

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

Colloquium to be held in Madrid on 25 to 26 June 2012 Questionnaire

Answers to the Questionnaire – MALTA

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?*

As regards decided cases, in so far as could be ascertained, the provisions of the EU Charter (hereinafter referred to as “the Charter”) have been invoked in three cases since December 2009. Two of the cases were brought before the courts in their constitutional jurisdiction while another was brought before the court in its ordinary jurisdiction¹. An attempt was also made to raise an issue under the EU Charter but the attempt was ruled by the court to be premature.

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

In *Alain Schmitt v Onor. Prim Ministru* articles 1, 3, 4, 6, 7, 9-12, 19, 21-24, 33, 45, 47, 51-54, were all invoked. In *Lowell v Direttur Generali tal-Qrati tal-Gustizzja et* the provisions invoked were article 39 (right to stand as candidate at elections to the European Parliament) and article 47 (right to a fair trial). The Court ruled, however, on the

¹ Applik. 16/2010 *Alain Schmitt vs Onor. Prim Ministru et*, First Hall Civil Court in its constitutional jurisdiction, 30 April 2010 which was appealed but the appeal was withdrawn; Applik. 5/2009 *Lowell vs Direttur Ġenerali tal-Qrati tal-Ġustizzja et* (confirmed by the Constitutional Court on 28 February, 2011); Citazz. 2429/1998 *Linda Busuttil et v Dr. Josie Muscat et*, First Hall Civil Court ordinary jurisdiction, 30 November 2010, pending in appeal.

basis of article 39 of the Constitution of the Republic of Malta and article 6 of the Convention (ECHR).

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

From the prevailing nature of cases raised before the administrative courts and tribunals, the issues most likely to engage the provisions of the Charter would be cases falling under articles 11, 15(2), 18, 19, 21, 23, 34, 37, 42, 45, 47, 49 and 50.

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

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)?*

As a rule, as regards treaties and international conventions which Malta may accede to as Member State of the European Union, and treaties and international conventions which Malta is bound to ratify in its own name or on behalf of the European community by virtue of its membership within the European Union, these shall (as from May 1st 2004) be deemed to be and shall be part of the domestic law of Malta and shall come into force one month following their being submitted in order to be discussed by the Standing Committee on Foreign and European Affairs of the House of Representatives (Parliament)².

A decision of a court based on any of the provisions of the Charter consisting of a finding of a violation of any of the Charter's provisions

² Artt. 3(1) and *proviso* art. 4(2) of Act V of 2003 (European Union Act, 2003).

can only relate to violations which occurred after the Charter's entry into force as part of the domestic law of Malta, or any actions of a continuous nature which, although commenced at a date prior to the Charter's entry into force, persisted after such entry into force.

The aforesaid is subject to any eventual ruling by the ECJ specifically on the aspect of the Charter's applicability *ratione temporis*.

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)?*

It does not result that, as from Malta's accession to the European Union in 2004, the 2000 Charter was relied upon by any Maltese court or invoked by any party in any case brought before the courts. As regards to alleged violations of fundamental rights and freedoms, Maltese courts relied exclusively (and to a certain extent still predominantly do) on the provisions of the "bill of fundamental rights" enshrined in the Constitution or on the provisions of the European Convention (ECHR) which is part of the domestic law of Malta.

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?*

No case before the Maltese courts has been tasked specifically with ruling on the meaning and extent of the phrase.

D– Review *ex officio* (on its own motion)³

³ 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:*
- a. *only at the request of the parties, or*
 - b. *also ex officio /through supplementation of the pleas in law ?*

As a matter of procedural principle, a Maltese court of law can only deliberate and pronounce itself on matters which the parties have specifically raised both as to (plaintiff's) requests as well as to (respondent's) pleas (the principle against *extra petita*) and is very careful not to exceed what is requested from it (the principle against *ultra petita*). Nevertheless, both in procedural as well as substantive matters, this rule is excepted where an issue affects a matter of public policy.

Although as yet there has not been a judicial pronouncement on this issue, since the Charter has been incorporated into the domestic law of Malta a Maltese court is likely to find on the basis of domestic law⁴ that it is bound not only to take judicial cognizance of its provisions but also to apply them notwithstanding the failure of the parties to expressly invoke its provisions if the case involves a right protected by the Charter and if the legal provision otherwise invoked by the parties happens to be in conflict with the Charter's provisions.

It must be pointed out, however, that review decisions by a Maltese court regarding the lawfulness of administrative decisions do not purport to examine the substantive merit of such decisions or to substitute the administration's discretion with its own.

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?*

Maltese law does formally make a distinction in its Constitution between rights and principles, the latter constituting non-enforceable

⁴ Art. 3(2) of Act V of 2003 (Chap. 460)

declarations of national aspirations or goals primarily of an economic or social nature⁵. Generally, rights are enforceable, but principles (unless they themselves have been given the status of rights by express provision of a law) only provide guidelines which courts may take notice of and upon which they can verify the lawfulness of certain regulations and behaviour. Whether such distinction is comparable to that made under article 52(5) of the Charter has yet to be decided by a Maltese court.

In this regard, one can refer to the aspect of ‘legitimate expectation’ derived from a manner of administrative behaviour being reviewed by an administrative court and the extent to which such behaviour gives right to an enforceable remedy under a right recognized at law.

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?*

It seems that the determination of this question depends very much on whether the particular provision falls within the ambit of an enforceable norm at national law level or whether it remains within the realm of a ‘mere’ recognized principle which does not enjoy direct enforceability. This issue is a matter of interpretation by the national courts, and to date has not arisen in the Maltese judicial context.

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.)?*

Further to what has been stated in the reply to question 8 above, since the court’s exercise of review is limited to the ‘procedural’ correctness of an impugned administrative act, the examination for compatibility has to be a limited one. This does not preclude the court from taking note of principles as well as rights (norms) which might be implicated in such impugned acts.

⁵ Artt. 7 to 21 (Chap 2) of the Constitution

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?*

A finding of a violation of principles would likely entail a remedy only if such principles are coupled with a violation of a right. Thus, the consequences do differ from those which would result from the finding of a violation of a right.

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?*

There being no authoritative decision as yet by a Maltese court on the course of action to be followed, one may surmise that recourse would be had to the Convention's limitation clauses (which already provide tried and tested criteria known and generally adopted by Maltese courts acting in their "constitutional" or "conventional" competence) and the Strasbourg Court's interpretation thereof. The case-law of the ECJ would, on the other hand, have to be reckoned and applied if the relative pronouncements purport to establish rules of interpretation amounting to fundamental doctrines and/or general rules of Community Law.

A reason for some concern would arise where kindred rights enshrined in both the Charter and the Convention are given non-convergent or outrightly incompatible interpretations by the respective judicial authorities in Luxembourg and Strasbourg.

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.*

Yes, the EU Charter has been transposed in full into national law by virtue of the procedure outlined in question 5, above. With respect to the Convention, the rights and freedoms set out in articles 2 to 18 of the Convention, articles 1 to 3 of the First Protocol, articles 1 to 4 of the Fourth Protocol, articles 1 and 2 of the Sixth Protocol and articles 1 to 5 of the Seventh Protocol have been incorporated as part of national law by virtue of an Act of Parliament (the European Convention Act, 1987)⁶ with effect from the 19th of August of that year.

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

According to Maltese Law⁷, all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Charter (being part of the Lisbon Treaty), and all such remedies and procedures from time to time provided for by or under the Treaty, that in accordance with the Treaty are without further enactment to be given legal effect or used in Malta, shall be recognized and available in law, and be enforced, allowed and followed accordingly. It appears that the whole Charter has direct effect in Malta and carries the status of primary legislation.

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

In view of the answer to the preceding question, there does not appear to be a need for national administrative courts to apply any criteria to determine whether the provisions of the EU Charter has direct effect.

⁶ Art 3(1) of Act XIV of 1987 (Chap 319)

⁷ Art. 4(1) of Act V of 2003

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.)?*

Such an examination takes place within the parameters of actions for review, and the answers to questions 8 and 11 apply here as well.

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?*

Within the context of a suit for judicial review of administrative action, a finding of a violation of any act being incompatible with a provision of the Charter⁸ is likely to lead to a quashing of said act and, in the appropriate circumstances, to the award of damages⁹. Furthermore, if the administration relied on a law which is incompatible with any of the rights enshrined in the Charter, an administrative court is bound to ignore (“disapply”) the law relied upon by the administration or to consider the act to have been “*ultra vires*”.

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?*

Since no judgment of a Maltese court has, so far, dealt with the issue specifically, one would only be speculating wildly. Presumably, in the light of article 6(1) of the TEU, if the ECJ judgment mentioned in the questionnaire¹⁰ were to be regarded as authoritative to the extent that it provides a binding rule on national courts, then it stands to reason that a Maltese court would not be wise to omit perusing the Explanation, without there being a valid or cogent reason to do so.

Having said that, since the manner and form of the deliberative part of a judgment is left very much to the discretion and creativity of the

⁸ Vide art. 469A(1)(b) of the Code of Organization and Civil Procedure (Chap 12)

⁹ Art. 469A(5) of Chap 12

¹⁰ C-279/09 (which appears to be the only instance so far where the ECJ has expressly referred to the Explanation)

particular judge presiding the court, there is no obligation on the court to expressly refer to the Explanation, even though it may have relied on it.

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?*

There having been only a few judgments which have dealt with the Charter, there does not appear to be a single, prevailing system of interpretation discernible in the judgments so far pronounced.

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?*

Since both the Convention and the Charter enjoy the same status of primary legislation under Maltese law, in theory the administrative courts have no option but to apply them both. In practice, however, Maltese courts, being much more familiar with the Convention's provisions and related case-law, tend to rely (at least ostensibly) more on the Convention than the Charter.

Just as normally in a case regarding a violation of a fundamental right, the competent Maltese court would apply both the provisions of the Constitution (Chapter IV) as well as the corresponding provisions of the Convention, it appears to be only a question of time before the relative provisions of the Charter will start featuring as well in such judgments.

Again, the thorny issue would arise where, notwithstanding the identical provisions, the same provisions are given divergent interpretations by the respective judicial bodies at Luxembourg and Strasbourg.

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

In so far as the provisions of the Convention are similar to the corresponding provisions of the Charter, one would be justified in holding that the Strasbourg Court's case-law could be very useful in providing authoritative interpretation and enlightenment. This approach would obviate the possibility of divergent or discordant interpretations of the same right under the two legal instruments and would seem to be upholding the provisions of article 52(3) of the Charter itself.

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 recognizes rights which arise from the constitutional traditions of the member states (article 52, paragraph 4 of the EU Charter)?*

Given that so far no judgment by a Maltese court has pronounced itself on the matter, an answer would have to be necessarily highly speculative and unreliable. Comparative studies into the case-law of all the Member States courts', not to mention the hurdle imposed by the various languages to be mastered, is likely to be a daunting task. It seems that, in such a case, if the national court were to be faced with an issue of whether a particular point constitutes a 'common constitutional tradition', referring the matter to the ECJ for a preliminary ruling could be a possible outcome¹¹.

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

¹¹ Art 267 TFEU

Given that ACA-Europe has built an impressive data bank of case-law, drawn from a wide pool of sources, one could envisage a ‘harmonized’ service to respective national administrative courts in the Member States, at least highlighting areas which tend to be considered a ‘common constitutional tradition’.

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?*

In view of the previous answer, this would be highly recommended, provided the ‘pooling’ would be done in a limited number of working languages, thereby assuring that all data can be accessed and understood.

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?*

In such a case, the national court (in the absence of any authoritative guidance through a judgment of the ECJ) would be correct to delve into the interpretation and origin of the provision in the relative international instrument from which it is derived.

Alternatively, if the provision has been otherwise ‘transposed’ already into the national law (e.g. by the ratification and incorporation of the relative international instrument into a national law), the interpretation of that law by the national courts (or courts of other jurisdictions which have adopted that provision) can be relied upon, particularly if the Union has itself adopted such international instruments through concluded agreements with the respective international institutions or organizations¹².

¹² Art. 216 TFEU

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?*

Owing to the size and structure of the Maltese judicial set-up, there exists no “network” of administrative tribunals. Furthermore, the principle of ‘judicial precedent’ does not apply in Malta and thus nothing would preclude one court from deciding differently from another on an analogous matter brought before it. Nevertheless, for the sake of legal certainty, it is an accepted rule of practice adopted by all courts and tribunals to acquaint themselves with judgments handed down by other courts and to adhere to any substantive authoritative rulings, unless compelling circumstances dictate otherwise. Generally, all judgments are available on-line very soon after pronouncement and interested parties may peruse of the information and decisions emitted.

Certainly, a structure at ACA-level (aiming at diffusing updated information on the interpretation and application of principles and legal provisions of the Charter) will be helpful in providing persuasive indicators to national courts or administrative tribunals as to the manner certain issues ought to be interpreted and/or applied.

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

None, the above-mentioned questions appear to be quite exhaustive, while the subject-matter requires some more time to evolve.