



**SUPREME ADMINISTRATIVE COURT OF LITHUANIA**

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

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**ANSWERS TO THE QUESTIONNAIRE / LITHUANIA**

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?*

The Supreme Administrative Court of Lithuania has referred to the provisions of the EU Charter, as amended by the 2007 Treaty of Lisbon, in 6 cases. Certain provisions of the EU Charter have also been at issue in one case heard by administrative court of first instance.

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

The Supreme Administrative Court has addressed Article 41 of the Charter concerned with the right to good administration and Article 47 concerned with the right to an effective remedy and fair trial. It has also referred to Article 18 on the right to asylum. Article 15 covering the freedom to choose an occupation and the right to engage in work and Article 45 dealing with the freedom of movement and residence have also been touched briefly. Meanwhile, the court of first instance has applied Article 7 which protects the right to respect for private and family life.

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

It is readily apparent from the case-law of the Supreme Administrative Court that the provisions of the Charter are mostly relevant in the areas such as asylum, public administration and judicial trial. There will of course be many other references to the provision of the Charter. Given the fact that EU legal norms are mostly applied in the cases of competition law, social security of migrant workers and environment law, it can be assumed that further references to Article 17 (the right to conduct a business), Article 34 (social security) and Article 37 (environmental protection) are going to be made.

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, it has not.

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)?*

There is no administrative courts case-law explicitly addressing this question. First of all a distinction between direct application of the provisions of the Charter and use of it for interpretative purposes should be made. There are no obstacles to rely on the Charter provisions *ex tunc* when we use it as an additional source for understanding the true meaning (interpretation) of national or EU law while making a judgment on the decision which was adopted before the Charter became a primary law of the EU. The courts or an aggrieved person may rely on the Charter for interpretative purposes despite the date on which the contested decision was made and at all levels of jurisdiction. This seems to be an accepted practice in the case-law of the Supreme Administrative Court. However, once the question of direct application of certain Charter provision is considered, general rules of applicability of laws should apply. Here one can refer to the ECJ's settled case-law that procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. In practice this most likely would not lessen the protection of fundamental rights, because it is reasonable to argue that these rights are already under similar (if not the same) protection conferred by constitutional norms and principles and (or) other international instruments (e.g., the ECHR). In addition, the laws that were in force when the contested decision was taken may be interpreted in the light of the Charter. The most recent decisions of the Supreme Administrative Court of Lithuania give good reasons to think that once the rights are invoked judges find the ways to breathe life into them.

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 analysis of the national case-law showed that national administrative courts were not keen on referring to the provisions of the EU Charter of 2000. There were several cases though where the courts of first instance had referred to the Charter of 2000 before it acquired the status of primary Union law. These cases included the application of Article 7 (respect for private and family life) and Article 48 (the presumption of innocence).

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?*

The phrase "implementing Union law" in Article 51(1) is interpreted in an extensive manner. The slightest connection between the Charter right allegedly infringed and a particular area of law where certain provisions of EU law have been implemented is sufficient to justify the application of the Charter. When the matter is viewed in the light of the protection of fundamental rights the national courts seem to adopt a broad view. One could assume that this broad view is based on the principle of vigilance since the choice whether to apply the provisions of the Charter is actually the choice of whether to protect fundamental values and principles on which the EU rests. On this view suffice is to say that the narrow interpretation would be too formal and pose danger of rendering fundamental provisions ineffective. The question whether the issue concerns the implementation of Union law has not been discussed expressly in any of decisions yet.

The cases that have fallen within the scope of the Charter are as follows:

- In administrative case No. A<sup>858</sup>-1013/2011 the Supreme Administrative Court heard an appeal concerning a refusal to make EU payments for agricultural areas. Even though the on-the-spot check was conducted in 2007 no decision was adopted as long as until 2009. The Court noted that the principle of good administration is established by the Constitution and Article 41 of the EU Charter. It went on to state that Article 30(1) of the Constitution, Article 47 of the EU Charter and Article 6 of the European Convention on Human Rights ensure the right to an effective judicial remedy. Having regard to this the Court held that the sanction for certain violations of rules

should have been adopted in a reasonable time. The institution which failed to follow the latter obligation was obliged to make the payments.

- Administrative case No. A<sup>858</sup>-1220/2010 and administrative case No. A<sup>858</sup>-1204/2010 both concerned a refusal to grant subsidiary protection. The Court noted that Article 18 of the EU Charter which is a constituent part of EU primary law establishes that the right to asylum is guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees as well as the rules of the Treaty establishing the European Community and the Treaty on the Functioning of the European Union. Therefore, the right to asylum is regarded as a fundamental right and its implementation is guaranteed by the European Union legal acts.
- Administrative case No. A<sup>756</sup>-686/2010 concerned Article 41(2)(a) of the Charter which covers the right of every person to be heard. The core of the dispute was adjudicating whether to grant subsidiary protection to a foreigner. The Court noted that the right to be heard embodied in the EU Charter expresses common legal values and it may be taken into account as a subsidiary source of law, i.e. it might be used for the interpretation of principle on good administration within the national legal system.
- In administrative case No. N<sup>575</sup>-7933/2010 the claimant argued that the withdrawal of his driving licence was in breach of Article 15 (freedom to conduct business) and Article 45 (freedom of movement and residence) of the EU Charter. In reply to this motive the Court briefly noted that the right of free movement was not absolute and might be limited provided that the limitation corresponded with certain conditions.

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 ?*

Administrative courts reviewing the legality of administrative decisions take into consideration the provisions of Community law, inter alia, the EU Charter, on request of the parties as well as on its own motion (*ex officio*). The applicants are free to introduce new legal arguments related to Community law and ECJ's case-law. The legal argumentation of the parties involved is not obligatory to the court and the court may apply a different legal ground to the presented factual circumstances. Under general rule, judges of national administrative courts are required to take an active role while examining the case and ensure that administrative decision is carried out within the limits of the national and EC law, i.e. judges have to evaluate all circumstances related to contested decisions and apply relevant legal norms either of national or Community law.

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 clear rights-principles dichotomy in the national law comparable with that embodied in Article 52(5) of the EU Charter. The principles are treated as underlying provisions of law and legal system. Both legal regulation and legal decisions (normative and individual) shall be based on the latter. The principles enable to verify the lawfulness of certain legal regulation, i.e. to challenge the legality of a legislative norm. On this view the principles are imperative: they embody certain rules of conduct. However, not only legal regulation (normative) but also its implementation is based on principles. An individual may rely on a principle in order to challenge certain administrative decision that allegedly infringes his rights.

It is possible that national administrative courts will employ some form of distinction between rights and principles when interpreting the Charter, more especially because it is expressly mentioned in Article 51(1) and 52(5) of the Charter. However, given the fact that the issue has not been addressed directly by national administrative courts, i.e. the courts have not employed any form of distinction, it is tempting to think that in practice the divide will stay less clear cut than might initially be thought. Besides, nothing precludes interpretation of certain Article as an enforceable right.

- 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?*

As has been pointed out above there is no clear cut divide between rights and principles in national law. However, one may assume that principles of the Charter are a mere recognition of a fundamental value, e.g. consumer protection (Article 38), while rights set particular requirements to follow, e.g. the right not to be punished twice for the same offence (Article 49). As Professor R. Dworkin rightly pointed out, principles state a reason that argues in one direction but do not necessitate a particular decision. They can conflict with each other and have a dimension of weight and importance that may change over a period of time. Still one may note that both sets of standards (rights and principles) may point to particular decision in particular circumstances. Therefore, the distinction and differences between them should not be over-emphasized.

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.)?*

Administrative courts in Lithuania carry out a full review of administrative acts. This means that national administrative court will conduct examination for compatibility with principles in both cases while ruling on the legality of a normative legal act and while reviewing a certain administrative decision that allegedly infringes one's rights. The principles are remarkably far-reaching and may be invoked at all levels. Compliance with fundamental principles is an essential condition for implementing the objectives of the state under the rule of law, *inter alia* to strengthen the protection of the rights and interests of individuals.

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?*

Even though academic literature repeatedly initiates debates on whether a party may be held liable for a violation of a principle given its abstract nature, the issue in practice seems to be attracting fewer doubts. Violation of a principle as well as violation of a right may subsequently lead to an annulment actions brought by the aggrieved individual and damages actions leading to compensation. Moreover, if the legitimacy of normative administrative acts is concerned, the act in question (or part thereof) which is in conflict with particular principles may not be applied from the day of official promulgation of the ruling of the Supreme Administrative Court.

#### 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 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?*

It would be reasonable to assume that despite the fact that there is a worrying difference between the Charter test and those found in the European Convention on Human Rights the national court would apply the limitation by taking into account particular circumstances of the case and the jurisprudence of the ECJ, the ECHR and national constitutional court. It is worthy to note that Article 52(3) states that Charter rights that correspond to those in the ECHR must be given the same meaning and scope. Therefore, it is tempting to think that the ECJ would strive to interpret the rules on limitations in a way which ensures the compliance with the case-law of the ECHR. However, it should be pointed out that a number of inconsistencies which already exist between the ECJ's case-law and that of the European Court of Human Rights calls for clearly developed conflict avoidances strategies and mechanisms. Indeed, one could agree that the implementation of abstract human rights always requires a contextual interpretation and therefore it is little wonder that inconsistencies exist. However, the national court may find itself facing what is known as a deadlock when the same provision is construed differently by each of the international courts or between the constitutional court and the international court. For the time being it seems to be enough for the national administrative courts to reconcile inasmuch as possible both lines of case-law. However, one may see the divergent case-law becoming a serious defect of the

current human rights protection system.

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.*

Both the EU Charter and the ECHR have not been transposed into national law. However, Article 2 of the Constitutional Act of the Republic of Lithuania on the Membership of the Republic of Lithuania in the European Union stipulates that the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania. In addition, based on Article 138(3) of the Constitution of the Republic of Lithuania ("International treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania"), the case-law of administrative courts recognizes the ECHR as a constituent part of Lithuania's legal system.

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

The rights contained in the EU Charter are directly applicable but only inasmuch as a situation falls within the scope of Union law and as defined by Article 51 of the Charter. It does not need any further transposition or incorporation. The Charter can be directly invoked before national administrative courts. There is no case-law that would explicitly state that certain provision of the Charter has a direct effect. Still one may assume that in case No A<sup>858</sup>-1013/2011 the Supreme Administrative Court implicitly recognized right to an effective judicial remedy (Article 47 of the Charter) as directly effective.

Despite their general nature, it seems likely that the provisions of the EU Charter, establishing certain right or principle, may be interpreted as having a direct effect in national law. Of course, due to the abstract nature of the provisions of the Charter it is hardly possible to define in advance clear boundaries, a precise content of the rights and (or) obligations and legal protection that certain provisions of the Charter give rise to. Thus it seems that defining the real limits and substance of the direct effect of the Charter provision(s) will be a matter and a result of the ECJ's case-law and the case-law of national courts.

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

There is no case-law of national administrative courts on the criteria for determining whether a provision of the EU Charter has a direct effect. However, it may be only assumed that if the case arises the court would choose to construe its approach having regard to the doctrine of direct effect developed in the ECJ's case-law. Provisions of the Charter which would not be sufficiently clear, precise and unconditional could be recognized as having no direct effect. Even in this case one should take into account that parallel constitutional fundamental rights and general principles of law apply and the rights embodied in the Charter would not be disregarded.

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.)?*

Administrative courts in Lithuania carry out a full review of administrative acts. However, one should note that for the time being the Supreme Administrative Court has not used directly effective Charter provision(s) as a sole ground for its judgment. Please also see answer to Question 8 for further details.

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?*

It may be assumed that if an individual decision adopted by the public authority does not comply with a provision of the EU Charter it may subsequently lead to an annulment action brought by the aggrieved individual and damages action leading to compensation.

#### 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?*

National administrative courts have not made any direct references to the Explanation yet. Article 6(1) TEU, as amended by the Treaty of Lisbon, states: "The rights, freedoms and principles in the Charter shall be interpreted [...] *with due regard* to the explanations referred to in the Charter, that set out the sources of those provisions." Given this wording (the provisions shall be interpreted *with due regard*), it could be assumed that the explanations should not be simply treated as optional guidelines for the interpretation of the Charter. The court shall take them into account for the purpose of interpreting and applying the provisions. However, it should be borne in mind that these explanations do not have a legally binding force themselves and do not set rules of conduct.

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?*

The Supreme Administrative Court of Lithuania has developed a sound body of case-law in which a variety of methods have been used. These include uniform interpretation, literal interpretation, reasonable interpretation, logical interpretation, teleological interpretation, etc. References to the spirit and to the purpose of the legal act have also been made. These methods, despite not being mentioned directly in judgements, are also applied in interpreting the provisions of the EU Charter.

#### 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?*

It is most common to refer to both texts the ECHR and the Charter. Moreover, references to the provisions of the Constitution that parallel fundamental rights are also made. For example, in administrative case No A<sup>858</sup>-1013/2011 the Supreme Administrative Court stated that the right to judicial protection is conferred by Article 30(1) of the Constitution, Article 6 of the ECHR and Article 47 of the Charter.

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

There is no relevant case-law of the national administrative courts on the question. However, to address this question it might be useful to refer to the ECJ's case-law. In the case of *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH* case (the case C-279/09, paragraph 35) ECJ stated that "As regards the Charter, Article 52(3) thereof states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of that provision, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, *inter alia*, by reference to the case-law of the European Court of Human Rights." Therefore, the national courts' approach concerning the EU Charter can be best appreciated when considered in conjunction with the case-law of the European Court of Human Rights. Having referred to this it may be concluded that national courts will strive for an interpretation that is the most compatible with that reached in the Strasbourg jurisprudence.

#### 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)?*

No direct references to the common constitutional traditions of the member states have been made yet. However, as a judge, I would like to address this question in a more pragmatic way. It seems that a starting point to the issue is the burden that the national judges will face if the case involves direct

application of the EU Charter. In practice application of Article 52(4) of the EU Charter means making a comparative survey of the constitutional law of the member states. However, the constitutional traditions of the member states may not be easily researched since they are subject to different languages, different regulations, procedures and dynamic case-law. Moreover, interpretation of a particular right can vary as between the member states.

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

A forum that is up to date and allows all members to exchange information and ask questions on constitutional issues is certainly a positive measure in facilitating the interpretation of the Charter. In addition, meetings, seminars and colloquiums on particular topics concerning the interpretation of the EU Charter rights may also serve as useful tools within this framework. It would be highly valuable if the Association would set up a data bank, consisting principally of decisions, as well as any other useful information, relevant to the interpretation of the constitutional rights of the member states too.

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?*

Yes, we would. The Supreme Administrative Court of Lithuania observes European legal traditions and is open to wide-reaching interpretations of European rights. Moreover, as has been pointed out above, a data bank consisting of judgments concerning constitutions of various member states would significantly facilitate the interpretation of the Charter and compliance with provisions embodied in Article 52(4) of the Charter.

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?*

There is no national case-law on the question. However, it should be observed that if an instrument from which a provision of the EU Charter is derived is legally binding, the court shall take into account the provisions and guidelines of that instrument. Otherwise, the national court would regard those documents as a very important source of inspiration which could facilitate the interpretation of particular legal norms.

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?*

Being the highest judicial instance in administrative cases the Supreme Administrative Court of Lithuania is obliged to form a uniform practice of the administrative courts in applying laws and other legal acts, *inter alia* EU law. Fulfilling the latter function, the Supreme Administrative Court publishes a bulletin concerning judgements, decisions and rulings adopted by the plenary session of the Court, judgements, decisions and rulings adopted by a chamber of three judges or an extended chamber of five judges the publication whereof has been approved by the majority of the Court's judges, as well as all judgements on the legality of regulatory administrative acts. The interpretation relating to the application of laws and other legal acts found in the judgements, decisions and rulings which are published in the bulletin of the Supreme Administrative Court is to be taken into account by courts, state authorities and other institutions as well as by other entities when applying these laws and other legal acts. In addition, the Court prepares reports on the most recent ECJ's case-law in order to ensure uniform interpretation of relevant legislation in administrative cases. Judges of administrative courts also share their experience and knowledge during various seminars, colloquiums, etc.

All members of ACA could become beneficiaries of a structure which would give certain guidelines and directions on EU law interpretation. This could bring all members into line with each other and thus ensure that the same high standards are guaranteed entire region wide.

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

*this questionnaire? No*