

**Association of the Councils of State
and Supreme Administrative Jurisdictions
of the European Union**

**Colloquium to be held in Madrid on 17 to 19 June 2012
Questionnaire**

A

Answers by the Supreme Court of Estonia

1. Conference on the Charter of Fundamental Rights

[...]

2. Questionnaire

A– General

1. In how many cases before your court and other administrative courts in your country has the EU Charter been at issue since 1 December 2009?

Answer: The EU Charter has been applied in the Supreme Court in 14 cases, 8 judgments were made after 1st December 2009 (see the answer to question no. 2).

Since 1st December 2009, no judgments which have entered into force have been made in administrative or circuit courts (courts of first and second instance) in administrative cases where the EU Charter has been at issue. Prior to the said date, five such judgments have entered into force (two judgments of the Tallinn Administrative Court, one judgment of the Tartu Administrative Court and two judgments of the Tallinn Circuit Court). During 2006–2012 there have been total of eleven judgments which have entered into force and in which the parties to the proceedings have referred to the EU Charter but the court has not deemed it necessary to explore the issue. Therefore, considering that the number of cases settled in a year in Estonian administrative courts (the first instance) is 3,000 on the average and in the circuit court (the second instance) 1,400 on the average, application of the EU Charter in the first and second instance is minimal.

2. Which provisions of the EU Charter were at issue in these cases?

Answer: The case-law of the administrative courts of first and second instance is all from the period before 1 December 2009 and the provisions referred to were the following:

1. Tallinn Administrative Court, case no. 3-05-1123, **Article 17** of the EU Charter (right to property);
2. Tallinn Administrative Court, case no. 3-04-240, **Article II-1** of the EU Charter (human dignity);
3. Tartu Administrative Court, case no. 3-09-1657, preamble and **Article II-1** of the EU Charter (human dignity);
4. Tallinn Circuit Court, case no. 3-06-1136, **Article II-97** (environmental protection);
5. Tallinn Circuit Court, case no. 3-06-188, **Article II-97** (environmental protection).

The case-law of the Supreme Court in a descending chronological order is the following:

- 1) The Administrative Law Chamber of the Supreme Court judgment of 12 December 2011 in administrative case no. 3-3-1-70-11, paragraph 21 – **Articles 7 and 8** of the Charter of Fundamental Rights of the European Union (data subject's rights). The Administrative Law Chamber referred to the judgment of the European

- Court of Justice of 24 November 2011 in joined cases C-468/10 and C-469/10: *Asociación Nacional de Establecimientos Financieros de Crédito* (C-468/10) and *Federación de Comercio Electrónico y Marketing Directo* (C-469/10), paragraph 40;
- 2) The Administrative Law Chamber of the Supreme Court judgment of 21 November 2011 in administrative case no. 3-3-1-27-11, paragraph 11 – **Article 34** of the Charter of Fundamental Rights of the European Union (entitlement to social security benefits and social services);
 - 3) The Supreme Court *en banc* judgment of 7 June 2011 in administrative case no. 3-4-1-12-10, paragraph 33 – **Article 21(1)** of the Charter of Fundamental Rights of the European Union (prohibition on discrimination based on age). The Supreme Court *en banc* also referred to the judgment of the European Court of Justice of 22 November 2005 in case no. C-144/04 *W. Mangold v. R. Helm*, paragraph 75;
 - 4) The Supreme Court *en banc* judgment of 12 April 2011 in civil case no. 3-2-1-62-10, paragraph 57.3 – **Article 47** of the Charter of Fundamental Rights of the European Union (principle of effective judicial protection). The Supreme Court *en banc* referred to the judgment of the ECHR *Paykar Yev Haghtanak Ltd v. Armenia*, request no. 21638/03, paragraph 49, and to the judgment of the European Court of Justice (Second Chamber) of 22 December 2010 in case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*;
 - 5) The Administrative Law Chamber of the Supreme Court ruling of 21 June 2010 in administrative case no. 3-3-1-85-09, paragraph 19 – **Article 47** of the Charter of Fundamental Rights of the European Union (principle of effective judicial protection);
 - 6) The Administrative Law Chamber of the Supreme Court judgment of 10 December 2010 in administrative case no. 3-3-1-72-10, paragraph 14 – **Article 41** of the Charter of Fundamental Rights of the European Union (the right to be heard (Article 41(2)(a)) and the right of every person to have access to his or her file (Article 41(2)(b));
 - 7) The Supreme Court *en banc* judgment of 1 July 2010 in constitutional review case no. 3-4-1-33-09 – **Article 39** of the Charter of Fundamental Rights of the European Union (the right to vote). The Supreme Court *en banc* also referred to Article 52(2) of the Charter;
 - 8) The Administrative Law Chamber of the Supreme Court ruling of 18 June 2010 in administrative case no. 3-3-1-101-09, paragraph 13 – **Article 37** of the Charter of Fundamental Rights of the European Union (environmental protection: principle of integration and sustainable development).

Before 1 December 2009

- 9) The Administrative Law Chamber of the Supreme Court judgment of 19 December 2006 in administrative case no. 3-3-1-80-06, paragraph 20 – **Article 41(2)(a)** of the Charter of Fundamental Rights of the European Union (the right to good administration);
- 10) The Administrative Law Chamber of the Supreme Court judgment of 28 March 2006 in administrative case no. 3-3-1-14-06, paragraph 11 – **Article 1** of the Charter of Fundamental Rights of the European Union (human dignity);
- 11) The Supreme Court *en banc* judgment of 22 February 2005 in civil case no. 3-2-1-73-04, paragraph 17 – **Article 17** of the Charter of Fundamental Rights of the European Union (the right to bequeath own possessions);
- 12) The Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in administrative case no. 3-4-1-7-03, paragraph 20 – the right to social and housing assistance. The Chamber does not refer to any Article of the Charter but states declaratively that the EU Charter includes that right;
- 13) The Supreme Court *en banc* judgment of 17 March 2003 in criminal case no. 3-1-3-10-02, paragraph 21 – principle of retroactive effect of a lesser punishment. The Supreme Court *en banc* does not refer to any Article of the Charter but states declaratively that the EU Charter includes that principle;

14) The Constitutional Review Chamber of the Supreme Court judgment of 17 February 2003 in administrative case no. 3-4-1-1-03, paragraph 15 – **Article 41** of the Charter of Fundamental Rights of the European Union (the right to good administration).

All together it is possible to conclude that there was no special provision of the EU Charter that was distinctively at issue in these cases. However, the Supreme Court applied Article 41 of the EU Charter 3 times (the right to good administration) which makes up about 21% of the total number of cases.

3. In which areas of law in particular does the EU Charter play a role?

Answer: The significant importance of the application of the EU Charter is expressed in the constitutional law. The case-law of the Supreme Court is characterised by the fact that the EU Charter is applied as an ancillary reason in interpretation of the provisions of the Constitution of the Republic of Estonia. References to the EU Charter have furnished several constitutional values and fundamental rights. This aspect of the application of the EU Charter must be deemed extremely important in view of the development of the Estonian constitutional law.

As it appears from the answer to the previous question, the EU Charter has been applied in the Supreme Court in 14 cases: one criminal case, two civil cases, seven administrative cases, two constitutional review cases where the issue of constitutionality has arisen in the adjudication of an administrative case, and two constitutional review cases (based on an application of the Chancellor of Justice). Consequently, the EU Charter has been applied more in adjudication of administrative cases than in adjudication of other cases.

On three occasions references have been made to Article 41 of the EU Charter and on two occasions to Article 47. Therefore, the EU Charter has been applied the most in ensuring the protection of procedural rights. See also the answers to question no. 6.

In 2005, § 32(4) of the Constitution was interpreted in connection with Article 17 of the EU Charter (the right to bequeath own possessions)¹ (see the answer to question no. 21).

If to compare the case-law of the Supreme Court in referring to the EU Charter before and after the year 2009, it can be noted that the application of the Charter has become more frequent (from 2003 to 2005 there were six cases and from 2009 up to the present eight cases). However, the volume of references has remained the same. The Supreme Court mostly states with only one sentence that the EU Charter includes the fundamental right under dispute. The later case-law is characterised by references to the judgments of the ECHR and the ECJ.

The later case-law of the Supreme Court from after the Treaty of Lisbon entered into force has concerned environmental protection, the right to vote, the right to be heard, the principle of effective judicial protection, prohibition on discrimination based on age, entitlement to social security benefits and social services, and data subject's rights).

Case-law of other courts

In criminal and misdemeanour cases in the courts of first and second instance the EU Charter has not been applied. In civil cases the Charter has been referred to once (before 1 December 2009): the Viru County Court, case no. 2-07-40266, Article 28 (the right of collective action).

¹ The Supreme Court *en banc*, judgment of 22 February 2005 in civil case no. 3-2-1-73-04, paragraph 17.

4. Has your court or another administrative court in your country recently asked the European Court of Justice (ECJ) for a preliminary ruling, which has not yet been published on the ECJ website, concerning the interpretation of a provision of the EU Charter? If so, give a brief description of the content of the reference.

Answer: No.

B– Scope *ratione temporis*

The EU Charter, as amended in 2007, acquired the status of primary Union law when the Treaty of Lisbon entered into force on 1 December 2009. On that date it replaced the previous version of 2000. There are a number of differences between the two texts. It is therefore important to consider the Charter's scope *ratione temporis*.

In the judgment in the *Küçükdeveci* case (ECJ, 19 January 2010, case C-555/07) the Court held that article 21, paragraph 1 of the EU Charter prohibits all discrimination, in particular on the grounds of age. Although in this judgment the Court derives support for the prohibition on age discrimination from the fact that it is enshrined in the Charter, it did not conduct any further examination for compatibility with Charter. One reason for this may be that the facts in this case date from before the entry into force of the Lisbon Treaty on 1 December 2009, when the Charter became binding.

5. From what point can the EU Charter be invoked in your national administrative law proceedings, bearing in mind the date on which the decision in question was taken (*ex tunc* or *ex nunc*)?

Answer: According to § 54 of the Administrative Procedure Act (APA), one of the prerequisites for the lawfulness of an administrative act is that it is issued pursuant to legislation in force at the moment of the issue and is in accordance with the legislation in force. Also an administrative measure shall be in accordance with the legislation in force at the moment of the taking thereof (§ 107(1) of the APA). The lawfulness of an administrative act or measure shall be verified considering the legal environment of the time when the administrative act was issued or the administrative measure was taken (§ 158(2) of the Code of Administrative Court Procedure (CACP))². The differences become apparent in deciding on the possibility of satisfaction of actions to require. Namely, the court cannot require an administrative authority to take a measure if the legislation in force at the time of the making of the judgment does not enable it.³

6. Does the EU Charter of 2000 play any role in your national legal system even though it did not have the status of primary Union law? If so, in what way and with what result(s)?

Answer: The Supreme Court applied the EU Charter quite early already as an ancillary reason of interpretation; whereas, in interpretation of the Constitution. The earliest judgment is from 2003 when the Constitutional Review Chamber of the Supreme Court formed an opinion that from § 14 of the Constitution arises a person's right to good administration which is one of the fundamental rights. At that time the court justified its opinion as follows: "*Article 41 of one of the most recent international documents on fundamental rights - the European Union Charter of Fundamental Rights - directly refers to the right to good administration. The*

² See also the Supreme Court *en banc* judgment of 31 May 2011 in administrative case no. 3-3-1-85-10, paragraph 10; the Administrative Law Chamber judgment of 21 February 2011 in case no. 3-3-1-80-10, paragraph 23.

³ The Supreme Court judgment of 7 December 2009 in administrative case no. 3-3-1-5-09, paragraph 44; judgment of 7 April 2010 in administrative case no. 3-3-1-5-10, paragraph 14.

Charter puts an obligation on the European Union institutions and bodies to handle the affairs of persons impartially, fairly and within reasonable time. Pursuant to the Charter the right to good administration includes, inter alia, the right to have access to a person's file, right to be heard, the obligation of the administration to give reasons for its decisions and the right to compensation for damage caused by an administrative agency. The Charter of Fundamental Rights of the European Union is not yet legally binding on Estonia, but - as it is also expressed in the preamble of the Charter - it is based, inter alia, on the constitutional tradition and the principles of democracy and the rule of law, common to the member states of the European Union. The principles of democracy and the rule of law, as well as other general principles and values of law valid in the European legal space, are also valid in Estonia. The analysis of the principles recognised in the European legal space leads to the conclusion that § 14 of the Constitution gives rise to a person's right to good administration, which is one of the fundamental rights.”⁴

In 2003 there was another judgment which contained a reference to the EU Charter. It concerned § 23 of the Constitution with regard to which it was noted: *“The Constitution was worded on the model of Article 15(1) of the UN International Covenant on Civil and Political Rights, the wording of which coincides with that of § 23 of the Constitution. The European Union Charter of Fundamental Rights establishes a principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.”*⁵ It appears that the EU Charter provided support in the clarification of the meaning of the Constitution after Estonia regained its independence.

In 2004 the Constitutional Review Chamber of the Supreme Court declared again that in order to interpret the Constitution, international agreements shall be applied: *“The Constitution does not specify when a person is needy, that is when the satisfaction of his or her primary needs is not guaranteed, and that is why, to interpret the Constitution, it is necessary to examine international agreements to which the Republic of Estonia has acceded. [---] Pursuant to the Charter of Fundamental Rights of the European Union, which is not yet legally binding on Estonia at present⁶, the Union recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.”*⁷

For instance, in administrative case no. 3-3-1-80-06 of 19 December 2006 (paragraph 20) the Administrative Law Chamber of the Supreme Court has, in explaining the principle of good administration (and the right to be heard, above all), referred to Article 41(2)(a) of the Charter of Fundamental Rights of the European Union in addition to the EU legislation regulating structural aid and the relevant case-law of the European Court of Justice. In administrative case no. 3-3-1-14-06 (paragraph 11) the Supreme Court proceeded also from Article 1 of the EU Charter of Fundamental Rights by stressing that human dignity must be respected and protected, and that the right to be treated with human dignity extends to everyone (including to imprisoned persons).

On three occasions references have been made to the EU Charter already before Estonia became a Member State of the European Union.

⁴ The Constitutional Review Chamber of the Supreme Court judgment of 17 February 2003 in case no. 3-4-1-1-03, paragraphs 15–16. In furnishing the fundamental right to good administration, the Supreme Court has referred to the EU Charter also in 2010, noting that “Based on Article 41 of the Charter of Fundamental Rights of the European Union, the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken (Article 41(2)(a)), and the right of every person to have access to his or her file (Article 41(2)(b)) (the Administrative Law Chamber of the Supreme Court, judgment of 10 December 2010 in administrative case no. 3-3-1-72-10, paragraph 14).

⁵ The Supreme Court *en banc* judgment of 17 March 2003 in criminal case no. 3-1-3-10-02, paragraph 21.

⁶ In January 2004.

⁷ The Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in case no. 3-4-1-7-03, paragraph 20.

The EU Charter has been referred to also in cases addressing national law where there was no contact with the EU law or its harmonisation and implementation. Such references to the Charter indicate that the court has sought to substantiate its reasoning by way of generally acknowledged principles of the European Union and, above all, in such particularly sensitive areas like social welfare law and judicial administration.⁸

C– Scope *ratione materiae*

Article 51, paragraph 1 of the EU Charter states that its provisions are directed to the member states only when they are implementing Union law, though it does not define what it means by ‘implementing Union law’. It emerges from ECJ case law that three situations may be distinguished which ‘fall within the scope’ of Union law.

Category 1 – Implementing obligations which fall within the scope of Union law

The first category of situations which clearly fall within the scope of Union law are those in which the member states are implementing or applying EU legislation. This comprises:

- implementation of Directives;⁹
- enforcement of Regulations;¹⁰
- enforcement of other secondary law (for example Decisions);
- enforcement of primary law;¹¹
- application of EU rules;¹²
- application of general principles of Union law.¹³

Category 2 – Departure from a fundamental economic freedom

The second category of situations, falling within the scope of Union law, are those in which the member states depart from a fundamental economic freedom guaranteed by Union law. In the ERT case,¹⁴ the Court held that if a member state relies on imperative grounds (such as public policy, public security or public health) to justify a statutory provision which is likely to obstruct the exercise of the freedom to provide services, such justification, provided by Community (now Union) law must be interpreted and applied in the light of general principles of law and of fundamental rights.

Category 3 – a ‘binding factor’ in relation to Union law

The third category of situations falling within the scope of Union law are those in which the ECJ considers some kind of link with Union law to be present, as a result of which the situation (action taken by member state/national legislation) falls within the

⁸ J. Laffranque. Euroopa Liidu õigussüsteem ja eesti õiguse koht selles. (Legal System of the European Union and the Role of Estonian Law in It). Tallinn, 2006, pp. 332–333.

⁹ See for example case C-2/92, Bostock, ECR 1994, p I-955, paragraph 16; case C-442/00, Caballero, ECR 2002, p. I-11915, paragraph 31; joined cases C-20/00 and 64/00, Booker Aquaculture, ECR 2003, p. I-7577, paragraph 88; case C-144/04, Mangold, ECR 2005, p. I-9981, paragraphs 75-77; case C-427/06, Bartsch, ECR 2008, p. I-7245; case C-555/07, Küçükdeveci, ECR 2010, p. I-0000.

¹⁰ See for example case C-5/88, Wachauf, ECR 1989, p. I-2609, paragraph 19; case C- 345/06, Heinrich, ECR 2009, p. I-1659, paragraph 45; case C-384/05, Piek, ECR 2007, I-289, paragraphs 32 and 34; case C-16/89, Spronk, ECR 1990, I-3185, paragraph 13; case C-400/10 PPU, J.McB, ECR 2010, p. I-0000, paragraph 50.

¹¹ Case C-309/96, Annibaldi, ECR 1997, p. I-2925, paragraph 14-21; case C-300/04, Eman and Sevinger, ECR 2005, p. I-8055, paragraphs 44-45, 52-53, 61.

¹² See for example case C-349/07, Sopropé, ECR 2008, p. I-1036, paragraph 34-38; case C-107/97, Rombi, ECR 2000, p. I-3367, paragraphs 65-67 and 73; case C-28/05, Dokter, ECR 2006, p. I-5431, paragraph 79; joined cases C-317/08, C-318/08, C-319/08, C-320/08, Alassini, ECR 2010, p. I-0000.

¹³ See for example case C-276/01, Steffensen, ECR 2003, p. I-3735, paragraphs 60-64; case C-262/99, Louloudakis, ECR 2001, p. I-5547 paragraph 71.

¹⁴ Case C-260/89, ERT, ECR 1991, p. I-2925, paragraphs 42-45.

scope of Union law and the fundamental rights it guarantees become applicable.¹⁵ This category of situations, however, has by no means been clearly formulated in ECJ case law.

7. How is the phrase 'implementing Union law' in article 51, paragraph 1 of the EU Charter interpreted in national proceedings? Can you give details of situations that have to date fallen within its scope? Do rulings explicitly state that a situation falls within the scope *ratione materiae* of the Charter?

Answer: Article 51(1) of the EU Charter has not been applied or interpreted in the case-law. As a remark it can be added that the Supreme Court has referred to Article 52(2) of the EU Charter, saying that pursuant to Article 20(2)(b) of the TFEU, citizens of the Union shall have, *inter alia*, the right to vote and to stand as candidates in elections to the European Parliament. These rights are reiterated by Article 39 of the Charter of Fundamental Rights of the European Union. This Article shall be applied on the conditions and within the limits provided for in other Articles of the Treaties and in legislation passed thereunder with regard to these rights to vote (see Article 52(2) of the EU Charter).¹⁶

D– Review ex officio (on its own motion)¹⁷

8. When reviewing the lawfulness of decisions, are the administrative courts competent under national law to examine the compatibility of those decisions with the EU Charter:
 - a. only at the request of the parties, or
 - b. also *ex officio* / through supplementation of the pleas in law?

Answer: Pursuant to § 2(3) of the Code of Administrative Court Procedure (CACP), the court shall adjudicate a matter only to the extent requested in the action (or another request provided by law). Whereas, the law applicable in the adjudication of the matter is decided by the court. § 158(1) of the CACP prescribes that in making of a judgment, the court shall decide which legislation is to be applied in the matter. This principle has been persistently stressed also in case-law (e.g. the Administrative Law Chamber of the Supreme Court judgments in administrative cases no. 3-3-1-49-11 and no. 3-3-1-52-11). According to the principle of investigation which is typical of administrative court procedure, the court interprets the requests of the participants to the proceedings and proceeds from the applicant's actual intention upon adjudication thereof. The court also ensures on its own initiative the ascertainment of facts relevant to the adjudication of the matter (§ 2(4) of the CACP). Pursuant to § 229(4) of the CACP, the Supreme Court (as the highest instance in administrative matters) is not bound by the legal justification of the appeal in cassation. Consequently, the courts may examine the compatibility with the EU Charter on their own initiative.

E– Distinction between rights and principles

In addition to article 51, paragraph 1 of the Charter, article 52, paragraph 5 and the accompanying Explanations ('Explanation') draw a distinction between the rights and principles enshrined in the Charter.

¹⁵ See for example case C-71/02, *Karner*, ECR 2004, p. I-03025, paragraphs 49-50; joined cases C-286/94, C-340/95, C-401/95 and C-47/96, *Garage Molenheide*, ECR 1997, p. I-7281, paragraphs 44-88; case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, ECR 2010, p. I-0000.

¹⁶ The Supreme Court *en banc* judgment of 1 July 2010 in case no. 3-4-1-33-09, paragraph 37.

¹⁷ See for an example of review *ex officio* joined cases C-222/05 to C-225/05, *Van der Weerd*, ECR 2007, p. I-4233.

Article 51, paragraph 1 reads as follows:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

Article 52, paragraph 5 reads as follows:

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.’

According to the Explanation accompanying article 52, paragraph 5,

‘Paragraph 5 clarifies the distinction between "rights" and "principles" set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities (...).’

9. Does your national law make a distinction between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter? What implications does this have for review by the courts?

Answer: The Estonian national law makes a distinction between (general) principles of law and legal provisions. For example, the Supreme Court has explained already in 1994 that a law which is in contradiction with the general principles of law is in contradiction with the Constitution. One of the general principles of law is that, as a rule, laws may not have retroactive effect. A general principle of law is also the principle of legitimate expectation – everyone has a right to conduct his or her activities in the reasonable expectation that applicable Acts will remain in force.¹⁸ However, the Supreme Court found that in democratic states the laws and general principles of law developed in the course of history are observed in law-making as well as in implementation of law, including in the administration of justice. When creating the general principles of Estonian law the general principles of law developed by the institutions of the Council of Europe and the European Union should be taken into consideration alongside the Constitution.¹⁹ Nonetheless, the national law does not provide, like Article 52(5) of the EU Charter, for guidelines on how to distinguish and apply principles and subjective rights. In case-law, general principles of law have been used to verify whether restriction on subjective rights is in conformity with the Constitution, e.g. whether it is proportional, whether the principle of legal certainty has been adhered to.

10. How do you determine whether a provision in the EU Charter can be deemed to constitute a ‘right’ or a ‘principle’ as referred to in article 52, paragraph 5 of the Charter?

¹⁸ The Constitutional Review Chamber of the Supreme Court judgment of 30 September 1994 in case no. III-4/1-5/94.

¹⁹ The Constitutional Review Chamber of the Supreme Court judgment of 30 September 1994 in case no. III-4/A-5/94.

Answer: In general, it can be concluded that in case-law no systematic or scientific method has developed on how to distinguish between “rights” and “principles” in case of provisions of the EU Charter. Consequently, no direct answer has been given to the question in the case-law but there are judgments of the Supreme Court from which it can be concluded that a provision of the EU Charter has been deemed a principle. For example, in 2010 the Supreme Court has analysed the issue of whether the Constitution of the Republic of Estonia includes a right to a clean environment. The Supreme Court notes in that judgment that a right to a clean environment cannot be deduced from Article 37 of the Charter of Fundamental Rights of the European Union which provides that 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 principle of sustainable development. Although the provision is incorporated in the Charter of Fundamental Rights, its different wording refers to setting of an objective, not to a grant of a subjective right.²⁰ In 2003 the Supreme Court *en banc* found, however, that the Charter of Fundamental Rights of the European Union establishes a principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.²¹ Consequently, it becomes evident from the opinions of the Supreme Court that Article 37 and Article 49(1) have been considered more as principles than rights.

11. How do the national administrative courts examine for compatibility with principles such as that contained in the second sentence of article 52, paragraph 5 of the EU Charter? (full review/limited scope of judicial review/etc.)?

Answer: The current case-law lacks a relevant position. See also the answer to question no. 9.

12. What are the legal consequences of a violation of a principle in national proceedings with no European dimension? Are these different from those that follow from the violation of a right?

Answer: See the answer to question no. 9.

F- Scope and interpretation of rights and principles

The purpose of Article 52 of the EU Charter is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights.

13. How do you interpret the general limitation clause of Article 52, paragraph 1, of the Charter? In accordance with the limitation clauses of the Convention for the Protection of Human Rights and Fundamental Freedoms? In accordance with the case-law of the European Court of Justice that restrictions may be imposed in the context of the economic freedoms, provided that those restrictions correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights? Or otherwise?

Answer: Estonia lacks relevant case-law. Also the opinions published in legal literature have inclined towards a wait-and-see attitude.²²

²⁰ The Administrative Law Chamber of the Supreme Court ruling of 18 June 2010 in administrative case no. 3-3-1-101-09, paragraph 13.

²¹ The Supreme Court *en banc* judgment of 17 March 2003 in criminal case no. 3-1-3-10-02, paragraph 21.

²² For example, Uno Lõhmus has noted: “Today it is not clear whether in restricting the fundamental rights provided for in the Charter of Fundamental Rights the ECJ will start to consider only the interests and values of the European Union. The wording of Article 52(1) of the Charter of Fundamental Rights refers to the general

G– Direct effect

14. Has the EU Charter been transposed into your national law, in full or in part, or via reference? If so, please state whether this also applies to the ECHR.

Answer: By the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union was declared a legally binding document which has the same legal force as the Treaties. As a source of primary law, the EU Charter is directly applicable in Estonia.

The Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) entered into force with regard to Estonia on 16 April 1996. As an international agreement ratified by the Riigikogu (the parliament of Estonia), the Convention is an integral part of the Estonian legal order.

15. Are the rights contained in the EU Charter directly applicable in your country? If so, which provisions already have direct effect?

Answer: The rights provided for in the Charter of Fundamental Rights are directly applicable but all Articles of the EU Charter do not have direct legal effect. The EU Charter distinguishes between rights and principles. Principles require that they be specified by legislation of general application and by implementing acts. There is no case-law regarding assessment of the direct effect of the provisions of the EU Charter.

16. What criteria do your national administrative courts apply in determining whether a provision of the EU Charter has direct effect?

Answer: When the Charter of Fundamental Rights was annexed to the Treaty of Lisbon it became legally binding for 25 Member States of the European Union, including for Estonia. Estonia ratified the Treaty of Lisbon on 11 June 2008. According to Article 6 of the Treaty of Lisbon, the Treaty entered into force on 1 December 2009.

In case-law there have been no explicit discussions whether in adjudicating a specific case there is an obligation to apply the legally binding EU Charter. Therefore it can be concluded that there are no uniform criteria for determining direct effect of the EU Charter (this is also indicated by the application of the EU Charter mostly as an ancillary reason of interpretation and not as an independent one).

17. In what way do your national administrative courts examine for compatibility with a provision of the EU Charter that has direct effect (full review/limited scope of judicial review/etc.)?

Answer: Pursuant to the applicable Code of Administrative Court Procedure (CACP), the court assesses the lawfulness of an administrative act or measure as at the issue of the administrative act or taking of the administrative measure (§ 158(1) of the CACP) and the court is required to determine the law applicable in the adjudication of the case (§ 158(2) of the CACP). Actions to require are exceptions where the situation of the time of the making of the judgment must also be taken into account (in this context see also the case-law referred to in the answer no. 5). In adjudication of a case, the court is bound by the extent of the action, and in case of an appeal, the higher court is, as a rule, bound by the extent of the

interests of the Union but Article 4(2) of the Treaty on European Union mentions also respect for national identity of Member States.” – Uno Lõhmus. Põhiõigused ja Euroopa Liidu õiguse üldpõhimõtted: funktsioonid, kohaldamisala ja mõju. (Fundamental Rights and General Principles of EU Law: Functions, Scope and Range.) Juridica 2011, no. 9, p. 651.

appeal or appeal in cassation (except for cases of material violation of procedural provisions). According to § 158 of the CACP, in adjudication of a case the court shall not apply a law or other legislation of general application if it is in contradiction with the Constitution of the Republic of Estonia or with EU law. As it appears from the answer to question no. 16, there is no case-law regarding issues of direct effect of the EU Charter.

18. If a case involves incompatibility with a provision of the EU Charter that has direct effect, what legal consequences do you attach to this?

Answer: See the answers to questions no. 16 and 17.

H– Interpretation methods

Explanations of the Charter were published when the EU Charter was proclaimed.²³ The ECJ judgment of 22 December 2010 in the case of *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* (case C-279/09, paragraph 32) confirmed that in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the Explanation have to be taken into consideration for the interpretation of the Charter.

19. In interpreting the EU Charter, do your national courts make use of the Explanation? If so, is this mentioned in the judgment?

Answer: No judgments of the Supreme Court include *expressis verbis* references to the “Explanations relating to the Charter of Fundamental Rights”²⁴ published in the Official Journal. However, the case-law of the Supreme Court is familiar with the European Court of Justice judgment of 22 December 2010 in the case of *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*. The Supreme Court has used the judgment in 2011 in interpreting the principle of effective judicial protection provided for in Article 47 of the EU Charter: “According to the case-law of the European Court of Justice (the European Court of Justice Second Chamber judgment of 22 December 2010 in Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*), the effective remedy provided in Art. 47 of the Charter of Fundamental Rights of the European Union shall be interpreted within the scope of application of the European Union law so that relying on it by legal persons is not precluded and that assistance granted upon application of the principle may include, above all, exemption from making a prepayment of procedural expenses and/or legal aid of a lawyer.”²⁵

20. Which interpretation methods (linguistic, systematic, teleological, historical, treaty-compliant, dynamic) are applied by your national administrative courts in interpreting the provisions of the EU Charter?

Answer: Although the Supreme Court has deemed it necessary to explicitly refer to specific methods of interpretation²⁶, the court has not chosen a method of interpretation in relation to the application of the EU Charter (at least it has not been described in the judgment). As it appears from the previous answers and examples, the EU Charter is applied, above all, as a reason of interpretation. It means, *inter alia*, that the court does not fail to apply a provision of a national specific law or of the Constitution and does not turn directly to the EU Charter but uses a reference to the EU Charter as a so-called secondary norm (principle) in order to interpret an applicable provision in accordance with the law in the light of a specific case.

²³ OJ EU 14 December 2007, C 303.

²⁴ Available in Estonian: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:ET:PDF>.

²⁵ The Supreme Court *en banc* judgment of 12 April 2011 in civil case no. 3-2-1-62-10, paragraph 57.3.

²⁶ For example, the Supreme Court *en banc* judgment of 23 February 2009 in constitutional review case no. 3-4-1-18-08.

I– Relationship between EU Charter and ECHR

Article 52, paragraph 3 of the EU Charter reads: ‘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’.

The Explanation accompanying article 52, paragraph 3 of the EU Charter contains a list of rights that at the time when the Explanation was adopted in 2007 were considered to correspond to the rights guaranteed by the ECHR within the meaning of this paragraph. The Explanation also includes a list of articles where the meaning is the same as the corresponding articles of the ECHR, but where the scope is wider.

ECJ case law also discusses the correspondence between the EU Charter and the ECHR.²⁷

21. In cases where the text of the ECHR and the EU Charter is identical, do your national administrative courts apply the ECHR and/or the Charter?

Answer: As a rule, the EU Charter is referred to together with the Convention. Since the Convention and the EU Charter are not competing legally, there is no room for the issue of whether only one or the other should be applied. The decision in favour of the EU Charter or the Convention is not made knowingly but it is common to apply them in harmony and there is no doubt that in quantity the EU Charter is applied less than the Convention.

An example can be brought from the case-law of the Supreme Court concerning compensation for damage caused by unreasonably extended criminal proceedings. The case was first reviewed by the Administrative Law Chamber of the Supreme Court who referred the case by a court ruling to be adjudicated by the Supreme Court *en banc*. The Administrative Law Chamber referred to the Convention as well as to the EU Charter:

A person’s general fundamental right to organisation and proceeding based on § 14 of the Constitution includes, *inter alia*, a subjective right to claim that proceedings conducted by a public authority be conducted within reasonable time. The aforesaid right is also based on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Pursuant to the said provision, 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. Similar regulatory framework is also included in Article 47 of the Charter of Fundamental Rights of the European Union. In keeping with the aforesaid, the right to carrying out of criminal proceedings within reasonable time is a right protected independently by the court.²⁸

In making a judgment, the Supreme Court *en banc* did not return to the EU Charter and applied only Articles 6 and 13 of the Convention and referred to the relevant case-law of the ECHR.

22. What role does the case law of the European Court of Human Rights (ECtHR) play in the interpretation of the EU Charter?

²⁷ Case C- 400/10 PPU, J. McB, ECR 2010, p. I-0000; cases C-92/09 and C-93/09, Schecke et al., ECR 2010, p. I-0000; case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH, ECR 2010, p. I-0000.

²⁸ The Administrative Law Chamber of the Supreme Court ruling of 21 June 2010 in administrative case no. 3-3-1-85-09, paragraph 19.

Answer: In composing and wording the catalogue of the fundamental rights and freedoms of the Constitution of the Republic of Estonia, the international documents prescribing the protection of human rights, including the Convention, were followed. Considering the case-law of the Supreme Court, the case-law of the ECHR has an important role in the interpretation of fundamental rights and freedoms provided for in the Constitution. Based on the case-law of the ECHR, several norms have been declared to be in contradiction with the Constitution.

To ensure harmony between the rights provided for in the Charter of Fundamental Rights and in the Convention, the EU Charter prescribes that these rights must be understood/interpreted the same as by the ECHR, and requires that the level of protection provided by the EU Charter would not be lower than the level of protection guaranteed by the Convention (Article 52(3) of the Charter). Considering the importance of the case-law of the ECHR in furnishing fundamental rights, it can be concluded that the Convention and the interpretation practice thereof will remain an important source for Estonia also in the future, including in interpretation of the EU Charter.

J- Relationship between the EU Charter and the 'constitutional traditions' of the member states

Article 52, paragraph 4 of the EU Charter states: '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'.

According to the Explanation accompanying article 52, paragraph 4, rather than following a rigid approach based on 'a lowest common denominator', the Charter rights in question should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

It emerges from the ECJ judgment of 22 December 2010 in the case of *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* (case C-279/09, paragraph 44) that the Court took account of the Advocate General's comparative survey of the law of the member states as contained in paragraphs 76 to 80 of his Opinion, which concluded that there was no truly common principle which is shared by all the member states as regards the award of legal aid to legal persons.

23. Do you refer to the common constitutional traditions of the member states in interpreting the EU Charter? If so, how do your national courts determine whether a provision of the EU Charter also recognises rights which arise from the constitutional traditions of the member states (article 52, paragraph 4 of the EU Charter)?

Answer: Estonia lacks relevant case-law.

However, the Supreme Court has stressed already in 2003 that the application of the EU Charter in Estonia is appropriate since it is based on the common constitutional traditions of the Member States of the European Union: "[...] as it is also expressed in the preamble of the Charter – the Charter is based, *inter alia*, on the constitutional tradition and the principles of democracy and the rule of law, common to the member states of the European Union. The principles of democracy and the rule of law, as well as other general principles and values of law valid in the European legal space, are also valid in Estonia. The analysis of the principles recognised in the European legal space leads to the conclusion that § 14 of the Constitution

gives rise to a person's right to good administration, which is one of the fundamental rights.”²⁹ In that court case the Supreme Court used the EU Charter as one of the reasons of interpretation in interpreting the Constitution, without being a court of a Member State of the European Union at that time.

24. Could there be a role here for the ACA-Europe Forum? Which?

Answer: The Forum is one way to develop relevant, fast and flexible communication. Setting up a register (see question no. 25) does not preclude the need for discussion but it does not replace the possibilities offered by the register in systematic search for and processing of information.

25. Would you consider it useful for ACA-Europe to set up a central register containing judgments handed down by the national courts concerning their constitutions which members of the Association could consult?

Answer: In such case, the content of the register should be either limited to the decisions where the relationship between national Constitutions and the EU law is addressed, or include the most significant national decisions.

K– Relationship between the EU Charter and other instruments

A number of rights contained in the EU Charter are derived from instruments other than the ECHR. For example, article 28 of the Charter, the right to collective bargaining and action, is based on article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers point 12-14, while article 24 of the EU Charter, the rights of the child, is based on the UN Convention on the Rights of the Child.

26. If a provision of the EU Charter is derived from an instrument other than the ECHR, what consequences does this have for the interpretation of the provision by your national administrative courts?

Answer: There is no relevant case-law.

L– Other

27. Is there a structure in your member state for consultation between administrative courts on EU law issues to ensure that interpretations are uniform? Would you like to see a similar structure at the level of ACA-Europe?

Answer: There is no special structure for such consultation. However, the Supreme Court (while being also the highest administrative court of the state) plays an important role in gathering and making available legal information (including concerning EU law) and in organising in-service training of the Estonian judges which includes also training in the field of EU law.

The Supreme Court ascertains the training needs of Estonian judges, prepares the strategies for training and training programs, organises the implementation thereof, and analyses training results. The programs naturally include also subjects related to EU law.

The Legal Information Department of the Supreme Court comprises a special unit for analysing case-law and one of its independent courses of action is EU law. Analyses have

²⁹ The Constitutional Review Chamber of the Supreme Court judgment of 17 February 2003 in case no. 3-4-1-1-03, paragraphs 15–16.

been published on the website of the Supreme Court³⁰ where one can find also overviews of the most important judgments of the European Court of Human Rights and the European Court of Justice³¹ which are compiled in cooperation with the European Union Court Division and the Human Rights Division of the Ministry of Foreign Affairs. There is also a list of Estonian judgments which have been reflected in the ACA-Europe's database Jurifast.³²

National case-law can be searched for through the Court Information System (KIS) and the judgments database of the Supreme Court. The latter is supported by recently renewed keyword search.

At the level of ACA-Europe this role could be fulfilled by the effective use of the existing possibilities (the Forum, databases Jurifast and Dec.Nat, seminars, colloquium) and further development thereof.

28. Do you have any other questions or comments on the EU Charter which have not been addressed in this questionnaire?

No comments.

³⁰ See official homepage of the Supreme Court: <http://www.riigikohus.ee/?id=1252>.

³¹ See official homepage of the Supreme Court: <http://www.riigikohus.ee/?id=1250>.

³² See official homepage of the Supreme Court: <http://www.riigikohus.ee/?id=719>.

**Judgments/orders of the European Court of Justice relating to the EU Charter
(1 December 2009 – 16 March 2011)**

- ECJ 19 January 2010, case C-555/07, Küçükdeveci (article 21 EU Charter)
- ECJ 4 March 2010, case C-578/08, Chakroun (article 7 EU Charter)
- ECJ 1 July 2010, case C-407/08/P, Knauf Gips/Commission (article 47 EU Charter)
- ECJ 16 September 2010, case C-149/10, Chatzi (articles 20 and 33, paragraph 2, EU Charter)
- ECJ 5 October 2010, case C-400/10 PPU, J. McB (articles 7, 24 and 51 EU Charter)
- ECJ 7 October 2010, case C-162/09, Lassal (article 45 EU Charter)
- ECJ 14 October 2010, case C-243/09, Günther Fuß (article 47 EU Charter)
- ECJ (order) 12 November 2010, case C-339/10, Estov (article 51 EU Charter)
- ECJ 9 November 2010, cases C-92/09 and C-93/09, Schecke et al. (articles 7 and 8 EU Charter)
- ECJ 11 November 2010 (order), case C-20/10, Vino (article 51 EU Charter)
- ECJ 22 December 2010, case C-208/09, Sayn Wittgenstein, (article 20 EU Charter)
- ECJ 22 December 2010, case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH (article 47 EU Charter)
- ECJ 22 December 2010, case C-491/10 PPU, Zarraga (article 24 EU Charter)
- ECJ EU 1 March 2011, case C-236/09, Association belge des Consommateurs Test-Achats ASBL (articles 21 en 23 EU Charter)
- ECJ 17 March 2011, case C-221/09, AJD Tuna Ltd, (articles 41 and 47 EU Charter)