Member States' obligations in relation to housing rights - views of the CJEU

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I. The European Union's competence in the field of housing rights

The Treaties do not clearly establish the European Union's competence relating to the right to housing, as they do not mention such aid.

On the one hand, in the silence of the treaties, one could consider that this matter, being mentioned neither in the exclusive competences (article 3 of the Treaty on the Functioning of the EU, hereafter "TFEU"), nor in the supporting competences of the Union (article 6 TFEU), falls under the shared competence of the Union (article 4 TFEU),[1] and that, consequently, the European institutions could adopt binding acts in this area.

On the other hand, Article 153 TFEU, concerning the social policy of the European Union, states in paragraph (j) that the fight against social exclusion[2] could concern housing assistance. However, this article establishes a mere supporting power, whereby the European Parliament and the Council may only adopt "*measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States*". The adoption of EU directives, which is foreseen for other social policy aspects, is not envisaged in the field of social exclusion. Moreover, according to paragraph 4 of the same article, the provisions adopted by the Union institutions "*shall not affect the right of Member States to define the fundamental principles of their social security systems and shall not significantly affect the financial equilibrium thereof* ".

However, housing assistance is explicitly mentioned in Article 34(3) of the Charter of Fundamental Rights of the European Union (hereafter the "*Charter*") on the fight against social exclusion. Indeed, the third paragraph of this article states: "*In order to counter social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices*".

1. In the area of exclusive EU competence, the EU alone can legislate, which is not the case for housing. In the area of shared competences, the competence lies with the Member State as long as the Union has not legislated. As soon as the Union has intervened, this legislation creates a pre-emption, so that, in the areas concerned in this sense, the Member States can no longer freely legislate. Finally, the third category is that of supporting and coordinating competences.

2. "*1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (...) j) the combating of social exclusion*".

Yet the recognition of a right to housing in Article 34 of the Charter is not unconditional, as this article refers to the laws and practices of the Member States. All provisions of the Charter that refer to national laws and practices cannot impose standards on Member States, unless the national legislation concerned is intended to implement Union law. This was affirmed by the Court in *Association des médiations sociales*, with regard to Article 27 of the Charter, although the reasoning is transposable to other provisions of the Charter:

> "*44. It must also be observed that Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.*
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> *45. It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law*".[3]

And, according to the Praesidium's[4] explanations of Article 34 of the Charter, the Union must respect the framework of its competences, notably based on Article 153 TFEU. These explanations state that:

> "*Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union*".

Despite the Charter's reference to the right to housing under Article 34(3), it still comes back to Article 153 and its weak supporting competence.

Of course, the right to housing may also be covered by other provisions of the Charter: Article 1 on human dignity, Article 4 on the prohibition of inhuman and degrading treatment, and Article 33(1) on the protection of the family (which reflects Article 16 of the Revised European Social Charter).[5]

However, the Charter cannot apply on its own, outside the scope of the Treaty. As the President of the Court has said: "*the Charter is the shadow of European law*" and "*just as the shadow of an object takes on its form, the scope of EU law defines that of the Charter*",[6] i.e. it is inseparable from European Union law. Therefore, everything that falls outside the scope of harmonisation or the general principles of Union law also falls outside the scope of the Charter.

As a conclusion, a specific European competence in the field of housing, seems to be possible only to the extent that the Union supports the action of the Member States. However, such a Union competence would be limited by the degree of protection provided by each Member State through

3. 15 January 2014, Association de médiation sociale, C-176/12, ECLI:EU:C:2014:2.

4. https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=celex%3A32007X1214%2801%29.

5. However, the right to good administration provided for in Article 41 is only applicable to the institutions of the Union. It cannot create new positive obligations for either the Union or its Member States. Admittedly, when a Member State implements a Union directive, it may be considered to have an obligation of good administration, but this obligation cannot form the basis for a development to add content to existing law or to create positive obligations.

6. K. Lenaerts "In Vielfalt geeint – Grundrechte als Basis des europäischen Integrationsprozesses" 42 EuGRZ 353, at 354 (2015): "*... handelt es sich bei der Charta um den Schatten des Unionsrechts. So wie ein Gegenstand die Konturen seines Schattens formt, bestimmt auch das Unionsrecht die 'Konturen' der Charta*".

its legislation or administrative practices and, in any event, it remains for the Member States to establish whether Union legislation to that effect could be developed.

That being said, nothing prevents the Union institutions from inserting provisions relating to the right to housing in acts relating to other areas where the Union has shared competence and therefore also a power to harmonise national legislations. In such a case, the protection of this right could be ensured in an indirect, but certainly more effective way.

II. Examples of indirect protection. The three categories of beneficiaries of the right to housing under EU law and the case law of the Court of Justice.

Under EU law, three different categories of beneficiaries of the right to housing can be envisaged: 1) EU citizens, 2) third-country nationals who are long-term residents in the EU and 3) applicants for international protection.

1) As regards the right to housing of EU citizens, the general principles of EU law apply, in particular the principle of non-discrimination on the basis of nationality and Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Therefore, the right to housing is addressed as any other right of Union citizens who move and reside in the territory of the Member States. If a Member State grants favourable conditions for housing to its own citizens, it will have to ensure the same benefits to nationals of other Member States who have resided on its territory for five years.

2) In contrast, for third-country nationals who are not citizens of a Member State, the European Union provides for specific rules: Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents and Directive 2013/33 of 26 June 2013 laying down standards for the reception of persons seeking international protection.

Article 11 of the former Directive regulates the provision of assistance and social protection and the first paragraph (f) of Article 11 specifically mentions access to housing. In particular, paragraph 4 of this Article provides that Member States may limit the principle of equal treatment to essential benefits.

The latter Directive contains important clarifications, notably in recitals 22, on taking into account the best interests of the child, and 35, on ensuring human dignity. Its Article 2(g) defines the material conditions of reception, which include accommodation and other elements considered essential. Article 18 specifies more clearly the obligations of Member States with regard to accommodation.

Regarding third-country nationals who are long-term residents, it is worth mentioning first of all the *Kamberaj*[7], which concerned an Albanian citizen living in Italy, in the region of Trentino-Alto Adige. In this region, the coefficient for the distribution of social housing funds was different for EU and non-EU citizens. The Court used Article 34 of the Charter for the first time to interpret Union law, holding that it precludes national legislation such as that at issue as discriminatory. The Court then left it to the national court to determine whether housing is an essential service within the meaning of Article 11(4) of Directive 2003/109.

7. Judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233.

The case of *Kamberaj* laid down key principles, affirming the relevance of Article 34 of the Charter, but it also left some doubts as to the actual scope of Article 11(4), as regards the possibility for Member States to provide that housing is not, under certain conditions, an essential service.

More recently, the decision *Land Oberösterreich v KV* [8] clarified the *Kamberaj* Judgment. The case concerned legislation which made it a condition of housing benefit that the applicant prove basic knowledge of the German language. A Turkish family, long-term residents in Austria, had been refused €300 in housing benefit. The question was whether this assistance was really essential, as the family was already receiving financial assistance for other purposes than housing. According to the Court:

> "*39. Furthermore, when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. According to Article 34 of the Charter, the European Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as a benefit fulfils the purpose set out in that article of the Charter, it cannot be regarded, under EU law, as not forming part of the 'core benefits' within the meaning of Article 11(4) of Directive 2003/109 (judgment of 24 April 2012, Kamberaj, C-571/10, EU:C:2012:233, paragraphs 80 and 92)*".

The Court added:

> "*42. It is apparent from the information provided by the referring court that, as the Advocate General noted in point 59 of his Opinion, housing assistance contributes to guaranteeing that those persons can lead a decent existence by enabling them to find adequate housing without spending too large a proportion of their income on housing to the detriment, possibly, of the satisfaction of other basic needs. Housing assistance thus appears to be a benefit that contributes to combating social exclusion and poverty, it being intended to ensure a decent existence for all those who lack sufficient resources, as referred to in Article 34(3) of the Charter. If that is the case, the grant thereof to third-country nationals who are long-term residents is therefore also necessary in order to achieve the integration objective pursued by Directive 2003/109. Consequently, housing assistance appears to be such as to constitute a 'core benefit' within the meaning of Article 11(4) of that directive*".

3) Concerning applicants for international protection, they are most often accommodated in structures that cannot be considered as actual housing, since they are accommodation centres where they stay temporarily and/or in conditions that are borderline acceptable.

The *Jawo* judgment [9] had already outlined what constitutes a situation of extreme material deprivation, in order to assess whether state assistance is not sufficient. This judgment refers to human dignity and precarious living conditions, stating, in essence, that everything can be granted or denied in terms of material reception conditions, except what falls below the minimum standard of dignity.

8. 10 June 2021, *Land Oberösterreich (Aide au logement)*, C-94/20, EU:C:2021:477.

9. 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218.

In the *Haqbin* judgment,[10] the Court approached this matter from a new angle, combining Article 24 of Directive 2013/33 on the possibility for Member States to limit or withdraw the benefit of material reception conditions with Articles 1 and 24 of the Charter. An unaccompanied minor was expelled from an accommodation centre in Belgium because of his behaviour, and was simply given a list of other centres where he could find accommodation. He was left to fend for himself and spent some nights with friends. The Court mainly used the protection of the child in the Charter to emphasise that this practice is not compatible with EU law and that Member States have a duty and responsibility to ensure a dignified standard of living for the child at all times, without interruption, including when they delegate this accommodation task. It is therefore not sufficient for the national authorities to limit themselves to giving the child a list of possible accommodation:

> "*50. On the contrary, first, the obligation to ensure a dignified standard of living, provided for in Article 20(5) of Directive 2013/33, requires Member States, by the very fact that the verb 'ensure' is used therein, to guarantee such a standard of living continuously and without interruption. Secondly, it is for the authorities of the Member States to ensure, under their supervision and under their own responsibility, the provision of material reception conditions guaranteeing such a standard of living, including when they have recourse, where appropriate, to private natural or legal persons in order to carry out, under their authority, that obligation*".

The Court therefore recognises that the Directive allows Member States to adopt sanctions for serious breaches of the rules imposed in accommodation centres, especially in cases of particularly violent behaviour. However, in this case, the sanction imposed on a vulnerable person such as an unaccompanied minor was disproportionate.

In the case of *FMS and Others*,[11] Afghan and Iranian citizens seeking international protection were confined in a transit zone between Hungary and Serbia, surrounded by barbed wire. They were sheltered in metal containers of about 13 m². They were not allowed to move within Hungary, and the only exit was to Serbia, which refused to take them in. The Court considered that this type of accommodation constitutes de facto retention, due to the lack of freedom of movement, and undermines the essential content of the material conditions of reception:

> "*254. It follows that an applicant for international protection who does not have the means of subsistence must be given either a financial allowance enabling him or her to be housed or housing in kind in one of the places referred to in Article 18 of that directive, which cannot be confused with the detention centres referred to in Article 10 of that directive. Accordingly, the grant to an applicant for international protection without the means of subsistence of housing in kind, within the meaning of Article 18, cannot have the effect of depriving that applicant of his or her freedom of movement, subject to penalties that may be imposed on him pursuant to Article 20 of that directive (see, to that effect, judgment of 12 November 2019, Haqbin, C-233/18, EU:C:2019:956, paragraph 52)*".

> "*255. Accordingly, and without there being any need to consider whether the detention of an applicant for international protection, on the ground that he or she is unable to provide for his or her needs, is a ground of detention independent of his or her status as an applicant for*

10. 12 November 2019, *Haqbin*, C-233/18, EU:C:2019:956.

11. 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367.

international protection, it is sufficient to observe that such a ground, in any event, undermines the essential content of the material reception conditions that must be provided to that applicant during the examination of his or her application for international protection and therefore does not comply with either the principles or the objective of Directive 2013/33."

Conclusions

As we have seen, while the right to housing does not exist as such in the EU Treaties, Article 34 of the Charter of Fundamental Rights refers to social assistance, including housing. However, the application of this article depends on the laws and practices of the Member States and cannot go beyond them.

Therefore, the Court of Justice must follow the legislator. Unlike the Strasbourg Court, which has a very different competence and can rule on any conduct of the Member States, the Court of Justice can only rule on conduct of the Member States that falls within the scope of Union law, by implementing a directive or regulation. The Court can thus rule on and apply the Charter. Outside this situation, it has no jurisdiction, because the Union has no competence in EU law.

However, indirect protection of the right to housing can also arise from Union acts that regulate other matters. Indeed, in addition to the examples mentioned in relation to the movement of citizens, migrants and refugees, other aspects of EU law indirectly relate to housing, and these are highly harmonised and technical, such as security, regulation of the mortgage market, certain elements of consumer protection, state aid rules, environmental issues, electricity and climate.

For all these aspects, the Charter can be applied and the Court has full jurisdiction.