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# The EU Charter, Environmental Protection, and Judicial Remedies

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The first thing to note about the Charter, when it is compared with the ECHR, is that it encapsulates a broader range of rights than its older Council of Europe cousin. Thus, rights will be discussed below that have no direct textual parallel with the ECHR.

That said, the Charter is more complex in the sense that there are a whole set of rules of which a legal advisor or judge needs to be appraised in order to ascertain whether the Charter is applicable at all. Unlike the ECHR, it is not a simple matter of determining whether a dispute falls, for example, within the scope *ratione materie, personae,* or *temporis,* of the Charter, although these rules apply to the Charter as much as they do to the ECHR. Rather, a set of rules have been elaborated in Court of Justice case law, and which are not written up in their entirety in the Charter itself, which might be described as operational rules for its application.

These are discussed in detail in an article by me that is posted to this web site and which is entitled "Remedies Under the EU Charter of Fundamental Rights". It appeared in 1 (2016) Europarattslig Tidskrift 15. The below is an attempt to apply these rules to the context of environmental litigation.

The provisions of the Charter that are relevant to environmental protection are attenuated, like all its provisions, by the general rules that govern the Charter's application. The key rules are as follows;

(i) the Charter cannot be used to expand the field of application of EU law, so each Charter article must be read within the context of these limits (see Article 51 (2) and 52 (2));

(ii) there is a distinction between rights and principles. Rights are directly justiciable but principles are not (Article 52 (5));

(iii) the Charter applies only to the "institutions, bodies, offices and agencies" of the EU and Member States "only when they are implementing EU law" (Article 51 (1));

(iv) there is a general derogation provision in Article 52 (1) of the Charter that is worded in almost exactly the same way as the derogation in Articles 7 to 11 of the ECHR. However, it seems to apply to *all* of the judiciable rights in the Charter;

(v) the case law of the ECHR provides the basis of the minimum standard of fundamental rights protection. However, while the EU can provide a higher standard of fundamental rights protection (see Article 52 (3)) neither Member State or national fundamental rights law can be applied if it is inconsistent with the primacy of EU law (c.f. Article 52 (4));

(vi) the wording of Article 47 of the Charter on effective judicial remedies seems to indicate that this provision and EU fundamental rights rules that fall within its remit may provide more rigorous protection than Articles 6 and 13 ECHR. But is this so?

**I The Charter and the Field of Application of EU law**

There is only one provision of the Charter that is directly refers to environmental protection.

**Article 37**

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principles of sustainable development".

What does this provision mean? See the Opinion of Advocate Kokott of 8 September 2016 in C-444/15 Associazione Italia Nostra Onlus v Comune di Venezia and Others, Opinion of 8 September 2016, paragraphs 24 to 35.

Further, due to Article 51 (1 and 2) and Article 52 (2) Article 37 cannot mean more than Article 191 (2) TFEU and Article 3(3) TEU.

**Article 191(2) states that:**

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union."

**Article 3(3) TEU states that:**

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

Why is the meaning of Charter Article 37 hemmed in by Article 191(2) and (3) Article 3 (3) TEU?

Because of Article 51 (1 and 2), 52 (2) of the Charter and Article 6 (1) TEU, second sentence. The Court has held, pursuant to these provisions, that the Charter cannot extend the field of application of European Union law beyond the powers of the Union and nor can it establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties (see e.g. paragraph 78 of Case C-40/11 Yoshikazu Iida, judgment of 8 November 2012).

Not only does this mean that Article 37 can have no role in expanding the limits of the competence of the EU to pass environmental measures (see notably C-370/12 Thomas Pringle, judgment of 27 November 2012), the obligation to "integrate" a high level of environmental protection and improvement of the quality of the environment" in Charter Article 37 is necessarily restricted by the same limits that appear in the TEU and the TFEU. Eg.

- Diversity of the regions of the EU needs to be taken into account. Article 191 (2) first paragraph. Thus, no objection to an EU law and policy that does this could be made on the basis that it is not specifically mentioned in Charter Article 37

- Similarly, because the second paragraph of Article 191 paragraph 2, allows Member states to take provisional measures for 'non-economic environmental reasons' in the context of EU harmonization measures concerning the environment, Article 37 could not be called upon to question an EU measure that provides for this.

- Charter Article 37 cannot be relied on to criticize the Union for taking account of any of the matters listed in Article 191 (3) (available scientific and technical data; environmental conditions in the various regions of the EU; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of the regions) even if they are, in an individual case, inconsistent with a high level of environmental protection.

See similarly, in the context of equality law, Case C – 54/13 Kaltoft (FOA), judgment of 18 December 2014. Article 21 of the Charter precluding discrimination on 'any ground' cannot be relied on to expand the bases of discrimination recognized under EU law. The same approach necessarily applies to Article 37 of the Charter.

**(2)** The same applies to other provisions of the Charter that are useful to those seeking to ensure the practical application of a high standard of environmental protection. Eg Article 41 right to good administration or Article 42 right of access to documents.

(a) Article 41 states as follows.

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

In the context of EU environmental law, Advocate General Kokott has attributed Article 41 with the following content. See Case C-186/04 Housieaux, Opinion of 27 January 2005.

> "32. The right to good administration creates for the administration an obligation to give reasons for its decisions. (16) Such a statement of reasons is not merely a general expression of the transparency of the administration's actions, but is also intended, in particular, to give the individual the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in his applying to the courts. (17) There is therefore a close connection between the obligation to give reasons and the fundamental right to effective legal protection.
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> 33. Accordingly, it would be incompatible with both the right to good administration and the fundamental right to effective legal protection if a public authority could simply let the two-month time-limit provided for in Article 3(4) of Directive 90/313 expire and for this to be deemed to constitute a lawful refusal of a request for information on the environment. Logically, therefore, the Court has held that the individual must automatically be informed of the reasons for the refusal of

his request, not necessarily at the same time as the actual refusal but in any event within the two-month time-limit. (18)"

Thus, Article 41 must be read in the light of parallel provisions in the TEU and TFEU, namely Article 296 TFEU, 340 TFEU, Article 20 (2) (d) TFEU, and Article 25 TFEU, and any relevant legislation. Article 41 cannot go beyond these provisions. It should also be noted that the Court applies Article 41 exclusively to EU institutions as results from the wording of the provision. However, Member state authorities are subject to similar obligations under a general principle of EU law when they are applying EU law (Case C‑141/12 YS, judgment of 17 July 2014, paras 67 and 68)

Note that the question of whether the Article 41 right to good administration can ground a claim in damages is currently before the Court. See Case C-337/15 P European Ombudsman v Claire Staelen, Opinion of Advocate General Wahl of 27 October 2016. This case concerns a claim for damages for breach of the right to good administration in the way the European Ombudsman handled a complaint about an open competition conducted by the Commission. However, the general principles it elaborates on the right to damages for breach of Charter Article 41 are likely to be equally pertinent to mismanagement by any EU agency, including the Commission; if complaints concerning environmental wrongs, and Member State environmental agencies implementing EU law pursuant to Charter Article 51 (1) (see further below).

(b) Charter Article 42 states that:

"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

Note this used to be reflected in Article 254 EC and it is now laid down in Article 15 TFEU. This provision and the case law elaborated pursuant to it sets the contours of Article 42, along with of course Regulation 1049/2001 and the Aarhus Convention.

An important development to watch concerning right of access to documents that is pertinent to environmental litigation is Case C-562/14 P Sweden v. Commission (pending), see the Opinion of Advocate General Sharpston of 17 November 2016. There the advocate general argues that if the Commission has already not decided to bring infringement proceedings against a Member State, then the Commission is precluded from applying automatically the presumption against release of documents that are pertinent to infringement proceedings that have been gathered by the Commission. If the Opinion is followed, the ruling could have important ramification for those wishing to have access to Commission evidence in environmental infringement proceedings, in order to, for example, bring proceedings before a national court. See eg Case C- 612/13 P Client Earth v Commission, judgment of 16 July 2015.

**II The Distinction between Rights and Principles**

While this question is yet to be decided by the Court on the basis of the rulings on the distinction between rights and principles issued by the Court thus far, Charter Article 37 is more likely to be a principle rather than a right. See notably, Case C-356/12 Glatzel v Freistaat Bayern, judgment of 22 May 2014, and case C-176/12 AMS v CGT, judgment of 15 January 2014. This means that Article 37 is not justiciable in and of itself, but requires further elaboration by positive EU and/or Member State laws. Conversely, Articles 41 and 42 are explicitly framed as rights and therefore, in principle, they are justiciable. However, the extent to which they have been fleshed out by general principles of EU law, and EU and Member State legislation, still is relevant to determining their content.

Compare, however, the Opinion of Advocate General Kokott in C-444/15 Associazione Italia Nostra Onlus v Comune di Venezia and Others, Opinion of 8 September 2016, paragraphs 24 to 35 which might be read as suggesting that there will be circumstances in which the right to a high level of environmental protection is justiciable. Given that the Opinion focuses on this right as it appears in the Lisbon Treaty rather than the Charter, it might be contended that the Charter distinction between rights and principles is unhelpful to the argument that breach of the high level of environmental protection guaranteed under the Charter can be enforced in the Courts.

But when a Charter right is justiciable, it can be called on to question the validity of an EU measure. See notably Joined Cases C-293/12 and C-594/12 Digital Rights Ireland. This means that the extent to which classical rights such as the right to property, as protected in the Charter by Article 17 and the right to respect for private and family life, as protected under the Charter by Article 7, have been called on successfully in the Strasbourg Court to sanction environmental damage, so too are they available under the Charter.

**III Member States when they are implementing EU law under Article 51 (1) of the Charter.**

(a) Implementing EU law entails a subject matter nexus. It is not necessary, for example, for the national measure to have been passed for the specific purpose of bringing an EU measure into Member State law. See Case C – 617/10 Hans Akerberg Fransson, judgment of 26 February 2013. The touchstone for determining whether the EU Charter is pertinent to the dispute is identification of a provision of EU law *aside from the Charter*, interpretation of which is relevant to the resolution of the dispute. Note that one of the leading cases on determining whether a Member State is implementing EU law concerned a failed attempt to argue that the parties differences fell within the scope of application of EU environmental law. Case C-309/96 Annibaldi, judgment of 18 December 1997;

(b) it also includes any exercise of discretion, when the power of a Member State authority to do so finds its source in EU law. C-411/10 and C- 493/10 NS v Secretary of State for the Home Department, judgment of 21 December 2011. Thus, if a Member State body is exercising a discretion vested with it by EU environmental legislation, the body is bound by all of the provisions of the Charter in exercising this discretion;

(c) it also applies to all remedial situations. See e.g. C-279/09 DEB, judgment of 22 December 2010. All remedies provided by Member States to enforce EU law, including EU environmental law, must comply with the Charter and in particular Article 47 thereof;

(d) institutions, bodies, offices and agencies of the EU are, however, automatically bound by the Charter. There is no need to prove that they are "implementing" EU law. Yet, outside of the agencies of the EU that have been vested with legal personality, determining whether an entity is a "body or office" of the EU may not always be a straight-forward exercise. See eg C-562/12 Liivimaa Lihaveis, judgment of 17 September 2014.

While there has been some uncertainty as to whether the Charter applied if EU bodies explicitly acted outside the scope of EU law, such as in the context of the ESM, (Case C-370/12 Pringle) the Court has recently clarified that even in such situations the Charter is binding (Case C-8/15 P - C-10/15 P Ledra Advertising, judgment of 20 September 2016. The Court held as follows at paragraphs 67 and 68.

"67 Furthermore, whilst the Member States do not implement EU law in the context of the ESM Treaty, so that the Charter is not addressed to them in that context (see, to that effect, judgment of 27 November 2012, Pringle, C‑370/12, EU:C:2012:756, paragraphs 178 to 181), on the other hand the Charter is addressed to the EU institutions, including, as the Advocate General has noted in point 85 of his Opinion, when they act outside the EU legal framework. Moreover, in the context of the adoption of a memorandum of understanding such as that of 26 April 2013, the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, Pringle, C‑370/12, EU:C:2012:756, paragraphs 163 and 164), to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter

68 It should therefore be examined whether the Commission contributed to a sufficiently serious breach of the appellants' right to property, within the meaning of Article 17(1) of the Charter, in the context of the adoption of the Memorandum of Understanding of 26 April 2013."

**IV (Article 52 (1) and permissible limitations.**

Article 52 (1) states as follows;

"1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

This seems to restrict all justiciable rights, and not just those to which a parallel restriction exists in the ECHR. So much can be distilled from the ruling of the Court of Justice in Case C-4/77 Pillbox 38, judgment of 4 May 2016, in which the limitation was attached to the Charter Article 16 freedom to conduct a business. This means that, if a high level of environmental protection as elaborated in Article 37 is a justiciable right, it is probably hemmed in by Article 52 (1).

Note, however, Charter Article 52 (3), which ensures that the minimum standard provided by the ECHR must be maintained under the Charter. This means that Article 52 (1) could not be applied to fall beneath that standard (see further below).

**V Level of Protection under the Charter**

The remainder of Article 52 is also important in understanding how to apply it. The text of the provision is as follows.

"2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

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.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

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

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States. '

The ruling of the Court of Justice appertaining to the above provisions that has attracted the most commentary is C-399/11 Criminal Proceedings Against Stefano Melloni, judgment of 26 February 2013, where the Court held, in the context of a case concerning criminal law, that fundamental rights protection afforded under Member State law that is inconsistent with the primacy of EU law cannot be applied by Member State courts, the text of Article 52 (4) notwithstanding. Thus, if such inconsistency arises in the context of the standard of environmental protection supplied by Member State, and probably ECHR law, then it would seem to be inapplicable.

**VI Article 47 and judicial remedies.**

Not long after the entry into force of the Lisbon Treaty (when the Charter became legally binding) the Court reiterated its case law to the effect that, in the ordinary course of events, Member State courts are not bound to create new judicial remedies to enforce EU rights. See C-583/11 P Inuit paragraph 104.

However, there is every indication that, under Article 47, the Court is affording the standard of protection provided under Article 6 and 13 of the ECHR (see e.g. C-239/14 Tall, judgment of 17 May 2015) and that national remedies are directly reviewable by reference to Article 47 (DEB). More recently the Court issued a detailed ruling on the interaction of Aarhus Convention obligations and Charter Article 47, and held that an interpretation of a national procedural rule that impeded access to justice for an environmental organization would be inconsistent with them. See Case C-243/15 Lesoochranarske Zoskupenre VLK, judgment of 8 November 2016.