

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

**Answers to the Questionnaire on behalf of the High Court of
Cassation and Justice of Romania**

1. Conference on the Charter of Fundamental Rights

A. Introduction

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

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

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

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

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

B Formulation of questions and aims

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

¹ OJ EU 18 December 2000, C 364.

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

The following themes are relevant in answering these questions:

- a. the scope *ratione temporis* of the EU Charter;
- b. the scope *ratione materiae* of the EU Charter (implementation of EU law);
- c. the question of review *ex officio* in the light of the EU Charter;
- d. the distinction between rights and principles in the EU Charter;
- e. the direct effect of the EU Charter;
- f. methods for interpreting the EU Charter;
- g. the relationship between the EU Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 'constitutional traditions' of the member states and instruments other than the ECHR.

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

C. Structure of questionnaire and deadline for replies

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

Your answers should be sent by email to Mrs Baguet (martine.baguet@aca-europe.eu) by 15 March 2012 at the latest. If after this date new judgments concerning the EU Charter are handed down in your country or if new proceedings are instituted, please let us know, once again by email.

2. Questionnaire

A– General

1. *In how many cases before your court and other administrative courts in your country has the EU Charter been at issue since 1 December 2009?*

Before the High Court of Cassation and Justice of Romania since December 1, 2009 the EU Charter has been mentioned within around 100 cases.

Nevertheless, we need to emphasize that in none of these cases references to the EU Charter were made as a sole and main argument meant to trigger the modification or the cassation of the Court decisions submitted to review in the appeal, rather as a subsidiary, or better said as supplementary arguments aimed meant to confirm the validity of the central arguments.

Unfortunately, we cannot provide statistics regarding the cases solved by the Administrative Tribunals and by the Courts of Appeal in

Romania in which the EU Charter has been invoked, as such statistics are not published.

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

The provisions of the EU Charter that have been invoked in most of the cases are listed below.

- Article 15 (right to pursue an occupation);
- Article 17 (property right);
- Article 20 (equality before the law);
- Article 21 (non-discrimination);
- Article 41 (right to good administration);
- Article 47 (right to an effective remedy and to a fair trial);
- Article 48 (the innocence presumption and the right to defence)
- Article 50 (right not to be tried or punished twice for the same offence).

An annex to present questionnaire is attached in this respect .

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

Most of the cases in which the EU Charter provisions were invoked were requests for revision of the decisions pronounced by High Court of Cassation and Justice of Romania acting as a recourse instance.

Main legal ground of such revision request was a provision in the *Romanian Law nr.554/2004 regarding the Administrative Disputes* (Law no. 554) according to which the national judge has to respect the principle of the priority of the EU Law.

Currently, such provision is no longer in force, as it was abrogated through a law passed in 2011 (Law nr.299/2011).

Generally, the areas of law in which the EU Charter has been particularly invoked are the following:

- Fiscal disputes (non-discrimination and right to good administration);
- Administrative regulations regarding social security and pension rights (property right and non-discrimination);
- Special regulation regarding the magistrate's profession (non-discrimination);
- Right of foreigners (right to good administration and the principle of a fair trial and reasonable delay);
- Compensatory damages granted by administrative national authorities in the context of property restitutions (right to good administration and the principle of a fair trial and reasonable delay).

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, until now there has been no request addressed by the High Court of Cassation and Justice of Romania to the ECJ for a preliminary ruling on the interpretation of the EU Charter, in the sense that the parties involved in litigation did not ask for a preliminary ruling, nor did the High Court *ex officio* submitted such request to the ECJ.

B– Scope *ratione temporis*

The EU Charter, as amended in 2007, acquired the status of primary Union law when the Treaty of Lisbon entered into force on 1 December 2009. On that date it replaced the previous version of 2000. There are a number of differences between the two texts. It is therefore important to consider the Charter's scope *ratione temporis*.

In the judgment in the *Kücükdeveci* case (ECJ, 19 January 2010, case C-555/07) the Court held that article 21, paragraph 1 of the EU Charter prohibits all discrimination, in particular on the grounds of age. Although in this judgment the Court derives support for the prohibition on age discrimination from the fact that it is enshrined in the Charter, it did not conduct any further examination for compatibility with Charter. One reason for this may be that the facts in this case date from before the entry into force of the Lisbon Treaty on 1 December 2009, when the Charter became binding.

5. *From what point can the EU Charter be invoked in your national administrative law proceedings, bearing in mind the date on which the decision in question was taken (ex tunc or ex nunc)?*

In our interpretation, the EU Charter can be invoked only against measures issued after December 1, 2009, the date on which it entered into force.

Nevertheless, before the High Court of Cassation and Justice of Romania, the provisions of the EU Charter have been invoked also prior to that date, as subsidiary arguments, usually in cases whereby specific articles in the European Convention Rights (CEDO) were applicable.

Consequently, High Court of Cassation and Justice of Romania decisions contain references to the EU Charter in the same manner, meaning that the EU Charter, even if mentioned, it is specified that it's not considered as having the force of a law.

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)?*

As mentioned above, the EU Charter was not considered as binding until it was integrated into the primary law of the European Union.

Nevertheless, the arguments based on its breach were not automatically rejected by the High Court of Cassation and Justice of Romania, on such grounds, provided that in respective cases other provisions in national law or in the EU Law were considered and represented valid legal grounds of the matters disputed in those cases.

An additional argument for such application and interpretation of the EU Charter derived from the provisions in the Law No. 304/2004 on judicial organisation.

According to the preamble of this law, "*Judicial organisation shall be instituted for the purpose of ensuring the observance of the fundamental human rights and freedoms stipulated, mainly, in the following documents: International Charter of Human Rights, Convention for the protection of human rights and fundamental freedoms, United Nations Convention on child's rights, and European Union's Charter of Fundamental Rights, as well as for ensuring the observance of the Constitution and laws of the country*".

Basically, to the best of our knowledge, in none of the judgments reviewing or annulling administrative decisions pronounced by the High Court of Cassation and Justice of Romania it was stated that the provisions of the EU Charter cannot be at least mentioned or invoked, before 2009, because they lacked the binding effect. Legal arguments based on the provisions in the EU Charter were analyzed along with legal arguments grounded on the provisions in national law or provisions in the primary Union Law already in force.

In this respect, we make reference also to the following provisions in the Romanian Constitution:

"Article 148 - Integration into the European Union":

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval."

C- Scope *ratione materiae*

Article 51, paragraph 1 of the EU Charter states that its provisions are directed to the member states only when they are implementing Union law, though it does not define what it means by 'implementing Union law'. It emerges from ECJ case law that three situations may be distinguished which 'fall within the scope' of Union law.

Category 1 – Implementing obligations which fall within the scope of Union law

The first category of situations which clearly fall within the scope of Union law are those in which the member states are implementing or applying EU legislation. This comprises:

- implementation of Directives;³
- enforcement of Regulations;⁴
- enforcement of other secondary law (for example Decisions);
- enforcement of primary law;⁵
- application of EU rules;⁶
- the application of general principles of Union law.⁷

Category 2 – Departure from a fundamental economic freedom

The second category of situations falling within the scope of Union law are those in which the member states depart from a fundamental economic freedom guaranteed by Union law. In the ERT case,⁸ the Court held that if a member state relies on imperative grounds (such as public policy, public security or public health) to justify a statutory provision which is likely to obstruct the exercise of the freedom to provide services, such justification, provided by Community (now Union) law must be interpreted and applied in the light of general principles of law and of fundamental rights.

Category 3 – a 'binding factor' in relation to Union law

The third category of situations falling within the scope of Union law are those in which the ECJ considers some kind of link with Union law to be present, as a result of which the situation (action taken by member state/national legislation) falls within the scope of Union law and the fundamental rights it guarantees become applicable.⁹ This category of situations, however, has by no means been clearly formulated in ECJ case law.

³ See for example case C-2/92, Bostock, ECR 1994, p I-955, paragraph 16; case C-442/00, Caballero, ECR 2002, p. I-11915, paragraph 31; joined cases C-20/00 and 64/00, Booker Aquaculture, ECR 2003, p. I-7577, paragraph 88; case C-144/04, Mangold, ECR 2005, p. I-9981, paragraphs 75-77; case C-427/06, Bartsch, ECR 2008, p. I-7245; case C-555/07, Küçükdeveci, ECR 2010, p. I-0000.

⁴ See for example case C-5/88, Wachauf, ECR 1989, p. I-2609, paragraph 19; case C- 345/06, Heinrich, ECR 2009, p. I-1659, paragraph 45; case C-384/05, Piek, ECR 2007, I-289, paragraphs 32 and 34; case C-16/89, Spronk, ECR 1990, I-3185, paragraph 13; case C-400/10 PPU, J.McB, ECR 2010, p. I-0000, paragraph 50.

⁵ Case C-309/96, Annibaldi, ECR 1997, p. I-2925, paragraph 14-21; case C-300/04, Eman and Sevinger, ECR 2005, p. I-8055, paragraphs 44-45, 52-53, 61.

⁶ See for example case C-349/07, Sopropé, ECR 2008, p. I-1036, paragraph 34-38; case C-107/97, Rombi, ECR 2000, p. I-3367, paragraphs 65-67 and 73; case C-28/05, Dokter, ECR 2006, p. I-5431, paragraph 79; joined cases C-317/08, C-318/08, C-319/08, C-320/08, Alassini, ECR 2010, p. I-0000.

⁷ See for example case C-276/01, Steffensen, ECR 2003, p. I-3735, paragraphs 60-64; case C-262/99, Louloudakis, ECR 2001, p. I-5547 paragraph 71.

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

⁹ See for example case C-71/02, Karner, ECR 2004, p. I-03025, paragraphs 49-50; joined cases C-286/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide, ECR 1997, p. I-7281, paragraphs 44-88; case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH, ECR 2010, p. I-0000.

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?

We cannot give any details of situations or rulings in which such interpretation has been made, as the question mentioned has not yet been addressed.

At the same time, we emphasize that the applicability of the EU Charter is not expressly stated in the Law no. 554 on Administrative Disputes or in the Civil Procedural Code.

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

8. When reviewing the lawfulness of decisions, are the administrative courts competent under national law to examine the compatibility of those decisions with the EU Charter:
- only at the request of the parties, or
 - also *ex officio* /through supplementation of the pleas in law ?

As a matter of principle, in the course of the judicial review of an administrative act or a decision issued by an administrative body, the administrative judge has to examine the compatibility of respective act/decision with all relevant legal rules, including EU Union Law, also *ex officio*, not only upon the request of the parties, provided though that the EU Union law is applicable in respective matter.

In other words, an administrative decision may be found illegal if breach of the Charter is manifest, even if none of the injured parties raised such illegality ground.

Based on the existing jurisprudence, we cannot mention any court decision in which such situation occurred.

E– Distinction between rights and principles

In addition to article 51, paragraph 1 of the Charter, article 52, paragraph 5 and the accompanying Explanations (:'Explanation') draw a distinction between the rights and principles enshrined in the Charter.

Article 51, paragraph 1 reads as follows:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'

¹⁰ See for an example of review *ex officio* joined cases C-222/05 to C-225/05, Van der Weerd, ECR 2007, p. I-4233.

Article 52, paragraph 5 reads as follows:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

According to the Explanation accompanying article 52, paragraph 5, 'Paragraph 5 clarifies the distinction between "rights" and "principles" set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities (...).'

9. Does your national law make a distinction between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter? What implications does this have for review by the courts?

Our national law contain no distinction between rights and principles and in any case no comparable if that in article 52 paragraph 5 of the EU Charter.

Also, we would like to emphasize that from a theoretical point of view we believe that no definite separation between the two concepts, the rights and *the principles* can be made as principles are treated as underlying the law provisions and regulating the whole legal system.

According to the Romanian doctrine, principles are basic (bright-line) rules provided by the Constitution, by laws issued by the Parliament or by administrative acts issued by the Executive Power (Government or other administrative bodies). Legal force of principles is given by the power of the acts they are provided for. For example, some of the constitutional principles such as, the principle of the separation and balance of powers, the rule of law, the principle of equality and the principle of non-discrimination are mentioned and regulated in other pieces of national legislation as well.

At the same time, a principle stipulated as such in the national Constitution can be considered at the same time as a "right", thus the separation of the two theoretical concepts is some times quite difficult to be done.

As an example, *the equality before the law*, regulated by the EU Charter as a right (article 20), can be found in the Romanian Constitution mentioned as a principle, but enjoying the same binding effect.

Due to the fact that Romanian administrative courts where not yet asked to interpret the provisions in article 51(1) and 52(5) in the EU

Charter we cannot make reference to any piece of jurisprudence in order to respond precisely to the addressed question.

Nevertheless, it is reasonable to believe that courts may interpret respective provisions in an extensive way rather than making a very clear distinction between rights and principles in connection with their applicable legal regime.

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 already mentioned above, we cannot refer to any precedent in which such question has been raised. Thus, it is difficult to predict the criteria based on which the national judge will mark the difference between rights and principles in the EU Charter. we believe however that the ECJ jurisprudence will serve as a source of interpretation and we do not exclude the possibility of asking for preliminary rulings in this respect, whenever appropriate.

In fact, the issue to be clarified, in our interpretation, is to determine whether the difference between a "right" and a "principle" generates a different legal regime with regard to the individuals requesting before the administrative courts for the annulment of various administrative acts.

As a conclusion, at this stage it is difficult to predict how the interpretation of article 52 par.(5) of the EU Charter will influence the development of the national jurisdiction on that matter.

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 Romania realize a full review of administrative acts, meaning that national administrative courts will conduct examination for compatibility with principles in both cases while ruling on the legality of a normative legal act and while reviewing an individual administrative decision that allegedly infringes one's rights.

The principles may be invoked with the same legal force as are the rights. When analyzing the legality of an administrative act, regulatory or individual, the courts will take into consideration national legal provisions as well as the provisions in the EU Charter.

Nevertheless, it is our interpretation that application of the EU Charter's provisions regarding the principles will generate various disputes.

***Prima facie*, provisions of article 52(5) in the EU Charter may be interpreted as precluding the judiciary control in the area of social and economic European politics, regulated as principles and not rights, despite the fact that the differences between the two categories is not as clear as we may believe, potentially generating confusions.**

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?

According to Romanian national law, principles even though cannot be invoked like individuals rights, are applied as legal provisions with equal binding force. Most of the principles invoked in national cases with no European dimension are stipulated in the Constitution.

Generally, principles are considered as enforcing individual rights and thus an administrative decision contrary to a principle is considered to be unlawful.

- F- Scope and interpretation of rights and principles

The purpose of Article 52 of the EU Charter is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights.

13. How do you interpret the general limitation clause of Article 52, paragraph 1, of the Charter? In accordance with the limitation clauses of the Convention for the Protection of Human Rights and Fundamental Freedoms? In accordance with the case-law of the European Court of Justice that restrictions may be imposed in the context of the economic freedoms, provided that those restrictions correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights? Or otherwise?

There is no precedent in the jurisprudence of the High Court of Cassation and Justice of Romania regarding to this point either, but we may consider that rights and freedoms are not absolute and have to be taken together with the rights and freedoms of others.

While it is possible to limit them by law, respective law must be necessary, justified by a reason of general interest accepted by the Community case law (public policy, public security, public health etc.) or in a convention in the case of a right protected by the ECHR, and proportionate.

- G- Direct effect

14. Has the EU Charter been transposed into your national law, in full or in part, or via reference? If so, please state whether this also applies to the ECHR.

The EU Charter has not been transposed into our national law and does not have to be, following the provision in the Romanian Constitution cited above (see response to question 6).

A similar regime applies to the ECHR as well, based on another provision in the Romanian Constitution (article 20).

According to Article 20 of the Constitution: „(1) *Constitutional provisions concerning the citizens' rights and liberties shall be*

interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions”

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

Following the response given to the previous question (no. 14) the entire EU Charter has direct effect , or better said, each time when a specific provision in this act has been invoked it was not rejected on the grounds of not having direct effect.

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

Again, without the possibility of making reference to certain decisions pronounced by the High Court of Cassation and Justice of Romania, we appreciate that it is likely that the question whether provisions of the Charter have direct effect will be judged according to the same criteria that are applied by the ECJ in answering the question whether a provision of the Treaties has direct effect, i.e. that the provisions must be sufficiently clear and precise and that they be unconditional.

This means that a provision containing rights will certainly be considered to have direct effect, while it remains to be decided whether the same applies to provisions containing principles.

In this context, we are making reference to decision pronounced by the Romanian Constitutional Court in which the provisions in the EU Charter were somehow analyzed.

The Constitutional Court of Romania ruled in the Decision No.871/2010 in the sense that *“the provisions of the EU Charter are considered in the process of the constitutional control only if such provisions ensure, guarantee and develop the Romanian constitutional provisions regarding the fundamental rights. In other words, EU Charter’s provisions are applicable only if their level of protection is at least equal to the constitutional provisions regulating the human rights”*.

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 Romania realize a full review of the administrative acts. However, one should note that for the time being the High Court of Cassation and Justice of Romania has not used directly and effectively the EU Charter’s provisions as a sole ground for its judgments. In this respect, please also see the answers to questions no.1 and 11 above.

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?

Since the authority of the Charter is higher than national laws by virtue of Article 20 of the Romanian Constitution, a national law, even one enacted subsequently, that is in breach of a provision of the EU Charter having direct effect, would not be applied and taken into consideration by the court. Thus, if an individual administrative decision is incompatible with a provision of the EU Charter that has direct effect, it shall be annulled.

H– Interpretation methods

Explanations of the Charter were published when the EU Charter was proclaimed.¹¹ The ECJ judgment of 22 December 2010 in the case of DEB Deutsche Energiehandels- und Beratungsgsgesellschaft mbH (case C-279/09, paragraph 32) confirmed that in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the Explanation have to be taken into consideration for the interpretation of the Charter.

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

To the best of our knowledge, until now there is no decision in High Court of Cassation and Justice of Romania jurisprudence that have referred to the *Explanation*.

We share the opinion that has been already expressed by other European States in the sense that the courts would probably refer to the *Explanation* if needed, in the same way that they take into account the preamble of the directives in order to obtain a better understanding of their scope.

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?

Generally speaking, the High Court of Cassation and Justice of Romania adopts the linguistic, the systematic, the teleological, the historical and the treaty-compliant methods in interpreting the national laws, as well as the EU law, so it is reasonable to envisage that such methods shall be applied in interpreting provisions of the EU Charter as well.

I– Relationship between EU Charter and ECHR

Article 52, paragraph 3 of the EU Charter reads: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of

¹¹ OJ EU 14 December 2007, C 303.

Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

The Explanation accompanying article 52, paragraph 3 of the EU Charter contains a list of rights that at the time when the Explanation was adopted in 2007 were considered to correspond to the rights guaranteed by the ECHR within the meaning of this paragraph. The Explanation also includes a list of articles where the meaning is the same as the corresponding articles of the ECHR, but where the scope is wider.

ECJ case law also discusses the correspondence between the EU Charter and the ECHR.¹²

21. In cases where the text of the ECHR and the EU Charter is identical, do your national administrative courts apply the ECHR and/or the Charter?

The question of choosing between the EU Charter and the ECHR has never arisen before the High Court of Cassation and Justice of Romania up to now.

We anticipate that courts shall follow the principle stated in article 5 (3) of the EU Charter, according to which in case the EU Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

This means that courts might choose to mention both instruments, namely the ECHR and the Charter, as grounds of same ruling.

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

It is our view that the case law of the European Court of Human Rights plays a significant role in the interpretation of the EU Charter moreover than even the ECJ in its jurisprudence makes constant references to such case law.

At the same time, it is difficult to imagine that the interpretation of human rights adopted by ECHR and ECJ could be different, as long as article 52 (3) in EU Charter provides that the rights established by the two instruments have same meaning and scope.

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

Article 52, paragraph 4 of the EU Charter states: ‘In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions’.

According to the Explanation accompanying article 52, paragraph 4, rather than following a rigid approach based of 'a lowest common denominator', the Charter

¹² Case C- 400/10 PPU, J. McB, ECR 2010, p. I-0000; cases C-92/09 and C-93/09, Schecke et al., ECR 2010, p. I-0000; case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH, ECR 2010, p. I-0000.

rights in question should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

It emerges from the ECJ judgment of 22 December 2010 in the case of DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH (case C-279/09, paragraph 44) that the Court took account of the Advocate General's comparative survey of the law of the member states as contained in paragraphs 76 to 80 of his Opinion, which concluded that there was no truly common principle which is shared by all the member states as regards the award of legal aid to legal persons.

23. Do you refer to the common constitutional traditions of the member states in interpreting the EU Charter? If so, how do your national courts determine whether a provision of the EU Charter also recognises rights which arise from the constitutional traditions of the member states (article 52, paragraph 4 of the EU Charter)?

The High Court of Cassation and Justice of Romania have not yet referred to the common constitutional traditions of the member states in interpreting the EU Charter.

It is our interpretation that such provision (article 52, paragraph 4 of the EU Charter) may remain only a theoretical provision, without a direct application and impact in various national cases, as long as the "common constitutional traditions" is a too vague concept.

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

We fully share the opinion expressed by other State Members in the sense that the application of article 52 para 4 in the EU Charter will most certainly be one of the major challenges for any national judge in his role of a first judge of the EU law as well as for the ECJ.

Interpreting fundamental rights in harmony with traditions common to 27 Member States requires knowledge of the common constitutional traditions concerned, which is not an easy task.

As we believe that the content of such concept shall be submitted to further and various interpretations, it is also our view that ACA-Europe Forum may be just the right place for discussing such related issues.

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?

We believe that it would be useful to have such a central register with the rights and freedoms under constitutional traditions as interpreted by the national courts, as well as the case law of the Court of Justice referring to them, to the extend possible.

At the same time, we should bear in mind that implementation of such an instrument may be difficult and require a significant amount of time and resources of all kinds.

K– Relationship between the EU Charter and other instruments

A number of rights contained in the EU Charter are derived from instruments other than the ECHR. For example, article 28 of the Charter, the right to collective bargaining and action, is based on article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers point 12-14, while article 24 of the EU Charter, the rights of the child, is based on the UN Convention on the Rights of the Child.

26. If a provision of the EU Charter is derived from an instrument other than the ECHR, what consequences does this have for the interpretation of the provision by your national administrative courts?

Up to date, such issue has not been addressed.

The lack of details of a specific and practical case refrain us to anticipate which would be the interpretation of the national administrative courts in the situation described.

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?

For the moment there are no special structures created in order to ensure uniform interpretation of the EU law issues. Nevertheless, informal meetings are regularly organized at the level of the courts of appeals with the participation of the judges from the High Court of Cassation and Justice of Romania in order to discuss matter of uniform jurisprudence.

In the past also the Superior Council of Magistrates used to organize such type of informal meetings with the purpose to eliminate the differences of jurisprudence within our judicial system, so much criticized, emphasizing that the differences of jurisprudence were not necessarily identified with regard to the EU law interpretation.

Of course, we cannot but support creation of any type of structure at the level of ACA-Europe in this respect, helpful at least for sharing information based on various examples of jurisprudence.

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

Responses prepared by:

Judge Dana Iarina VARTIRES and

Chief Assistant Magistrate Bogdan GEORGESCU

High Court of Cassation and Justice of Romania - Administrative and Fiscal Division

Annex

Judgments of the High Court of Cassation and Justice of Romania relating to the EU Charter (2009 –2012)

Case law regarding the article 17 in the EU Charter

- Decision No.1865/2011 – pensions review, Government Order No.737/2010;

Case law regarding the article 21 in the EU Charter

- Decision No.1616/2010

Case law regarding the article 41 in the EU Charter

- Decision No.279/2009, Decision No. 973/2009, Decision No. 3291/2009, Decision No.213/2010, Decision No.1754/2010, Decision No.118/2011, Decision No.501/2011, Decision No.713/2011, Decision No. 2436/2011, Decision No. 2536/2011– pronounced on the matter regarding the reasonable time of the proceedings in cases having as object compensatory measures for property rights

- Decision No.737/2009
- Decision No.2175/2010
- Decision No.2176/2010
- Decision No.2668/2010
- Decision No.4681/2010
- Decision No.1308/2011
- Decision No.1546/2011
- Decision No.1551/2011
- Decision No.2113/2011
- Decision No.2121/2011
- Decision No.2204/2011
- Decision No.2229/2011
- Decision No.3489/2010
- Decision No.3838/2010
- Decision No.3846/2011
- Decision No.4395/2011
- Decision No.4505/2011
- Decision No.5133/2011

Case law regarding the article 47 in the EU Charter

- Decision No.64/2009; Decision No.647/2009; Decision No.1027/2009; Decision No.1174/2009; Decision No.1477/2009; Decision No.1519/209; Decision

No.1665/2009; Decision No.1743/2009; Decision No.1939/2009; Decision No.2020/2009; Decision No.2116/2009; Decision No.2441/2009; Decision No.74/2010; Decision No.188/2010; Decision No.189/2010; Decision No.237/2010; Decision No.439/2010; Decision No.995/2010; Decision No.1147/2010; Decision No.1169/2010; Decision No.1206/2010; Decision No.1313/2010; Decision No.2459/2010; Decision No.2474/2010; Decision No.782/2011, Decision No.2256/2011; Decision No.2382/2011; Decision No.2655/2011; Decision No.2703/2011; Decision No.3153/2011. Decision No.3153/2011; Decision No.3185/2008; Decision No.3190/2010; Decision No.3207/2009; Decision No.3226/2008; Decision No.3400/2008; Decision No.3515/2008; Decision No.3526/2008; Decision No.3573/2011; Decision No.3607/2009; Decision No.3609/2009; Decision No.3615/2008;

Case law regarding the article 50 in the EU Charter

- Decision No.1421/2011

Case law regarding the article 15, 21,48 in the EU Charter

- Decision No.127/2011