

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?

EU Charter has appeared in 4 decisions of the Supreme Administrative Court of the Czech Republic (SAC) and was not mentioned in any decisions of lower administrative courts.

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

The courts mostly dealt with the application of Article 41 in tax matters and with the Article 24 in cases regarding to the social security system.

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

See the answer to Question No. 2.

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.

The Supreme Administrative Court is about to refer the case for a preliminary ruling in this matter. The suggested questions shall be:

- (a) Is it from the EU law possible to deduce that taxpayer has the right to be informed about decision of the tax administration on the provision of information under the Directive 77/799/EEC? Has the taxpayer right to participate on the formulation of questions which are directed abroad? If there are no such rights for the taxpayer under EU law, is it possible to acknowledge similar rights under national law?
- (b) Has the taxpayer right to participate on questioning witnesses in the requested state during the processing of request for information under Directive 77/779/EEC?
- (c) Is the tax administration in the requested state obliged to comply with a minimum content of the answers during the providing of information so that it is clear from which sources and how the requested tax administration came to the provided information? Can the taxpayer challenge the accuracy of these provided information, for example because of the procedural defects in the proceeding in the requested state which preceded the provision of information? Or does the principle of mutual trust and cooperation apply according to which it is not possible to call into question the information provided by the tax administration?

B – Scope *ratione temporis*

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*)?

Before the 1 December 2009, the EU Charter was handled by the courts as a formally non-binding legal document. After the entry into force of the Lisbon Treaty, the Charter was given binding legal effect equal to the primary EU law. If the relevant facts of the case took place after 1 December 2009, the parties can invoke the rights under the EU Charter.

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)?

The EU Charter of 2000 was used as legally non-binding document for the purpose of argumentation. Because of its character, it was used only for interpretative purposes and did not have any further results.

C – Scope *ratione materiae*

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?

Neither the SAC, nor lower administrative court have ever given any explanation to the wording of the Article 51 of the EU Charter. Up to this point, the SAC has only excluded the application of the Charter with regard to its *ratione materiae*. Its scope has therefore not yet been expressly interpreted.

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

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 ?

Even though it is not necessary to explicitly express it in their discretion, the SAC and every administrative courts of the Czech Republic shall always take into consideration the constitutionality of their decisions and it is their duty to measure the decisions with the requirement of protection of fundamental human rights and freedoms, regardless whether there has been raised an objection by the party or not. It is also necessary to

always focus on the intensity of the violation of fundamental rights, since the violation needs to be severe and with crucial faults.

E – Distinction between rights and principles

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?

There is no such distinction in the Czech Charter of Fundamental Rights and Freedoms. All rights in the Charter which are “justiciable”, so they directly bind the courts as well as the executive and legislature bodies. Certain parallel of this distinction we might find in Article 41 of the Czech Charter of Fundamental Rights and Freedoms (“*The rights listed in Article 26, Article 27 para. 4, Articles 28 to 31, Article 32 paras. 1 and 3, Article 33, and Article 35 of this Charter may be claimed only within the confines of the laws implementing these provisions.*”), which we can read also in the way that is above all a guide for the legislators to define the content of this right (though his “freedom” has limits mentioned by the Constitutional Court for example in the plenary finding Nr. 1/08) and only in by him defined framework the individuals can invoke the rights (such as before courts etc.). So these rights are mostly addressed to the legislators, they are not solely meant to be invoked before the courts, similar as the principles under Article 52 of the Czech Charter of Fundamental Rights and Freedom.

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?

The court has to evaluate the level of abstraction, precision and unconditionality. In case the provision is unconditional, precise and clear, it should constitute a right. In cases when there is no strict formulation of the obligation or right, it should stipulate 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.)?

The administrative court may only examine the executive acts that implement principles of the EU Charter, and that only in the scope in which they relate to the public subjective rights according to the Charter.

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?

As mentioned above (in Question Nr. 9), we do not apply the principle in the meaning of EU Charter. If we take the distinction between rights under Article 41 of the Charter of Fundamental Rights and Freedoms (and Article 17 § 5 and others) and the other rights (directly applicable before court) as the most similar to the principle and rights under the EU Charter, the Constitutional Court sometimes referred to them in the meaning that it is not possible to invoke them completely before the court if they are not defined in an act.

Because of this, their “violation” is almost impossible since without implementing them in an act, they are “principles” without any content. They can get their content only when being a part of a statute.

F - Scope and interpretation of rights and principles

- 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, 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?

Similar provisions are included in Article 4 of the Czech Charter of Fundamental Rights and Freedoms:

“(1) Duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms.

(2) Limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in this Charter of Fundamental Rights and Freedoms.

(3) Any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions.

(4) When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.”.

Administrative courts shall take into account the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. It also should consider the case-law of the ECJ in case it is relevant for limitation of human rights.

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.

The EU Charter is applicable in the Czech Republic as a source of European primary law so the special transposition is not needed. Similarly, the ECHR is applicable as a source of international law on the basis of general clause in Article 10 of the Constitution (“*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*”). Therefore, neither the ECHR, nor the EU Charter have been specially transposed.

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

Yes. Even though any court has declared the direct effect of any provision yet, the provisions of the EU Charter are subject to the same rules as any other source of primary EU law. It must be unconditional, precise and clear and it must be addressed to individuals.

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

See the answer to the Question Nr. 15.

- 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.)?

Until now there has been no case concerning the direct applicability 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?

The decision of the administrative body shall be declared incompatible with the EU Charter and quashed.

H – Interpretation methods

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

Yes. For example in the case No. 1 As 4/2011, the SAC expressly considered the Explanations referred to the Charter.

- 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?

Even though it has not been discussed yet by any administrative court, the courts usually use all types of methods when interpreting the law.

I – Relationship between EU Charter and ECHR

- 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 such a case, the court should apply both legal sources.

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

Since the EU Charter is partly derived from European Convention on Human Rights, some provisions of EU Charter shall be interpreted in accordance with the case-law of ECtHR relevant to these provisions.

J – Relationship between the EU Charter and the ‘constitutional traditions’ of the member states

- 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)?

Such a situation has not happened yet.

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

Yes. It would have an important role for comparison and identification of certain legal institutes (such as the existence of constitutional tradition etc).

- 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?

As a matter of thought, we do not exclude the usefulness of such a register, but we guess that a tick box or a search criterion in the Jurifast or in any other existing database would be enough. For example, the SAC works with the constitutional rights and they appear in most of the judgements. If all of them should be sent, there would be a big bundle of such decisions, most of them with no relevance. Another question would also be the need of translation. More suitable would be to send cases, which not only concern the constitution, but exceed to the EU Charter.

The register should also be somehow connected and combined to the ACA-Europe Forum as mentioned in Question 24. The explanation of national practice and good direction to the judgement would also be an advantage.

K – Relationship between the EU Charter and other instruments

- 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?

The other instrument is to interpret in accordance with the Explanations to the EU Charter. If the instruments are derived from other international treaty, it must be interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties of 1969.

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?

Yes, at the SAC is a special department – Research and Documentation Service – which offers informal consultation on EU issues. It gives consultations to the judges of SAC and of regional courts in the matters of European law. To consult the Research and Documentation Service is not compulsory. Even though this is an informal way of answering the above mentioned questions; it is usually very helpful in dealing with individual issues of the EU law.

A similar structure at the level of ACA-Europe is not exactly needed. We guess that the Forum within ACA-Europe would be sufficient.

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

We would like to thank you this way for the well-prepared questionnaire and for the care you provided in this matter.