

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union
Seminar on the EU Charter of Fundamental Rights, 24 November 2011

Answers to the questionnaire on behalf of the Council of State of the Netherlands (final version, 27 September 2011)

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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?

In the period from 1 December 2009 to 3 August 2011, the Charter was at issue in 49 judgments given under administrative law.¹ In all these cases, the court concerned reviewed for compatibility with the Charter.² The following judgments were rendered:

- 12 judgments of the Administrative Jurisdiction Division of the Council of State ('the Division');
- 12 judgments of other administrative courts of last instance;³
- 25 judgments of administrative courts of first instance.

In the same period, the Charter was at issue in 19 judgments in areas other than administrative law.

The list of judgments is enclosed as an annexe.

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

The provisions of the Charter that were invoked before the administrative courts were are:

- article 1 (human dignity);
- article 4 (prohibition of torture and inhuman or degrading treatment or punishment);
- article 7 (respect for private and family life);
- article 8 (protection of personal data);
- article 18 (right to asylum);
- article 19, paragraph 2 (non-refoulement);
- article 21, paragraph 1 (non-discrimination);
- article 24 (rights of the child);
- article 41 (right to good administration);
- article 47 (right to an effective remedy and to a fair trial);
- article 49 (principles of legality and proportionality of criminal offences and penalties);
- article 51, paragraph 1 (scope) and
- article 52, paragraphs 1, 3 and 4 (limitations, rights corresponding to ECHR, constitutional traditions).

¹ For the purposes of enumerating judgments in which the Charter is at issue, a search was carried out of the database at the website www.rechtspraak.nl. This database contains digitised versions of the judgments handed down by all Dutch courts. The search terms *Handvest* (Charter) and *grondrechten* (fundamental rights) were used, for the period from 1 December 2009 to 3 August 2011.

² This means that judgments in which reference was made to the Charter without mentioning specific articles have *not* been included in these figures.

³ In addition to the Administrative Jurisdiction Division, the Netherlands has the following administrative courts of last instance: the Central Appeals Court for Public Service and Social Security Matters (*Centrale Raad van Beroep*; 'CRvB') and the Administrative Court for Trade and Industry (*College van Beroep voor het Bedrijfsleven*; 'CBB'). In tax cases, appeal lies to a Court of Appeal (*gerechtshof*) after which appeal in cassation lies to the Supreme Court (*Hoge Raad*).

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

From the above list and from an analysis of the judgments, it appears that in the current state of case law in the Netherlands, it is primarily the following areas of law that are involved:

- aliens law (articles 1, 4, 7, 18, 19 and 47);
- fiscal law (the imposition of fines and the proportionality of penalties: articles 41 and 47);
- criminal law.

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. No preliminary rulings have been requested concerning the Charter's interpretation.

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*)?

When reviewing a decision, Dutch administrative courts judge its lawfulness *ex tunc*:⁴ the court bases its conclusions on the facts as they stood and the law⁵ that applied when the disputed decision was given.⁶ In consequence, the Division will *only* review for compatibility with the 2007 Charter if the decision concerned was taken *after* 1 December 2009, the date on which the 2007 Charter became legally binding.⁷ Rulings on points of procedural law constitute an exception to this rule. The 2007 Charter is applicable on these rulings, even in cases relating to decisions under administrative law made *before* 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)?

The EU Charter of 2000 was raised in proceedings before the Division on several occasions. In a few recent judgments – handed down after 1 December 2009 – in which the Charter was invoked, but the decision in question could not be reviewed for compatibility with the 2007 Charter because it had been given before 1 December 2009, the Division examined its compatibility with the 2000 Charter. In this respect the Division specifically followed the case-law of the Court of Justice of the European Union (the ECJ), stating that the 2000 Charter is not a binding legal instrument and that the principal aim of the Charter is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council

⁴ Only in asylum cases do administrative courts examine the decision *ex nunc* pursuant to section 83 of the Aliens Act 2000.

⁵ No distinction is made here between substantive and procedural rules.

⁶ See e.g. Administrative Jurisdiction Division (ABRvS) 21 April 2010, 200904357/1/H3. There is no reason to assume that this would be otherwise in the case of Union law. The implementation, application and enforcement of Union law take place in the context of national law: member states themselves determine which proceedings are applicable and how these are arranged. This follows from the principle of 'procedural autonomy'; see also the case law of the European Court of Justice (ECJ), Case 33/76, Rewe, Jur. 1976, p.1989.

⁷ See ABRvS 23 February 2011, 201006212/1/H2: AB 2011/117, consideration 2.7.2., ABRvS 1 December 2010, 201003052/1/V3, consideration 2.2.2; ABRvS 1 December 2010, 201000882/1/H3, consideration 2.8.2.

of Europe and the case law of the Court . . . and of the European Court of Human Rights'.⁸ On this basis, the Division determined that, from the said Charter, 'no additional rights accrue[d] which can be invoked independently'.⁹

This does not mean that the 2000 Charter has played no role whatsoever in the Division's decisions. In rulings dating from before 1 December 2009, the 2000 Charter was mentioned several times in judgments, not as a separate (autonomous) basis for review, but as an affirmation of existing fundamental rights within the European Union, such as result in particular from the constitutional traditions of member states and international conventions.¹⁰ Thus, where the 2000 Charter was invoked, the Division examined the relevant decision for compatibility with the identical provision in the ECHR.¹¹

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?

In general, the Division explicitly examines decisions in the light of article 51, paragraph 1 of the Charter before examining their compatibility with the Charter. In other words, it first determines whether the situation at issue falls within the scope of the Charter.

In a judgment given by the Division on 15 July 2011,¹² the case involved a decision to reject an asylum application. The appellant invoked article 47 of the Charter. Since the minister had rejected the application on the basis of EC Regulation 343/2003 (the Dublin Regulation),¹³ because he considered that another country bore responsibility for it, the Division ruled that the case involved the implementation of Union law and that it therefore came within the scope of the Charter.

In a judgment given by the Division on 19 July 2011,¹⁴ the case concerned a decision to reject an application for a temporary asylum residence permit. The appellant invoked articles 41 and 47 of the Charter. The decision had been taken on the basis of *national* legislation, namely the Aliens Act 2000. However, this Act provided the framework for the implementation of Directive 2004/83/EC.¹⁵ On these grounds, the Division concluded that the decision had implemented Union law, and that the case therefore came within the scope of the Charter.

In a ruling by the Central Appeals Court for Public Service and Social Security Matters (CRvB) of 13 May 2011,¹⁶ the decision was likewise explicitly examined in the light of article 51, paragraph 1 of the Charter. The CRvB considered that the Charter's scope was defined in article 51 and came to the

⁸ See case C-540/03, Parliament/Council, Jur. 2006, point 38. Reference is also made to this ruling in ABRvS 1 December 2010, 201003052/1/V3, consideration 2.2.3; ABRvS 1 December 2010, 201000882/1/H3, consideration 2.8.2.

⁹ See ABRvS 23 February 2011, 201006212/1/H2: AB 2011/117, consideration 2.7.2., ABRvS, 1 December 2010, 201003052/1/V3, consideration 2.2.3; ABRvS 1 December 2010, 201000882/1/H3, consideration 2.8.2.

¹⁰ See ABRvS 22 November 2006, no. 200600612/1, consideration 2.5.1, ABRvS 19 December 2007, no. 200604981/1, AB 2008, 48, consideration 2.13.1, ABRvS 20 August 2008, no. 200708387, JB 2008, 217, consideration 2.4.1 and ABRvS 22 November 2006, no. 200600657/1, LJV AZ2769, consideration 2.3.2.

¹¹ ABRvS 22 November 2006, no. 200600657/1, consideration 2.3.2. At issue here was article 1 of the First Protocol to the ECHR in relation to article 17 of the Charter.

¹² ABRvS, 15 July 2011, no. 201101530/1/V2.

¹³ Regulation 343/2003 of the Council of the European Union of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

¹⁴ ABRvS, 19 July 2011, no. 201100226/1/V2.

¹⁵ Directive 2004/83/EC of the Council of the European Union of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

¹⁶ CRvB, 13 May 2011, LJV: BQ4763 (fine imposed for violation of an obligation under the Unemployment Insurance Act (WW)).

conclusion that the case at hand did not involve the implementation of any provision of Union law and that the provision of the Charter that had been invoked (article 47) therefore did not apply. This case involved an appeal against the imposition of a fine on the basis of national legislation, namely the Unemployment Insurance Act (WW). The appellant held that the court fees he had been ordered to pay amounted to a breach of article 47 of the Charter.

In two cases, the Division reviewed decisions for compatibility with the Charter *without prior examination* in the light of article 51, paragraph 1 of the Charter. In these cases, the disputed decisions obviously came within the Charter's scope. The judgment of 14 July 2011 concerned the implementation of the Dublin Regulation.¹⁷ The judgment of 4 July 2011 involved the application of Directive 2004/38/EC.¹⁸ However, it is clear from the various judgments that administrative courts ruling at first instance and courts ruling outside the sphere of administrative law did not always start by examining the case in the light of article 51, paragraph 1 of the Charter. In consequence, cases occasionally arose in which courts examined a decision for compatibility with the Charter while the case did not in fact fall within the scope of Union law.¹⁹

It is assumed, in the light of the Explanations relating to the Charter,²⁰ and the case law of the ECJ,²¹ that the word 'implementing' in article 51, paragraph 1 of the Charter should be interpreted as equivalent to the term 'within the scope' of Union law. As noted in the questionnaire, it is clear from the ECJ's case law that three categories should be distinguished that fall 'within the scope' of Union law.

The three categories in the questionnaire are as follows:

- Category 1 – implementation of obligations which fall within the scope of Union law;
- Category 2 – departure from a fundamental economic freedom; and
- Category 3 – a 'binding factor' in relation to Union law.

All the judgments of the Division mentioned above were given in 'category 1 cases'. The situations clearly fell within the scope of Union law, since they involved the implementation of Union law in the strict sense. In the judgment of 15 July, the disputed decision itself came within the scope of Union law, since it implemented a Regulation, and in the judgment of 19 July, the disputed decision was taken on the basis of legislation that falls within this scope, since it was taken to implement a Directive. The last two judgments of the Division mentioned above likewise involved implementation of Union law in the strict sense; they revolved around decisions taken to implement a Regulation and a Directive respectively.

¹⁷ ABRvS, 14 July 2011, 201009278/1/V3 (transfer of an alien to Italy) and for purposes of comparison: ABRvS, 14 July 2011, 201002796/1/V3; ABRvS, 14 July 2011, 201007479/1/V3; ABRvS, 14 July 2011, 201105973/1/V4.

¹⁸ ABRvS, 4 July 2011, 201103855/1/V2 (termination of an alien's right of residence and a decision declaring him to be an undesirable alien, with reference to article 27 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States).

¹⁹ See A. Pahladsingh & H.J.T.M. van Roosmalen, 'Het Handvest van de Grondrechten van de Europese Unie één jaar juridisch bindend: rechtspraak in kaart', NtER 2011, 2, p. 54-61.

²⁰ From which it follows that those who drafted the Charter sought to align the text with the relevant case law of the ECJ concerning the fundamental rights applicable in the EU.

²¹ Which shows that the ECJ does in fact employ a wide interpretation when examining a decision's compatibility with article 51, paragraph 1 of the EU Charter: it does not merely look to see whether the case involved implementation of Union law in the strict sense, but also to see whether the case involves a situation that falls 'within the scope of Union law' in some other sense. This is clear, for instance, from its judgment of 12 November 2010 in the *Estov* case. In this case, the ECJ did not examine the disputed decision for compatibility with the Charter, since the case did not involve a measure taken in order to implement Union law, besides which there was no other factor linking the case to Union law. So the Court does not only examine the case to see if it involves implementation of Union law in the strict sense; it also looks to see if the case falls 'within the scope of Union law' in some other way (Case C-339/10, *Estov*, 12 November 2010). Cf. the ECJ's judgment of 1 March 2011 in the *Chartry* case, consideration 25 (Case C-457/09, *Chartry*, 1 March 2011).

To date, all the relevant cases dealt with by the national courts – not only the Division but also other administrative courts of first or last instance – involved situations that came within the scope of Union law (and hence within the scope of the Charter), within the meaning of category 1. In the future, it is possible that category 2 cases, which occur less frequently than category 1 cases, will also be defined as such by the national administrative courts.

No predictions can be made at present regarding the application of the third category: to date, the ECJ's case law in this regard is far from uniform, and its judgments vary greatly according to the circumstances of each individual case.

D - Review *ex proprio motu* (of 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 proprio motu* / through supplementation of the pleas in law?**

The primary rule in Dutch procedural law is that the scope of the proceedings is determined by the arguments put forward by the parties; in principle, the administrative court only examines the lawfulness of decisions at the parties' request.

Only in highly specific circumstances does the court have an obligation to examine a decision *ex proprio motu*, that is, by applying objective law, even when there is no factual basis for such an examination in the grounds. Review *ex proprio motu* takes place *only* in matters relating to public policy, that is, matters directly or indirectly relating to access to courts of law and the limits on their competence, or to the essence of due process, regardless of whether the parties have asked the court to consider these points in their grounds.

The main categories that belong under this heading are as follows:

- matters relating to the court's competence and the admissibility of the appellant's case;
- matters relating to the powers of the administrative authority; and
- fundamental procedural safeguards when an appeal is lodged from a judgment given at first instance.

To date, no national administrative court has ever examined a decision for compatibility with the Charter *ex proprio motu*. That one may do so in the future cannot be ruled out, however, should one of the situations outlined above arise (the possible application of article 47 of the Charter comes to mind, for instance).

Review *ex proprio motu* must be distinguished from supplementing legal grounds as Dutch administrative courts are obliged to do.²² Supplementing legal grounds means that the court determines – within the boundaries of the proceedings – which rules of law should serve as the legal basis for settling the dispute brought before it and how these rules of law should be interpreted. In this task, the court is not bound by any interpretation of the law adduced by either party, but it is obliged, supplementing or correcting whatever the appellant maintains, to take into account in its conclusion what the appellant manifestly intends to adduce, according to the arguments he presents. In concrete terms, what this means is that if a party invokes a fundamental right whose essence is contained in the Charter – in other words, without referring explicitly to the Charter – the court is obliged to translate this into an invocation (in part) of the relevant provision of the Charter.²³

²² As follows from section 8:69, subsection 2 of the General Administrative Law Act (*Algemene wet bestuursrecht*).

²³ T. Barkhuysen and A.W. Bos, 'De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht', *Jb Plus* 2011, no. 1, p. 14.

The examination of a case in the light of the Charter by supplementing the legal grounds has been at issue in a judgment handed down by the Division.²⁴ If the court concludes from the factual arguments that the appellant is complaining of the violation of one of his fundamental rights, the provision of the Charter enshrining this fundamental right should be brought into the court's assessment.²⁵

Even where the court supplements the legal grounds, however, it must still start by considering the case in the light of article 51, paragraph 1 of the Charter. After all, the fact that, say, a provision of the ECHR can be invoked does not automatically imply that the case involves a situation that falls 'within the scope' of the Charter.

As the above makes clear, it is assumed that in cases that are partly or wholly governed by Union law, review *ex proprio motu* and amplifying the legal basis *ex proprio motu* take place, in principle, in the same way as in proceedings based on national law: inasmuch as EU law does not provide otherwise, national procedural law is also applicable to such cases (principle of national procedural autonomy).²⁶

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?

The catalogue of fundamental rights laid down in the Netherlands (in the Constitution) does not distinguish between rights and principles as referred to in article 52, paragraph 5 of the Charter. The distinction laid down in the said article was thus not based on the Dutch constitution.

Dutch procedural law does include 'principles of good administration': legal norms that government bodies must observe in their administrative acts. These principles have been developed through case law and are in part codified in the General Administrative Law Act. In principle, the government is bound by these principles in all its acts and decisions, and they automatically serve as a standard / norm for judicial review.²⁷ If a member of the public disputes an administrative decision, he can argue his case in court. The court will not only check to see whether the administrative authority adhered to the statutory rules in taking its decision, but it will also check whether the decision was in accordance with 'the general principles of good administration'. If a decision is found to have violated one or more of these principles, the court will overturn the decision. Examples of 'general principles of good administration' include the principle that the grounds for the decision must be stated, the principle of due care, the principle of proportionality, and the prohibition of *détournement de pouvoir*. Dutch law also contains 'general legal principles', such as the principle of legal certainty and the prohibition of retroactive effect.

Some of these principles can also be found in the Charter, such as the principle of equality and the principle of public proceedings, but in the Charter they have the character of rights.

At first sight, however, the national principles appear to be different in kind from the principles in the Charter.

²⁴ See ABRvS, 28 April 2011, 201100194/1/V3, legal consideration 2.1.2.

²⁵ Cf. T. Barkhuysen and A.W. Bos, 'De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht', Jb Plus 2011, no. 1, pp. 13-14.

²⁶ This autonomy is constrained by two criteria. On the basis of the principle of equality, legal proceedings based on Union law must be heard in the same way as similar legal proceedings based on national law. The requirement of effectiveness means that national procedural law must not render the exercise of rights conferred by the Union law impossible or excessively difficult. See ECJ case law: Rewe, ECJ 16 December 1976, case 33/76, Jur. 1976, p. 1989, and more specifically on the significance of these two requirements for the problem of the scope of the proceedings / review *ex proprio motu*: Van Schijndel, ECJ 14 December 1995, C-430/93 Jur. 1995, p. I-8209; Peterbroeck, ECJ 14 December 1995, case C-312/93, Jur. 1995, p. I 4599; Kraaijeveld/Zuid Holland ECJ 24 October 1996 C-72/95, Jur. 1996, p. I-5403 and Van der Weerd, ECJ 7 June 2007, no. C-223/05, no. C-224/05, no. C-225/05.

²⁷ Although not always in full; this depends on the principle at issue and the kind of administrative act involved.

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?

To date, there is no national case law on the principles enshrined in the Charter (article 52, paragraph 5), so no judgments have been handed down in which the court has determined that a Charter provision must be defined as a principle. How the administrative courts will identify the principles enshrined in the Charter as such, and on the basis of what criteria, has yet to become clear.

It is not always easy to identify the principles enshrined in the Charter; neither the Charter itself nor the Explanations give unequivocal or exhaustive indications for all its provisions.²⁸

For the time being, it may be assumed that in identifying principles, one must start by considering the text of the provision itself. If the text of the provision does not provide the desired clarity, the Explanations should be consulted.

Thus, the Explanation relating to article 52, paragraph 5 of the Charter gives three examples of principles:

- article 25 (the elderly);
- article 26 (integration of persons with disabilities); and
- article 37 (environmental protection).

However, the Explanation relating to individual articles does not always yield clear answers. Not infrequently, for instance, the article refers to a right, while the Explanation relating to the article refers to a principle (see e.g. articles 26 and 34 of the Charter, on the integration of persons with disabilities and social security/social assistance, respectively).

In addition, it sometimes happens that both the Explanation and the text of the article itself refer to a principle, while it appears more logical, in view of the ECJ's case law, to speak of a directly enforceable right. A case in point is article 23 of the Charter (equality between men and women; see answer to theme F).

One final difficulty is that there are certain provisions, according to the Explanation relating to article 52, paragraph 5 of the Charter, that contain elements of both rights and principles. As examples, the Explanation cites articles 23, 33 and 34 of the Charter (on employment and family life, and social security and social assistance, respectively). In cases of judicial review, this can lead to a lack of clarity concerning the point at which the limits referred to in article 52, paragraph 5 apply.

It is also possible that in seeking to identify principles, the criteria suggested in the literature in this regard could serve as guidelines:

- the question of whether the provision is intended, or partly intended, to protect individuals or whether this should be excluded;
- the wording of the norm;
- the origin of the norm (in particular, whether or not it originates in the constitutional traditions of the member states);
- the meaning and purpose of the norm;
- the need for the norm to be 'concretised'.²⁹

The concretisation of the term 'principle' must eventually be achieved in the ECJ's case law.³⁰ In the

²⁸ M. Dougan, 'The Treaty of Lisbon 2007, winning minds, not hearts', *Common Market Law Review*, 2008, no. 3, pp. 663-664. See also the EU Committee of the House of Lords, 'Tenth report on the European Union Chapter 5: Fundamental Rights', point 5.22, (<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/6209.html>).

²⁹ These criteria were developed by T. von Danwitz and C. Ladenburger, in 'Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta', Verlag C.H. Beck Munich, 2006, pp. 806-07.

³⁰ The EU committee of the House of Lords reaches the same conclusion in its 'Tenth report on the European Union Chapter 5: Fundamental Rights', point 5.17, (<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/6209.html>).

event of doubt in a specific case, it would therefore be appropriate to request a preliminary ruling from the ECJ.

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.)?

Dutch administrative courts have not yet examined any decisions for compatibility with the principles enshrined in the Charter.

It is clear from article 52, paragraph 5 of the Charter that courts have only limited competence in respect of principles. Since the text of article 52, paragraph 5 is open to different interpretations, the precise significance of this limitation is not yet clear. The limitation may relate to the acts that the courts may examine for compatibility with principles and/or the way in which they may do so.

For the time being, it is considered that article 52, paragraph 5 of the Charter may imply that the courts can only examine for compatibility with principles those acts that apply or implement principles in the Charter. Where application to national acts is concerned, this would mean that the acts would have to fulfil two separate criteria. First, the act concerned must qualify as an act that implements Union law (see article 51, paragraph 1 of the Charter). Second, it would have to be an act that constitutes an application or implementation of the principle enshrined in the Charter. This includes both acts performed by the member states (*ex proprio motu*) to implement these principles and acts implementing Union law that applies these principles.³¹

There are good grounds for adopting this interpretation in the wording of the second sentence of article 52, paragraph 5 of the Charter, considered in conjunction with the first sentence. For the second sentence provides as follows: 'They [the provisions of the Charter that contain principles] shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. 'Such acts' refers to acts that implement principles (see the first sentence of article 52, paragraph 5).³²

On the other hand, the Explanation relating to article 52, paragraph 5 of the Charter refers to the approach taken by the ECJ/General Court in relation to the precautionary principle, the principle of market stabilisation, and the principle of reasonable expectations.³³ By way of illustration, two judgments are cited. In one of these judgments (*Van den Berg*),³⁴ acts are examined for compatibility with principles (namely market stabilisation and reasonable expectations) even though these acts can clearly not be classified as acts that serve to apply or implement these principles.³⁵ Thus, it appears to follow from this judgment that there is no limitation in respect of the nature of the act.

It is also conceivable that the limitation applies not so much to the acts that may be examined in the light of principles as to the manner in which this examination takes place.

One possible interpretation would be that in relation to principles there can only be interpretation or review of legality, and that principles cannot serve as an independent (autonomous) basis on which to grant subjective rights. This reading would be in line with the Explanation relating to article 52,

³¹ The latter variant may apply, for instance, in the case of national legislation implementing an act of the European Union (e.g. a Directive). The Union act applies a principle contained in the Charter.

³² This interpretation is supported in the literature by D. Denman, 'The Charter of Fundamental Rights', *European Human Rights Law Review*, 2010, no. 4, p. 354; S. Kouloulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *European Gender Equality Law Review*, 2008-1, p. 18 and T. Barkhuysen and A.W. Bos, 'De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht', *JBplus*, 2011, p.6.

³³ Case T-13/99, *Pfizer Animal Health SA*, Jur. 2002 (application of the precautionary principle) and Case C-265/85, *Van den Berg*, Jur. 1987, I-1155 (application of the principle of market stabilisation and the principle of reasonable expectations).

³⁴ Case C-265/85, *Van den Berg*, Jur. 1987, I-1155

³⁵ For the principle of market stabilisation, see pp. 19 and 21.

paragraph 5 of the Charter, which states explicitly that ‘principles do not . . . give rise to direct claims for positive action’.

This interpretation derives support from the judgments cited in the Explanations. For in all these judgments, the ECJ/General Court ruled on the legality of the disputed acts, and did not consider the application of subjective rights or positive measures: in each case, the court only looked to see if the act concerned was ‘lawful’ in the light of the principle concerned, that is to say, whether the act should have been performed.

Finally, the possibility cannot be excluded that the limitations imposed on judicial competence relate to the field of application as well as the manner of application.

In addition, it is to be expected that the courts will in general exercise caution in applying principles. This follows not so much from article 52, paragraph 5 of the Charter as from the nature of the principles. After all, in general these accord considerable freedom for the executive and legislative branches of government in their acts.

A similar picture emerges from the judgments cited in the Explanation. It is clear from these judgments that courts are not quick to rule that there has been a violation of a principle (here, the precautionary principle, the principle of market stabilisation, and the principle of reasonable expectations) and that they are reluctant to curb the freedom of action of the body concerned.³⁶

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?

Since Dutch law does not recognise principles as referred to in article 52, paragraph 5 of the Charter, no Dutch court has ever ruled that a principle has been violated in national proceedings without an EU dimension.

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?

³⁶ Ibid. 34.

To date, neither the Division nor any other administrative court of last instance has had to rule on article 52, paragraph 1 of the Charter. In consequence, no specific interpretation has yet been given in Dutch case law to the general limitation clause contained in this article.

Although it appears to follow from the Explanation relating to article 52, paragraph 1 of the Charter that the general limitation clause should be interpreted in line with the case law of the ECJ,³⁷ the text of the article clearly contains elements from the ECHR limitation clauses and the related case law of the European Court of Human Rights (ECtHR). A case in point is the requirement that the limitation 'must be provided for by law'. This is an additional requirement in relation to the case law of the ECJ, which must necessarily be interpreted in line with the case law of the ECtHR.

It is therefore to be expected that in interpreting the elements of article 52, paragraph 1 of the Charter, the administrative courts will take the case law of the ECtHR into account as well as that of the ECJ.³⁸

Another question is whether the general limitation clause of article 52, paragraph 1 of the Charter also applies to rights that *correspond* to rights guaranteed by the ECHR and hence come within the scope of article 52, paragraph 3 of the Charter. For according to the Explanations, it follows from this article that insofar as the rights in the Charter correspond to rights guaranteed by the ECHR, their meaning and scope, *including authorised limitations*, are the same as those laid down by the ECHR.

From the ECJ judgment in the *McB* case, which focused on article 7 of the Charter that corresponds to article 8 of the ECHR, it may be evidently be inferred that article 52, paragraph 1 also applies to corresponding rights.³⁹

It is therefore quite possible that in the case of corresponding rights, both article 52, paragraph 1 and article 52, paragraph 3 of the Charter are applicable. Article 52, paragraph 3 appears to prescribe, in a case of this kind, that ECtHR case law must *in any case* be taken into account, in order to ensure that the meaning and scope of the relevant provision provide at least as much protection as that provided by the corresponding provision of the ECHR. Finally, following on from this, the question arises of how the general grounds for limitation should be interpreted in the case of rights that correspond to a provision in the ECHR, but which enjoy a larger measure of protection under the Charter.

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.**
- 15. Are the rights contained in the EU Charter directly applicable in your country? If so, which provisions already have direct effect?**
- 16. What criteria do your national administrative courts apply in determining whether a provision of the EU Charter has direct effect?**

³⁷ After all, the Explanation relating to article 52, paragraph 1 of the Charter refers to the case law of the ECJ regarding the conditions on which limitations may be imposed on fundamental EU rights (case C- 292/97, K. Karlsson et al., 13 April 2000, paragraph 45 of the grounds, principle of equal treatment). According to the Explanations, the *wording* of article 52, paragraph 1 of the Charter was based on this case law.

³⁸ An illustrative point is consideration 72 in the *Schecke* judgment (joined cases C-92/09 and C-93/09, Schecke/Eifert, 9 November 2010): 'it is also necessary to ascertain whether the limitation imposed on the rights conferred by Articles 7 and 8 of the Charter is proportionate to the legitimate aim pursued (see, inter alia, European Court of Human Rights, *Gillow v. United Kingdom*, 24 November 1986, § 55, Series A no. 109, and *Österreichischer Rundfunk and Others*, paragraph 83)'. In this ruling, the ECJ interprets the requirement of proportionality from the general limitation clause in article 52, paragraph 1 of the Charter *on the basis of the case law of the ECtHR*. For purposes of comparison, see also the conclusion in the *Scarlet Extended* case (C-70/10, Scarlet Extended 14 April 2011), in which, for the interpretation of the requirement that the limitation must be provided for by law, *reference is made to the case law of the ECtHR* (points 93 et seq.).

³⁹ See consideration 59 of Case C-400/10 PPU, *J. McB*, Jur. 2010.

The Charter has not been transposed into national law in the Netherlands.⁴⁰ With the entry into force of the Lisbon Treaty the Charter acquired the status of a treaty, which placed it on a par with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It is clear from ECJ case law that this status means that the Charter takes precedence in its own right – regardless of the constitutional choice made under national law – over national law and is directly applicable and has direct effect within the legal order of the member states.⁴¹ This principle is adhered to both in Dutch legal doctrine⁴² and in Dutch case law.⁴³ This means that the Charter’s provisions (its rights and principles) are in principle directly applicable, provided the relevant criteria developed in the ECJ’s case law are fulfilled.

For a provision to have direct effect, it has to be – to put it concisely – formulated unconditionally and sufficiently accurately.⁴⁴ It is up to the administrative courts to determine whether these criteria have been fulfilled in the case of a provision of the Charter that has been invoked.

In its case law, the ECJ has defined more precisely these conditions for direct effect.

Thus, direct effect is also possible if a provision of EU law accords discretionary powers or a margin of discretion to member states (the national legislature).⁴⁵

Dutch administrative case law has implicitly recognised the direct applicability of two provisions (rights) of the Charter. Article 47 (the right to an effective legal remedy)⁴⁶ and article 41 (right to good administration) have been applied directly in national proceedings and each has served as an independent (autonomous) legal basis for judicial review.⁴⁷

Many of the Charter’s provisions appear unquestionably to have direct effect. These include, for instance, articles 7, 8 and 30 of the Charter (the right to respect for private and family life, the right to protection of personal data, and the right to protection in the event of unjustified dismissal). The rights protected by these provisions are defined in fairly specific and unconditional terms.

In determining whether a provision is directly applicable, the national court may take account of the ECJ’s case law on ‘general principles of Union law’ corresponding to provisions of the Charter.

In its case law, the ECJ has recognised a number of provisions of the ECHR as general principles of Union law,⁴⁸ such as freedom of expression,⁴⁹ the right to protection of property,⁵⁰ the right to a fair trial,⁵¹ the right to an effective legal remedy,⁵² and the right to respect for private and family life.⁵³ Each of these provisions has an equivalent in the Charter. These are, respectively:

⁴⁰ The Netherlands adheres to a monistic system as regards the relationship between international and national law. This is clear from articles 93 and 94 of the Dutch Constitution. According to article 93 of the Constitution, ‘Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published’, and Article 94 of the Constitution states: ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons’.

⁴¹ ECJ 5 February 1963, case C-26/62, *Van Gend en Loos*; ECJ 15 July 1964, case C-6/64, *Costa/ENEL*.

⁴² See e.g. Jans, de Lange, Prechal and Widdershoven, ‘Europeanisation of Public Law’, Europa Law Publishing, Groningen 2007, pp. 63-64.

⁴³ See e.g. ABRvS, 7 July 2005, AB 1997, 117 and Dutch Supreme Court, 2 November 2004, LJN: AR1797.

⁴⁴ See e.g. ECJ, case C-8/81, *Becker*, ECR. 53.

⁴⁵ See Case C-72/95, *Kraaijeveld*, Jur. 1996, I-5403. In this case it was determined that a margin of discretion does not mean that a provision cannot be used as an independent legal basis for review in national proceedings. The review consists of establishing whether the member state has exceeded the limits of its discretion. (See also ECJ, 1 February 1977, case C-51/76, *VNO*, Jur. 1977). This case law is particularly important in relation to provisions containing *principles*, because member states are generally allowed considerable discretionary powers where principles are concerned.

⁴⁶ See ABRvS, 15 July 2011, no. 201101530/1/V2 and ABRvS, 19 July 2001, no. 201100226/1/V2.

⁴⁷ See ABRvS, 19 July 2001, no. 201100226/1/V2 and CRvB, 13 October 2010 (LJN BO1242). In relation to article 41 of the Charter, however, the Administrative Jurisdiction Division expressed a reservation. It stated: ‘leaving aside the question of whether article 41 of the Charter, having regard to its wording and the Explanation relating to it, is applicable to decision-making such as that which is at issue here, it cannot be said that the Minister failed to take the principles underlying article 41 into account in his decision-making’. The appellant’s invocation of article 41 of the Charter was therefore held to be untenable.

⁴⁸ This case law is codified in article 6, paragraph 3 of the TEU, which states that the fundamental rights as guaranteed by the ECHR constitute ‘general principles of the Union’s law’. See also chapter 3, section 5.

⁴⁹ See e.g. case C-368/95, *Familiapress*, Jur. 1997, I-3689 and case C-260/89, *ERT*, Jur. 1991, I-2925.

⁵⁰ See e.g. the joined cases C- 20/00 and C-64/00 *Booker Aquaculture*, Jur 2003, I-7411.

⁵¹ See e.g. case C-276/01 *Steffensen*, Jur. 2003, I-3735.

- article 11, paragraph 1 (freedom of expression and of information);
- article 17, paragraph 1 (the right to property);
- article 47, second paragraph (right to a fair trial);
- article 47, first paragraph (right to an effective remedy) and
- article 7 (right to respect for private and family life).

In addition to the fundamental rights inscribed in the ECHR,⁵⁴ the case law of the ECJ also recognises, for instance, the principle of equality and non-discrimination as a general legal principle.⁵⁵ The right to equality and non-discrimination is also inscribed in the Charter, in:

- article 21, paragraph 1 (non-discrimination)
- article 21, paragraph 2 (non-discrimination on the basis of nationality)
- article 23 (equality between women and men).

In recent case law, the ECJ has assumed that general legal principles are directly applicable.⁵⁶ It could be posited that the Charter provisions listed above, which correspond to general principles of Union law, are therefore likewise directly applicable. However, it cannot be inferred with certainty from the ECJ's case law that every general legal principle can be successfully invoked independently, in every situation, in national proceedings.⁵⁷

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.)?

In the case of a directly applicable provision of the Charter (like other directly applicable provisions of Union law), the relevant decision and/or legislation (on the basis of which the decision was taken) are reviewed directly for compatibility with the provision concerned. In such cases, the administrative court conducts a rigorous (full) review of the government's compliance with the provision concerned.

A 'full review' (*volle toets*) means, in Dutch administrative law, that the court repeats the assessment made by the government body concerned, and replaces the latter's judgment with its own if it deems such to be appropriate. This contrasts with the test of reasonableness (*marginale toetsing*), in which the court takes account of the government body's discretionary powers and goes no further than reviewing whether the government body concerned exercised these discretionary powers reasonably,

The above conclusion regarding the direct applicability of Charter provisions does not automatically apply to the principles enshrined in the Charter. For the scope of review in the case of principles, see theme E, question 11.

⁵² See e.g. case C-222/84, *Johnston*, Jur. 1987, I-1651.

⁵³ See e.g. case C-94/00, *Roquette Freres*, Jur. 2002, I-9011 and case C-60/00, *Carpenter*, Jur. 2002, I-6279.

⁵⁴ Cases C-402/05 P and C-415/05, *Kadi and Al Barakaat International Foundation/Council and Commission*, Jur. 2008, I-6351, point 283.

⁵⁵ See e.g. the recent cases C-144/04, *Mangold*, Jur. 2005, I-9981 and C-555/07 *Kücükdeveci*, Jur. 2010, I-0000.

⁵⁶ See case C-144/04, *Mangold*, Jur. 2005, I-9981 and Case C-555/07 *Kücükdeveci*, Jur. 2010, I-0000. The *Mangold* judgment involved age discrimination. In this case, a Directive was applicable, but it could not be invoked by Mangold in relation to his former employer. The ECJ concluded, however, that this Directive was merely a more detailed elaboration of the general legal principle of equal treatment, which principle *could* be invoked in relation to another party. In consequence, the national court was obliged to ensure the full application of this principle by ruling inapplicable any national provision that was incompatible with it. In the *Kücükdeveci* judgment, the Court pursued the same line of reasoning as in the *Mangold* judgment.

⁵⁷ J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, 'Europeanisation of Public Law', Europa Law Publishing, 2007, p. 124. It should be noted that both these judgments have prompted numerous critical reactions. See e.g. S. Prechal in: 'Competence creep and General Principles of Law', *Review of European and Administrative Law*, Vol. 3, No. 1, 2010 pp. 10-12.

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?

When national law and Union law are found to be incompatible, the primacy of Union law must be safeguarded. If the interpretation of legislation and/or administrative acts (decisions) in accordance with Union law does not produce a result, the national law that is incompatible with the Charter should be declared inapplicable.

Whether the incompatibility with Union law has legal consequences for the legislation or decision concerned depends on the method of review adopted by the court.

Dutch administrative courts conduct reviews of the merits at 'concrete' and 'abstract' level. In a review at concrete level, the administrative court determines *in concreto* whether the disputed decision was in accordance with the directly applicable provision of Union law. If the court concludes that the decision was in breach of the said provision, it will annul the decision.⁵⁸

In a review at abstract level, the court does not review the specific decision, but the statutory regulation on the basis of which the decision was made. In this case, the administrative court reviews the statutory regulation for compatibility with the directly applicable provision of Union law. If the court concludes that the statutory regulation is incompatible with Union law, it declares this statutory regulation to be non-binding or inapplicable. The disputed decision will then be annulled, since there is no longer any legal basis for it.⁵⁹ It is clear from the case law of the Division that the majority of cases involve review at concrete level.

As far as the legal consequences of incompatibility with directly applicable Union law are concerned, one may therefore conclude that several possibilities exist:

- the administrative act (decision) that is incompatible with Union law is annulled;
- the provision (legislation) that is incompatible with Union law is
 - declared inapplicable or
 - declared to be non-binding.

In addition, the court has the option of awarding damages.

To date, there has only been a single finding of incompatibility with the Charter in Dutch administrative law. In a judgment of 4 July 2011,⁶⁰ the Division concluded that there had been a breach of article 47 of the Charter, since the payment of court fees – in the specific circumstances of the alien concerned⁶¹ – constituted a substantial breach of the right of access to the court. For the alien, the legal consequence of this ruling was that he was exempted from paying court fees for his appeal and that he therefore gained access to the court. This is an exceptional situation because the case was about admissibility (payment of court fees) and there was hence no review of the merits (no decision or legislation was at issue). The case was about actual access to the court.

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?

⁵⁸ For an example of review at concrete level of a decision in the light of Union law, see ABRvS, 29 November 1991, M&R 1992/9, no. 99, and more recently ABRvS 23 March 2011, 200700622/1/H3.

⁵⁹ For an example of review at abstract level of a decision in the light of Union law, see ABRvS, 8 August 1997, M&R 1997/11, no. 126.

⁶⁰ See ABRvS, 14 July 2011, no. 201009278/1/V3.

⁶¹ The alien was being held in a high-security institution at which his maximum pay was 0.76 euro per hour.

In interpreting the provisions of the Charter, courts are obliged under the terms of article 6, paragraph 1 of the TEU to pay 'due regard' to the Explanations⁶² that were drawn up under the responsibility of the praesidium of the Convention charged with drafting the Charter.⁶³ A number of the Division's judgments show that it interpreted the Charter's provisions with the aid of these Explanations.

Thus, in its judgment of 15 July 2011, the Division explicitly relied on the Explanation for its interpretation of article 47, first paragraph of the Charter: it concluded that there was nothing in the Explanations to suggest that article 47, first paragraph constituted an obstacle to the adoption of procedural rules in national law.⁶⁴ In a judgment of 19 July, the Division relied on the Explanation in its interpretation of articles 41 and 47 of the Charter. In relation to article 41, the Explanation was consulted to clarify the question of whether this article applies to decisions on asylum applications. As regards article 47, the Division ruled that according to the wording of the article and to the Explanation, this article did not apply to the administrative phase but to the judicial phase of proceedings.⁶⁵ However, it is not always mentioned explicitly that the Explanation was consulted as an aid in interpreting an article of the Charter.⁶⁶ In such cases, whether or not the Explanation was consulted to help interpret the Charter is unclear.

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?

From the judgments of the Division in which the Charter is at issue, it can be inferred that, to date, in interpreting the Charter's provisions, use is made primarily of the linguistic⁶⁷ and treaty-compliant methods of interpretation (in line with the ECHR and its interpretation).⁶⁸ Outside the context of the Charter, Dutch administrative courts use a range of methods. Thus, in interpreting acts of parliament, the Division also uses the historical, anticipatory, dynamic, fundamental values and teleological methods.⁶⁹ It is perfectly possible that these methods too may be used to interpret the Charter in the future.

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 cases in which the text of the ECHR and the EU Charter is identical, and in which the parties actually invoke both articles, the overall situation is that Dutch administrative courts will apply both. As a rule, the court will apply the ECHR article that has been invoked first, and subsequently the article of the Charter, which would be interpreted/applied along the same lines as the identical article of the ECHR, producing the same outcome.

⁶² 14 December 2007, C 303/02, PB EU, p. 17 ff.

⁶³ Article 52, paragraph 7, of the Charter itself imposes an identical obligation.

⁶⁴ ABRvS, 15 July 2001, no. 201101530/1/V2.

⁶⁵ ABRvS, 19 July 2011, no. 201100226/1/V2.

⁶⁶ ABRvS, 14 July 2011, no. 201009278/1/V3; ABRvS, 4 July 2011, no. 201103855/1/V2 and CRvB, 13 October 2010 (LJN BO1242).

⁶⁷ See ABRvS, 19 July 2011, no. 201100226/1/V2, in which articles 47 and 41 are interpreted linguistically.

⁶⁸ See ABRvS, 15 July 2011, no. 201101530/1/V2, in which article 47 is interpreted on the basis of article 13 of the ECHR and the case law of the ECtHR on this article and ABRvS 14 July 2011, no. 201009278/1/V3, in which articles 1, 4, 18, 19, paragraph 2 and article 47 of the Charter are interpreted on the basis of article 3 of the ECHR and the case law of the ECtHR on this article.

⁶⁹ See J.C.A. de Poorter and H.J.T.M. van Roosmalen, 'Rol en betekenis van de Grondwet. Constitutionele toetsing in relatie tot de Raad van State', The Hague: Council of State 2010, p. 19 (pp.13-76 deal with constitutional review in the light of fundamental rights in the legislative process).

In a judgment of 15 July 2011,⁷⁰ the Division started by applying article 13 of the ECHR and then applied article 47, first paragraph of the Charter. After having concluded, on the basis of the Explanation relating to the Charter, that article 47, first paragraph of the Charter is based on article 13 of the ECHR and corresponds to it,⁷¹ it interpreted and applied article 47 of the Charter (on the basis of article 52, paragraph 3 of the Charter) in the same way as article 13 of the ECHR (on the basis of relevant ECtHR case law). In consequence, the Division reached the same conclusion as in relation to article 13 of the ECHR.

In other cases, after the relevant provision of the ECHR has been applied, it is not followed by the application of the identical provision of the Charter; instead, the court concludes, citing the application and interpretation of the ECHR article, that the Charter provision does not contain any additional rights, and that its application would therefore not turn out differently.⁷²

If only a provision of the Charter is invoked, and an article corresponding to it exists in the ECHR, the court will not necessarily apply the latter as well. For instance, the Division has on occasion applied article 47 of the Charter, when it is invoked, without involving the ECHR in its deliberations.⁷³ The Central Appeals Court for Public Service and Social Security Matters, ruling on 13 October 2010 on a case in which only article 47 of the Charter had been invoked,⁷⁴ did apply the identical article 6 of the ECHR, but only in order to expand on the application of the Charter article: the ECHR provision and the relevant case law were used, as it were, to *interpret* the article of the Charter.⁷⁵

Where only an ECHR provision is invoked, in general only this provision will be applied, and not the Charter, even if the Charter contains an article corresponding to the provision in question.⁷⁶

Finally, it is possible that a right may be invoked that is contained both in the Charter and in the ECHR (without parties specifying any provision or legal instrument). To date, one judgment has been given in a case in which this occurred.

In a judgment given by the Division on 4 July 2011,⁷⁷ the right invoked was access to the court. In this case, the Division applied only article 47 of the Charter. The identical article from the ECHR is not mentioned in the judgment.

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

In general, Dutch administrative courts rely heavily on ECtHR case law when interpreting provisions of the Charter. In two judgments involving a provision of the Charter that (according to the Explanation) corresponded to a provision from the ECHR, the Division interpreted them on the basis of ECtHR case law on the corresponding provision of the ECHR.⁷⁸

⁷⁰ ABRvS, 15 July 2011, no. 201101530/1/V2.

⁷¹ This case concerned article 47, first paragraph of the Charter, which affords 'more extensive' protection than the corresponding article in the ECHR, according to the Explanation. However, the Explanation also states that it is only more extensive in that it guarantees the right to an effective remedy before a court. The Administrative Jurisdiction Division did not consider this more extensive protection to be relevant in the case at hand, that is, in relation to adopting procedural rules in national law, and hence concluded that in this particular case, article 47, first paragraph corresponded to article 13 of the ECHR.

⁷² ABRvS 14 July 2011, no. 201009278/1/V3.

⁷³ The Administrative Jurisdiction Division applied only article 47 of the Charter, ABRvS, 19 July 2011, no. 201100226/1/V2. Likewise, the Administrative Jurisdiction Division applied only article 47 of the Charter in ABRvS 4 July 2011, no. 201103855/1/V2.

⁷⁴ CRvB, 13 October 2010 (LJN BO1242).

⁷⁵ In method of review, this is similar to cases in which both the article in the ECHR and the corresponding article in the Charter were invoked, as discussed in the previous section.

⁷⁶ See, among numerous other examples, ABRvS, 15 September 2010, 201001002/1/M1; ABRvS, 7 December 2010, 201000606/1/V1; ABRvS, 7 June 2011, 201002216/1/V3; ABRvS, 16 June 2011, 201010430/1/V1.

⁷⁷ ABRvS 14 July 2011, no. 201009278/1/V3.

⁷⁸ ABRvS, 15 July 2011, no. 201101530/1/V2, in which article 47 is interpreted on the basis of article 13 ECHR and the ECtHR case law regarding this article; and ABRvS 14 July 2011, no. 201009278/1/V3, in which articles 1, 4, 18, 19, paragraph 2, and 47 of the Charter are interpreted on the basis of article 3 ECHR and the ECtHR case law regarding this article.

The Central Appeals Court for Public Service and Social Security Matters, in a judgment of 13 October 2010,⁷⁹ also interprets a provision of the Charter on the basis of case law relating to the corresponding provision in the ECHR. This case was about article 47, second paragraph of the Charter, which corresponds, according to the Explanation, to article 6, paragraph 1 of the ECHR.⁸⁰ According to the CRvB, there was no reason to suppose, given the similar wording of the two articles, that the interpretation of article 47 of the Charter would be any different from that of article 6 of the ECHR.

Administrative courts of first instance also generally interpret provisions of the Charter that correspond to ECHR provisions on the basis of the ECtHR's case law regarding the latter.⁸¹

However, administrative courts of last instance, in cases involving a provision of the Charter that corresponds to one in the ECHR, do not always interpret the said provision of the Charter on the basis of ECtHR case law. In a judgment of 4 July 2011,⁸² the Division applied article 47 of the Charter without citing the case law on the corresponding article of the ECHR to back up its interpretation. Similarly, in a judgment of 19 July 2011,⁸³ the Division applied article 47 of the Charter, but did not discuss the case law of the ECtHR regarding the corresponding article of the ECHR (article 6).

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)?

To date, the Division has at no time cited the 'common constitutional traditions' of the member states in interpreting a provision of the Charter. However, Arnhem Court of Appeal, in a judgment of 22 March 2011,⁸⁴ ruled that the exemption from inheritance tax that applies in tax law to children under 23 years of age comes within the scope of article 52, paragraph 4 of the Charter, which 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'.

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

⁷⁹ CRvB, 13 October 2010 (LJN BO1242).

⁸⁰ The Explanation relating to article 52, paragraph 3, states that the substance of article 47, second paragraph is the same as that of article 6 of the ECHR, but that the provision of the Charter is wider in scope. The CRvB does not raise this point in its judgment.

⁸¹ The Hague district court, sitting in 's-Hertogenbosch, 20 September 2010, LJN:BN8696.

⁸² ABRvS, 4 July 2011, no. 201103855/1/V2.

⁸³ ABRvS, 19 July 2011, no. 201100226/1/V2.

⁸⁴ Arnhem Court of Appeal, 22 March 2011, LJN BQ0618.

In the view of the Division, the restricted access section of the Forum of the ACA Europe is a suitable arena for exchanges addressing the issue of which provisions of the Charter arise from the constitutional traditions of the member states. In addition, the Forum could be used more generally for discussion of the interpretation of the Charter's provisions.

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?

It would seem useful for ACA Europe to set up a central register of this kind. However, the practical feasibility of such an operation, including factors such as funding and workload, must be explored. A possible alternative would be for European institutions (such as the European Commission or the ECJ) to set up a register of this kind.

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?

To date, neither the Division nor any other administrative court of last instance has had to rule on a Charter provision deriving from an instrument other than the ECHR. However, administrative courts ruling at first instance on aliens cases have sometimes deliberated over such a provision of the Charter, namely article 24, which according to the Explanation is based *inter alia* on article 3 of the International Convention on the Rights of the Child (ICRC). There is nothing in these judgments to suggest that the fact that article 24 of the Charter derived from the ICRC has any consequences for its interpretation. In most cases, the provisions are invoked in combination with one another and applied jointly, without this having any influence on the interpretation of the individual provisions. It can be inferred from these judgments, however, that administrative courts assume that article 24 of the Charter has the same scope as article 3 of the ICRC.⁸⁵

L – Other matters

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 Netherlands has a consultative network of judges at national courts (known as the 'Eurogroep'). This study group consists of members of the judiciary (representatives of courts at all levels) with specialist knowledge of European law. It meets once every three months, to discuss judgments given by European and national courts relating to the application of European law (roughly 20 to 25 judgments are discussed at each meeting). Since 2010 a separate list has also been kept of judgments relating to the Charter. The agenda of each meeting is posted on the intranet website of the Council for the Judiciary (Porta Iuris), and hence is accessible to everyone working in the Dutch judicial system.

There is also a network of court coordinators for European law (GCE). This network has the objective of promoting exchanges of knowledge on European law between courts and cooperation between

⁸⁵ Judgments in which this is clear are: The Hague district court, 20 July 2011, LJN: BR4071 (minor children, Dublin Regulation transfer) and The Hague district court, sitting in Zwolle, 17 December 2010, LJN: BO9130 (minor children, Dublin Regulation transfer).

courts. The network organises a meeting on a specific theme each year. For instance, a meeting held on 9 June 2010 focused on the Lisbon Treaty, and was entitled 'De GCE neemt collega's mee' ('The GCE shares its expertise'). The event included lectures on institutional developments and on the Treaty's consequences for the protection of fundamental rights.⁸⁶

The ACA Europe has a consultative structure in the restricted access part of the Forum, where questions can be raised about issues relating to EU law and information can be exchanged. However, a physical consultative structure within the ACA Europe would not appear to be appropriate.

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

Yes.

The following question was not addressed: Does the Charter afford protection to legal persons of public law?

⁸⁶ See CBB annual report for 2010, p. 14.