

**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**

1. Conference on the Charter of Fundamental Rights

A. Introduction

The Charter of Fundamental Rights of the European Union ('the EU Charter') was solemnly proclaimed in 2000 at the meeting of the European Council in Nice.¹ In 2007 the Charter was amended.² With the entry into effect of the Lisbon Treaty on 1 December 2009, the Charter acquired the same binding force as the EU Treaties. This is laid down in article 6, paragraph 1 of the Treaty on European Union (TEU), which states:

'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'

For national courts in the member states, this means that the EU Charter must be applied in disputes, provided the conditions governing such application are met. To gain a better insight into the consequences that follow from this and to create a body of knowledge concerning the interpretation of the Charter, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union ('ACA-Europe') has decided to deal with such topic in the colloquium to be organised in 2012 by the Spanish president. All members of ACA-Europe can participate in the colloquium.

B Formulation of questions and aims

The questions on which the colloquium will focus are as follows. In what situations must the national administrative courts examine decisions for compatibility with the EU Charter, what methods must be applied in interpreting the various rights and principles enshrined in the Charter and what is the substance of these rights and principles?

The following themes are relevant in answering these questions:

- a. the scope *ratione temporis* of the EU Charter;
- b. the scope *ratione materiae* of the EU Charter (implementation of EU law);
- c. the question of review *ex officio* in the light of the EU Charter;
- d. the distinction between rights and principles in the EU Charter;
- e. the direct effect of the EU Charter;
- f. methods for interpreting the EU Charter;

¹ OJ EU 18 December 2000, C 364.

² OJ EU 14 December 2007, C 303. The text of the 2007 EU Charter was republished in the Official Journal of the European Union, OJ EU 30 March 2010, C 83.

- g. the relationship between the EU Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 'constitutional traditions' of the member states and instruments other than the ECHR.

The aim is to exchange information and experiences relating to the working of the Charter in practice. To this end, an inventory of experience to date in the member states is needed, based on the answers to this questionnaire, which was originally prepared by our colleagues of the Dutch Council of State.

C. Structure of questionnaire and deadline for replies

The questionnaire consists of 28 questions based around the above themes. You are asked to answer the questions on behalf of your member state, and as far as possible to base them on judicial practice in your organisation and possibly others. Where no information is available, you can give your own views. The references in the questionnaire to the EU Charter relate to the 2007 Charter, unless otherwise specified.

Your answers should be sent by email to Rosario Brea (rosario.brea@justicia.es) by 31 March 2012 at the latest. If after this date new judgments concerning the EU Charter are handed down in your country or if new proceedings are instituted, please let us know, once again by email.

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?

There have been few decisions of the Council of State since 1 December 2009 which have regarded questions on the EU Charter. This is mainly due to the fact that it takes some time for questions regarding new laws to be raised before the Council of State (which acts as Judge of Appeal). It can be considered that the interpretation given by the decision of the Council of State, section IV, 2 March 2010, n. 1220, according to which in accordance with Article 6, paragraphs 1 and 3 of the Treaty on the European Union (TUE), the norms of the European Convention for Human Rights (ECHR), since the entry into effect of the Treaty of Lisbon, had the same binding force as the EU Treaties, was isolated and was expressly denied by the Constitutional Court (Constitutional Court, 11 March 2011, n. 80).

The decision of 18 August 2010, n. 5881, of the sixth section of the Council of State considered that a collective agreement which recognised to the University degree a stronger value than a secondary school diploma in the fire-brigade employment system, didn't violate TUE norms coming from the provisions of Articles 1, 20 and 31 of the Charter.

The decision of 3 December 2010, n. 8504, of the fourth section of the Council of State decided that in a competition exam for a public employment the evaluation of a candidate given through a numerical vote does not violate the provision of Article 41, second paragraph, section c) of the Charter.

There are a few decisions of the Regional Administrative Tribunals (TARs) (Administrative Judges of first instance) which take into account the provisions of the Charter. The decision of 5 January 2010, n. 1, of the Lombardy TAR

(Brescia), considered that the Statute of the town of Brescia, which didn't provide for a female presence in the city's corporate bodies was not in compliance with the provisions of Article 23 of the Charter.

The decision of the Sicilian TAR (Catania) of 22 December 2011, n. 3167, only described that one of the grounds for complaint was "the violation of principles of equality, impartiality of Public Administration, and of equal pay for equal work, principles recognised also by the Charter".

The Apulia TAR (Lecce) decision of 2 December 2011 dealing with a claim regarding the result of a public examination competition, describes that one of the grounds for complaint was the violation of the provision of Article 41 of the Charter. That ground for complaint was not considered relevant for the decision.

In other decisions of the TARs, provisions of the Charter are cited (e.g. Articles 1, 7, 21, 23, 25 and 26) but those provisions were not considered relevant for the decisions.

A decision was made which stated that an economic benefit (of an additional five years of seniority) which was attributed to judges who, in accordance with the statute law n. 111 of 30 July 2007, had to succeed in a second level competition examination prior to becoming judges (as opposed to the previous system of becoming a judge immediately after University and passing an exam in their third year of being a judge) was upheld in a series of decisions dated 27 October 2011, at the Latium TAR (Rome), stating that it didn't violate the provision of Article 21 of the Charter.

The Trentino-Alto Adige TAR (Trento) decided (decision n. 247 of 12 October 2011) that revoking a concession without allowing the concessionary to participate in the administrative proceedings regarding that revocation, violated the provision of Article 41, paragraph 2 of the Charter.

The provision of Article 26 of the Charter is cited in many decisions of the TARs concerning the number of hours allotted for teacher's aides for special needs students, but the annulment of the administrative decisions was decided independently from the provision of the Charter.

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

See 1 above.

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

See 1 above.

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.

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 *Kücükdeveci* 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*)?

The EU Charter cannot be invoked in our national administrative law proceedings as legally binding, with the same force as the treaties, regarding facts which occurred before the treaty of Lisbon entered into force on 1 December 2009.

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)?

Prior to 1 December 2009, the EU Charter of 2000 was primarily used as a tool for interpreting national or European provisions and to evaluate whether or not a general principle of law existed.

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;³
- enforcement of Regulations;⁴
- enforcement of other secondary law (for example Decisions);
- enforcement of primary law;⁵

³ 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, *Kücükdeveci*, ECR 2010, p. I-0000.

⁴ 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.

- application of EU rules;⁶
- the application of general principles of Union law.⁷

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,⁸ 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 scope of Union law and the fundamental rights it guarantees become applicable.⁹ 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?

There have not yet been any cases in Italian proceedings in which the question of ‘implementing Union law’ has been specifically raised or applied, but according to the Jurisprudence of the ECJ (ordinance 11 November 2010, C-20/10, *Vino*, point 53) the Charter can be applied only to cases which are ruled by EU law and not to cases which are exclusively ruled by national provisions without any link to EU law. In other words, using an expression from the ECJ, the case ‘must be subject to Union law’ (*Vino*, cited above). Implementing cases subject to Union law-

- 1. the case is ruled by EU law;**
- 2. the case is ruled by national acts or facts which implement EU law;**
- 3. the case concerns States’ jurisdictions for conduct which otherwise would be incompatible with EU law.**

D– Review *ex officio* (on its own motion)¹⁰

⁵ 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.

⁶ 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.

⁷ 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.

⁸ Case C-260/89, *ERT*, ECR 1991, p. I-2925, paragraphs 42-45.

⁹ 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.

¹⁰ 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.

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:
- only at the request of the parties, or
 - also *ex officio* /through supplementation of the pleas in law ?

Generally the Administrative Courts are competent to examine the compliance of an Administrative decision to the EU Charter only upon specific request of the parties, but, in cases where the parties do not cite the Charter, and instead cite a national provision which the Court finds to be in violation of a provision of the Charter, which has direct effect, the Judge in that case has the duty and the competence not to apply the national provision which is in violation (Council of State section IV, 20 February 2005, n. 579 and section V, 19 May 2009, n. 3072).

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.

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?

Yes, our national law makes a distinction between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter. This distinction is comparable to the distinction between Constitutional programmatic and preceptive norms. The distinction was very popular in the years following the entry into force of the Italian Constitution on 1 January

1948. The distinction being that programmatic constitutional norms indicated goals and concepts and therefore did not have the force to abrogate prior norms which were established by an inferior source of law; and preceptive constitutional norms immediately attributed rights or legitimate interests and therefore did have the force to abrogate prior norms which were established by an inferior source of law.

With the creation of the Constitutional Court, this distinction lost its primary meaning as, from the date of its first ruling (n.1 of 1956) the Constitutional Court decided that, from that point forward, any conflict between a constitutional programmatic or preceptive norm and a prior norm, must be reviewed by the Constitutional Court in order to establish whether or not the prior norm, established by inferior sources of law, violated a Constitutional norm (either preceptive or programmatic) and therefore whether or not it had to be annulled.

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?

An Italian method for determining whether a provision in the EU Charter is a right or a principle, has not been declared by any official decision but generally follows the European method of determining whether the norm has a direct effect on national law (being sufficiently precise and unconditional) in which case it is considered to be a right, or not, in which case it is considered a principle.

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.)?

To date, this question has not come before the Italian Courts, but, in the event that it does, the first question to address would be whether or not the provision of the principle of the Charter in question has a direct effect on the national law. If it does have a direct effect the Italian Courts wouldn't apply the national norm which conflicts. If it doesn't, and if the national norm which has to be applied cannot be interpreted as being in conformity with the EU Charter principle, the Italian Judge would raise the question before the Italian Constitutional Court (Constitutional Court decision ns. 227/2010 and 28/2010) for the violation of Article 11 and Article 117, 1st paragraph of the Italian Constitution.

Article 11

"Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends."

Article 117.1

Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.

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?

This has been answered in response to question number 10 above. The present question seems to regard the legal consequences of a violation of a principle in an administrative decision. It is possible to venture to answer that, if the violation of a right is normally justiciable with the consequences provided by the law (annulment, recovery of damages, etc) the violation of a principle is justiciable only if the administrative decision which appears to violate the principle, cannot be otherwise reasonably justified.

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?

Considering the third paragraph of Article 52 and the Explanation relating to this Article, it can be answered that, insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR (the explanation provides a list of the corresponding articles) the general limitation clause set up under the first paragraph of Article 52 has to be referred to the limitations laid down in the ECHR and related to the evolving European Court of Human Rights case law.

Similarly, regarding the other rights and freedoms recognised by the Charter the general limitation clause, for its same nature must guarantee that the limitations must be consistent with the fundamental values of the EU as perceived by the European social body. The national Courts and the Court of Justice will have the difficult task of finding the reasonable and proportionate balance between the necessary restrictions and the very substance of those rights and freedoms.

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.

As the Charter shall have the same legal value as the Treaties, it is already integrated into the Italian law, in accordance with Article 11 of the Italian Constitution; it has the same value as the Constitution (i.e. a higher authority than statute law) with the limit of constitutional standards of fundamental principles and inalienable rights of the person. The Italian Courts have the duty and the competence not to apply the national laws which are in conflict with the Treaties and therefore also with the Charter.

This does not apply to the ECHR. If a Court is of the opinion that a relevant national law is in conflict with a norm of the ECHR, the question must be referred to the Italian Constitutional Court, in accordance with Article 117, first paragraph, of the Italian Constitution (as cited above).

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

Although there is no case law of an Italian Court which specifically and expressly regards these issues, I would respond affirmatively to the question regarding the direct applicability of the rights contained in the EU Charter. As said before, the Administrative Courts made reference to Articles of the Charter as an additional argument.

Traditionally, as mentioned previously, I should consider the norms of the Charter which provide rights as having direct effect. The criteria for determining whether a provision of the Charter has a direct vertical effect (effect towards the public authority) could be the same as that which was adopted regarding European directives (i.e. the requirement that that provision is sufficiently precise and unconditional).

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

See 15 above.

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.)?

The review must be exhaustive and not limited to an external control.

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?

According to the Jurisprudence of the Italian Constitutional Court, since decision n. 170/1984, every Italian Court is obliged not to apply the Italian law which is in conflict with the European norm having a direct effect (with the limits of constitutional fundamental principles and inalienable rights of the person).

H– Interpretation methods

Explanations of the Charter were published when the EU Charter was proclaimed.¹¹ 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?

¹¹ OJ EU 14 December 2007, C 303.

I think that the Explanations relating to the Charter are a useful tool for interpreting the provisions of the Charter. To date, I haven't found any judgement of an Italian administrative Court which has mentioned the Explanations.

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?

So far the Courts have generally referred to the provision of the Charter as an additional argument, so there was not a specific interpretation of the provisions of the Charter which was considered as parts of the general (I should dare to use the word "global") system of fundamental rights. Therefore, I should answer that, so far the interpretive method has been systematic, teleological and historical.

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.¹²

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?

In the Italian system of law the norms of the Charter with direct effect, and the norms of the ECHR have different force. The conflict between a provision of the Charter with direct effect and an Italian statute law implies that the Courts have the power and the duty of not applying the relevant Italian statute law.

At variance, the conflict between a provision of the ECHR and a statute law implies that the Court which would apply the Italian statute law has to raise the question of constitutionality of the Italian law in accordance with Article 117.1 (as quoted above).

This difference depends on the fact that the Italian Constitutional Court stated that Article 11 of the Italian Constitution applies to the European norms but not to the norms of the ECHR (Italian Constitutional Court, decision n. 348/2007; 349/2007; 312/2009; 80/2011). Therefore, if the case is subject to Union law the Courts will apply the Charter, if not they will apply the ECHR.

¹² 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.

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

The question has not yet arisen but, in accordance with Article 52, paragraph 3 of the Charter, if the provision of the Charter in question corresponds to a provision of the ECHR, according to the case law of our Court of Cassation, the national Courts will normally follow the interpretation of the European Court of Human Rights.

- 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 of '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)?

To date, the administrative courts in Italy haven't had the occasion to rely on "common constitutional traditions". If a question of interpretation of that kind arises before a national court, it would be proper to follow the comparative method as suggested in the explanation on Article 52. That explanation, in the relevant part, refers to "approach to common constitutional traditions followed by the Court of Justice (e.g., judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 18 May 1982, Case 155/79 *AM&S* [1982] ECR 1575). Under that rule, rather than following a rigid approach of 'a lowest common denominator', the Charter rights concerned 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 could also be proper for the national court to refer the question, examined through the comparative method, to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU; that would enrich a useful dialogue among the courts.

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

It would be helpful first to try to determine a list of fundamental rights recognized by the Charter (or provisions of the Charter) as they result from the

constitutional traditions common to Member States. That could be done by a small group of ACA – Europe judges. Then, ACA – Europe can establish a central register containing the most important national judgments on each provision of the fundamental right listed by the group, handed down by the national courts. That register would be a useful tool in enriching the dialogue among courts.

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?

Please see 24 above.

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?

In this case, the national court will take into account the case law of the international courts which deal with these rights, will examine the question through the comparative method and, if necessary, will refer the question to the Court of Justice for a preliminary ruling.

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?

The uniform interpretation of EU law issues is guaranteed by the decisions of the Council of State whose four sections (III, IV, V and VI) work as supreme jurisdictional administrative courts (the decisions of the administrative tribunals are appealed before the Council of State). A structure for consultation among supreme administrative courts would enrich the dialogue among national courts, Court of Justice, and European Court of Human Rights. A question regarding the uniform interpretation of the EU can also be brought before the Council of State as a consultative body (sections I, II and section for normative acts and general assembly) by the government.

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

It's my opinion, that although the Charter has been rightly criticized in the past for its Western-centric focus (e.g. Professor Peter Häberle, during a seminar in Italy on 21 March 2003, mentioned the Garrido Project as a positive example of Europe opening to the world [Weltoffenheit] which emphasized Europe's duty of solidarity with the rest of the planet), I believe the Charter itself is of great

importance, not only for the universal protection of fundamental human rights, but also as a tool for strengthening the links between the various Courts of the Member States and consequently, the connections between all citizens of the 27 States. This conference is another way to increase cooperation and understanding among the Courts. As mentioned earlier, in the response to question number 24, I suggested the possibility of a registry which could be useful for organizing and sharing important decisions regarding the provisions of the Charter and its practical application in each of the Member States. It would be interesting to know the opinions of other Judges as to what further steps could be taken to maximize the effectiveness of the Charter and particularly its power to unite the various Courts.

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