A Further Step to a Unitarian Protection of Fundamental Rights: The CJEU's Pfleger Decision

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The Court of Justice of the European Union (CJEU) seems rather unimpressed by the critique related to its expansive interpretation of triggering the application of fundamental rights in *Åkerberg Fransson*. In *Pfleger*, the third chamber of the CJEU distanced itself even further from the wording of the EU Charter of Fundamental Rights (CFR). The Charter states in Art. 51 Section 1, that it is addressed to the member states "only when they are implementing Union law." In the decision delivered on April 30th, 2014 the CJEU also considered the derogation of fundamental freedoms to be included. Thus the Court secured another way to apply EU fundamental rights in cases rather remotely connected to EU law.

1. The Judgment

The case concerns Austrian laws restricting games of chance using gaming machines. Austria, like many EU member states, only allows a limited number of state licensed gaming machines. This system does not only serve as a lucrative source of income, but also aims to fight compulsive gambling and criminal activities. Because of the drastic interference in the free market, we are dealing here with restrictions of the EU fundamental freedoms. In this specific case the fundamental freedom of services is affected (Art. 57 TFEU). Like all fundamental freedoms, the free movement of services can be limited, especially based on grounds of public policy, public security or public health. (Art. 62, 52 TFEU). And at this point EU fundamental rights enter the equation: Is the Austrian system restricting games of chances compatible with the protection of fundamental rights to conduct a business and the right to property (Art. 15-17 CFR)? In the end, this question gets resolved by a quite unspectacular proportionality test. As Advocate General Sharpston states in para. 70 of her opinion, there are no other standards applied than commonly used in cases related to Art. 56 TFEU.

1. The Context

At first sight, the judgment is not really surprising. This assessment is confirmed by the CJEU to leave the case to a small chamber. There was no press release published. But on the other hand, the case contradicts the majority of (mainly German) scholars. They were defending a narrower understanding of Art. 51 CFR. Partly this was due to the German language version of the passage: "Durchführung" of EU law sounds less active than the English "implementing" or especially "cuando apliquen" in the Spanish version. The advocate general points this out in para. 40. Another reason might be that some German EU law experts concentrate on the legislative history of Art. 51 CFR. They emphasize how the charter convention had to accept this narrow version, which was aimed to restrict the expansive case-law of the CJEU.

The *ERT* case from 1991 already established the possibility to apply EU fundamental rights to situations when the member states try to derogate from fundamental freedoms. The same was done when member states were violating fundamental rights in order to protect one of the fundamental freedoms (*Schmidberger*).

ERT and *Schmidberger* represent a fundamental-freedom-constellation that triggers the application of EU fundamental rights. And this was exactly what the critiques of the Charter Convention had in mind when they limited the scope to "implementation." The so-called Praesidium of the Convention later tried to correct this restriction in the explanations related to the Charter. But this seemed to be a lost cause. The

Convention had gotten the text it wanted and the explanations lacked a legally binding character.

But it gets even more interesting with *Pfleger*, when we also consider how the CJEU's recent case-law had provoked bad blood. The CJEU's *Åkerberg Fransson* decision constructed the meaning of "implementing" EU law as wide as possible. Understood like that, almost any national case had some sufficient connection to EU law to trigger EU fundamental rights. The decision even provoked an angry response by the German Federal Constitutional Court. The German Justices have even used academic events to express their discomfort with this development.

It is therefore interesting to see how many times the *Pfleger* decision exclusively cites *Åkerberg Fransson* (para. 31-34). After that, the CJEU simply states the continuation of *ERT* without giving any explanation for it (para. 35). The CJEU could have just used established case-law, but instead the Court hammers the connection to *Åkerberg Fransson* into the reader's mind. It seems obvious that the Court is neither impressed by the German critique from the Constitutional Court nor by the representatives from the Charter Convention.

1. The Significance

With *Pfleger*, the CJEU continues on its road to transform into a real constitutional court. Traditionally, there were two distinct ways to apply EU fundamental rights to national law: the fundamental-freedom-constellation and the classical agency-situation (e.g., implementing a directive). They both did not only survive the new Charter, they also seem to merge. *Åkerberg Fransson* establishes the simple rule that wherever EU law reaches, fundamental rights follow. In general, this is a good solution, since EU law enjoys primacy even over national constitutional law and EU fundamental rights are supposed to compensate for that. And nobody could have really hoped for the Court to establish different rules for the scope of application for the different sources of fundamental rights in the EU (Art. 6 EU). But the problem here is that the Court refuses to recognize the importance of a federal and limited incorporation of fundamental rights in Europe. In *Åkerberg Fransson*, the CJEU showed how tenuous a connection to EU law was necessary to make it possible for the Justices to step in. With *Pfleger*, this centripetal tendency is further strengthened. In the future, it will be almost impossible to describe with certainty an area free of EU fundamental rights.

Until now, the CJEU generally has not used the possibility to use fundamental-freedom-constellations too often (cf. here). But the way the Court in *Pfleger* uses *Åkerberg Fransson* as a new standard seems worrisome for everyone skeptical towards a European unitarian fundamental rights order.

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