. The source of the discrimination was a provision in national legislation. The effect of the horizontal direct effect was that the national court had to disapply the discriminatory provision of national law. The effect of *Mangold* and *Kücükdeveci* is that private employers cannot rely on a national provision that turns out to be contrary to the principle of non-discrimination.

In *D.I.*,<sup>16</sup> the Danish court asked about the role of the *principles of legal certainty and legitimate expectations*. According to the CJEU, those principles cannot be a ground for derogation from the obligation of the court to disapply national provisions. The national court may not give priority to the protection of the legitimate expectations of the private employer who has complied with national law.

In *Egenberger*,<sup>17</sup> horizontal direct effect was given for the first time to a provision of the Charter, namely the prohibition of discrimination on grounds of religion or belief under Article 21 (1) of the Charter. It is also clear from this judgment that fundamental rights may have a *binding effect* on individuals, even if the discrimination arises from contracts concluded between individuals. This goes beyond *Mangold* and *Kücükdeveci*, which concerned discrimination contained in legislation.

In *Bauer*,<sup>18</sup> the court confers, for the first time, horizontal direct effect to a fundamental right other than non-discrimination, namely the right to paid annual leave (Article 31 (2) of the Charter). This judgment also provides a clear and structured assessment framework for the doctrine.

Finally, *Cresco*<sup>19</sup> is the first judgment explicitly instructing the national court, in a dispute between individuals, to grant subjective rights to individuals on the basis of fundamental rights. The consequence of horizontal direct effect in this case goes beyond setting aside a national legal provision. The employer faces an obligation arising from the Union fundamental right itself (instead of (the remainder of) the national law). This case concerned non-discrimination on the grounds of religion and belief (Article 21 (1) of the Charter). The judgment shows how a private employer can be *directly bound* by a Charter provision.

## Further reading

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4, 7 and 8 of the FRA handbook.

Frantziou, E. (2019), '(Most of) the Charter of Fundamental Rights is horizontally applicable: ECJ 6 November 2018, Joined cases C-569/16 and C-570/16, Bauer et al', *European Constitutional Law Review*, Vol 19, pp. 306–323.

<sup>15</sup> CJEU, C-144/04, *Mangold*, 22 November 2005.

<sup>16</sup> CJEU, C-441/14, *D.I.*, 19 April 2016.<sup>17</sup> CJEU, C-414/16, *Egenberger*, 17 April 2018.

<sup>17</sup> CJEU, C-414/16, *Egenberger*, 17 April 2018.

<sup>18</sup> CJEU, C-569/16 and C-570/16, *Bauer*, 6 November 2018.

<sup>19</sup> CJEU, C-193/17, *Cresco*, 22 January 2019.



## CASE STUDY 3 - RETIREMENT AGE NON-DISCRIMINATION

### Handout for participants

#### The facts of the case

Ms Sanchez, a farmer, wishes to apply for support for early retirement from farming, which is financed by the European Union. The requirements for allocating such support are contained in EU Regulation No. 1257/1999 concerning the granting of support for early retirement from farming.<sup>20</sup> This regulation was an instrument of the common agricultural policy. Early retirement support acts as an economic incentive that seeks (i) to encourage elderly farmers to definitively stop farming, earlier than they would do under normal circumstances, and (ii) to thus facilitate structural change in the agriculture sector, with a view to better ensuring the economic viability of holdings. The process of allocating support is run by EU Member States.

Ms Sanchez failed to obtain the support. One of the conditions imposed by the relevant Union regulation is that the applicant should not yet have reached the "normal retirement age". This must be determined based on national pension provisions: in this case national pension law. In the relevant provisions, there is a distinction between men and women in terms of the establishment of the pension age.

This regulation is intended to be to the advantage of women but has a negative impact on Ms Sanchez in the context of the allocation of the EU support funding. Based on this national regulation, she, as a mother of two children, had already reached the pension age at

the time of application, and therefore her request for Union support was rejected. If she had been a man, she would not have reached the pension age at the time of the request and would have been eligible for support for early retirement.

Ms Sanchez argues that the Czech pension system violates the EU prohibition of discrimination on the grounds of sex. However, in an earlier case, the European Court of Human Rights (ECtHR) dealt with the issue of differential treatment based on sex in the same national pension system and ruled that it is compatible with the European Convention on Human Rights (ECHR).

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

Article 21 – Non-discrimination:

*"1. Any discrimination based on any ground such as [...] sex [...] shall be prohibited."*

#### Regulation No. 1257/1999

In Chapter IV entitled 'Early Retirement', Article 10 (1) is worded as follows:

*"Support for early retirement from farming shall contribute to the following objectives:*

*"to provide an income for elderly farmers who decide to stop farming,*

<sup>20</sup> Council Regulation (EC) No. 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, OJ 1999 L 160, p. 80.

*“to encourage the replacement of such elderly farmers by farmers able to improve, where necessary, the economic viability of the remaining agricultural holdings*

*“to reassign agricultural land to non-agricultural uses where it cannot be farmed under satisfactory conditions of economic viability.”*

Article 11 (1) provides the following:

“A transferor of a farm shall:

- “stop all commercial farming activity definitively; he may, however, continue non-commercial farming and retain the use of the buildings,
- “be not less than 55 years old but not yet of normal retirement age at the time of transfer,
- “and
- “have practised farming for the 10 years preceding transfer.”

Based on the case law of the CJEU, the definition of “normal retirement age” within the meaning of the second indent of Article 11 (1), in the absence of harmonisation at EU level, falls within the competences of the Member States.

## Which provisions of national law apply?

Article 5 of the national law on retirement sets the pension age as such, for social and historical reasons. The retirement age of men and women is different, with the latter being determined by the number of children a woman has raised (while men can go to pension at the age of 60, women can do so at the age of 53, if they raised at least 5 children, at 54 if they raised 3 or 4 children, at 55 if they raised 2 children, etc.).

*“(1) Retirement age shall be:*

*“(a) for men, 60 years;*

*“(b) for women:*

*“1. 53 years, if they have raised at least five children,*

*“2. 54 years, if they have raised three or four children,*

*“3. 55 years, if they have raised two children,*

*“4. 56 years, if they have raised one child, or*

*“5. 57 years, if the insured persons reached that age by 31 December 1995.”*

## Questions

Please answer question 1 before moving on to the next questions.

### Question 1: Does the Charter apply to Article 5 of the national law on retirement?

Choose one or more responses:

- a. No, pension law is a national matter and is within Member State sovereignty.
- b. No, the ECtHR has dealt with the matter already and found it compatible with the ECHR.
- c. Yes, it is about providing EU agricultural subsidies.
- d. No, the regulation refers to national law for the definition of the pension age. The Union legislature therefore wishes to leave this matter to the Member States.
- e. Yes, the Charter has the status of primary law and, in principle, always applies.

## Notes

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Assuming that the Charter applies:

**Question 2: Does the CJEU need to follow the ECtHR, which has already found that the differential treatment is compatible with the ECHR?**

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**Question 3: How would you assess Article 5 of the national law on retirement in the light of the Union principle of non-discrimination based on sex (Article 21 (1) of the Charter)?**

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**Question 4: If this provision is contrary to the Union principle of non-discrimination based on sex, what should the national court do? How should it determine the “normal retirement age” at the time of transfer of a farm under Article 11 of Regulation No. 1257/1999?**

### Notes

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For more information, please consult the EU Charter pages on the [FRA website](#)



## Background information for trainers

### Introductory notes

This case is based on CJEU, C-401/11, *Soukupová*, 11 April 2013, ECLI:EU:C:2013:223.

*Soukupová* concerns the application of the Union principle of non-discrimination to a national pension scheme in the context of granting EU agricultural aid.

## Questions and answers

### Question 1. Does the Charter apply to Article 5 of the national law on retirement?

Choose one or more responses:<sup>21</sup>

- a. No, pension law is a national matter and is within Member State sovereignty.
- b. No, the ECHR has dealt with the matter already and found it compatible with the ECHR.
- c. **Yes, it is about providing EU agricultural subsidies.**
- d. No, the regulation refers to national law for the definition of the pension age. The Union legislature therefore wishes to leave this matter to the Member States.
- e. Yes, the Charter has the status of primary law and, in principle, always applies.

### Introductory remarks

Checking if the Charter applies is key to this question, based on Article 51 (1) of the Charter.

Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook).

In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

### Correct answer

**Option c** is the correct answer (see *Soukupová*, paragraph 26).

Article 5 of the national law on retirement qualifies as a measure implementing Union law in the sense

of Article 51 (1) of the Charter, but only if it is applied within the framework of the regulation.

### Explanation

According to Article 51 (1) of the Charter, the Charter only applies to national measures *implementing Union law* (which is why option f is not correct). According to the case law of the CJEU, “implementing Union law” has a broad meaning, covering all execution and application of Union law by Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

*In the context of support* for early retirement from farming, EU fundamental rights apply to national measures on the calculation of the pensionable age. This conclusion can be argued in two ways.

- The first line of argumentation is quite straightforward: the allocation of EU subsidies falls within the scope of EU law.
- The second line of argumentation needs some more explanation. As mentioned in the case, the EU regulation on early retirement support for farmers lays down the condition that a farmer who reaches the “normal retirement age” is no longer able to obtain support for early retirement. Furthermore, the regulation does not define the “normal retirement age”. Instead, it refers to national law for the meaning of “normal retirement age”. This is a situation in which the Union legislature is using a national legal concept. As a result, national pension legislation can be used in the context of the EU regulation on early retirement support for farmers. If that happens, the national retirement legislation constitutes implementation in the sense of Article 51 of the Charter, but only in the context of the EU regulation (see situation A.5 in Chapter 7 of the FRA handbook). This is also why option d is not correct.

This case study shows that the Charter can also apply to national acts falling *within the competences (sovereignty)* of Member States and acts that are *not intended* to implement Union law. This is an important point to note and the reason why **option a** is not correct.

### Question 2: Assuming that the Charter applies, does the CJEU need to follow the ECtHR, which has already found that the differential treatment is compatible with the ECHR?

### Correct answer

No.

### Explanation

The Charter contains rights that correspond to rights guaranteed by the ECHR (“corresponding rights”). By

<sup>21</sup> Trainer, do not forget to choose ‘Allow audience to vote for more options’ in the voting tool.

virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR).

According to the 'Explanations relating to the Charter of Fundamental Rights', in so far as Article 21 corresponds to Article 14 of the ECHR, it applies in compliance with that provision.

However, this does not imply that the CJEU has to follow the ECtHR; the ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see Article 52 (3) of the Charter and Chapter 2 of the FRA handbook).

### **Question 3: How would you assess Article 5 of the national law on retirement in the light of the Union principle of non-discrimination based on sex (Article 21 (1) of the Charter)?**

#### **Introductory remarks**

The CJEU performs the assessment of the national pension scheme entirely within the context of the regulation. Both the question of whether or not there is unequal treatment of comparable situations and the question of whether or not the difference in treatment can be objectively justified are answered in the light of the regulation.

The reason for this is twofold.

- First, according to settled case law, the application of the principle of non-discrimination must take place within the specific context (subject matter and purpose) of the Union scheme that introduces the distinction. In that regard, it does not make any distinction between whether the difference in treatment follows directly from the EU legislation at issue or whether it follows indirectly from the EU legislation through the link in national law. See in this regard:<sup>22</sup>
  - *"52. It must be recalled that the elements which characterise different situations, and hence their comparability, must, in particular, be determined and assessed in the light of the subject matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account [...]."*
  - *"53. That approach must also prevail mutatis mutandis in an examination of the compliance with the principle of equal treatment of national measures implementing European Union law."*

- Second, by being closely linked to the purpose and subject matter of the Union legislation, a proper dividing line is drawn between the EU context in which the Union fundamental rights apply and the purely national situation in which the Union fundamental rights do not apply. As stated under question 1, the national pension scheme qualifies as implementation of Union law within the meaning of Article 51 (1) of the Charter only when applied in the context of the regulation. It follows that the CJEU can assess alleged cases of discrimination in the granting of Union aid, but it cannot rule on the discriminatory nature of the national pension scheme as such.

#### **Correct answer**

The difference in treatment in the determination of the "normal retirement age" for the purposes of applying Article 11 (1) of Regulation No. 1257/1999, depending on the gender of the applicant for support for early retirement from farming and, in the case of female applicants, on the number of children raised by the applicant, is not compatible with Article 21 (1) of the Charter.

*Explanation (see Soukupová, paragraphs 29–34)*

According to settled CJEU case law, the principles of equal treatment and non-discrimination require that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

a. Is Mrs Sanchez being treated differently from a man in a comparable position?

Yes - Elderly female farmers and elderly male farmers are in comparable situations, in the light of the purpose of the support for early retirement set out in Article 10 (1) of Regulation No. 1257/1999, which is to encourage such farmers, regardless of their sex and the number of children they have raised, to stop farming early and definitively, with a view to better ensuring the viability of agricultural holdings. Both male and female farmers are entitled to claim such support, if, in accordance with Article 11 (1) of that regulation, they have definitively stopped all commercial farming activity after having practised farming for the 10 years preceding that cessation and are at least 55 years old but not yet of "normal retirement age" at the time of the cessation.

b. Is there an objective justification for this difference in treatment?

No - The objectives of structural change in the agricultural sector envisaged by the support for early retirement from farming granted on the basis of Regulation No. 1257/1999 can clearly be attained without Member States resorting to discriminatory treatment.

<sup>22</sup>CJEU, C-195/12, IBV, 26 September 2013.



**Question 4. If this provision is contrary to the Union principle of non-discrimination based on sex, what should the national court do? How should it determine the concept of “normal retirement age” at the time of transfer of a farm under Article 11 of Regulation No. 1257/1999?**

#### **Introductory remarks**

This question focuses on the direct effect of the Charter in national legal proceedings. The effect of the Charter within national law does not depend on the constitutional law of Member States but follows from EU law and is therefore based on the principles of direct effect and supremacy.

National courts can use Union fundamental rights as independent grounds for review and as sources of rights and obligations. This is no different from other norms of Union law. It is likely that most Charter provisions fulfil these conditions (see Chapter 3 of the FRA handbook).

It must be noted that the direct effect of the so-called Charter principles is limited. According to Article 52 (5) of the Charter, there is a distinction between “rights” and “principles”. Both these types of Charter provisions are binding. The main distinction is that Charter rights describe “an individual legal situation”. They create individual or subjective rights without the need for further legislative elaboration. Principles include a task for governments. The more concrete the Charter provision, the greater the chance there is a “right”. It follows from Article 52 (5) of the Charter that courts may not confer subjective rights on the basis of Charter principles (see Chapter 1 of the FRA handbook). However, this case study concerns a Charter right – Article 21.

This question is about a specific kind of direct effect of the principle of non-discrimination.

#### **Correct answer**

The court should disapply the national provision, and Mrs Sanchez must simply be treated by national courts as if she were a man of the same age when the national authorities consider her eligibility for early retirement support (see Soukupová, paragraph 35).

#### **Explanation**

Under the consistent case law of the CJEU, as long as measures reinstating equal treatment have not been adopted by the national legislature, respect for equal treatment can be guaranteed only by granting persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. The disadvantaged person must therefore be placed in the same position as the person enjoying the advantage concerned.

#### **Further Reading**

Chapter 1 ‘Field of application’ and ‘What is the rationale of Article 51?’ and Chapters 3, 4 and 7 of the FRA handbook.

Chapter 3.3.3 of FRA's *Handbook on European non-discrimination law – 2018 edition*.

ECtHR, *Andrle v. the Czech Republic*, No. 6268/08, 20 June 2011.

## CASE STUDY 4 - INSTALLING ELECTRICITY METERS IN ROMA DISTRICTS *NON-DISCRIMINATION*

### Handout for participants

#### The facts of the case

Ms Dimitrov runs, as a sole trader, a grocer's shop in a district inhabited mainly by persons of Roma origin. Ms Dimitrov is of Bulgarian ethnic origin; she does not define herself as being of Roma origin and is not to be regarded as such. Electricity distributor, ELECTRA, installed the electricity meters for all the consumers of that district on the concrete pylons that form part of the overhead electricity supply network, at a height of between six and seven metres, whereas in the other districts the meters installed by ELECTRA are placed at a height of 1.70 metres, usually in the consumer's property, on the property's façade or on the wall around the property. Ms Dimitrov complained that she was unable to check her electricity meter to monitor her consumption and make sure that the bills sent to her, which in her view overcharged her, were correct. According to ELECTRA, the reasons for this practice are to prevent tampering with electricity meters and illegal electricity extraction, which are apparently especially common in "Roma districts". ELECTRA asserted that, in its view, the damage and unlawful connections are perpetrated mainly by persons of Roma origin. ELECTRA refuses to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they are common knowledge. The practice at issue is carried out across the whole of the district, which is lived in mainly, but not exclusively, by persons of Roma origin. It applies to all the district's inhabitants, irrespective of whether or not their individual meters have been tampered with or have given rise to unlawful connections and regardless of the identity of the perpetrators of such behaviour. The practice has lasted nearly 25 years. Other electricity distribution companies have given up the practice at issue, preferring to use other techniques to combat damage

and tampering, and have restored the electricity meters in the districts concerned to a normal height.

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

Article 21 – Non-discrimination states:

*"1. Any discrimination based on any ground such as [...] ethnic or social origin [...] shall be prohibited."*

According to the case law of the Court of Justice of the European Union (CJEU), the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins, and backgrounds, applies to the Roma community.

#### Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>23</sup>

As provided in Article 1, the purpose of this directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting the principle of equal treatment into effect in EU Member States.

<sup>23</sup> OJ 2000 L 180, p. 22.

Article 2, entitled 'Concept of discrimination', provides:

*"1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.*

*"2. For the purposes of paragraph 1:*

*"(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;*

*"(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*

*"3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment [...]"*

Article 3, entitled 'Scope', states in paragraph 1 (h):

*"Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons [...] in relation to:*

*"(h) access to and supply of goods and services which are available to the public, including housing."*

It follows from the CJEU's case law that the supply of electricity is covered by Article 3 (1) (h) of Directive 2000/43/EC, and that provision must be interpreted as meaning that the installation of an electricity meter at the final consumer's property, which constitutes an adjunct inextricably linked to that supply, falls within the scope of the directive and is subject to observance of the principle of equal treatment, which the directive lays down.

## Which provisions of national law apply?

### Law on energy

Article 10 provides that:

*"activities in the energy sector [...] shall be regulated by the State Commission for Energy and Water Regulation, [...] a specialised independent State body."*

Article 98a provides:

*"The published general conditions shall enter into force for the final customer even without express written acceptance."*

Article 120 states:

*"1. The electricity supplied to final customers shall be measured by commercial measuring instruments belonging to the operator of the electricity transmission or distribution network [...]"*

*"3. The operator of the electricity transmission or distribution network shall determine the type and number of the measuring instruments and equipment [...] and the place where they are installed."*

### General conditions of ELECTRA

ELECTRA's general conditions, as approved by the State Commission for Energy and Water Regulation, state in Article 27:

*"1. Commercial measuring instruments [...] shall be placed in such a way that the customer may visually check the readings.*

*"2. If, in order to protect the life and health of the inhabitants, property, the quality of the electricity, the continuity of the electricity supply or the safety and reliability of the electricity supply system, commercial measuring instruments are installed in places to which access is difficult, the electricity distribution undertaking is required to ensure at its own cost the possibility of making a visual check within three days of a written request to that effect from the customer."*

As regards that possibility of carrying out a visual check, ELECTRA's general conditions provide that it will send a vehicle equipped with a lifting platform, enabling its employees to read electricity meters in an elevated position and transmit that information to the customer. In addition, it remains possible for the customer to pay to have a second meter – a 'checking' meter – installed in their home.

## Questions

Please answer question 1 before moving on to the next questions.

### Question 1: Is the Charter applicable in the situation in question?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- b. No, because the relevant national legislation was not meant to transpose Directive 2000/43/EC into national law.
- c. No, the Charter does not apply to situations that are confined, in all respects, within a single Member State.
- d. Yes, because the situation falls within the scope of Directive 2000/43/EC.

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Assuming that the Charter applies:

### Question 2: Is Ms Dimitrov able to rely on the principle of non-discrimination on the grounds of ethnic origin, even though she is not of Roma origin?

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**Question 3: Are there matters in this case pointing to assessing the differential treatment as “direct” discrimination on the grounds of ethnic origin?**

### Notes

**Question 4: Assuming that the practice qualifies as “indirect” discrimination, would it be justifiable on the ground that the aim is both to prevent fraud and abuse and to protect individuals against the risks to their lives and health that arise from such conduct, as well as to ensure the quality and security of electricity distribution in the interest of all users?**

- a.** Do you consider these objectives legitimate?
- b.** How would you assess the provision under the principle of proportionality?

### Notes

## Background information for trainers

### Introductory Notes

This case is based on CJEU, C-83/14, CHEZ, ECLI:EU:C:2015:480, 16 July 2015.

### Questions and Answers

#### Question 1: Is the Charter applicable in the situation in question?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. No, because the relevant national legislation was not meant to transpose Directive 2000/43/EC into national law.
- c. No, the Charter does not apply to situations that are confined, in all respects, within a single Member State.
- d. **Yes, because the situation falls within the scope of Directive 2000/43/EC.**

#### Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply to Member States only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which case the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

#### Correct answer

**Option d** is the correct answer (CHEZ does not explicitly concern Article 51 (1) of the Charter; however, it is

explained in paragraphs 38–44 that the situation in question falls within the scope of Directive 2000/43/EC).

#### Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

National measures falling within the material, personal and temporal scope of Union legal acts qualify as Article 51 implementation, even when they are not designed to implement that legislation (which is why option b is not correct). It must be noted that the legislation at issue should truly fall within the scope of a particular Union legal act, be it regarding its personal scope (who is covered?), its substantial scope (what situations are covered?) or its temporal application. The mere interaction of the subject matter of national legislation with a Union legal act is not sufficient to bring that national legislation within the scope of EU law (see situation B.1 in Chapter 7 of the FRA handbook).

**Option a** is not correct (see introductory remarks).

**Option c** is not correct. According to the settled case law, the provisions of the Treaty on the Functioning of the European Union on the freedoms of movement do not apply to situations that are confined, in all respects, within a single Member State. However, this does not apply to the Charter. The Charter can apply in situations with no cross-border element, for example when it concerns EU legislation that harmonises a specific field of law across Member States. Consequently, the rules contained in the EU legislation concerned apply, irrespective of the purely internal nature of the situation at issue in the main proceedings.<sup>24</sup>

#### Question 2: Is Ms Dimitrov able to rely on the principle of non-discrimination on the grounds of ethnic origin, even though she is not of Roma origin?

#### Introductory remarks

This question relates to what is known in legal doctrine (and in the Opinion of the Advocate General) as “discrimination by association” (see Chapter 2.1.4 of FRA’s *Handbook on European non-discrimination law*).

<sup>24</sup> CJEU, C-483/16, *Sziber*, ECLI:EU:C:2018:367, 31 May 2018, paras. 56–59.



The CJEU had already recognised the concept in *Coleman* (CJEU, C-303/06, *Coleman*, ECLI:EU:C:2008:415, 17 July 2008.). *Coleman* concerned a mother who was being discriminated against because she had a child with disabilities. In *CHEZ*, the applicant had no personal relationship with the person possessing the protected characteristic.

#### Correct answer

Yes (see *CHEZ*, paragraphs 51–60).

#### Explanation

The principle of non-discrimination applies not to a *particular category of persons* but by reference to specific *grounds*. That principle is intended to also benefit persons who, although not themselves members of the race or ethnic group concerned, suffer less favourable treatment or a particular disadvantage on one of the grounds.

Although Ms Dimitrov is not of Roma origin, the fact remains that it is indeed Roma origin – in this instance that of most of the other inhabitants of the district in which she runs her business – that is the factor on the basis of which she considers that she has suffered less favourable treatment or a particular disadvantage.

#### Question 3: Are there matters in this case pointing to assessing the differential treatment as a “direct” discrimination on grounds of ethnic origin?

##### Introductory remark

Direct discrimination occurs if the treatment is less favourable on the basis of the protected ground. Indirect discrimination occurs when the treatment has the *effect* of putting the relevant persons in a disadvantaged position.

#### Correct answer

Yes (see *CHEZ*, paragraphs 70–91).

#### Explanation

A difference in treatment for reasons relating to racial or ethnic origin must be classified as “direct discrimination”.

It is for national judicial or other competent bodies to assess, in accordance with rules of national law and/or national practice, the facts from which it may be presumed that there has been direct discrimination. There must be enough evidence that the treatment was *due* to the protected ground.

The matters that may be taken into consideration in relation to this connection are as follows.

- It is common ground and not disputed by ELECTRA that the company has established the practice at issue only in districts in which the majority of the population is of Roma origin.
- ELECTRA asserted that, in its view, the damage and unlawful connections are perpetrated mainly by persons of Roma origin. Such assertions could, in fact, suggest that the practice at issue is based on ethnic stereotypes or prejudices, thus combining racial grounds with other grounds.
- ELECTRA failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that such issues are common knowledge.
- The practice at issue is compulsory, widespread and lasting, and:
  - has been extended without distinction to all the district’s inhabitants, whether or not their individual meters have been tampered with or given rise to unlawful connections and regardless of the identity of the perpetrators of such behaviour;
  - still endures nearly a quarter of a century after it was introduced, suggesting that the inhabitants of that district, which is known to be lived in mainly by persons of Roma origin, are, as a whole, considered to be potential perpetrators of such unlawful conduct.

If the national court were to conclude that there is a presumption of discrimination, the effective application of the principle of equal treatment would require that the burden of proof then fall on the respondents concerned, who must prove that there has been no breach of that principle.

Assessing whether there was a breach of the principle of equal treatment requires establishing whether the situations were comparable. All elements characterising the situations need to be taken into account. In the case in question, in principle, all final consumers of electricity who are supplied by the same distributor within an urban area must, irrespective of the district in which they reside, be regarded as being, in relation to that distributor, in a comparable situation with regard to making available an electricity meter intended to measure their consumption and enabling them to monitor changes in their consumption.

#### Question 4: Assuming that the practice qualifies as “indirect” discrimination, would it be justifiable on the ground that the aim is both to prevent fraud and abuse and to protect individuals against the risks to their lives and health that arise from such conduct, as well as to ensure

## the quality and security of electricity distribution in the interest of all users?

### Introductory remark

Indirect discrimination is prohibited, unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The concept of objective justification must be interpreted strictly (see *CHEZ*, paragraphs 112–113).

### Correct answer

No (see *CHEZ*, paragraphs 114–128).

### Explanation

#### a. Legitimate aim?

The aims constitute legitimate aims recognised by EU law. However, since *ELECTRA* relies, for the purpose of justifying the practice at issue, on the numerous instances of damage and numerous unlawful connections to electricity meters that are said to have occurred in the past in the district concerned, and on the risk of such conduct continuing in the future, the company has the task, at the very least, of establishing objectively (i) the actual existence and extent of that unlawful conduct and (ii), in the light of the fact that 25 years have since elapsed, the precise reasons why there is currently a major risk in the district concerned that such damage and unlawful connections to meters will continue. To discharge the burden of proof borne by it in this regard, *CHEZ RB* cannot merely contend that such conduct and risks are “common knowledge”.

#### b. Appropriate and necessary?

*ELECTRA* must also establish that the practice constitutes an appropriate and necessary means of achieving those aims.

- The conditions relating to the appropriateness of the practice for the purpose of pursuing the legitimate aims invoked appear to be satisfied.
- The fact that other electricity distribution companies have given up the practice at issue, preferring to use other techniques to combat damage and tampering, raises questions regarding necessity. It seems that appropriate and less restrictive measures exist for the purpose of achieving the aims invoked by *ELECTRA*.

Even assuming that no other measure as effective as the practice at issue can be identified, the practice at issue cannot be justified, since the disadvantages caused by the practice appear *disproportionate* to the *objectives pursued*. In this regard, the following circumstances are relevant:

- the legitimate interest of the final consumers of electricity in having access to the supply of electricity in conditions that do not have an offensive or stigmatising effect;
- the binding, widespread and longstanding nature of the practice at issue, which, as is common ground, is imposed without distinction and lastingly on all the inhabitants of the district concerned, notwithstanding the fact that no individual unlawful conduct is attributable to most of the inhabitants and that they cannot be held accountable for such acts caused by third parties;
- the legitimate interest of the final consumers inhabiting the district concerned in being able to check and monitor their electricity consumption effectively and regularly.

### Further Reading

Chapter 1 ‘Field of application’ and ‘What is the rationale of Article 51’ and Chapters 3, 4 and 7 of the FRA handbook.

Chapter 3.3.3 of FRA’s *Handbook on European non-discrimination law – 2018 edition*.

Benedi Lahuerta, S. (2016), ‘Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*’, *Common Market Law Review*, Vol. 53, No. 3, pp. 797–817.



# CASE STUDY 5 - USE OF PSYCHOLOGICAL TESTS TO CONFIRM SEXUAL ORIENTATION ASYLUM AND MIGRATION

## Handout for participants

### The facts of the case

In April 2015, Mr Okorie, a Nigerian national, submitted an application for asylum in an EU Member State. In support of that application, he claimed that he had a well-founded fear of being persecuted in his country of origin on account of his homosexuality. As a result of a decision made on 1 October 2015, the national immigration authorities rejected Okorie's application for asylum. Although they considered that his statements were not fundamentally contradictory, they concluded that he lacked credibility on the basis of a psychologist's expert report. That expert's report entailed an exploratory examination, an examination of his personality and several personality tests, and concluded that it was not possible to confirm Okorie's assertion relating to his sexual orientation.

Okorie brought an action before the national administrative court, contending in particular that the psychological tests he had undergone seriously prejudiced his fundamental rights under Article 1 (human dignity) and Article 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union (the Charter) and did not make it possible to assess the plausibility of his sexual orientation. The national immigration authority contested the violation of fundamental rights, stating that the tests are necessary to confirm sexual orientation and do not involve any physical examination or an obligation to view pornographic photographs or videos. In addition, Okorie consented to the test.

## Which EU law provisions are relevant here?

### Charter

#### Article 1 – Human dignity

*"Human dignity is inviolable. It must be respected and protected."*

#### Article 7 – Respect for private and family life

*"Everyone has the right to respect for his or her private and family life, home and communications."*

#### Article 47 – 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."*

*"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."*

*"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

## Qualification Directive 2011/95/EU<sup>25</sup>

Article 4 provides that:

*"1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.*

*2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.*

*"3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:*

*"(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the*

*country of origin and the manner in which they are applied;*

*"(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;*

*"(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;*

*"(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;*

*"(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship."*

<sup>25</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337, p. 9.

It follows from the case law of the Court of Justice of the European Union (CJEU) that Article 4 of Directive 2011/95/EU does not preclude national immigration authorities from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant.

## Questions

Please answer question 1 before moving on to the next questions.

**Question 1: Mr Okorie claims that certain aspects of the procedure before the national court violate Article 47 of the Charter (effective judicial protection). Does Article 47 of the Charter apply to the proceedings before the national administrative court?**

- a.** Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- b.** Yes, because the procedure before the national court concerns the application of Directive 2011/95/EU.
- c.** No, the methods of assessment by the immigration authorities fall outside the scope of EU law, as Directive 2011/95/EU does not harmonise the national rules on evidence.
- d.** No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

## Notes

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Assuming that the Charter applies:

**Question 2: Discuss, on the basis of the relevant provisions of the Charter, if the interpretation of Articles 1 and 7 of the Charter must comply with the same standards as those laid down by the ECHR and the case law of the European Court of Human Rights (ECtHR).**

## Notes

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**Question 3: Is it compatible with the Charter to use a psychologist's expert report on the basis of projective personality tests to assess the veracity of a claim made by an applicant for international protection concerning their sexual orientation? Specify the Charter provisions that are relevant to this question and the relevant factors to be taken into account.**

## Notes

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For more information, please consult the EU Charter pages on the [FRA website](#)

## Background information for trainers

### Introductory Notes

This case study is based on CJEU, C-473/16, *F*, ECLI:EU:C:2018:36, 25 January 2018.

The case study only concerns the first question (see *F*, paragraphs 47–71) on the psychologist's expert report. The fact that the French and Dutch governments as well as the Commission had vigorously contested the reliability of the expert's report at issue is left outside the case study (see *F*, paragraph 58).

## Questions and Answers

### Question 1. Does Article 47 of the Charter apply to the proceedings before the national administrative court?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. **Yes, because the procedure before the national court concerns the application of Directive 2011/95/EU.**
- c. No, the methods of assessment by the immigration authorities fall outside the scope of EU law, as Directive 2011/95/EU does not harmonise the national rules on evidence.
- d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

### Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which case the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with

the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not explicit in *F*, and Article 47 of the Charter does not play a role in that case.

### Correct answer

**Option b** is the correct answer (see situation A.3 in Chapter 7 of the FRA handbook).

### Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, "implementing Union law" has a broad meaning covering all types of execution and application of Union law by the Member States. It means the same as "acting within the scope of EU law" and covers all situations governed by EU law.

In this case, the application of the Charter is connected to Article 4 of Directive 2011/95/EU, which concerns the duty of Member States to assess the relevant elements of the application for international protection.

**Option c** is not correct. The exercise by Member States of such discretion qualifies, in principle, as "implementing Union law", regardless of whether it concerns a mandatory or optional exercise of discretionary powers (see situation A.3 in the FRA handbook). That is why option c is not correct. In addition, it is possible to refer to situation A.4 in Chapter 7 of the FRA handbook: measures falling within the procedural autonomy of Member States qualify as implementation in the sense of Article 51 (1) of the Charter.

**Option a** is not correct (see introductory remarks).

**Option d** is not correct. An important added value of Article 47 of the Charter in comparison with Article 6 of the ECHR is that its scope of application is not limited to civil claims and criminal prosecution. It therefore also applies in other fields of litigation, such as asylum and migration and taxation (see the explanations on Article 47 and Article 52 (3) of the Charter).

### Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant to the interpretation of Articles 1 and 7 of the Charter.

### Correct answer:

Yes. The ECHR and the case law of the ECtHR are, in principle, relevant to the application of Article 7 of the Charter. In this case, however, the CJEU does not refer to case law of the ECtHR. This is probably because the

use of a psychologist's expert report on the basis of projective personality tests does not pass the proportionality test of Article 52 (1) of the Charter.

#### Explanation

The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However, the Charter contains rights that correspond to rights guaranteed by the ECHR ("corresponding rights"). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see the last sentence of Article 52 (3) of the Charter, and Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

Article 52 of the Charter – Scope and interpretation of rights and principles

*"3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*

#### How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and in the explanation on the specific Charter provision at issue in 'Explanations relating to the Charter of Fundamental Rights' (available on EUR-LEX, in 'Treaties/Other treaties and protocols'; OJ C 303, 14.12.2007).

Explanation on Article 7 – Respect for private and family life

*"The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology, the word 'correspondence' has been replaced by 'communications'."*

*"In accordance with Article 52 (3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:"*

*"1. Everyone has the right to respect for his private and family life, his home and his correspondence."*

*"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or*

*morals, or for the protection of the rights and freedoms of others."*

Explanation on Article 52 – Scope and interpretation of rights and principles

*"Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR: [...]"*

*Article 7 corresponds to Article 8 of the ECHR,"*

#### Question 3: Is it compatible with the Charter to use a psychologist's expert report on the basis of projective personality tests to assess the veracity of a claim made by an applicant for international protection concerning their sexual orientation?

##### Introductory remarks

Chapter 8 of the FRA handbook gives a structured framework for the examination of whether or not a national provision is compatible with the Charter. To make sure all necessary steps are taken, it is advisable to use this checklist. In this case, the assessment should involve Article 52 (1) of the Charter (the general clause for limitations).

The conditions laid down in Article 52 (1) of the Charter are as follows.

- Are the limitations provided for by law?
- Is respect for the essence of the fundamental right at issue guaranteed?
- Do the limitations serve a legitimate objective?
- Is the limitation appropriate to address the problem identified?
- Does the limitation go beyond what is necessary to achieve the objective pursued? Are there any measures available that would interfere less in fundamental rights?
- Are the limitations proportionate to the aim pursued?

In this case, the focus is on *the proportionality test*.

##### Correct answer

No. It is incompatible with Article 7 of the Charter (see *F.*, paragraphs 50–70). The CJEU does not deal with Article 1 of the Charter.

## Explanation

The use of a psychologist's expert report such as that at issue in the main proceedings constitutes an interference with that person's right to respect for their private life (see *F.*, paragraph 54). The interference with the private life of the applicant for international protection arising from the preparation and use of such an expert's report is, in view of its nature and subject matter, *particularly serious* (see *F.*, paragraph 60).

In this regard, it is relevant that consent is not necessarily given freely; it is *de facto* imposed under the pressure of the circumstances in which applicants seeking international protection find themselves (see *F.*, paragraph 53).

As this case concerns an interference, the conditions laid down in Article 52 (1) should be checked (see introductory remarks).

The CJEU goes directly to the proportionality test. What is decisive is that the impact of such an expert's report on the applicant's private life seems disproportionate to the aim pursued. In the light of the seriousness of the interference with the right to privacy, the test cannot be regarded as proportionate to the benefit that it may represent for the assessment of the facts and circumstances set out in Article 4 of Directive 2011/95/EU. The following elements viewed together are relevant in this regard.

- The interference with the private life of the applicant for international protection arising from the preparation and use of such an expert's report is particularly serious.
- Such an expert's report is based, in particular, on the fact that the person concerned undergoes a series of psychological tests intended to establish an essential element of their identity that concerns their personal sphere in that it relates to intimate aspects of their life.
- Principle 18 of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity states that no person may be forced to undergo any form of psychological test on account of their sexual orientation or gender identity.

In addition, such an expert's report cannot be considered essential for the purpose of confirming the statements of an applicant for international protection relating to their sexual orientation to adjudicate on an application for international protection based on a fear of persecution on the grounds of that orientation.

## Further Reading

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4, 7 and 8 of the FRA handbook.

Ferreira, N. and Venturi, D. (2018), 'Testing the untestable: The CJEU's decision in Case C-473/16, *F V Bevándorlási És Állampolgársági Hivatal* (28 June 2018)', EDAL – *European Database of Asylum Law*, available at <https://ssrn.com/abstract=3204321>.



# CASE STUDY 6 - SUSPENSION OF A RETURN DECISION ASYLUM AND MIGRATION

## Handout for participants

### The facts of the case

On 15 April 2009, Mr Madagi submitted an application pursuant to national law for a residence permit on medical grounds, on the basis that he was suffering from a particularly serious illness. That application was considered admissible on 4 December 2009. As a result of a decision made on 6 June 2011, Mr Madagi's application for leave to reside was rejected on the ground that his country of origin (Nigeria) has adequate medical infrastructure to care for persons suffering from his illness. On 29 June 2011, Mr Madagi was notified of that decision and was ordered to leave France. This decision must be classified as a "return decision" within the meaning of Article 3 (4) of Return Directive 2008/115/EC. On 7 July 2011, Mr Madagi appealed against this return decision, stating that no appropriate treatment for his illness is available in Nigeria. Under the relevant national rules, no judicial remedy is available to Mr Madagi to suspend the enforcement of a return decision.

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

Article 19 – Protection in the event of removal, expulsion or extradition

*"2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[...]"*

Article 47 – 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."*

*"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."*

*"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

#### Return Directive 2008/115/EC<sup>26</sup>

Article 3 (4) provides the following:

*"For the purpose of this Directive the following definitions shall apply:*

*[...]*

*"(4) 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return".*

<sup>26</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348, p. 98.

Article 5 is worded as follows:

*"When implementing this Directive, Member States shall take due account of:*

*[...]*

*"(c) the state of health of the third-country national concerned and respect the principle of non-refoulement."*

Article 9, entitled 'Postponement of removal', provides in paragraph 1:

*"Member States shall postpone removal:*

*"(a) when it would violate the principle of non-refoulement, or*

*"(b) for as long as a suspensory effect is granted in accordance with Article 13 (2)."*

Article 12 states:

*"Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. [...]"*

Article 13 (1) and (2) provide the following:

*"1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12 (1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.*

*"2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as*

*referred to in Article 12 (1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation."*

Article 14 (1) states the following:

*"Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:*

*[...]*

*"(b) emergency health care and essential treatment of illness are provided".*

## Which provisions of national law apply?

Article 3 (i) of the law on entry, residence, establishment and removal of foreign nationals provides in paragraph 1:

*"A foreign national residing in France who can prove his identity in accordance with paragraph 2 and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in France".*

## Questions

### Question 1. Does Article 47 of the Charter apply to the national procedural rules regarding the (lack of) suspension?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- b. Yes, because these rules qualify as the implementation of Directive 2008/115/EC.
- c. No, because Article 13 (2) of Directive 2008/115/EC does not require that the remedy provided for in Article 13 (1) should necessarily have suspensive effect.
- d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

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Assuming that the Charter applies:

**Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the interpretation of Articles 47 and 19 of the Charter must comply with the same standards as those fixed by the ECHR and the case law of the European Court of Human Rights (ECtHR).**

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**Question 3. Do Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, imply that there has to be a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in their state of health?**

## Notes

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For more information, please consult the EU Charter pages on the [FRA website](#)

## Background information for trainers

### Introductory Notes

This case study is based on the Court of Justice of the European Union (CJEU), C-562/13, *Abdida*, ECLI:EU:C:2014:2453, 18 December 2014.

The case study concerns only the suspensive effect of an appeal against a return decision, dealt with by the CJEU in paragraphs 39–53. It does not cover the question of whether there is a duty to provide for their basic needs. The facts of the case study have been simplified, and this aspect has been left aside.

## Questions and Answers

### Question 1. Does Article 47 of the Charter apply to the national procedural rules regarding the (lack of) suspension?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. **Yes, because these rules qualify as the implementation of Directive 2008/115/EC.**
- c. No, because Article 13 (2) of Directive 2008/115/EC does not require that the remedy provided for in Article 13 (1) should necessarily have a suspensive effect.
- d. No, this case concerns asylum, and Article 47 of the Charter guarantees the right to effective judicial protection only for civil claims and in the context of a criminal prosecution.

### Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which case the Charter plays no role, or does it fall within the scope of Union law in which case the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand

with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not explicit in *Abdida*. The CJEU uses the Charter to interpret Articles 5 and 13 of Directive 2008/115/EC.

### Correct answer

**Option b** is the correct answer (see situation A.3 in Chapter 7 of the FRA handbook).

### Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as “acting within the scope of EU law” and covers all situations governed by EU law.

In this case, the application of the Charter is connected to Article 13 (2) of Directive 2008/115/EC, which gives discretion to Member States to grant temporary suspension of return decisions. The exercise by Member States of such discretion qualifies, in principle, as “implementing Union law”, regardless of whether it concerns a mandatory or optional exercise of discretionary powers. It may even be the case that respect for the Charter leads to the mandatory exercise of discretion on the basis of Union law. This is exactly what happens in this case (other examples in which a discretion turns out to be a duty are CJEU, C-411/10 and C-493/10, N.S., 21 December 2011, paragraphs 55, 68–69 and 106–108; and CJEU, C-329/13, *Stefan*, 8 May 2014, paragraph 35). This is why option c is not correct.

**Option a** is not correct (see introductory remarks).

**Option d** is not correct. An important added value of Article 47 of the Charter in comparison with Article 6 of the ECHR is that its scope of application is not limited to civil claims and criminal prosecution. It therefore also applies in other fields of litigation, such as asylum and migration and taxation (see the underlined parts of the explanation for question 2).

### Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant.

### Correct answer:

Yes. The ECHR and the case law of the ECtHR are, in principle, relevant to the application of Article 47 and Article 19 (2) of the Charter. The CJEU also refers to



case law of the ECtHR (see *Abdida*, paragraphs 47 and 51).

### Explanation

The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However, the Charter contains rights that correspond to rights guaranteed by the ECHR ("corresponding rights"). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

Article 52 of the Charter – Scope and interpretation of rights and principles

*"3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*

How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and the explanation on the specific Charter provision at issue in 'Explanations relating to the Charter of Fundamental Rights' (available on EUR-LEX, in 'Treaties/Other treaties and protocols'; OJ C 303, 14.12.2007).

Explanation on Article 19 – Protection in the event of removal, expulsion or extradition

[...]

*Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see *Ahmed v. Austria*, judgment of 17 December 1996, 1996-VI, p. 2206, and *Soering*, judgment of 7 July 1989)."*

Explanation on Article 47 – Right to an effective remedy and to a fair trial

*"The first paragraph is based on Article 13 of the ECHR:*

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

*"However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.*

[...]

*"The second paragraph corresponds to Article 6 (1) of the ECHR which reads as follows:*

*"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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

*"In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law, as stated by the Court in Case 294/83, 'Les Verts' v. European Parliament (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.*

*"With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union."*

Explanation on Article 52 – Scope and interpretation of rights and principles

*"Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:*

[...]

*"Article 19 (2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,*

[...]

*"Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:*

[...]

*“Article 47 (2) and (3) corresponds to Article 6 (1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation,*

*[...]”*

**Question 3. Do Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, imply that there has to be a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health?**

**Correct answer**

Yes (see *Abdida*, paragraphs 46–53).

According to the CJEU, Articles 5 and 13 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) and Article 47 of the Charter, must be interpreted as precluding national legislation that does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health.

#### **Explanation**

The directive does not require that the remedy provided for in Article 13 (1) has suspensive effect. Nonetheless, the characteristics of such a remedy must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.

In this regard, it should be noted that Article 19 (2) of the Charter states that no one may be removed to a state where there is a serious risk that they would be subjected to inhuman or degrading treatment. By referring to the case law of the ECtHR, the CJEU considers that, in the very exceptional cases in which the removal of a third-country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) of the Charter, proceed with such a removal.

Those very exceptional cases are characterised by the seriousness and irreparable nature of the harm that may be caused by the removal of a third-country national to a country in which there is a serious risk that they will be subjected to inhuman or degrading treatment.

For the appeal to be effective in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in their state of health, that third country national must be able to avail themselves, in such circumstances, of a remedy with suspensive effect, to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115/EC, viewed in conjunction with Article 19 (2) of the Charter.

#### **Further Reading**

Chapter 1 ‘Field of application’ and ‘What is the rationale of Article 51?’ and Chapters 3, 4, 7 and 8 of the FRA handbook.



# CASE STUDY 7 - AMATEUR JOURNALISM ON YOUTUBE DATA PROTECTION AND INFORMATION SOCIETY

## Handout for participants

### The facts of the case

Mr Persson recorded a video inside a police station. The recording concerned a statement he made to the police in the context of administrative proceedings that had been initiated against him. In that video recording, it is possible to see the police facilities and a number of police officers going about their duties. Mr Persson's conversation with the police officers while they carried out certain administrative functions was recorded. He can be heard, as well as the police officers concerned and the person who accompanied him to the police station. Mr Persson published the resulting video recording on the internet site [YouTube](https://www.youtube.com/watch?v=...).

The national data protection authority (DPA) decided that Mr Persson had infringed the relevant national rules, because he had not informed the police officers of the intended purpose of the filming. He also failed to give the national DPA any information about the purpose of making the video recording and publishing it on an internet site, to demonstrate that his aim in making and publishing the film met the requirements of the relevant national rules. Consequently, the national DPA told Mr Persson to remove the video concerned from YouTube and other internet sites on which it had been published.

Mr Persson brought proceedings before the national court. He admits that he did not have the express consent of the police officers either to make the video recording or to subsequently publish it on the internet. However, he argues that, by means of his video recording, he wished to make society aware of something that, in his opinion, constituted illegal conduct on the part of the police.

The national court considers that it is clear from earlier Court of Justice of the European Union (CJEU) case law that the recording and upload activity at issue falls within the scope of the General Data Protection Regulation (GDPR)<sup>27</sup> and that no exemption applies. In particular, the processing does not fall within the exempted "context of purely personal or household activities", since Persson had not restricted the dissemination of the video and had thereby permitted "access to personal data to an indefinite number of people". However, the national court seeks guidance from the CJEU on the following question: do the activities of an individual such as those of Mr Persson fall within the concept of "journalistic purposes", as set out in Article 85 of the GDPR?

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

Article 7 – Respect for private and family life

*"Everyone has the right to respect for his or her private and family life, home and communications."*

Article 8 – Protection of personal data

<sup>27</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016 L 1119 (General Data Protection Regulation).

*"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."*

#### Article 11 – Freedom of expression and information

*"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

*"2. The freedom and pluralism of the media shall be respected."*

### General Data Protection Regulation

#### Purpose

The purpose of the GDPR is to ensure the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data, such as the right to respect for private and family life and the right to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter, while permitting the free flow of personal data.

That objective cannot, however, be pursued without acknowledging that those fundamental rights must, to some degree, be reconciled with the fundamental right to freedom of expression (Article 11 of the Charter).

#### Article 6 – Lawfulness of processing

*"1. Processing shall be lawful only if and to the extent that at least one of the following applies: [...]*

*"(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."*

#### Article 85 – Processing and freedom of expression and information

*"2. For processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information."*

## Questions

To bring his case before the national court, Mr Persson must pay court fees (€ 27.50).

Article 78 (1) of the GDPR does provide for a right to an effective judicial remedy against decisions of DPAs. The GDPR does not, however, contain any provision on court fees or procedural rules governing such legal proceedings.

The obligation to pay court fees follows from national procedural law; the national law at issue applies, in general, to administrative cases and was not designed to implement the GDPR. In this particular case, national procedural law provides for an exemption from court fees. Unfortunately, Mr Persson does not fulfil the requirements for this exemption as, in addition to conditions relating to financial standing, the exemption applies only to persons over 30 years of age. He does not agree and posits that the requirements for exemption violate the principle of non-discrimination (Article 21 of the Charter).

**Question 1. Does the Charter apply to the national law regarding court fees?**

- a.** Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- b.** No, the regulation does not contain any provision on court fees or procedural rules. These provisions fall within the national procedural autonomy.
- c.** No, the national law at issue applies in general and was not designed to execute the regulation.
- d.** Yes, it concerns a national procedural rule that is used within the context of the GDPR.

**Notes**

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Assuming that the Charter applies:

**Question 2. Discuss, based on the relevant provisions of the Charter, if the ECHR and the case law of the European Court of Human Rights (ECtHR) are relevant in this case.**

**Notes**

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**Question 3. How would you assess this case in the light of the GDPR and the Charter? Discuss the balancing between the competing fundamental rights and answer the following questions.**

- a. What factors should the national court take into account? What should be decisive?
- b. Would it make a difference if the case concerned a publication in print media?
- c. What do you think of the views expressed before the CJEU by some Member States that journalism always necessarily connotes a degree of formalism and professional procedures or control?
- d. Does it matter that YouTube is not a journalistic platform?
- e. Is it relevant that the police officers were not informed of the recording and its purpose?

## Notes

[illegible]

For more information, please consult the EU Charter pages on the [FRA website](#)

## Background information for trainers

### Introductory Notes

This case is based on CJEU, C-345/17, *Buivids*, ECLI:EU:C:2019:122, 14 February 2019. *Buivids* draws on previous case law:

- CJEU, C-101/01, *Lindqvist*, ECLI:EU:C:2003:596, 6 November 2003;
- CJEU, C-73/07, *Satamedia*, EU:C:2008:727, 16 December 2008.

Please note that *Buivids* is based on Data Protection Directive 95/46/EC (DPD); this directive has been repealed by the GDPR, which has applied since 25 May 2018. The *Buivids* judgment refers to Article 7 (f) and Article 9 of the DPD. In the handout, these provisions are replaced by the (almost) equivalent Article 6 (1) (f) and Article 85 of the GDPR.

The case study addresses only the part of the judgment that deals with the second question in which the CJEU gives instructions to the national court about how it can verify whether an activity concerns the processing of personal data for journalistic purposes within the meaning of the directive. Regarding the first question, the CJEU ruled that a video recording such as the one in question and its publication on the internet falls within the scope of Directive 95/46/EC. The fact that this is a one-off recording does not alter this. After all, the recording, made with a digital camera, is stored in the memory of that camera and can therefore be regarded as an automated processing of personal data. The fact that there are images of police officers in an office does not detract from this either, since the directive does not provide for an exception to this rule. This part of the judgment is incorporated into the facts of the case study and is therefore “a given” and not part of the questions. It must, however, be noted that this part of the ruling implies that data protection applies to a range of amateur publications of third-party personal data on different forms of social media, such as Facebook and Instagram.

### Questions And Answers

To bring his case before the national court, Mr Persson must pay court fees (€ 27.50). Article 78 (1) of the GDPR does provide for a right to an effective judicial remedy against decisions of DPAs concerning them. The GDPR does not, however, contain any provision on court fees or procedural rules governing such legal proceedings. The obligation to pay court fees follows from national procedural law; the national law at issue applies, in general, to administrative cases and was not designed to implement the GDPR. In this particular case, national procedural law foresees an exemption from court fees. Unfortunately, Mr Persson does not

fulfil the requirements for this exemption as, in addition to conditions relating to financial standing, the exemption applies only to persons over 30 years of age. He does not agree and posits that the requirements for exemption violate the principle of non-discrimination (Article 21 of the Charter).

### Question 1. Does the Charter apply to the national law regarding court fees?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. No, the regulation does not contain any provision on court fees or procedural rules. These provisions fall within the national procedural autonomy.
- c. No, the national law at issue applies in general and was not designed to execute the regulation.
- d. **Yes, it concerns a national procedural rule that is used within the context of the GDPR.**

### Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of application of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which case the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not taken from *Buivids*.

### Correct answer

**Option d** is the correct answer (see situation A.4 in Chapter 7 of the FRA handbook).

## Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, "implementing Union law" has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as "acting within the scope of EU law" and covers all situations governed by EU law.

National measures that are used to guarantee the application and effectiveness of EU law (sanctioning, remedies and enforcement) qualify as "implementation of Union law" in the sense of Article 51 (1) of the Charter. EU fundamental rights apply to these national measures if they are used in an EU law context. This rule normally applies irrespective of whether or not the Union legal act at issue contains specific provisions (obligations) concerning the effectiveness of EU law.

**Option a** is not correct (see introductory remarks).

**Option b** correctly states that such rules fall within the national procedural autonomy. However, as explained previously, acting within this procedural autonomy may qualify as the implementation of Union law (Article 51 (1) of the Charter).

**Option c** is not correct. General rules that are not intended to implement EU law can qualify as Article 51 implementation if the rule is used in the context of EU law.

**Question 2. Discuss, on the basis of the relevant provisions of the Charter, if the ECHR and the case law of the ECtHR are relevant in this case.**

**Correct answer:**

Yes. The ECHR is, in principle, relevant to the application of Articles 8 and 11 of the Charter.

## Explanation

The ECHR does not constitute a legal instrument that has been formally incorporated into Union law. However the Charter contains rights that correspond to rights guaranteed by the ECHR ("corresponding rights"). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

Article 52 of the Charter – Scope and interpretation of rights and principles

*"3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*

How do I know if there are corresponding rights at stake?

The answer can be found in the explanation on Article 52 (3) of the Charter and the explanation on the specific Charter provision at issue in the 'Explanations relating to the Charter of Fundamental Rights' (available on EUR-LEX, in 'Treaties/Other treaties and protocols'; OJ C 303, 14.12.2007).

Explanation on Article 7 – Respect for private and family life

*"The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word 'correspondence' has been replaced by 'communications'."*

Explanation on Article 11 – Freedom of expression and information

*"Article 11 corresponds to Article 10 of the European Convention on Human Rights [...]"*

Explanation on Article 52 – Scope and interpretation of rights and principles

*"[...] Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:*

*[...]*

*"- Article 7 corresponds to Article 8 of the ECHR*

*[...]*

*"- Article 11 corresponds to Article 10 of the ECHR".*

It follows that Articles 8 and 10 of the ECHR (and the respective case law of the ECtHR) are in principle relevant, in terms of establishing the minimum level of protection, to the explanations on Articles 7 and 11 of the Charter (see Buivids, paragraph 65; the CJEU mentions only Article 7 of the Charter).

Article 8 of the Charter has no equivalent article in the ECHR. However, the ECtHR has interpreted Article 8 of the ECHR as including data protection (ECtHR, S and Marper v. UK, Nos. 30562/04 and 30566/04, 4 December 2008 (Grand Chamber)).

In *Buivids*, the CJEU referred to case law in which the Strasbourg Court laid down a number of relevant cri-



teria that must be taken into account (see *Buivids*, paragraph 66).

**Question 3. How would you assess this case in the light of the GDPR and the Charter? Discuss the balancing between the competing fundamental rights**

**Ruling of the CJEU**

Factual circumstances such as the video recording of police officers in a police station while a statement is being made and the publication of that video on a website on which users can send, watch and share videos may constitute the processing of personal data solely for **journalistic purposes** (Article 85 of the GDPR), in so far as it is apparent from that video that the **sole object** of that recording and publication thereof is the **disclosure of information, opinions or ideas to the public**. It is for the national court to determine this.

**Explanation**

The point of departure of the CJEU is that two fundamental rights, namely the right to privacy of the police officers and the right to freedom of expression of the plaintiff, should be reconciled (see *Buivids*, paragraph 62).

a. What factors should the national court take into account? What should be decisive?

The national court must determine whether it appears from the video in question that (i) the sole purpose of the recording and publication of the video was the disclosure (ii) to the public of (iii) information, opinions or ideas (see *Buivids*, paragraph 59).

As a result, to achieve a balance between those two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data must apply only as far as is strictly necessary (see *Buivids*, paragraph 64).

Relevant criteria that must be taken into account are contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and the manner and circumstances in which the information was obtained and its veracity (see *Buivids*, paragraph 66; the CJEU takes this from the case law of the ECHR).

b. Would it make a difference if the case concerned a publication in print media?

The CJEU does not deal with this topic. However, the Advocate General refers to the ECHR stating the following (paragraph 63):

*“The Strasbourg Court has ruled that the risk of harm posed by content and communications on the internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press publishing using more old fashioned technology such as print media.”*

It seems that this element could be relevant in the context of the proportionality test.

c. What do you think of the views expressed before the CJEU by some Member States that journalism always necessarily connotes a degree of formalism and professional procedures or control?

The CJEU considered that the fact that Mr Buivids is not a professional journalist does not exclude the possibility that the recording of the video and its publication on the internet may come within the scope of the exemption for journalistic purposes (see *Buivids*, paragraph 55).

d. Does it matter that YouTube is not a journalistic platform?

No, as the CJEU considered that the fact that Mr Buivids uploaded the video to an internet site such as YouTube cannot in itself preclude the classification of that processing of personal data as having been carried out solely for journalistic purposes, within the meaning of Article 9 of the DPD (see *Buivids*, paragraph 56).

e. Is it relevant that the police officers were not informed of the recording and its purpose?

The possibility of the controller's adopting measures to mitigate the extent of the interference with the right to privacy must be taken into account. In the present case, it is apparent from the documents submitted to the CJEU that it cannot be ruled out that the recording and publication of the video in question, which took place without the persons concerned being informed of the recording and its purpose, constitutes an interference with the fundamental right to privacy of those persons, namely the police officers featured in that video (see *Buivids*, paragraphs 66 and 67).

## Further Reading

Chapter 1 'Field of application' and 'What is the rationale of Article 51?' and Chapters 3, 4 and 7 of the FRA handbook.

ECtHR, *Magyar Helsinki Bizottság v. Hungary*, CE:ECHR:2016:1108JUD001803011, 8 November 2016.

ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, CE:ECHR:2017: 0627JUD000093113, 27 June 2017.

Erdos, D. (2015), 'From the Scylla of restriction to the Charybdis of licence? Exploring the scope of the "special purposes" freedom of expression shield in European data protection', *Common Market Law Review*, Vol. 52, pp. 119–154.

Docksey, C. and Hijmans, H. (2019), 'The Court of Justice as a key player in privacy and data protection', *European Data Protection Law Review*, Vol. 5, No. 3, pp. 300–316.

European Data Protection Supervisor (EDPS) (2017), *Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A toolkit*, Brussels, EDPS, available at [https://edps.europa.eu/sites/edp/files/publication/17-06-01\\_necessity\\_toolkit\\_final\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/17-06-01_necessity_toolkit_final_en.pdf).

European Data Protection Supervisor (EDPS) (2019), *EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data*, Brussels, EDPS.



# CASE STUDY 8 - DUTY OF TELECOMMUNICATION PROVIDERS TO RETAIN METADATA

## DATA PROTECTION AND INFORMATION SOCIETY

### Handout for participants

#### The facts of the case

Mr Brown and Mr Rice each lodged, before the competent national court, applications for judicial review of the legality of certain national provisions. They claimed that these provisions were incompatible with the Charter. Their claims concerned a national regime that imposes on telecommunication providers an obligation to retain communications data in relation to all means of communication and all users. They argued that this general data retention obligation violates the Charter. According to the national legislature, the purpose of this regime is to provide the competent authorities with a means of investigating and fighting crimes. The retention of communications data gives the authorities the ability to access data relating to communications that a person has effected, even before they are suspected of being involved in a crime. As suspects and networks are often not known in advance, the data of all citizens are retained. Once a suspicion against a given person arises, this general duty of retention permits the police or intelligence agency to access historical data that would not be available without a general data retention obligation. According to the national authorities, targeted data retention cannot replace a general duty of retention. Apart from that, the national provisions concern only traffic and location data (known as metadata, which show with whom, where, how and for how long communication took place). It does not include the content of telephone calls, text messages or emails.

### Which EU law provisions are relevant here?

#### Charter of Fundamental Rights of the European Union (the Charter)

Article 7 – Respect for private and family life

*“Everyone has the right to respect for his or her private and family life, home and communications.”*

Article 8 – 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.”*

Article 11 – Freedom of expression and information

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”*

## Directive 2002/58/EC on privacy and electronic communications<sup>28</sup>

### Aim

Directive 2002/58/EC seeks to ensure a high level of protection of personal data and privacy for all electronic communications services regardless of the technology used. To that end, Directive 2002/58/EC contains specific provisions designed to offer protection to the users of electronic communications services against risks to their personal data and privacy that arise from new technology and the increasing capacity for automated storage and processing of data.

### *The principle of confidentiality of electronic communication*

In particular, Article 5 (1) of that directive provides that Member States must ensure, by means of their national legislation, the confidentiality of communications effected by means of a public communications network and publicly available electronic communications services, and the confidentiality of the related traffic data. The principle of confidentiality of communications established by Directive 2002/58/EC implies that, as a general rule, any person other than the users is prohibited from storing, without the consent of the users concerned, the traffic data related to electronic communications. The directive contains some specific exceptions, such as for the necessary processing and storage of traffic data for billing and marketing of services.

<sup>28</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ 2002 L 201, p. 37, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, OJ 2009 L 337, p. 11.

### *Article 15 (1): discretionary power for Member States*

In addition, Article 15 (1) of Directive 2002/58/EC enables Member States to introduce exceptions to the obligation of the principle, laid down in Article 5 (1) of that directive, to ensure the confidentiality of personal data. This provision states the following:

*"1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in [...] this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system [...]. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. [...]"*

## Which provisions of national law apply?

The national legislation at issue in the main proceedings is based on Article 15 (1) of Directive 2002/58/EC and provides, for the purpose of fighting crime, for general and indiscriminate retention of all traffic and location data of all subscribers and registered users with respect to all means of electronic communications. According to the relevant national provisions, telecommunication providers are required to retain the communications data necessary to identify the source and destination of communications, the date, time, duration and type of each communication, the communications equipment used, and the location of the mobile communications equipment used at the start and the end of each communication.

## Questions

Note: the questions concern only the retention of the data and not the issue of the access of the competent national authorities to the retained data.

To bring such cases before court, court fees (€ 27.50) must be paid. This follows from national procedural law. Such law applies in general to administrative cases and was not designed to implement the directive. Directive 2002/58/EC does not, however, contain any provision on court fees or procedural rules governing such legal proceedings.

In this particular case, national procedural law foresees an exemption from court fees. In addition to conditions relating to financial standing, the exemption applies only to persons aged over 30 years. Mr Brown (aged 32) fulfils the requirements for this exemption, whereas Mr Rice (aged 28) does not. Mr Rice does not agree and posits that the requirements for exemption violate the principle of non-discrimination (Article 21 of the Charter).

**Question 1. Does Article 21 of the Charter apply to the national law regarding court fees?**

- a.** Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the European Convention on Human Rights (ECHR).
- b.** No, the directive does not contain any provision on court fees. These provisions fall within the national procedural autonomy.
- c.** No, the national law at issue applies in general and was not designed to implement the directive.
- d.** Yes, it concerns a national procedural rule that is used within the context of the directive.

## Notes

[illegible]

Assuming that the Charter applies:

**Question 2. Discuss, on the basis of the relevant Charter provisions, if the ECHR and the case law of the European Court of Human Rights (ECtHR) are relevant in this case.**

## Notes

[illegible]

Question 3. How would you assess the national rules governing the retention of the data in the light of the Charter?

### Notes

Question 4. If you consider these rules a violation of the Charter, what should be done to make the national legislation at issue Charter proof?

### Notes

For more information, please consult the EU Charter pages on the [FRA website](#)



## Background information for trainers

### Introductory Notes

This case is based on the Court of Justice of the European Union (CJEU), C-203/15 and C-698/15, *Tele2/Watson*, ECLI:EU:C:2016:970, 21 December 2016, which draws on CJEU, C-293/12 and C-594/12, *Digital Rights Ireland*, EU:C:2014:238, 8 April 2014.

Under the Data Retention [Directive 2006/24/EC](#), there was an obligation under EU law for telecommunication providers to retain traffic and location data for the detection, prevention and prosecution of criminal offences. The purpose of this regime was to provide the competent authorities with a means of investigating and fighting serious crime, and, in particular, combating terrorism. The directive was declared invalid by the CJEU in the case *Digital Rights Ireland*. The CJEU ruled that the general retention obligation under the directive did not comply with Articles 7 and 8 of the Charter. As a result of the CJEU judgment, there was no longer a data retention obligation under Union law for telecommunications operators. What did remain, however, was the possibility for Member States to provide such an obligation by virtue of national law, based on Article 15 (1) of Directive 2002/58/EC. Many Member States have made use of this power and have adopted national rules governing the retention of and access to such data. *Tele2/Watson* focuses on the question of the compatibility of such national legislation with the Charter. The case concerns metadata. In most countries, metadata had previously been regarded as less sensitive than the content of a communication. However, the CJEU clarified, in *Tele2/Watson*, that the impact of this information is no less sensitive than the actual content of communications (*Tele2/Watson*, paragraph 99). *Tele2/Watson* concerns both the retention of such data (first question in the judgment) and the access of the competent national authorities to the retained data. This case study focuses only on retention and not on access.

### Questions and Answers

To bring such cases before court, court fees (€ 27.50) must be paid. This follows from national procedural law. Such law applies in general to administrative cases and was not designed to implement the directive. Directive 2002/58/EC does not, however, contain any provision on court fees or on procedural rules governing such legal proceedings. In this particular case, national procedural law foresees an exemption from court fees. In addition to conditions relating to financial standing, the exemption applies only to persons aged over 30 years. Mr Brown (aged 32) fulfils the requirements for this exemption, whereas Mr Rice (aged 28) does not. Mr Rice does not agree and posits that

the requirements for exemption violate the principle of non-discrimination (Article 21 of the Charter).

### Question 1. Does Article 21 of the Charter apply to the national law regarding court fees?

- a. Yes, the Charter is a catalogue of fundamental rights that, in principle, always applies, as is the case with the ECHR.
- b. No, the directive does not contain any provision on court fees. These provisions fall within the national procedural autonomy.
- c. No, the national law at issue applies in general and was not designed to implement the directive.
- d. **Yes, it concerns a national procedural rule that is used within the context of the directive.**

### Introductory remarks

It is important to start the analysis of a Charter case by checking, on the basis of Article 51 (1) of the Charter, if the Charter applies. Feedback in response to this question could focus on the reasons for consistently carrying out this important preliminary step (see Chapter 3 of the FRA handbook). In addition, Chapter 7 of that handbook, in which a checklist for the application of Article 51 (1) of the Charter is given, could also be referred to.

It is very important to remember that EU fundamental rights apply only in situations that fall within the scope of application of EU law. This is a major difference from the ECHR, which applies, in principle, in all cases. In applying the Charter, it is necessary to check on the basis of Article 51 (1) of the Charter: is the case in question a purely national situation in which the Charter plays no role, or does it fall within the scope of Union law in which case the Charter applies? The Article 51 (1) system essentially comes down to this: the application of Union fundamental rights goes hand in hand with the application of other provisions of Union law. It is also important to remember that the application of the Charter is always linked to the application of other provisions of EU law.

This question as such is not taken from *Tele2/Watson*.

### Correct answer

**Option d** is the correct answer (see situation A.4 in Chapter 7 of the FRA handbook).

### Explanation

According to Article 51 (1) of the Charter, the Charter applies to all national measures implementing Union law. According to the case law of the CJEU, “implementing Union law” has a broad meaning covering all types of execution and application of Union law by Member States. It means the same as “acting within

the scope of EU law” and covers all situations governed by EU law.

National measures that are used to guarantee the application and effectiveness of EU law (sanctioning, remedies and enforcement) qualify as “implementation of Union law” in the sense of Article 51 (1). EU fundamental rights apply to these national measures if they are used in this context. This rule normally applies irrespective of whether or not the Union legal act at issue contains specific provisions (obligations) concerning the effectiveness of EU law.

**Option a** is not correct (see introductory remarks).

**Option b** correctly states that such rules fall within the national procedural autonomy. However, acting within this procedural autonomy qualifies as implementation of Union law (Article 51 (1) of the Charter).

**Option c** is not correct. General rules that are not intended to implement EU law can qualify as Article 51 implementation if the rule is used in the context of EU law.

**Question 2. Discuss, on the basis of the relevant Charter provisions, if the ECHR and the case law of the ECtHR are relevant in this case.**

**Correct answer:**

Yes. The ECHR is, in principle, relevant to the application of Articles 8 and 11 of the Charter.

#### **Explanation**

As long as the EU has not acceded to the ECHR, the convention does not constitute a legal instrument that has been formally incorporated into Union law. However the Charter contains rights that correspond to rights guaranteed by the ECHR (“corresponding rights”). By virtue of Article 52 (3) of the Charter, the meaning and scope of those corresponding Charter rights are to be the same as those laid down by the ECHR (including the case law of the ECtHR). The ECHR establishes the minimum threshold of protection. Union law may provide for more extensive protection (see Chapter 2 and steps 9 and 10 in Chapter 8 of the FRA handbook).

Article 52 of the Charter – Scope and interpretation of rights and principles

*“3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”*

#### **How do I know if there are corresponding rights at stake?**

The answer can be found in the explanation on Article 52 (3) of the Charter and the explanation on the specific Charter provision at issue in the ‘Explanations relating to the Charter of Fundamental Rights’ (available on EUR-LEX, in ‘Treaties/Other treaties and protocols’; OJ C 303, 14.12.2007).

Explanation on Article 7 – Respect for private and family life

*“The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word ‘correspondence’ has been replaced by ‘communications’.”*

Explanation on Article 11 – Freedom of expression and information

“Article 11 corresponds to Article 10 of the European Convention on Human Rights

[...]”.

Explanation on Article 52 – Scope and interpretation of rights and principles

*“[...] Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:*

[...]”

*“- Article 7 corresponds to Article 8 of the ECHR*

[...]”

*“- Article 11 corresponds to Article 10 of the ECHR”.*

It follows that Articles 8 and 10 of the ECHR (including the case law of the ECtHR) are in principle relevant, in terms of establishing the minimum level of protection, to the explanations on Articles 7 and 11 of the Charter. Article 7 of the Charter does not have a corresponding ECHR right. The CJEU considers that Article 8 of the Charter is distinct from Article 7 of the Charter and has no equivalent article in the ECHR (see Tele2/Watson, paragraph 129). However, it must be noted that the ECtHR has interpreted Article 8 of the ECHR as including data protection (ECtHR, S and Marper v. UK, Nos. 30562/04 and 30566/04, judgment of 4 December 2008 (Grand Chamber)).

**Question 3. How would you assess the national rules governing the retention of the data in the light of the Charter?**

#### **Introductory remark**

Chapter 8 of the FRA handbook gives a structured framework for the examination of whether or not a

national provision is compatible with the Charter. To make sure that all necessary steps are taken, it is advisable to use this checklist. In this case, the assessment should involve the examination of the existence of a limitation of rights and an examination based on Article 52 (1) of the Charter (the general clause for limitations of Charter rights) and Article 52 (3) of the Charter, which applies to Charter rights corresponding to rights guaranteed by the ECHR.

The conditions laid down in Article 52 (1) of the Charter are as follows.

- Are the limitations provided for by law?
- Is respect for the essence of the fundamental right at issue guaranteed?
- Do the limitations serve a legitimate objective?
- Is the limitation appropriate to address the problem identified?
- Does the limitation go beyond what is necessary to achieve the objective pursued? Are there any measures available that would interfere less in fundamental rights?
- Are the limitations proportionate to the aim pursued?

#### Correct answer

The CJEU ruled as follows:

“Article 15 (1) of Directive 2002/58/EC, read in the light of Articles 7, 8 and 11 and Article 52 (1) of the Charter, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.”

#### Explanation

The assessment could be structured as follows:

a. Does the national legislation at issue limit fundamental rights?

See CJEU, *Tele2*, paragraphs 98–101 (see also Advocate General, *Tele2*, paragraphs 253, 254 and 257).

According to the CJEU, the legislation interferes with the fundamental rights enshrined in Articles 7, 8 and 11 of the Charter.

The CJEU particularly takes into account the fact that retention of *all traffic and location data*, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data have been retained (such as conclusions about their everyday habits, their permanent or temporary places of residence, their daily or other

movements, the activities they carry out, their social relationships and the social environments they frequent). Those data provide a means of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, *than the actual content of communications*. The fact that the data are retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance.

The interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter is “very far-reaching” and must be considered to be “particularly serious”.

With regard to Article 11 of the Charter, the CJEU considers that the retention of traffic and location data could have an effect on the use of the means of electronic communication and, consequently, on the exercise by the users thereof of their freedom of expression, guaranteed in Article 11 of the Charter (see *Tele2/Watson*, paragraph 92). Although Article 11 of the Charter is mentioned in the ruling, there is no separate analysis of this provision in the judgment.

b. Are the limitations provided for by law?

Yes

c. Is respect for the essence of the fundamental right at issue guaranteed?

Yes.

The national legislation at issue does not adversely affect the essence of those rights, as it does not permit retention of the content of a communication (see CJEU, *Tele2*, paragraph 101).

d. Do the limitations serve a legitimate objective?

No.

The purpose of the national legislation is to fight crime.

Normally, when applying Article 52 (1) of the Charter, a whole range of objectives might, in principle, qualify as legitimate aims. In this case, the possible grounds for justification are limited by virtue of Article 15 (1) of Directive 2002/58/EC, which indeed enumerates “the prevention, investigation, detection and prosecution of criminal offences” as possible grounds for justification.

However, the CJEU considers that, given the seriousness of the interference in the fundamental rights concerned represented by national legislation that provides for the retention of traffic and location data, only the objective of fighting serious crime is capable

of justifying such a measure (see CJEU, *Tele2*, paragraph 102).

e. Is the limitation appropriate to address the problem identified?

Yes – this is not explicitly dealt with by the CJEU.

f. Are the limitations proportionate?

No.

According to the CJEU, national legislation such as that at issue exceeds the limits of what is strictly necessary and cannot be considered justified (see CJEU, *Tele2*, paragraph 107).

The CJEU applies a strict proportionality test. Recital 11 of Directive 2002/58/EC states that a measure of that kind must be “strictly” proportionate to the intended purpose, and from the court’s settled case law to the effect that the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only as far as is strictly necessary (see CJEU, *Tele2*, paragraphs 95–96).

The main considerations of the CJEU regarding the proportionality can be summarised as follows (see CJEU, *Tele2*, paragraphs 103–106):

The national legislation provides for the general and indiscriminate retention of all traffic and location data. Moreover, it covers, in a generalised manner, all subscribers and registered users and all means of electronic communication, as well as all traffic data, and provides for no differentiation, limitation or exception according to the objective pursued. It is comprehensive in that it affects all persons using electronic communications services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings. It therefore applies even to persons for whom there is no evidence that their conduct might have a link – even an indirect or remote link – with serious criminal offences. Furthermore, it does not provide for any exception; consequently, it applies even to persons whose communications are subject, according to the rules of national law, to the obligation of professional secrecy.

Conclusion: the limitations cannot be justified by virtue of Article 52 (1) of the Charter. It is therefore not necessary to check whether the Charter right at issue corresponds to a right guaranteed by the ECHR (Article 52 (3)) or has an equivalent provision in other human rights instruments to which the Union or all Member States are party (Article 53).

**Question 4. If you consider these rules a violation of the Charter, what should be done to make the national legislation at issue Charter proof?**

### Correct answer

The main problem under the principle of proportionality is the general and indiscriminate scope of the duty of retention of location and traffic data. As a result, it should be (i) a targeted duty of retention that (ii) is restricted to combating serious crimes. The CJEU gives specific minimum requirements.

*Explanation: requirements given by the CJEU*

(CJEU, *Tele2*, paragraphs 108–112).

The purpose should be to fight serious crime.

National legislation must lay down clear and precise rules governing the scope and application of such a data retention measure and impose minimum safeguards so that the persons whose data have been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. Legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary.

Data retention should be limited to what is strictly necessary. The retention of data must meet objective criteria that establish a connection between the data to be retained and the objective pursued. In particular, such conditions must be shown to circumscribe, in practice, the extent of that measure and thus the public affected.

The national legislation must be based on objective evidence that makes it possible to identify a person whose data are likely to reveal a direct or indirect link with serious criminal offences. A geographical criterion can be used if the competent national authorities consider, on the basis of objective evidence, that there exists, in one or more geographical areas, a high risk of preparation for or commission of such offences.

### Further Reading

Chapter 1 ‘Field of application’ and ‘What is the rationale of Article 51?’ and Chapters 3, 4, 7 and 8 of the FRA handbook.

Cameron, I. (2017), ‘A. Court of Justice balancing data protection and law enforcement needs: *Tele2/Watson and Watson*’, *Common Market Law Review*, Vol. 54, No. 5, pp. 1467–1495.

Docksey, C. and Hijmans, H. (2019), ‘The Court of Justice as a key player in privacy and data protection’, *European Data Protection Law Review*, Vol. 5, No. 3, pp. 300–316.

European Data Protection Supervisor (EDPS) (2017), *Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A toolkit*, Brussels, EDPS, available at [https://edps.europa.eu/sites/edp/files/publication/17-06-01\\_necessity\\_toolkit\\_final\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/17-06-01_necessity_toolkit_final_en.pdf).

European Data Protection Supervisor (EDPS) (2019), *EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data*, Brussels, EDPS.

# ANNEX: EVALUATION FORMS

## 1. Example of training evaluation form for face-to-face workshops

(NB: The following evaluation form template is to be adapted according to the programme and need of a given workshop. It is recommended to hand it out to the participants at least 5 min before the end of the workshop and to collect it again at the end. This is to ensure a high response rate.)

Title, place and date of workshop \_\_\_\_\_

Please indicate the type of organisation for which you work: \_\_\_\_\_

Please indicate your profession: \_\_\_\_\_

**Please help us to improve the quality of our workshops by completing this questionnaire.**

**The evaluation is anonymous.**

Practical and organisational aspects	Excellent	Good	Average	Satisfactory	Poor	N/A
<b>a.</b> Material (publications, tools, presentations, etc.) provided to participants	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>b.</b> Practical aspects: meeting room, staff support, logistical arrangements, programme	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>c.</b> Catering during lunches and breaks	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>d.</b> Friendliness and professionalism of the event organiser (flight and accommodation booking where applicable)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Space for your comments (please let us know some concrete examples of what you liked/did not like and why):						



How interesting and/or relevant to your work was the workshop?	Excellent	Good	Average	Satisfactory	Poor	N/A
a. Overall quality of the workshop	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Session 1: ...	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Session 2: ...	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Session 3: ...	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Space for your comments (please let us know some concrete examples of what you liked/did not like and why):						

OUTCOMES: Did you find the workshop useful in terms of:	Excellent	Good	Average	Satisfactory	Poor	N/A
a. Opportunity to discuss and exchange ideas and lessons learnt	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Getting new input for your own work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Enhancing cooperation with other participants/organisations/institutions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Opportunities provided for networking	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Getting better insight into FRA's material and tools on the EU Charter of Fundamental Rights	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Space for your comments (please let us know some concrete examples of what you liked/did not like and why):						

Please add any other comment that you would like to feed back to us:



Thanks for having taken the time to evaluate your experience and providing us with your valuable feedback!

## 2. Example of training evaluation form for online workshops

(NB: The following evaluation form template is to be adapted according to the actual programme and need of a given workshop. It is recommended to do it as an online survey and send it to participants at the latest on day after the training. This is to ensure a high response rate.)

Title, place and date of workshop \_\_\_\_\_

Please indicate the type of organisation for which you work: \_\_\_\_\_

Please indicate your profession: \_\_\_\_\_

**Please help us to improve the quality of our workshops by completing this questionnaire.**

**The evaluation is anonymous.**

Practical and organisational aspects	Excellent	Good	Average	Satisfactory	Poor	N/A
a. Material (list of Charter publications, material and tools, presentations, etc.) provided to participants	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Practical aspects: invitation, programme and meeting platform	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Space for your comments (please let us know some concrete examples of what you liked/did not like and why):						

How interesting and/or relevant to your work was the webinar?	Excellent	Good	Average	Satisfactory	Poor	N/A
a. Overall quality of the webinar	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Session 1: ...	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Session 2: ...	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Session 3: ...	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Space for your comments (please let us know some concrete examples of what you liked/did not like and why):						

OUTCOMES: Did you find the workshop useful in terms of:	Excellent	Good	Average	Satisfactory	Poor	N/A
<b>a.</b> Opportunity to discuss and exchange ideas and lessons learnt during the interactive discussion	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>b.</b> Getting new input for your own work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>c.</b> Getting better insight into FRA's material and tools on the EU Charter of Fundamental Rights	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Space for your comments (please let us know some concrete examples of what you liked/did not like and why):						
Please add any other comment that you would like to feed back to us:						



Thanks for having taken the time to evaluate your experience and providing us with your valuable feedback!







# PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

The Charter of Fundamental Rights of the European Union (CFREU) is the EU's bill of rights. It always binds the EU institutions and the Member States when they act within the scope of EU law. However, it is far from easy to assess whether a concrete case falls within the scope of EU law. This is why it is necessary to provide training and training material to legal professionals so that they can understand the field of application of the Charter as laid out in its Article 51.

This trainer's manual aims at providing guidance on both the organisation and the implementation of such trainings based on a series of case studies, which will be extended in the future.

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