Part II - When can an individual seek protection under the Charter

When can an individual seek protection under the Charter?

1. The beneficiaries of the Charter's protection

Since the entry into force of the Treaty of Maastricht in 1993, any person with the citizenship of an EU Member State is automatically an EU citizen. EU citizenship is additional to national citizenship and confers a set of rights, including the right to non-discrimination on the basis of nationality when the Treaty applies, and the right to move and reside within the EU under conditions established by EU law. More information on the rights deriving from EU citizenship and how to exercise them is available here.

It is worth noting that **EU citizens are not the only ones to benefit from this protection: citizens of non-member States** and **stateless persons** may rely on the Charter. **Legal persons** also benefit from the protection afforded by the Charter with respect to certain rights: more information on this is provided in section 1.1.

A few fundamental rights laid down in the Charter apply only to EU citizens, notably:

the right to work and freedom to choose an occupation (Article 15(1))

the freedom to conduct a business (Article 16)

the right to vote for and stand as a candidate in European Parliament and municipal elections (Articles 39 and 40)

the right to move and reside freely with the EU (Article 45)

The right to protection by the diplomatic and consular authorities of any other EU Member State (Article 46)

It should be noted that, to date, the Court of Justice of the European Union has only allowed EU citizens to rely on the right not be discriminated against on nationality grounds within the scope of the Treaties, laid down in Article 18 TFEU and now also in Article 21(2) of the Charter.

However, both EU citizens and *non-EU citizens* may exercise the majority of the fundamental rights laid down by the EU Charter. The decisive factor is whether responsibility for the alleged violation of fundamental rights is attributable to the European Union itself or to an EU Member State when implementing EU law. Section 3 provides guidance in this respect.

1.1 Legal persons as beneficiaries of the Charter's protection

Some of the provisions of the Charter specifically include among the beneficiaries of the rights they set out 'any... legal person... having its registered office in a Member State', in particular:

the right of access to documents of the institutions, bodies, offices and agencies of the EU (Article 42);

the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices and agencies of the EU (Article 43);

the right to petition the European Parliament.

However, the majority of the Charter's provisions contain no such indication.

Some of them appear to be inherently limited to natural persons, for instance: Article 1 (human dignity), Article 2 (right to life), Article 3 (right to the integrity of the person), Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), Article 5 (prohibition of slavery and forced labour), Article 9 (right to marry and right to found a family), Article 18 (right to asylum) , Article 19 (protection in the event of removal, expulsion or extradition), Article 23 (equality between women and men), Article 24 (the rights of the child), Article 25 (the rights of the elderly), Article 26 (integration of persons with disabilities), Article 29 (right of access to placement services), Article 30 (protection in the event of unjustified dismissal), Article 31 (fair and just working conditions), Article 32 (prohibition of child labour and protection of young people at work), Article 33 (family and professional life), Article 34 (social security and social assistance), Article 39 (Right to vote and stand as a candidate at elections to the European Parliament), Article 40 (Right to vote and stand as a candidate at municipal elections), Article 45 (freedom of movement and of residence) and Article 46 (diplomatic and consular protection).

In contrast, the Court of Justice has ruled that legal persons can rely on only some of the Charter's provisions that do not explicitly mention them amongst the beneficiaries, for example: Articles 7 and 8 on respect for private and family life and the protection of personal data (see Case C-92/09 Volker und Markus Schecke), and Article 47(3) on access to legal aid (see Case C-279/09 DEB). At the same time, the case-law of the Court of Justice shows that the protection afforded to legal persons may differ, in terms of scope and level, from that enjoyed by natural persons.

For the remaining provisions, it is not clear whether they extend to legal persons or not. If a case involving one of these provisions comes, in any other respect, within the scope of application of the Charter, it might be worth asking the Court of Justice to clarify whether legal persons are included among the beneficiaries of such protection.

In making its assessment, the Court of Justice would have to take into consideration the case-law of the European Court of Human Rights, if the Charter provision relied upon was characterised as a 'corresponding right' within the meaning of Article 52(3) of the Charter (see Part III, sections 5 and 5.1 and the *Schecke* and *DEB*cases, referred to above).

2. The entities obliged to respect the Charter

According to Article 51(1), **the Charter is binding on**:

the EU institutions, bodies, offices and agencies;

the Member States, but only when they are implementing EU law.

Any **EU institution, body, office or agency** is bound to respect the Charter, as are their staff in the fulfilment of their duties.

They must respect the Charter when adopting and applying EU acts and, more generally, when they exercise the powers and tasks conferred on them by the EU Treaties (the TEU and TFEU).

Examples of fundamental rights' violations by EU **institutions, bodies, offices or agencies**, or by their staff, include:

the adoption of a legal act (an EU directive or regulation, for instance) that does not provide adequate safeguards as regards the treatment of personal data;

the refusal to grant access to documents;

an investigation by Commission officials seeking to ascertain infringement of competition rules contrary to the right to respect for private life.

Note that the Charter also binds the EU institutions, bodies, offices and agencies when they adopt or apply an act intended to have effects also or exclusively outside the EU. Similarly, the Charter binds EU employees even when they perform their duties outside the European Union. Examples include:

an international agreement between the EU and the US concerning the exchange of personal data;

a decision of the Council of the European Union ordering the freezing of the funds of an Iraqi national or a legal person established in Iraq.

As far as the notion of ‘State’ is concerned, the explanation of Article 51(1) (for the ‘Explanations relating to the Charter of Fundamental Rights', see Part III, section 6) clearly establishes that this refers to ‘the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law’. The Charter is also binding on States when they act as employers.
Moreover, according to the settled case-law of the Court of Justice, the notion of ‘State’ also includes ‘a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals’ (see Case C-282/10 *Dominguez*). Therefore, when such a body implements EU law, it is bound to comply with the Charter in the same way as any State entity.
To recapitulate, under Article 51(1), the Charter can be relied upon for recourse against any infringement of fundamental rights deriving from an act adopted by the EU institutions, bodies, offices and agencies. In contrast, individuals may only invoke the protection afforded by the Charter in response to an infringement derived from a national act implementing EU law.
Therein lies a **significant difference** in relation to the ECHR and national constitutions: action can be brought against any act by an EU Member State if it is contrary to the State’s constitution or the ECHR.
An individual might therefore doubt whether it was worthwhile to take the trouble to establish that a national act that allegedly breached the Charter was taken in a context of applying EU law.
From **the standpoint of the individual invoking such protection**, this additional effort is worthwhile inasmuch as the Charter, if applicable:
enables the victim of the breach to avail him/herself of the different judicial and non-judicial forms of recourse provided by EU law (see Part I, section 4); for instance, before submitting a complaint to the European Court of Human Rights in Strasbourg concerning a breach of the ECHR, the victim must first exhaust national remedies (on this rule and the limits to its application, see the Practical guide on admissibility criteria);
whereas the first national courts to deal with the case can submit a reference to the Court of Justice for a preliminary ruling (see section 4);
EU law produces distinct effects at national level, which can provide particularly effective protection for the victim of a violation, such as duty incumbent on a national court to disapply any national act that is incompatible with the Charter or to interpret it in conformity with the Charter, and the payment of damages by the Member State concerned.
In terms of **the relationship between EU law and national law (the legal perspective)**, the issue of whether a national act implements EU law must first be established; since EU law prevails over national law (primacy), national law must be in accordance with EU law.
In substance, within the context of implementing EU law, the Charter constitutes the point of reference for the protection of fundamental rights. National sources protecting fundamental rights may play a role; however, their significance depends on the degree of the connection between EU law and the national provisions concerned in the case in dispute (see Part III, section 7).

2.1 When private parties must respect the Charter

Private parties are beneficiaries of the protection afforded by the Charter. In contrast, it contains no reference to them as being among the categories bound by it.
Nevertheless, this does not mean that private parties are never under an obligation to comply with the Charter.
According to the Court of Justice, a Charter **provision** that is **'sufficient in itself to confer on individuals an individual right which they may invoke as such' may be invoked to request the disapplication of conflicting national provisions even in proceedings between private parties** (see Case C-176/12 *Association de médiation sociale*, paragraph 47).
We could bear in the following example (based on case C-555/07 Kücükdeveci). Mr A is a private sector employer and Ms B is his employee. Mrs B receives a letter notifying her of her dismissal and granting her a notice period of one month. This is in line with the national rules in force, according to which the notice period is one month where the employee has been working for the employer for less than two years, excluding any time before the employee’s 25th birthday. According to Ms B, who had been employed from the age of 18, the provision in question is discriminatory on the ground of age. She therefore initiates legal proceedings against her employer before the national courts. The national court holds that the allegedly discriminatory national provision implements EU law, since it governs the criteria for dismissal and falls within the scope of Directive No 2000/78/EC establishing a general framework for equal treatment in employment and occupation. In confirming that the national provision in question implements EU law, the Court of Justice rules that Article 21(1) of the Charter, prohibiting discrimination on the basis, inter alia, of age, may be invoked and used in order to disapply the conflicting national provision, including with respect to proceedings involving private parties. In the view of the Court of Justice, the national provisions such as the one in dispute are discriminatory on the ground of age; therefore they should not be upheld by the national court with respect to Ms B.
In order words, although the duty of ensuring that national rules are in line with the Charter is only binding on Member States, their failure with respect to the obligation in question may lead to the direct application of the Charter’s provisions with regard to private parties.
This distinctive feature of the Charter, referred to as **direct horizontal effect**, is an **additional advantage compared with the ECHR**, the provisions of which do not have the same effect.
There are, of course, **two contrasting sides** to the direct horizontal effect of the Charter: on the one hand, it enhances the protection afforded to the fundamental rights of individuals; on the other, private parties that comply with national law might lose their cases.
It is therefore very important to be aware of the Charter provisions which have direct horizontal effect. More information on this subject is provided in Part III, section 7.

3. When a national act implements EU law

According to the Court of Justice, a national measure implements EU law when it ‘falls within the scope of EU law’ (see Case C-617/10 *Åkerberg Fransson*, paragraphs 17-23). Thus, the Charter applies to any national acts **falling within the scope of EU law**, and to such acts only.
At first sight, this further, obscure statement does not provide any indication of the extent of the scope of application of the Charter. Yet, before the Treaty of Lisbon, the Court of Justice based itself on this wording to delineate the field of application of the fundamental rights protected as general principles of EU law. This case-law provided clarifications on the matter beyond the wording implementation/field of application of European Union law. This means that the Charter’s protection cannot be triggered simply by claiming that the case at issue concerns a breach, by a national act, of a fundamental right laid down in the Charter, but instead,
a national act falls within the scope of application of EU law, and thus of the Charter, because there is a rule of EU primary or secondary law, distinct from the allegedly breached Charter provision, which applies to the case at issue.
In other words, **the situation in which the breach took place must be governed by rules of EU law**. A list of situations in which this criterion is fulfilled is given in Part III, section 2.
In addition to the provisions of the Charter itself, there are other provisions of EU law which cannot be used to trigger the protection afforded by the Charter. In particular, the provisions of the Treaties (TEU and TFEU) that confer on the European Union the power to act in certain fields cannot, in and of themselves, trigger the application of the Charter. But, if the EU legislative instances exert their law-making powers by adopting acts in a certain field, violations of fundamental rights taking place within the scope of such acts will enter into the scope of application of the Charter.

For example, Article 30 provides protection against unjust dismissal. The European Union has the legal power to regulate dismissals, but it has not exercised that power to date. Therefore, a decision to dismiss an employee cannot be challenged under Article 30 of the Charter in the absence of any other

connection to EU law, as in Case C-117/14 *Poclava*.

3.1 A practical example

The following two cases concern national rules preventing access to legal aid by legal persons. However, the Charter, or more specifically Article 47(3) on the right to legal aid, is applicable in only one of these cases.

ALFA case*: Alfa, a German company operating in the natural gas sector, wants to bring legal action to establish Germany's liability under EU law. Following Germany's failure to transpose within the fixed deadline two EU Directives concerning the marketing of natural gas, Alfa experienced major financial losses. Lacking any income or assets, Alfa cannot pay a lawyer and therefore applies to receive legal aid. Nevertheless, according to German rules, only natural persons can receive legal aid. Alfa challenges the national rules before a domestic court.*

BETA case*: Beta, a Portuguese commercial company trading agricultural products, wants to bring a claim against Omega, another commercial company established in Portugal, in order to recover a credit for a service provided in Portugal. However, Beta lacks any income or assets and cannot pay a lawyer. It applies for legal aid, but the application is rejected as, according to Portuguese law, only natural persons can receive legal aid. Beta challenges the national rules before a domestic court.*

ALFA can invoke the protection of the Charter, whereas BETA cannot. Why?

The legal action that Alfa wants to bring against Germany is aimed at enforcing a right granted by EU law: the right to have Member States repair the damage caused by violations of their EU law obligations (such as the obligation to transpose an EU Directive within the fixed deadline). Thus, more is involved than the 'mere' claim that a provision of the EU Charter has been violated.

In contrast, no EU rule of law other than the provision of the Charter allegedly breached applies to the Beta case. All the elements of the case are situated within the confines of the territory of a single Member State (so the Treaty provisions on the free movement of services do not apply), the legal action that Beta wants to bring does not concern a situation governed by EU law and there is no EU legislation concerning access to legal aid in court proceedings in the Member States.

The ALFA and BETA cases are inspired by two real cases settled by the Court of Justice, respectively Case C-279/09 *DEB* and Case C-258/13 *Sociedade Agrícola*.

4. When the Charter is not applicable

The Charter cannot be relied upon to challenge a violation of fundamental rights stemming from a national act that does not implement EU law (see section 2).

This does not mean that the persons claiming a violation of their fundamental rights are deprived of any protection. Their complaints need to be submitted to the national courts or to the European Court of Human Rights, depending on the circumstances, instead.

The **question** is **not** *whether* there is a door that one can knock on to seek protection, but ***which*** **is the right door to knock on**.

The page 'Who to contact' provides some information on where to turn to seek qualified advice on the proper course of action.

Moreover, legal practitioners can find additional explanations on the Charter's scope and effects in Part III.

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