

## Colophon:

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This publication has been realized with the financial support of the European Union.

The Newsletter (English and French) is published on the website of ACA-Europe, the Association of the Councils of State Supreme administrative jurisdictions of the European Union. ([www.aca-europe.eu](http://www.aca-europe.eu)). We have also printed a French version of the Newsletter.

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## **From the Secretary-General's desk**

With the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union (as adopted by the European Council in Nice on 7 December 2000 and amended in 2007) became legally binding, just like the other European treaties.

Since then, national courts have had to apply the Charter in all disputes. Thus the Charter is a new addition to the legal arsenal essential for all national courts. Indeed, the content of the Charter makes it a key building block in Europe's architecture. Consequently, a national court's obligation to apply the Charter raises a number of issues: In which cases is it necessary to check compliance with the Charter? Which method(s) must be applied in any interpretation the court may be called upon to give of the principles set out in the Charter? What is the scope of the fundamental rights enshrined in the Charter?

The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) is fully aware of the issues raised here and, to that end, organised a seminar in The Hague on 24 November 2011, with the scientific support of the Council of State of the Netherlands.

For the sake of efficiency, the seminar, chaired by Mrs SEVENSTER, brought together a select group of ACA-Europe member Councils of State and Supreme Administrative Courts, specifically: the Court of Justice of the European Union, the Federal Administrative Court of Germany, the Administrative Court of Austria, the Council of State of Belgium, the Supreme Court of Spain, the Supreme Administrative Court of Finland, the Council of State of France, the Supreme Court of the United Kingdom, the Supreme Court of Hungary, the Supreme Administrative Court of Lithuania, the Council of State of the Netherlands and the Supreme Administrative Court of Poland. The European Court of Human Rights and the European Commission were also involved.

The seminar provided a forum for attendees to explore and discuss the scope of these issues, assisted by answers they had given to a questionnaire before attending. During the seminar, the Council of State of the Netherlands led an exchange of views based on the national reports compiled on the basis of the questionnaire. Given the high level of interest shown, the Supreme Court of Spain decided to also make this the subject of its colloquium on 25 June 2012, marking the end of its presidency of ACA-Europe. This will give all ACA-Europe member high courts an opportunity to help expand on the approach launched at The Hague.

At The Hague, ACA-Europe was keen to show that it is fully aware of the challenges that national courts face in having to deal with the growing interdependence between national law and EU law.

This newsletter includes the general report drafted by the Council of State of the Netherlands at the close of the initial exchange of ideas. The questionnaire and the national reports are available at [www.aca-europe.eu](http://www.aca-europe.eu) under Colloquia/Seminars.

Yves Kreins  
Secretary-General

# General Report

## Rapporteurs are for:

- The Administrative Court (Austria), Mr HANDSTANGER;
- The Council of State (Belgium), Mr VANDERNOOT;
- The Supreme Administrative Court (Finland), Ms PYNÄ;
- The Council of State (France), Ms VON COESTER;
- The Federal Administrative Court (Germany), Ms HELD-DAAB;
- The Supreme Court (Great-Britain), Lord Justice CARNWATH;
- The Supreme Court (Hungary), Mr OSZTOVITS;
- The Supreme Administrative Court (Lithuania), Mr VALANCIUS;
- The Council of State (The Netherlands), Ms SEVENSTER, chairman of the seminar;
- The Supreme Administrative Court (Poland), Mr CHLEBNY;
- The Supreme Court (Spain), Mr DIEZ PICAZO;
- The Court of Justice of the European Union, Mr VON DANWITZ.<sup>1</sup>

## Introduction

On the 24<sup>th</sup> of November 2011, an ACA-seminar has been organised in the Hague (“The Hague Seminar”). The objective of this seminar was to exchange information and experiences relating to the working of the EU Charter in practice, and to create a body of knowledge concerning the interpretation and application of the EU Charter.

To gain a better insight into the national practices concerning the EU Charter, a questionnaire was drafted and sent to the participants (rapporteurs), consisting of 27 questions.<sup>2</sup> The (national) reports submitted served as the first basis for this general report. A draft general report has been sent to the participants before the The Hague seminar. At the seminar the following three themes were in particular discussed: (1) the scope *ratione materiae* of the EU Charter; (2) the distinction between rights and principles; (3) relationship between EU Charter and ECHR. The discussion took place on the basis of discussion papers on these issues drawn up by the Dutch presidency.<sup>3</sup>

In total, 15 participants attended the seminar, which consisted of the 12 rapporteurs, and three guest speakers - Ms Prechal (Court of Justice of the European Union – hereafter CJEU), Mr Spielmann (European Court of Human Rights – hereafter ECHR) and Romero (European Commission)<sup>4</sup>.

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<sup>1</sup> The replies by Judge Von Danwitz primarily represent the author’s personal views. The answers therefore cannot be ascribed to the court of which the author is a member.

<sup>2</sup> The questionnaire is available on the website [www.aca-europe.eu/en/colloquiums/colloq\\_en.html#seminars](http://www.aca-europe.eu/en/colloquiums/colloq_en.html#seminars).

<sup>3</sup> The work documents are available on the website [www.aca-europe.eu/en/colloquiums/colloq\\_en.html#seminars](http://www.aca-europe.eu/en/colloquiums/colloq_en.html#seminars).

<sup>4</sup> At the seminar, the guest speakers spoke in a personal capacity.

The views, clarifications and additions expressed by the participants at the seminar, have, if relevant and necessary for the sake of completeness, been inserted in this general report, either under the heading "Views expressed at the The Hague seminar d.d. 24.11.2011" or in footnotes.

The results of the seminar will be used to lay the foundations for the colloquium on 25 June 2012 by the Supreme Court of Spain at the end of its presidency of ACA-Europe.

## Theme A - General

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

The conclusion to be drawn from the reports is that the Charter has by now been referred to in the national administrative case law of all the participating countries. A number of reports mention only (or predominantly) judgments in which the Charter was invoked by a party and in which the court actually reviewed for compatibility with the Charter.<sup>5</sup> Other reports also mentioned judgments in which the Charter was referred to without further specification or in which Charter was used merely as an additional argument or for the purpose of explaining and interpreting other legislation.<sup>6</sup> The *Spanish* and *Belgian* reports explicitly state that the Charter has only played an indirect role and has been of incidental significance in judgments up to now.

The table below shows the number of judgments of the administrative courts in which the Charter has been referred to in each of the participating countries since 1 December 2009. To the extent possible on the basis of the reports, a distinction is made in the table between the highest administrative court and the lower administrative courts. For the record, the *French*, *German*, *English* and *Dutch* reports also mention judgments rendered outside the domain of administrative law. These judgments are listed separately in the table.

**Table of national judgments on the 'Charter'**

Country	Total number of administrative law judgments	Number of judgments by the highest administrative courts	Number of judgments by lower administrative courts	Number of judgments outside the domain of administrative law
France	95	30	65	10 (area of law unknown)
Hungary	2	1	1	Not reported
Poland	28	14	14	Not reported
Belgium	2	1	1	Not reported
United Kingdom	4	4		2 (civil law)
Finland	20	10	10	Not reported
Germany	20	11	9	3 (2 fiscal and 1 social security)
Lithuania	7	6	1	Not reported
Austria	12	12		Not reported
Spain	6	6		Not reported
Netherlands	49	24	25	19 (15 criminal law and 4 civil law)

<sup>5</sup> This group includes *the Netherlands*, *the UK*, *Poland*, *Austria*, *Germany*, *Lithuania*, *Austria* and *France*.

<sup>6</sup> These countries are *Spain*, *Belgium*, *Finland* and *Hungary*.

## Protocol 30

*Poland* and the *UK* both requested the addition of a protocol to the Treaty of Lisbon concerning the application of the Charter. Briefly, Protocol 30 to the Treaty of Lisbon provides that the rights enumerated in the Charter cannot be invoked before their national courts unless those rights are anchored elsewhere in national law. The *Polish* and *British* reports both discuss the protocol and its effect. The conclusion from both reports is that the protocol should probably not be treated as an opt-out. The existing legal practice does not yet provide any certainty about what restrictions actually follow from the protocol, although there is currently a request for a preliminary ruling before the Court of Justice of the European Union (CJEU) in which the English Court of Appeal has submitted questions arising from civil-law proceedings about, *inter alia*, the interpretation of the protocol and its significance for the application of the Charter.<sup>7</sup> The *British* rapporteur notes: “*it is also possible that the protocol will not have any practical implications and as such the Charter will be applied in the UK to the same extent as it is applied in other Member States.*” According to the *Polish* rapporteur, it can be assumed that the Charter must be applied in the Polish legal system, albeit subject to the conditions/restrictions arising from the protocol. In the *Polish* doctrine, the impact of this limitation on the application of the Charter is heavily qualified. In the first place, Poland’s constitution itself contains a list of fundamental rights and Poland is a party to all the major international human rights conventions. Secondly, the most important rights in the Charter are protected as ‘general principles of Union law’ under Article 6 (3) of the Treaty on European Union (TEU).

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

A great many provisions of the Charter have already been mentioned at least once in judgments of national administrative courts. The reports refer to a wide range of provisions of the Charter and give no reason to assume that some provisions arise significantly more often than others. The provisions of the Charter most frequently mentioned in the reports are: article 7 (respect for private and family life), article 11 (freedom of expression and information), article 17 (right to property), article 18 (right to asylum), article 19 (prohibition of collective expulsion and non-refoulement), article 24 (rights of the child), article 41 (right to good administration) and article 47 (right to an effective remedy and to a fair trial).

There is an appendix to this report containing a list of the provisions of the Charter and showing for each provision whether or not it has been referred to in administrative law cases in the participating countries and, if so, in which countries those provisions have been at issue. There is also an extra column containing a list of the relevant case law of the CJEU on each provision since 1 December 2009 (in other words, judgments in which provisions of the Charter were actually applied).<sup>8</sup>

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<sup>7</sup> See: CJEU, case C-411/10, 21 December 2011, *NS/Secretary of State for the Home Department*.

See also the reference for a preliminary ruling by the Court of Appeal of 12 July 2010, [2010] EWCA Civ 990.

<sup>8</sup> This refers to application in a broad sense, in other words, the use of the Charter as an instrument of interpretation or as an autonomous ground for review.

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

The Charter plays a role in a variety of areas in the domain of administrative law. The area of law in which the Charter seems to have played the most prominent role to date is immigration and asylum law: apart from *Spain*, *Hungary* and *Austria*, the Charter has had an impact (to a greater or lesser extent) in this area of law in every country. The reports from *Germany* and *the Netherlands* in fact show that more judgments have been made in the area of immigration and asylum law than in any other area of law affected by the Charter.

### **4. Has your court or another administrative court in your country recently asked the CJEU for a preliminary ruling, which has not yet been published on the CJEU website, concerning the interpretation of a provision of the EU Charter? If so, give a brief description of the content of the reference?**

According to the reports, to date requests for preliminary rulings concerning the EU Charter have been made to the CJEU by *Hungary*, *Spain* and *Austria*. In *Austria* the request for a preliminary ruling concerned the interpretation of several provisions of Regulation 343/2003 (Dublin Regulation).<sup>9</sup> One of the questions asked was whether article 3(2) of this regulation was compatible with articles 4 and 7 of the Charter. The questions referred by *Spain* relate to the interpretation of Directive 95/46 (Privacy Directive), which could be affected by Article 8 of the Charter (the right to protection of personal data).<sup>10</sup> The *Hungarian* report does not mention the subject matter of the requests for preliminary rulings.

## **Theme B - Scope *ratione temporis***

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

The following premise emerges, although it is generally not stated explicitly. Whether the Charter's scope *ratione temporis* extends to situations dating from before the entry into force of the Treaty of Lisbon (1 December 2009) has to be answered according to national law. Diverging views are expressed in the *Spanish* report and the report of Judge *Von Danwitz*.

On the basis of the reports a broad distinction can be made between the view that (a) the Charter can only be applied in cases relating to situations dating from after 1 December 2009 and the view that (b) the Charter can also be applied in cases relating to situations dating from before 1 December 2009. Some reports also address (c) the special position of procedural decisions. Finally, several reports (e) make an exception for the use of the Charter as an instrument of interpretation or as an additional argument.

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<sup>9</sup> This request for a preliminary ruling has now been published on the Court's website, with reference C-245/11, *K*.

<sup>10</sup> This request for a preliminary ruling has now been published on the Court's website, with reference C-469/10, *Federación de Comercio Electrónico y Marketing Directo*.

a. Application of the Charter to situations prior to 1 December 2009 is not possible

In *France, Austria, the Netherlands, Poland, Hungary, Belgium and Lithuania* it seems to be assumed that in principle the Charter can only be applied in situations arising after 1 December 2009. This conclusion must be treated with caution, however, because the differences in the way this question was answered and in the national legal systems make comparisons difficult. For example, the reports from *France, Austria, the Netherlands and Poland* stress that in administrative law proceedings the lawfulness of decisions is reviewed *ex tunc*. Accordingly, the Charter is only applicable with respect to decisions made after 1 December 2009. The reports from *Lithuania and Belgium* explain in more general terms that the Charter is applicable to *actions and facts* from 1 December 2009. According to the *Hungarian* report, only *cases* dating from after 1 December 2009 fall within the scope *ratione temporis* of the Charter and that the Charter only operates *ex nunc*.

b. Application of the Charter to situations prior to 1 December 2009 is possible

According to the reports from *Finland, Germany, Spain* and Judge *Von Danwitz*, the application of the Charter to situations existing prior to 1 December 2009 is possible. In the *Finnish* report a distinction is made between “*situations that ceased to exist prior to 1.12.2009*” and “*violations constituting a continuing situation*”. The Charter does not apply to the first category of situations, but does to the second. Judge *Von Danwitz* makes a similar distinction, and refers as far as the review of the legality of the legislative acts of the Union is concerned to the judgments of the CJEU in the *Volker and Markus Schecke* (C-92/09 and C-93/09) and *Association Belge de Consommateurs Test Achats et al.* (C-236/09) cases.

In *Germany* there are some situations in which the Charter may apply to acts dating from before 1 December 2009. That is the case if those acts are reviewed *ex nunc* under German law. The method of review (*ex nunc* or *ex tunc*) depends on the nature of the disputed act. As an example of a situation where the review is *ex nunc* the report mentions an appeal against the refusal to grant a licence to perform activities in the banking sector. The revocation of a driving license or the dismissal of public servants are, by contrast, subject to *ex tunc* review and in those cases the Charter only applies to decisions made after 1 December 2009.

The *Spanish* report states that under Spanish law the Charter would in principle be applicable to situations existing after 1 December 2009, but further notes that the scope *ratione temporis* of the Charter has to be established under Union law rather than under the national law of the member states. Therefore, according to the Spanish reaction, it would be legitimate for the CJEU to introduce special criteria for the application of the Charter to events dating from prior to 1 December 2009. In particular, the rapporteur feels it is conceivable that elements of the Charter constitute part of the ‘*ordre public*’ and are consequently always applicable.

c. Procedural decisions

The *Belgian* report mentions a procedural decision taken on the grounds of article 47, paragraph 2 of the Charter in a judgment rendered after 1 December 2009 but in a case that related to facts or decisions dating from prior to 1 December 2009. In the Netherlands the Charter is also applicable to procedural decisions of the court made after 1 December 2009, even in cases relating to administrative decisions made prior to 1 December 2009.

d. Distinction between material and procedural provisions of the Charter

In *Lithuania* a distinction is made between the material and procedural provisions of the Charter. The procedural rules have applied in all current cases since 1 December 2009 (see subsection a. for the material provisions).

e. The Charter as an instrument of interpretation or as an additional argument

In *Lithuania's* report it is noted that “*there are no obstacles to rely on the Charter provisions ex tunc when we use it as an additional source for understanding the true meaning (interpretation) of national or EU law while making a judgment on the decision which was adopted before the Charter became primary law of the EU. The courts or an aggrieved person may rely on the Charter for interpretative purposes despite the date on which the contested decision was made and at all levels of jurisdiction...*”. The Spanish report says: “*In any event it seems clear that the Charter can be used as an additional argument, even for cases arisen before its coming into force (...)*”.

**6. Does the 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 results?**

As a rule, the Charter of 2000 plays a role in the legal system of the participating countries,<sup>11</sup> *not* as an autonomous ground for review (since it was not a binding legal instrument) but rather as an additional argument or as confirmation of existing (Union) law, or as a 'source of inspiration'.

**Theme C - Scope *ratione materiae***<sup>12</sup>

**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 EU Charter?**

As a rule, national judgments in which the Charter is applied do not explicitly mention why the situation falls within the scope of the Charter. Judgments of *Dutch* and *British* courts are the exceptions to the rule. For example, the *Dutch* report provides examples of judgments in which the court explicitly reviewed compatibility with article 51, paragraph 1 of the Charter. The *United Kingdom's* report seems to imply that the administrative courts will expressly review whether a situation involves "implementing Union law".

The reports stress that the meaning of the phrase "implementing Union law" has *not* yet been determined in national case law.<sup>13</sup> Judge *Von Danwitz* notes that the CJEU has not yet been called on to pronounce in depth on the scope of the Charter with regard to this phrase. The general impression to

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<sup>11</sup> With the exception of *Hungarian* and *Austrian* case law. The response from the *United Kingdom* does not address this question.

<sup>12</sup> See the work document (theme 1) available on the website [www.aca-europe.eu/en/colloquiums/colloq\\_en.html#seminars](http://www.aca-europe.eu/en/colloquiums/colloq_en.html#seminars).

<sup>13</sup> Because there is generally little case law on the Charter or more specifically because the highest administrative court has not yet ruled on this point (as mentioned in the *French* report).

emerge from the scant case law and the personal views of the rapporteurs (in relation to the three categories of situation mentioned in the questionnaire)<sup>14</sup> is the following:

A broad interpretation is generally adopted with respect to category 1 and 2

Generally speaking, the phrase “implementing” in article 51, paragraph 1 of the Charter seems to be interpreted broadly. In most of the reports the authors assume that the Charter applies in situations falling into categories 1 and 2. The *British* report gives an example of a broad application for category 2. The judgment concerns the refusal to issue an export ban. With a reference to the *ERT case* (C-260/89), the refusal is described as “implementing Union law”.<sup>15</sup>

The *German* case law shows that, apart from the situations specified in categories 1 and 2, the Charter is also applicable in situations where “*other individual rights guaranteed by primary or secondary Union law can be invoked*”. In these cases, the Charter mostly is referred to as a means of interpretation to define the content of the individual rights concerned. This case law may therefore be described rather as an example of a broad concept of category 2 than as indicating any adoption of category 3.

None of the other reports mention the application of the Charter in situations falling outside categories 1 and 2. At the same time most reports are silent with regard to the (existence) of a third category.<sup>16</sup> Hence, in these reports there are generally no fundamental objections raised to the existence of a category 3. Nor are any fundamental reasons cited in support of the existence of this category, with the exception of *Lithuania*, where it is assumed that the Charter has broad application on the basis of the ‘*principle of vigilance*’. However, there are frequent references to the lack of certainty surrounding this category. For example, the *Spanish* report poses the following question: “*How binding must an indirect connection with European affairs be in order to justify the compulsory application of the Charter?*”

Some reports contain clues for the answer to the question of when situations fall outside the scope of the Charter. The *German* report argues that the conclusion to be drawn from national case law is “*that there can be no implementation in areas outside the competence of the Union, especially in cases where no transnational elements can be found, where competences still rest exclusively with the Member States, or where only Third State nationals are concerned.*” Furthermore, a judgment of the *Finnish* Supreme Administrative Court also seems to imply that the mere existence of a transnational element is not sufficient for the applicability of the Charter. This case concerned a prosecution for tax fraud in connection with the illegal import of tobacco from Estonia to Finland. The Finnish judge found that article 50 of the Charter (*ne bis in idem*) did not apply since the case involved a sanction within a single member state and there had been no harmonisation of these sanctions.

More circumspect approach: *France* and Judge *Von Danwitz*

The *French* report suggests that the phrase “*implementing Union law*” in article 51, paragraph 1 of the Charter may be interpreted narrowly. Although the case law provides no conclusive evidence in the absence of judgments by the *Conseil d’Etat*, the administrative courts of appeal adopt a fairly strict

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<sup>14</sup> 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' with Union law.

<sup>15</sup> High Court, 29 November 2010, *R (Zagorski) v Secretary of State for Business, Innovation and Skills* ([2010] EWHC 3110). See pages 9 and 10 of the report from the *United Kingdom*.

<sup>16</sup> Apart from the *French* rapporteur. In France, a strict interpretation of the clause in article 51, paragraph 1 of the Charter is adopted (see below).

interpretation of "*implementing Union law*". Furthermore, the report refers to two rulings that could indicate a very circumspect application of the Charter in situations falling under category 2.

Given the genesis of and the explanations related to Article 51, Judge *Von Danwitz* considers that the phrase "*implementing Union law*" is meant to include the cases of application in the *Wachauf* and *ERT* lines of jurisprudence. He points out that this phrase is not the same as "within the scope of Union law" (that being the scope of the general principles of law). The latter term is broader. Moreover, that term was initially proposed when article 51 of the Charter was being drafted, but met with opposition. In his view, the Charter only applies in situations falling into categories 1 and 2. Other situations do not fall within the scope of the Charter, even where the actions by the member states fall within a field covered by the treaties of the Union (*Annibaldi* situation<sup>17</sup>). In particular, the mere fact that the situation concerned is in an area in which the EU possesses powers should not be sufficient for the applicability of the Charter. Furthermore, the case law concerning the field of application of Article 18 of the Treaty on the Functioning of the European Union (TFEU) (prohibition of discrimination on the grounds of nationality) should not be used to define the scope of the Charter. In the opinion of Judge *Von Danwitz*, this interpretation reflects the function of the Charter, which is to enable the uniform application of Union law. He stresses that the Charter is not intended to introduce a generally applicable minimum standard for the member states, since that falls under the ECHR.

#### **Views expressed at the The Hague seminar d.d. 24.11.2011**

The speakers on the applicability of the Charter *ratione materiae* (Judge von Danwitz, CJEU and Director General Romero, Legal Service, European Commission) agreed on the analysis that (1) a third category could not be derived from the case law of the CJEU (2) no criterion has been put forward supporting the existence of such a category and (3) there was no practical need for the creation of such a category. They therefore considered the Charter to be applicable only in situations falling into categories 1 and 2. A general, comprehensive criterion concerning the applicability of the Charter *ratione materiae* was considered not to be feasible. Nonetheless, it was proposed to use the question of whether a situation at hand was "substantively governed by EU law" as an approximate test for the applicability for the Charter.

Judge Prechal mentioned that the classification in three categories in certain publications or opinions of Advocates General is a result of the lack of clarity of the case law of the CJEU. The number of categories also depends on the way the different categories are defined.

### **Theme D - Review *ex officio***

**8. When reviewing the lawfulness of decisions, are the administrative courts competent under national law to examine the compatibility of those decisions with the EU Charter:**

**a- only at the request of the parties, or**

**b- also *ex officio*/through supplementation of the pleas in law?<sup>18</sup>**

With the exception of the reports from *Finland* and *Belgium*, no national judgments were mentioned in which compatibility with the Charter was reviewed *ex officio*. The replies of the participating countries to this question were based on the *general* national procedural rules: it is apparently assumed that

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<sup>17</sup> See: CJEU, case C-309/96, 18 December 1997, *Annibaldi*, Jurspr. p. I-7493.

<sup>18</sup> This question is not answered in the reports from *Hungary* and the *UK*.

these rules apply in full to the review of compatibility with the Charter. That is explicitly stated in the *Netherlands*' reaction. According to Judge *Von Danwitz*, the approach adopted by the CJEU in the *Van der Weerd* (C-222/05), *Kempter* (C-2/06) and *Martin Martin* (C-227/08) cases should be transposable to the review of the compatibility of a decision with the Charter. Essentially, the approach taken is that where the national court is competent to perform an *ex officio* review under national law, it is obliged to do so with respect to mandatory rules of EU law. Broadly speaking, the countries can be divided into following groups.

- a. In principle, compatibility with the Charter will only be reviewed at the request of the parties: *Spain, the Netherlands, Austria, France* and the highest administrative court in *Poland*.

The main rule in the administrative procedural law of *Spain, Austria, France* and *the Netherlands* is that the scope of the proceedings is determined by the arguments put forward by the parties and therefore, in principle, the administrative court will only review compatibility with the Charter at the request of the parties.

The *French* system seems the strictest in this sense: the court can only investigate an argument if it is explicitly put forward, as such and with sufficient precision, by one of the parties. In *Austria* and the *Netherlands*, *ex officio* review is only possible under very specific circumstances (and is then also mandatory). For example, in the *Netherlands* *ex officio* review only takes place with respect to issues of public policy, in other words aspects that directly or indirectly affect access to the court and the limits of its appreciation, regardless of whether the parties wanted to advance them in their arguments.<sup>19</sup> According to the Dutch rapporteur, a possible example of this might be the *ex officio* application of article 47 of the Charter (the right to an effective remedy and to a fair trial). In addition, the Dutch administrative court is obliged to supplement legal grounds. In *Austria*, the court must only apply legal rules *ex officio* in the event of a complaint against an administrative body for failure to comply with the obligation to make a decision. The courts in *Austria* also have the competence to supplement legal grounds. In *Spain* lower courts may, after hearing the parties, supplement legal grounds. This possibility could be used for the Charter. On that point, the *Spanish* rapporteur says: "*This gives some room for application of rules ex officio, without breaking the essentially adversarial nature of the process*". In *Poland* the courts of first instance must review *ex officio*, but the highest administrative court can only review compatibility with the Charter at the request of the parties.

- b. *Ex officio* review of compatibility with the Charter: *Belgium, Lithuania, Germany, Finland* and courts of first instance in *Poland*

The *Lithuanian, German* and *Finnish* administrative courts and the Polish administrative court in first instance are obliged to review *ex officio* all relevant legal rules, including the Charter. In *Belgium* there is also *ex officio* review of compatibility with the Charter because respect of fundamental rights is an element of public policy.

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<sup>19</sup> The main categories are: issues of competence and jurisdiction; issues relating to the powers of the public body and fundamental procedural requirements with respect to the appeal in first instance.

## Theme E- Distinction between rights and principles<sup>20</sup>

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

The following countries have national equivalents of the principles in the Charter: *Spain, France, Poland, Germany and Austria*. According to the report of Judge *Von Danwitz*, Spanish and French law probably served as a source of inspiration for the distinction made between rights and principles in the Charter.<sup>21</sup>

#### *Spain: 'principles governing the economic and social policy' or 'social guarantees' in the Constitution*

The *Spanish* constitution makes a clear distinction between fundamental rights on the one hand, and principles ('*principles governing the economic and social policy*' or '*social guarantees*') on the other. The background to these principles was the desire to include social guarantees in the constitution but without curtailing the legislator's freedom of action in terms of achieving political and social objectives. These principles have the same binding force as the rights laid down in the constitution. For example, acts that are contrary to a principle can be declared invalid by reason of "unconstitutionality". However, principles cannot normally constitute an independent ground for claiming subjective rights; they first have to be implemented in legislation. Nonetheless, some principles may have direct effect provided they are formulated unconditionally.<sup>22</sup> The opposite applies for rights: in principle they do constitute an independent ground for awarding subjective rights unless the text of the provision shows that further legislation is necessary.

#### *France: unwritten 'droits-créances'*

*French* public law makes a similar distinction between 'rights' and 'principles', but uses different terms. The point of departure is the unwritten 'judge-made' principles. These principles can be broken down into '*principles with a constitutional value*' ('*principes à valeur constitutionnelle*') and '*general legal principles*' ('*principes généraux du droit*'). They can also be divided into '*subjective rights*' ('*droits – libertés*') and '*positive rights*' ('*droits-créances*'). These positive rights are probably similar to the principles in the Charter. In principle, positive rights (the right to work or to health care, for example) can only be invoked against the legislator. The legislator must, subject to oversight by the constitutional court, "*formulate rules by which everyone can best exercise these rights*". The distinction between positive rights and subjective rights also has implications for the nature of the judicial review by the administrative courts. In the case of positive rights, the courts will only investigate whether the relevant measure may be incompatible with the law ('*contrôle de compatibilité*'). With subjective rights, the review is stricter and is more concerned with conformity with the law ('*contrôle de conformité*').

<sup>20</sup> See the work document (theme 2) available on the website [www.aca-europe.eu/en/colloquiums/colloq\\_en.html#seminars](http://www.aca-europe.eu/en/colloquiums/colloq_en.html#seminars).

<sup>21</sup> During the The Hague seminar, Ms Prechal, Judge at the CJEU, stated that the distinction between rights and principles boils down to a basic idea in all Member States.

<sup>22</sup> The *Spanish* rapporteur gives the example of the principle of equal treatment of children, regardless of whether the child is legitimate or not.

### Poland: 'program norms' in the Constitution

The *Polish* constitution contains so-called '*program norms*', which are binding but do not create any subjective rights. They merely provide guidelines/objectives for government bodies, generally for achieving social or economic goals. It is for the government bodies to decide how those objectives will be achieved. The courts cannot apply the '*program norms*' as an independent ground for awarding individual rights, but they can serve as a ground for reviewing legality.

### Austria: 'Staatszielbestimmungen' in the Constitution

The *Austrian* rapporteur draws a parallel between the '*Staatszielbestimmungen*' in the Austrian constitution and the principles in the Charter. He mentions the following provisions as examples: "*the Republic (...) acknowledges its responsibility for the comprehensive protection of the environment*", "*the Republic (...) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of every-day life*" and "*the Federation, Laender and municipalities subscribe to the de-facto equality of men and women*". These constitutional norms are binding on the government bodies when drafting legislation and overseeing compliance with it. They can be applied by the judge as an instrument of interpretation and as a ground for reviewing legality.

### Germany: Constitutional objectives (Staatszielbestimmungen) and legislative mandates (Gesetzgebungsaufträge)

In the *German* doctrine the principles in the Charter are compared with the so-called '*national objectives*' and '*legislative mandates*' enumerated in the German constitution. They set out the ambitions and the objectives of the legislator and are "*purely objective*" in nature. They do not create any individual rights.

### Belgium, the Netherlands, Finland, Lithuania, Hungary: no equivalent of the principles in the Charter

According to the reports from *Belgium, the Netherlands, Finland, Lithuania* and *Hungary*, their national systems make no distinction similar to that in the Charter. The *Dutch* report does mention the so-called '*general principles of good administration*'. These are principles of administrative and procedural law which government bodies must observe in their administrative acts. Examples include the principle of giving reasons for a decision and the requirement of due care. Dutch law also incorporates '*general legal principles*', such as the principle of legal certainty. The rapporteur concludes that at first glance the nature of these principles seems to differ from those laid down in the Charter.

### History of the drafting of the Charter

Judge *Von Danwitz* explains that the distinction between '*rights*' and '*principles*' is the result of a compromise reached after intensive and controversial debate, particularly with regard to the social rights. The intention is to make a distinction between '*subjective rights*' and '*objective rights*', whereby principles can be invoked less easily than rights.

## 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 EU Charter?<sup>23</sup>

The reports show that there has not yet been any national case law on this point.<sup>24</sup> Accordingly, there are no examples of national cases in which it has been found that a provision of the Charter should be deemed to be a principle or in which the identification of principles has been addressed in more general terms. Nor has the CJEU ruled on this point. Judge *Von Danwitz* refers to the current *Dominguez* case (Case C-282/10), which raises the question of whether article 31, paragraph 2 of the Charter (the right to limitation of maximum working hours and rest periods) is a right or a principle. The Advocate General has already published his opinion in this case. A-G Trstenjak has expressed the view that article 31, paragraph 2 of the Charter is a right and not a principle.<sup>25</sup>

The reports show that it will not always be easy to determine whether a provision of the Charter is a right or a principle. By contrast with the *Spanish* constitution, for example, in the Charter the principles are not clustered in separate chapters. Furthermore, according to the Explanations relating to the Charter (the Explanation), some provisions contain elements of both a right and a principle. The report from *the Netherlands* notes: “neither the Charter itself nor the Explanation provide unequivocal or exhaustive evidence for all provisions”. The report also notes that the use of the term ‘right’ or ‘principle’ in the text of the provision or in the Explanation does not automatically mean that the provision must be qualified as a right or a principle.

The rapporteurs generally assume that for the purpose of identifying rights and principles the text of the provision itself must be considered first.<sup>26</sup> It is also noted that if the text does not provide the necessary certainty, the Explanation should be considered. The *Finnish* report adds that the circumstances of the case also have to be taken into account.

Some reports suggest additional criteria that could be used to identify principles:

- the wording and context of the norm. The *German* report explains this as follows: “Where the EU Charter speaks of someone having a claim or being entitled to something, or where obligations with regard to an individual are stated precisely, a right is assumed that can be invoked by the court. Where the text only states obligations, especially obligations of the Union in general, legal doctrine tends to assume a principle that has to be respected and transformed by individual measures which may create rights themselves”. The *Spanish* rapporteur argues that the use of the phrase “in conformity with EU law and national legislation” implies that the relevant provision is a principle;
- the ‘need for specific implementation’ of the norm (see the reports of Judge *Von Danwitz* and *the Netherlands*). Does the relevant provision need to be expressed in legislation to take effect? If the answer is yes, it is a principle;
- the degree of precision of the norm (Judge *Von Danwitz*);
- the question of whether the provision clearly purports to protect individuals or evidently does not (see the report of *the Netherlands*);

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<sup>23</sup> The *Hungarian* report does not contain an answer to this question.

<sup>24</sup> This is explicitly argued in some reports (*Netherlands, Belgium, Poland*). It follows implicitly from the other reports. The *German* report, however, mentions that principles have been referred to in two cases to interpret/strengthen the rights encapsulated in other standards.

<sup>25</sup> Advisory opinion of A-G Trstenjak of 18 September 2011 in case C-282/10, *Dominguez*, points 75-79.

<sup>26</sup> The *Austrian* report argues more generally that it is possible that the administrative court will use its experience with the application of the aforementioned ‘Staatzielbestimmungen’ in identifying principles.

- the origin of the norm (in particular whether it ensues from the constitutional traditions of the member states) (see the report of *the Netherlands*).

Finally, the reports from *Finland*, Judge *Von Danwitz* and *the Netherlands* note that identification of the principles is ultimately a task of the CJEU.

#### Views expressed at the The Hague seminar d.d. 24.11.2011

At the seminar, it appeared that views differ (greatly) on this matter. Although most of the participants seemed to be able to handle the application of principles, no general rules on this point emerged. The reason seems to be the ambiguous language of the Charter and its Explanations on this issue. Questions have been raised concerning the relevance of the categorization of a provision as a right or a principle. It has been argued that in the end it is not so much the categorization as such that seem to be relevant, but rather the *content* of the provision (eg degree of precision etc).<sup>27</sup>

#### **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)?**

According to the reports, the national administrative courts have not yet reviewed compatibility with the principles contained in the Charter.

Some rapporteurs did give their views.

#### No distinction between principles and rights

The *Spanish* report says that the courts will not employ a more limited review for principles because principles have the same binding force as rights. Furthermore, Spanish law does not have a closed system of "*grounds of review*". However, the report notes that some principles are so vague that they will seldom be found to have been violated. The reports from *Lithuania* and *Finland* also indicate that judicial review of compatibility with principles will be no different than in relation to rights. In *Finland's* case, this seems to follow from the fact that Finnish law makes no distinction between rights and principles. The *Finnish* courts can therefore conduct a full review of compatibility with the principles in the Charter, provided the facts and substance of the case allow it.

#### Answer depends on the principle concerned

The *French* report notes that the method of review depends on whether the principle concerned has direct effect. If so, there seems to be no distinction between principles and the rights in the Charter. If the relevant principle does not have direct effect, there is scope for a review of legality (*'invocabilité d'exclusion'*), in which case the court has to investigate whether the authorities remained within their margin of appreciation. By analogy with the situation involving the application of directives whose deadline for implementation has not expired, it is also possible for the court to prohibit measures from

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<sup>27</sup> Amongst others this point has been raised by Ms Prechal, Judge at the CJEU. She also argued that the first relevant question should be whether a provision of the Charter has direct effect (in a broad sense) or not.

being taken that would seriously impair the possibility of the principle achieving the required result (*'invocabilité de prévention'*).<sup>28</sup>

#### More limited review than that of rights

Judge *Von Danwitz* notes that principles can be invoked as an independent ground of review of legality or as an instrument of interpretation. However, principles cannot serve as an independent ground for granting subjective rights. Nor can they create an obligation for the legislator to implement them. They cannot serve either as a ground for awarding damages for a breach thereof. He also notes that in the case of principles the Union legislator and the national legislator have a wide margin of appreciation. This means that judicial review should be limited to investigating manifest errors.

The *Dutch* rapporteur argues that it is clear from article 52, paragraph 5 of the Charter that judicial competence is limited with respect to principles, but that it is unclear precisely how it is limited. The restriction may relate to the acts to which the court can apply principles and/or to the manner in which principles can be applied. Possibly, the courts can only apply principles to acts that implement/apply principles in the Charter.<sup>29</sup> It is also conceivable that the restriction relates not so much to the acts to which principles can be applied, but more to the method of application.

A possible interpretation could be that in the case of principles there can only be interpretation or review of their legality and that they cannot serve as an independent ground for the granting of subjective rights.<sup>30</sup> Finally, it is also possible that the restriction on the judicial competence relates both to the scope and the method of application. The Dutch rapporteur also remarks that the principles in the Charter generally imply considerable freedom for the executive and legislative branches of government in their acts. It is to be expected that the courts will generally exercise restraint in the application of principles. This follows not so much from the text of article 52, paragraph 5 of the Charter as from the nature of the principles.

The *German* administrative courts will probably adopt the same method of review with respect to the principles in the Charter as for the German equivalent of principles. The point of departure is a wide margin of appreciation. Judicial review is limited to deciding whether the margin of appreciation has been exceeded, which implies that judicial review will generally be more limited than in the case of a review involving individual rights.

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<sup>28</sup> Reference is made to a judgment of the French Council of State (Conseil d'Etat) of 29 October 2004 in the case *Sueur et al.*, no. 269814.

<sup>29</sup> At the seminar, the Spanish rapporteur supported this interpretation. He expressed the view that the national courts can only apply principles to acts that implement principles. In other words, for the application of principles an implementing measure (EU/national) is needed. Otherwise, the principles of the Charter can be used only as an additional argument. Judge Prechal did not agree on this point. According to judge Prechal, the application of principles is not limited to acts that implement principles. In her view, any limitation of this kind would mean a drawback of the basic notion that the legality of all acts can be tested against all fundamental rights. All measures which fall within the scope of article 51 (1) of the Charter can in principle be reviewed (on legality).

<sup>30</sup> At the seminar, this interpretation was supported by the Spanish rapporteur: the purpose of article 52 (5) of the Charter is precisely to prevent the principles from being directly invoked by the national courts. Principles can *only* be invoked through implementation legislation.

## 12. What are the legal consequences of a violation of a principle in national proceedings with no European dimension? Are they different from those that follow from the violation of a right?

Because this question could be understood in different ways,<sup>31</sup> the answers varied. In some reports (*Belgium, Poland, Austria and the Netherlands*) the reply is limited to the remark that no violation of a principle has ever been established in national proceedings without a European dimension and it is therefore impossible to say what the legal consequences would be in such a case. Others discuss the legal consequences of a violation of the national equivalents of the principles in the Charter (see below under a). Yet others discuss the legal consequences of a violation of the principles in the Charter (see below under b), but without arguing that those principles would have to be applied in national proceedings without an EU dimension.

### a. Legal consequences of a violation of national equivalents of the principles in the Charter

The reports from *Spain* and *Germany* address the possible legal consequences of a violation of the national equivalents of the principles in the Charter. In *Spain* a distinction has to be made in the national principles between individual administrative decisions on the one hand, and administrative regulations and secondary legislation that implement principles, on the other. Individual decisions cannot be declared invalid by reason of a violation of a principle. Implementing measures that are contrary to principles can be declared invalid or unconstitutional. The *German* report states that a violation of the national principles will have the same legal consequences as a violation of a right. The reason given for this is that the principles have the same binding force as rights.

### b. Legal consequences of a violation of principles in the Charter

The reports from *Germany, Finland, Lithuania, France* and Judge *Von Danwitz* discuss the potential legal consequences of a violation of principles in the Charter.

According to the *German, Finnish, Lithuanian* and *French* reports, the legal consequences of a violation of a principle will not differ from the legal consequences of the violation of a right. In the *German* report, this conclusion is based on the binding force of the principles in the Charter. In the opinion of the German rapporteur, article 52, paragraph 5 of the Charter does not imply any restriction on the legal consequences of principles. The reason given in the *Finnish* report is that the constitutional culture makes no distinction between rights and principles. The precise legal consequences will depend more on the circumstances of the case. The *French* report distinguishes three legal consequences: (1) annulment of the act, (2) an order of enforcement and (3) damages. The *Lithuanian* report states that decisions contrary to a principle should not be applicable. The rapporteur also feels that damages could be awarded for violation of a principle, although that is questioned in the doctrine. Judge *Von Danwitz* does identify a difference in legal consequences, specifying that principles cannot serve as a basis for claims for compensation for non-contractual liability.

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<sup>31</sup> This is probably mainly due to the reference to national proceedings “without an EU dimension”.

## Theme F - Interpretation and scope 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 clause of the Convention for the Protection of Human Rights and Fundamental Freedoms? Or in accordance with the case law of the Court of Justice of the European Union concerning restrictions on fundamental freedoms? Or otherwise?

In general, there have not yet been any judgments in the participating member states in which the courts have given a specific interpretation to the general limitation clause in article 52, paragraph 1 of the Charter.<sup>32</sup> It also emerges from the reports that the interpretation of article 52, paragraph 1 of the Charter is found to be difficult.

None of the rapporteurs argued that the case law of the European Court of Human Rights is decisive for the application of the general limitation clause of article 52, paragraph 1 of the Charter. Equally, none of the rapporteurs argued that it should be determined by the case law of the CJEU on restrictions of fundamental freedoms. However, in some reports it is explicitly argued that it is impossible to opt in general for either the European Court of Human Rights' approach or the approach of the CJEU (for example, *Germany, Lithuania, France and the Netherlands*). Most of the reports also refer to the relationship with article 52, paragraph 3 of the Charter. According to the *Dutch* rapporteur, the case law of the CJEU seems to imply that article 52, paragraph 1 of the Charter also applies to the rights corresponding with those laid down in the ECHR, which fall under article 52, paragraph 3 of the Charter.

The *Spanish* rapporteur does argue that the approach taken by the European Court of Human Rights seems more suitable than the CJEU's approach towards limitations to fundamental freedoms, particularly because an objective of general interest is sufficient for limiting EU fundamental freedoms. The *Spanish* rapporteur does not regard this criterion as substantial enough to restrict a fundamental right. In that context, he feels that there should have to be a "*particularly relevant public need*".

Judge *Von Danwitz* specifies that the limitation clause has an autonomous significance that has to be interpreted on the basis of the CJEU's case law on fundamental rights. He refers to the role of the test of proportionality, under which one of the aspects that has to be reviewed is whether the ends (the general interest that is invoked) justify the means (the limitation of a fundamental right).<sup>33</sup> In the case of rights corresponding to those guaranteed by the ECHR, article 52, paragraph 3 of the Charter provides that the case law of the European Court of Human Rights must be taken into account in order to ensure that the Charter does not afford a lower level of protection than is provided under the ECHR.

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<sup>32</sup> Except in the *Dutch* case law, where up to now there has been one judgment (outside the domain of administrative law) in which the general limitation clause of article 52, paragraph 1 of the Charter has been interpreted. In the *German* case law there have been references to the general limitation clause of article 52, paragraph 1 of the Charter, in judgments in which the court ruled that the rights in the Charter had not been violated. No conclusions can be drawn on this point from the replies from the *UK, Hungary and Belgium*.

<sup>33</sup> In this context, Mr Romero (European Commission) noted at the seminar that since the entry into force of the Charter the test of proportionality plays an important role in the decision making process of the European Commission. According to Mr Romero, no absolute rules or model can be formulated for the requirement of proportionality. Instead, it should be considered on a case-by-case basis.

## Theme G - Direct effect

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

In the vast majority of the participating countries (*France, Spain, Lithuania, Poland, the Netherlands, Belgium and Austria*) the Charter and the ECHR have *not* been transposed into national legislation. In these countries constitutional law provides that, following ratification, treaties (or more specifically the EU treaties)<sup>34</sup> are binding in/constitute part of the national legal system<sup>35</sup> and in most cases also provides that they take precedence in the event of inconsistency with national legislation. Since the Charter acquired the same binding legal force and status as the EU treaties with the entry into force of the Treaty of Lisbon, in principle it has direct effect in the national legal system. In these countries, therefore, the Charter does not have to be transposed into national legislation to have direct effect. Furthermore, the *Dutch* report points out that, quite apart from the constitutional choice of the member states, the Charter also has direct effect in the legal systems of the member states in its own right and takes precedence over national law. It is assumed that this ensues from Union law itself. A similar argument also follows, albeit more implicitly, from the *Belgian* report.

In the *United Kingdom* the Charter has not been transposed into national law, but the ECHR has.

In *Germany, Hungary and Finland* the Charter and the ECHR have both been transposed into national legislation. In *Germany* the Treaty of Lisbon has been transposed in its entirety into national legislation, and hence the Charter also has by virtue of article 6, paragraph 1 TFEU. The *Finnish* rapporteur states that the Charter has been transposed 'via reference' (semi-dualistic system where international treaties are transposed into national law referring to the transposable international treaty).

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

#### Recognition of direct effect in national case law

Up to now, the direct effect of a number of provisions of the Charter has only been implicitly recognised in administrative case law in *France, Hungary and the Netherlands*. The relevant articles are: article 47 (right to an effective remedy and to a fair trial),<sup>36</sup> article 41 (right to good administration),<sup>37</sup> article 24 (rights of the child),<sup>38</sup> article 20 (equality before the law)<sup>39</sup> and article 49 (principles of legality and *lex mitior*).<sup>40</sup> In *Belgian* administrative case law, the direct effect of article 24 of the Charter (rights of the child) has been denied.

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<sup>34</sup> As appears to be the case in the *United Kingdom*, for example.

<sup>35</sup> This is explicitly stated in the reports from the *Netherlands, Lithuania, France and Poland* and follows implicitly from *Belgium's* report. Although the report from *Austria* shows that the Charter has direct effect in the Austrian legal system, the report is silent on the precise constitutional rule.

<sup>36</sup> In France, Hungary and the Netherlands.

<sup>37</sup> In Hungary and the Netherlands.

<sup>38</sup> In France.

<sup>39</sup> In France.

<sup>40</sup> In Hungary.

## Positions with regard to the direct effect of rights contained in the Charter

The reports reveal, sometimes implicitly, a general assumption that the rights contained in the Charter may have direct effect, provided the relevant criteria formulated by the CJEU are met (see question 16). It should be noted that some rapporteurs refer in this context to provisions of the Charter in general and not specifically to *rights*.<sup>41</sup> The *Dutch* rapporteur stresses that this principle applies with respect to *all* provisions of the Charter, both rights and *principles*. The *German* report expresses doubts about whether the principles contained in the Charter can have direct effect. According to Judge *Von Danwitz*, the answer to this question depends mainly on the scope of the field of application of the Charter as defined in article 51, paragraph 1 of the Charter. The *German* rapporteur also emphasises that the issue of direct effect is only relevant for national measures that fall within the scope of the Charter.

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

Up to now there have been no judgments in which the courts in the participating member states have explicitly stated what criteria they used to determine whether or not the specific provision of the Charter at issue had direct effect. The general assumption seems to be that the courts will base their decision on the usual *general* (technical) criteria for the direct effect of standards of Union law, as they have been formulated in the case law of the CJEU. More specifically, the reports from *Belgium, France, Germany, the Netherlands, Finland* and *Lithuania* suggest that to have direct effect the wording of the provision must be *unconditional* and *sufficiently precise*.<sup>42</sup> The *Finnish* rapporteur proposes the additional condition that the provision must grant rights. The *Dutch* rapporteur stresses that a provision of Union law can also have direct effect if it grants discretionary powers or a margin of appreciation to the member states. This is particularly important with regard to provisions of the Charter containing principles, since those provisions generally leave member states a generous margin of appreciation. Finally, the *Dutch* rapporteur mentions several examples of provisions of the Charter which automatically seem to have direct effect, namely articles 7, 8 and 20, which prescribe the right to respect for private and family life, protection of personal data and equality before the law, respectively.

### **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)?**

The general view to emerge from the reports is that it should be a *full* review.<sup>43</sup> The *German* rapporteur notes that the full review implies an unrestricted test of legality, including the interpretation of vague legal terms as well as the test of proportionality, thereby assessing the legitimacy of the aim, the necessity and the adequacy of the measure. Still this does not prevent "*that courts in certain cases may exercise judicial self-restraint leaving the legislator a margin of appreciation*". The rapporteurs from *the Netherlands* and *France* discuss precisely what this full review entails in more detail. The *Dutch* and *French* reports both contrast the full form of review with a more limited review in which the court goes no further than investigating whether the relevant government body "*could reasonably have arrived at the decision and the weighing of interests was not unreasonable*" (according to the

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<sup>41</sup> See, for example, *Belgium, Lithuania* and *Spain*.

<sup>42</sup> Reference is made, inter alia, to the judgment of the CJEU in case C-8/81, *Becker*, ECR. 53.

<sup>43</sup> In this context, there were also references to a "full review of conformity" (*France*), a "full review" (*Belgium*), an "intensive review" (*Netherlands*) or an "extensive" review (Judge *Von Danwitz*).

*Netherlands*) or "did not make any manifest error of judgment " (according to *France*). The *Dutch* rapporteur goes on to say that a full review in national administrative law means that the court repeats the assessment by the relevant government body and, if necessary, substitutes its own decision for that of the government body.

The *Hungarian* rapporteur notes that the Hungarian courts are inclined to restrict the application of the Charter as such, preferring to protect fundamental rights via national legislation and the ECHR.<sup>44</sup>

**18. If a case involves incompatibility with a provision of the EU Charter that has direct effect, what legal consequences do you attach to that?**

The rapporteurs generally agree that in the event of incompatibility with a provision of the Charter that has direct effect the relevant decisions or laws should be rendered inapplicable. The *Spanish*, *Lithuanian* and *Dutch* rapporteurs also mention the possibility of the court awarding damages. According to the *Spanish* rapporteur, another potential legal consequence is the recognition of a right, for example to restitution of property unduly taken by the administration.

## **Theme H - Methods of interpretation**

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

In four countries (*Germany*, *Finland*, *Austria* and *the Netherlands*), the Explanation has already been used to interpret the Charter in administrative case law.<sup>45</sup> There have been no judgments containing explicit references to the Explanation in the other countries.<sup>46</sup> However, the general view is that in future the administrative court will (or should) make use of the Explanation.<sup>47</sup>

The *French* report also notes that in particular the courts will follow an interpretation of the Charter given by the CJEU on the basis of the Explanation. Judge *Von Danwitz* refers to the judgment in the *DEB* case (C-279/09), in which the CJEU refers to the Explanation for the interpretation of a provision of the Charter.

**20. Which methods of interpretation (linguistic, systematic, teleological, historical, treaty-compliant, dynamic) are applied by your national administrative courts in interpreting the provisions of the EU Charter?<sup>48</sup>**

The responses show that various methods are or could be applied in interpreting provisions of the Charter.<sup>49</sup> The methods referred to are general (classical) methods of interpretation which do not apply

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<sup>44</sup> See also the *Hungarian* response under theme I.

<sup>45</sup> The case in *Austria* concerned the interpretation of article 47 of the Charter (the right to an effective remedy and to a fair trial) and in the *Netherlands* the interpretation of article 47, first paragraph (the right to an effective remedy) and article 41 (the right to good administration) of the Charter.

<sup>46</sup> For the *United Kingdom* and *Belgium* this cannot be established with certainty on the basis of the reports.

<sup>47</sup> Only in the *Spanish* report is this view not expressed. At the seminar, Mr Romero Requena (European Commission) pointed out that the interpretative value of the Explanation will gradually decrease, particularly in view of developments in the case law of both European Courts. Eventually, the relevant case law of both European Courts shall become leading.

<sup>48</sup> The reports from the *United Kingdom* and *Belgium* do not state a clear position on this subject.

<sup>49</sup> In many countries there have been no judgments up to now in which a particular method of interpretation has been adopted for the interpretation of the Charter (explicitly). Only *France* and *the Netherlands* mention cases which clearly show that particular methods of interpretation were used to interpret the Charter.

specifically to the interpretation of the Charter. The methods of interpretation that were specifically mentioned are:

- the grammatical method (*the Netherlands, Germany, Lithuania, Hungary*);
- the treaty-compliant method (*the Netherlands, Germany*);
- the systematic method (*the Netherlands, Germany, France*);
- the teleological method (*the Netherlands, Germany, Austria, Lithuania*);
- the dynamic method (*the Netherlands, Germany*);
- the fundamental value method (*the Netherlands*);
- the anticipatory method (*the Netherlands*);
- the historical method (*Germany, the Netherlands*);
- the uniform method (*Lithuania*);
- the logical method (*Lithuania*).

The *French* report states that – because up to now the courts have only had to rule on provisions of the Charter that were invoked in relation to other provisions concerning the same rights (ECHR, directives) – the most commonly used method of interpretation is the systematic method. According to the *Dutch* report, up to now the administrative courts have mainly used the linguistic and treaty-compliant (in accordance with (the interpretation of) the ECHR) methods. The *Austrian* report mentions that the teleological method, as applied by the CJEU ("purposive approach"), is used for interpreting both national and European legislation. It is therefore logical to assume that this method will also be used to interpret the Charter. The *German* report states that courts are circumspect in using the dynamic method to interpret the powers of the Union. Judge *Von Danwitz* notes that in addition to the classical methods of interpretation, special attention should be devoted to the history of the drafting of the Charter. He draws attention to article 52, paragraph 4 and paragraph 6 of the Charter according to which the shared common legal traditions of the member states and the national legislation and practices should also be taken into account.

## Theme I - Relationship between EU Charter and ECHR

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

It is clear from the majority of the reports (with the exception of *the Netherlands, Hungary and Germany*) that there is scarcely any case law on this point. The *French* and *Spanish* rapporteurs expressly mentioned that the choice between applying the Charter or the ECHR has not yet arisen.

Generally speaking, a pragmatic approach is adopted in deciding which instrument (ECHR or EU Charter) to apply. For example, the simultaneous application of the two instruments is generally regarded as possible.<sup>50</sup> None of the rapporteurs adopts the fundamental position that the national courts are *obliged* – within the limits of their competence<sup>51</sup> – to apply the Charter in situations falling within the scope of the Charter (Article 51, paragraph 1). Judge *Von Danwitz*, however, does take that view with regard to Article 6 TEU and the case law on the primacy of Union law over national law. His principal argument is that by virtue of the principle of primacy the Charter must be applied in a situation that falls within the scope of the Charter by virtue of article 51, paragraph 1 of the Charter.

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<sup>50</sup> See, for example, *Belgium, Spain, Hungary, Lithuania, France and the Netherlands*.

<sup>51</sup> See, for example, theme D "Ex officio review".

Article 52, paragraph 3 of the Charter does not affect that obligation, but relates only to the interpretation of rights corresponding to those contained in the ECHR. The *German* report states more or less the same. German courts are obliged to apply the Charter as well as the ECHR in cases which fall within the scope of both. The *Hungarian* rapporteur, by contrast, seems to believe that the ECHR takes precedence, because the ECHR entered into force earlier than the Charter.

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

In scenarios involving corresponding rights within the meaning of article 52, paragraph 3 of the Charter, most rapporteurs agree that the case law of the European Court of Human Rights must be considered when interpreting the relevant provision of the Charter. In several participating countries (*the Netherlands, Hungary, Germany*) that is already the practice: the national courts generally follow the case law of the European Court of Human Rights when interpreting corresponding rights.

The reports differ or remain silent on the question of what should happen if the European Court of Human Rights and the CJEU adopt different approaches. Some rapporteurs feel that the interpretation by the European Court of Human Rights should prevail.<sup>52</sup> For example, the *Spanish* rapporteur refers in this context to the fact that the Treaty of Lisbon appears to assign precedence to the ECHR in view of the EU's obligation to accede to the ECHR and in light of Article 52, paragraph 3 of the Charter.

Judge *Von Danwitz* argues that article 52, paragraph 3 of the Charter requires that the level of protection afforded by the ECHR must be respected. The *Polish* rapporteur argues, with reference to the Polish doctrine, that the intention is that the highest level of protection will be provided. The national courts will therefore have to carefully consider which test (CJEU or ECHR) offers the highest level of protection and will have to apply that test.

The *French* rapporteur, finally, notes that the CJEU's case law on the Charter will probably be reviewed first, and only then the case law of the ECHR.<sup>53</sup>

### Views expressed at the The Hague seminar d.d. 24.11.2011

It emerged from the discussion that, besides the interaction that follows from Article 52 (1) and (3), there is a certain interaction between the EU Charter and the ECHR at the level of the two Courts.<sup>54</sup>

Furthermore, participants generally expressed the view that in the case of corresponding rights (the rights in the Charter which correspond with those guaranteed by the ECHR), the highest level of protection should be provided.

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<sup>52</sup> See, for example, *Lithuania, Spain*.

<sup>53</sup> At the seminar, the French rapporteur further clarified that when it comes to limitations on the exercise of rights recognised in the Charter, the test of proportionality should be more strict than in cases concerning limitations on the exercise of free movement rights.

<sup>54</sup> According to Mr Spielmann, Judge at the European Court of Human Rights, the level of human rights protection within the Council of Europe is increased by the Charter, that is, the European Court of Human Rights is inspired by the level of protection afforded by the Charter.

In this context, CJEU Judge Prechal points out that the CJEU learns from the practice of the European Court of Human Rights. Ms Prechal mentions the "full review of law and facts" (with reference to cases C-69/10, Samba Diouf, and C-430/10, Gaydarov) and the "reasonable time of proceedings".

## **Theme 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 a provision of 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 general impression is that up to now the 'common constitutional traditions' of the member states have not been used in interpreting provisions of the Charter. Only the *Finnish* report mentions that the national courts may refer to the constitutional traditions of other member states.

Views expressed at the The Hague seminar d.d. 24.11.2011

At the seminar, the participants expressed great interest in further exploring the relationship between the Charter and the constitutional traditions.

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

Most rapporteurs say that the ACA-Europe Forum would be a good place to discuss and share information about constitutional issues and about the question of which provisions of the Charter arise from the constitutional traditions of the member states.

**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?**

All of the reports said that a central register (created by ACA-Europe) containing judgments of the national courts concerning their constitutions would be useful. Some do point out the practical objections: setting up and maintaining such a register will not only be expensive, but create a lot of work both for ACA-Europe and the national administrative courts. The *Dutch* rapporteur suggests the option of having the EU institutions (European Commission or CJEU) create such a register.

The *Dutch* rapporteur also refers to the CODICES database of the Venice Commission of the Council of Europe, which contains case law on constitutional issues, including judgments from the member states of the European Union.<sup>55</sup> That raises the question of whether there is also a need for another database containing cases specifically concerning the interpretation of the Charter by national courts.

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<sup>55</sup> <[www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm](http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm)>.

## Theme 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 that provision by the national administrative courts?

The reports show that most national administrative courts have not yet issued any rulings on such provisions of the Charter.<sup>56</sup> To the extent that the national administrative courts have considered provisions of the Charter derived from an instrument other than the ECHR (as is the case in *the Netherlands*<sup>57</sup> and *Germany*), up to now it does not seem to have had any consequences for the interpretation of those provisions.<sup>58</sup>

The reports from *Austria*, *Belgium*, *France* and Judge *Von Danwitz* contain specific views concerning the (potential implications for) the interpretation of such provisions of the Charter.

Judge *Von Danwitz* argues that the Charter itself does not contain any rule that necessitates a specific interpretation in such a case. Nevertheless, in his view it can be assumed that to the extent possible the CJEU will give the same meaning to provisions corresponding with those in the Charter and, at any rate, will be influenced by the corresponding articles of international instruments in interpreting a provision of the Charter.

The *French* rapporteur points out that the provisions of the Charter that correspond with other international instruments will usually be invoked together with their counterpart in international law. For example, article 24 of the Charter will be invoked in combination with article 3 of the International Convention on the Rights of the Child. This means that the provisions of the Charter corresponding with provisions of other international instruments will seldom be interpreted autonomously and that the court will be inclined to refer to older case law, even if there is no provision on the issue similar to article 52, paragraph 3 of the Charter. Nevertheless, its inclusion in the Charter can strengthen the right concerned, especially since specific rules have to be observed in interpreting the Charter, such as referring to constitutional traditions. The case law of the CJEU will probably play a decisive role on this point.

The *Belgian* rapporteur argues that the mere fact that a provision of the Charter is derived from an international instrument other than the ECHR is unlikely to have any consequences for the interpretation of that provision.

According to the *Austrian* rapporteur, important factors in this regard are the Union law context of the relevant provision of the Charter and the case law of the CJEU concerning it.

The *Finnish* rapporteur notes that it is not unusual for reference to be made to international instruments other than the ECHR in the case law of the CJEU and of Finland's Supreme Administrative Court.

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<sup>56</sup> This is explicitly stated in some reports (*Hungary*, *Lithuania*, *Poland*). It also clearly appears from the other reports, but implicitly. The question is not answered in the report from the *UK*.

<sup>57</sup> The *Dutch* report specifically states that it involved administrative courts of first instance in immigration cases.

<sup>58</sup> But the *Dutch* rapporteur does refer to a judgment in which the administrative court in first instance ruled that article 24 of the Charter in principle has the same *scope* as article 3 of the International Convention on the Rights of the Child.

The *Spanish* report, finally, draws attention to the fact that only the ECHR has its ‘own’ court. The other international instruments have no "*official interpreter*", which means that, apart from diplomatic initiatives, the interpretation of those human rights instruments is, by definition, decentralised. The CJEU is therefore the only court in a position to formulate uniform criteria.

## Theme L - Other

### **27. Is there a structure in your member state for consultation between national 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?**

Most participating countries report that there is some form of consultation between administrative courts on EU law issues. The reports show that the consultation is usually on an *ad hoc* basis.<sup>59</sup> The *Netherlands* and *Hungary* have a more permanent structure for consultation. The reports from *Poland*, *France* and *Lithuania* mention other methods of promoting the uniform interpretation of Union law. For example, the *Polish* rapporteur refers to the role of the special EU division of the *Supreme Administrative Court*, "*the European Law Department*". The *French* rapporteur notes that harmonisation of national administrative case law relating to EU law is guaranteed primarily by the Council of State, through its judgments on appeal and by issuing advisory opinions for lower administrative courts on request. According to the *Lithuanian* report, the *Supreme Administrative Court* ensures the uniform application of EU law in various ways. For example, it publishes a volume containing every national judgment that has been rendered for the lower administrative courts and government bodies (which they have to take into account in applying laws) and publishes reports on developments in the case law of the CJEU.

The *Belgian*, *French*, *Polish* and *Lithuanian* rapporteurs indicate that there is a need for a structure for consultation at the level of ACA-Europe. According to the *Belgian* rapporteur, this structure could be particularly useful for gathering information on issues of common interest, such as identifying the ‘common constitutional traditions’ of the member states. Finally, the *Dutch* rapporteur mentioned that the ACA-Europe provides a platform for consultation through the members’ section of the Forum.

### **28. Do you have any other questions or comments about the EU Charter that have not been raised in this questionnaire?**

The *French* rapporteur referred to the rights and principles in the Charter that originate in EU legislation, such as the protection of personal data. What additional protection is provided by their inclusion in the Charter? Do they only constitute an adoption of those EU provisions or can they – by being included in the Charter – also serve to fill gaps or repair shortcomings?

The *Finnish* rapporteur would like to know more about how other countries interpret the explanation of article 47 of the Charter in the Explanation, which states that article 47 has a wider scope than article 6 of the ECHR, since the right to a fair hearing is not confined to disputes relating to civil law rights and obligations, but extends to all disputes falling within the scope of Union law.

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<sup>59</sup> See *Austria*, *Finland*, *Germany*, *Spain*.

Finally, the *Dutch* rapporteur asks: does the Charter provide protection for legal persons of public law?

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## Appendix to theme A (question 2)

The table below shows for each provision of the Charter the references in administrative law case law as mentioned in the national reports. There is also an extra column containing a list of the relevant case law of the CJEU (including the General Court) on each provision that has been rendered in the period from 1 December 2009 to 8 November 2011. The table only mentions CJEU case law in which provisions of the Charter were actually applied.<sup>60</sup>

<b>Framework Charter of Fundamental rights of the EU (2007)</b>			
<b>Charter article</b>	<b>Content (shortened)</b>	<b>Referred to in national administrative case-law</b>	<b>Applied in case-law of the CJEU/General Court</b>
<b><i>Title I Dignity</i></b>			
Article 1	Human dignity	Hungary, Netherlands.	
Article 2(1)	Right to life	United Kingdom*, France*, Germany.	
Article 2(2)	Prohibition of the death penalty	-	
Article 3	Right to the integrity of the person	France, Germany (§ 1).	
Article 4	Prohibition of torture and inhuman or degrading treatment or punishment	Austria, United Kingdom, France, Germany, Netherlands.	
Article 5(1)	Prohibition of slavery or servitude	-	
Article 5(2)	Prohibition of forced or compulsory labour	-	
Article 5(3)	Prohibition of trafficking in human beings	-	
<b><i>Title II Freedoms</i></b>			
Article 6	Right to liberty and security	Hungary.	
Article 7	Respect for private and family life	Austria, United Kingdom, France, Germany, Spain, Netherlands.	- Case C-578/08, <i>Chakroun</i> , 4 March, 2010; - Case C-400/10 PPU, <i>McB</i> , 5 October 2010; - Case C-92/09 and C-93/09, <i>Volker und Markus Schecke</i> , 9 November 2010; - Case C-145/09, <i>Tsakouridis</i> , 23 November 2010.
Article 8	Protection of personal data	United Kingdom, Spain, Netherlands.	- Case C-92/09 and C-93/09, <i>Volker und Markus Schecke</i> , 9 November 2010. - Case C-543/09, <i>Deutsche</i>

<sup>60</sup> This refers to application in a broad sense: the use of the Charter as an instrument of interpretation or as an autonomous ground for review.

Judgments in which the Charter was referred to without further specification or in which Charter was used merely as an additional argument are not listed.

			<i>Telekom</i> , 5 May 2011.
Article 9	Right to marry and right to found a family	France.	
Article 10(1)	Freedom of thought, conscience and religion	Germany.	
Article 10(2)	Right to conscientious objection	-	
Article 11(1)	Freedom of expression and information	United Kingdom*, France*, Spain*.	- Case C-163/10, <i>Patriciello</i> , 6 September 2011.
Article 11(2)	Freedom and pluralism of the media	-	
Article 12(1)	Freedom of assembly and of association	-	
Article 12(2)	Expression political will	-	
Article 13	Freedom of the arts and sciences	-	
Article 14(1)	Right to education and access to vocational and continuing training	France*.	
Article 14(2)	Right to receive free compulsory education	-	
Article 14(3)	Freedom to found educational establishments	-	
Article 15(1)	Freedom to choose an occupation and right to engage in work	Belgium*, France*, Germany, Lithuania*.	
Article 15(2)	Right to seek employment, to work, to exercise the right of establishment and to provide services	-	
Article 15(3)	Right to equivalent working conditions	Germany.	

Article 16	Freedom to conduct a business	Belgium, France, Germany.	
Article 17(1)	Right to property	United Kingdom, Spain*, Poland*.	- Case T-181/08, <i>Tay Za/Raad</i> , 19 May 2010.
Article 17(2)	Protection intellectual property	-	
Article 18	Right to asylum	France, Germany, Lithuania, Netherlands.	
Article 19(1)	Prohibition of collective expulsions	France*.	
Article 19(2)	Non-refoulement	United Kingdom, Germany, Netherlands.	
<b>Title III Equality</b>			
Article 20	Equality before the law	France, Poland.	- Case C-149/10, <i>Chatzi</i> , 16 september 2010; - Case C-550/07 P, <i>Akzo Nobel</i> , 14 September 2010. - Case C-21/10, <i>Nagy</i> , 21 July 2011.
Article 21(1)	Non-discrimination	France*, Germany, Netherlands.	- Case C-550/07 P, <i>Akzo Nobel</i> , 14 September 2010 (21). - Case C-236/09, <i>Test-Achats</i> , 1 March 2011. - Case C-297/10 and C-298/10, <i>Hennigs</i> , 8 September 2011.
Article 21(2)	Non-discrimination on grounds of nationality	Germany.	
Article 22	Cultural, religious and linguistic diversity	-	
Article 23	Equality between women and men	Germany (§ 1).	- Case 236/09, <i>Test-Achats</i> , 1 March 2011.
Article 24	The rights of the child	Belgium, United Kingdom, France (§ 2), Germany (§ 2 en § 3), Poland, Netherlands.	- Case C-403/09 PPU, <i>Detiček</i> , 23 december 2009 ; - Case C-211/10 PPU, <i>Povse</i> , 1 July 2010 ; - Case C-149/10, <i>Chatzi</i> , 16 September 2010 ; - Case C-400/10 PPU, <i>McB</i> , 5 October 2010;

			- Case C-491/10 PPU, <i>Aguirre Zarraga</i> , 22 December 2010.
Article 25	The rights of the elderly	-	
Article 26	Integration of persons with disabilities	-	
<b><i>Title IV Solidarity</i></b>			
Article 27	Workers' right to information and consultation within the undertaking	-	
Article 28	Right of collective bargaining and action	-	- Case C-297/10 and C-298/10, <i>Hennigs</i> , 8 September 2011.
Article 29	Right of access to placement services	-	
Article 30	Protection in the event of unjustified dismissal	-	- Case C-323/08, <i>Rodriguez Mayor</i> , 10 December 2009.
Article 31(1)	The right to working conditions which respect health, safety and dignity.	-	
Article 31(2)	The right to limitation of maximum working hours rest periods	-	
Article 32	Prohibition of child labour and protection of young people at work	-	
Article 33(1)	Family and professional life	France*.	
Article 33(2)	Right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave.	-	- Case C-149/10, <i>Chatzi</i> , 16 September 2010.
Article 34(1)	Entitlement to social security benefits and social services in cases such as maternity, illness, industrial accidents,	-	

	dependency or old age, and in the case of loss of employment		
Article 34(2)	Right to social security benefits and social advantages in case of legal residence	-	
Article 34(3)	The right to social and housing assistance	-	
Article 35	Health care	-	
Article 36	Access to services of general economic interest	-	
Article 37	Environmental protection	-	
Article 38	Consumer protection	-	
Article 39(1)	Right to vote and to stand as a candidate at elections to the European Parliament	-	
Article 39(2)	Elections European Parliament by direct universal suffrage in a free and secret ballot	-	
Article 40	Right to vote and to stand as a candidate at municipal elections	-	
Article 41(1,2)	Right to good administration	Hungary, France, Germany, Spain, Lithuania, Poland, Netherlands.	- Case C-221/09, <i>AJD Tuna</i> , 17 March 2011.
Article 41(3)	The right to have the Union make good any damage caused by its institutions or by its servants	-	

Article 41(4)	Right to write to the institutions of the Union in one of the languages of the Treaties and have an answer in the same language	-	
Article 42	Right of access to documents	-	
Article 43	European Ombudsman	-	
Article 44	Right to petition	-	
Article 45(1)	Freedom of movement and of residence for citizens of the Union	Germany, Lithuania*.	
Article 45(2)	Freedom of movement and residence for third country nationals legally resident in the Union	-	
Article 46	Diplomatic and consular protection	-	
<b>Title VI Justice</b>			
Article 47(1)	Right to an effective remedy and to a fair trial before a tribunal	Austria*, United Kingdom*, France*, Germany*, Lithuania*, Poland*, Netherlands*.	- Case C-279/09, <i>DEB</i> , 22 December 2010 ; - Case C-221/09, <i>AJD Tuna</i> , 17 March 2011; - Case C-407/08 P, <i>Knauf Gips</i> , 1 July 2010; - Case C-372/09 and C-373/09, <i>Penarroja</i> , 17 March 2011; - Case T-181/08, <i>Tay Za/Raad</i> , 19 May 2010.
Article 47(2)	Right to a fair hearing	Belgium.	
Article 47(3)	Right to legal aid	-	
Article 48(1)	Presumption of innocence	-	- Case T-49/07, <i>Fahas/Raad</i> , 7 December 2010.
Article 48(2)	The rights of the defence	-	- Case C-550/07 P, <i>Akzo Nobel</i> , 14 September 2010.
Article 49(1,2)	Principles of legality and lex-mitior	France, Netherlands.	
Article 49(3)	Principle of proportionality of criminal offences and	-	

	penalties.		
Article 50	Right not to be tried or punished twice in criminal proceedings for the same criminal offence	Austria, France.	
Article 51 (1)	Field of application	United Kingdom, Germany, Netherlands.	<ul style="list-style-type: none"> <li>- Case C-323/08, <i>Rodriguez Mayor</i>, 10 December 2009 (implicit reference);</li> <li>- Case C-400/10 PPU, <i>McB</i>, 5 October 2010;</li> <li>- Case C-339/10 PPU, <i>Estov</i>, 12 november 2010;</li> <li>- Case C-279/09, <i>DEB</i>, 22 December 2010;</li> <li>- Case C-20/10, <i>Vino I</i>, 11 November 2010;</li> <li>- Case C-457/09, <i>Chartry</i>, 1 March 2011 (see also case C-538/10, <i>Lebrun</i> and case C-314/10, <i>Pagnoul</i>);</li> <li>- Case C-267/10 and C-268/10, <i>Rossius</i>, 23 May 2011;</li> <li>- Case C-161/11, <i>Vino II</i>, 22 June 2011;</li> <li>- Case C-1/10, <i>Gueye</i>, 15 September 2011 (implicit reference).</li> </ul>
Article 51 (2)		Germany.	<ul style="list-style-type: none"> <li>- Case C-400/10 PPU, <i>McB</i>, 5 October 2010;</li> <li>- Case C-161/11, <i>Vino II</i>, 22 June 2011.</li> </ul>
Article 52 (1)	Scope and interpretation of rights and principles	Germany, Netherlands.	<ul style="list-style-type: none"> <li>- Case C-400/10 PPU, <i>McB</i>, 5 October 2010;</li> <li>- Case C-92/09 and C-93/09, <i>Volker und Markus Schecke</i>, 9 November 2010;</li> <li>- Case C-407/08 P, <i>Knauf Gips</i>, 1 July 2010.</li> </ul>
Article 52 (2)		United Kingdom.	
Article 52 (3)		United Kingdom, Germany, Netherlands.	<ul style="list-style-type: none"> <li>- Case C-400/10 PPU, <i>McB</i>, 5 October 2010;</li> <li>- Case C-92/09 and C-93/09, <i>Volker und Markus Schecke</i>, 9 November 2010;</li> <li>- Case C-279/09, <i>DEB</i>, 22 December 2010.</li> </ul>
Article 52 (4)		Germany, Netherlands.	

Article 52 (5)		-	
Article 52 (6)		-	
Article 52 (7)		Germany.	
Article 53	Level of protection	-	- Case C-279/09, <i>DEB</i> , 22 December 2010.
Article 54	Prohibition of abuse of rights	Poland.	

\* without specification of the paragraph.





