

XXIIIrd COLLOQUIUM OF THE ASSOCIATION OF COUNCILS OF STATE AND
THE SUPREME ADMINISTRATIVE JURISDICTIONS OF THE EUROPEAN UNION
MADRID – 25-26 JUNE 2012

*Application of the Charter of Fundamental
Rights of the European Union by national courts:
the experience of administrative courts*

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PREFACE

This report provides a key instrument for the exchange of information and opinion within the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, it being the tangible result of the debates held at the 23rd Colloquium in Madrid on 25-26 June 2012.

The colloquium took as the centrepiece of its discussions the Charter of Fundamental Rights of the European Union. The Lisbon Treaty amended the Treaty on European Union and the Treaty Establishing the European Community and granted this Charter “the same legal force as the Treaties”. These rights were thereby endowed with the same primacy and direct effect as Community law, with the consequent enhancement both of their protective effect and of the binding nature of this protection.

The Charter lends greater visibility and clarity to fundamental rights, establishing a greater level of legal certainty within the European Union and strengthening the ties that bind the people of Europe together, while respecting cultural diversity and each nation’s own traditions.

Against the backdrop of the acute crisis that we are currently facing, judicial interpretation of the Charter will contribute to overcoming difficulties and will play a decisive role in upholding every citizen’s right to dignity, liberty, equality, solidarity, citizenship and justice.

It must not be forgotten that rights also engender responsibilities and obligations both to institutions and to other citizens, including to future generations. As a result, we who participate in the considerable task of dispensing justice have a special duty to guarantee, protect and respectfully interpret the essential content of the rights enshrined in this Charter of Fundamental Rights of the European Union.

A duty that we undertake with great responsibility.

Gonzalo Moliner Tamborero

President of the Supreme Court of Spain

INTRODUCTION

The Charter of Fundamental Rights

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The Charter of Fundamental Rights marks a **core step of codification** of fundamental rights protection in the European Union. It builds upon the European Convention on Human Rights, the European Social Charter and other human rights conventions as well as the constitutional traditions common to the EU-Member States. The introduction of a fundamental rights regime into EU law is essentially a story of judge-made law.

Today the Charter offers judicial authorities and citizens a true Bill of Rights instead of the necessity to search for the Court's decisions in conjunction with a variety of legal and political documents. Some of the Charter's provisions constitute rather symbolic confirmations others reflect new developments of existing human rights instruments, such as the absolute prohibition of the death penalty, as an example for the first category, and the prohibition of reproductive cloning of human beings and the prohibition of discrimination on relatively "new" of policy such as disability, age and sexual orientation as examples for the latter category.

The Charter's entry into force can therefore be seen as a major legal innovation of the Lisbon Treaty and will have a significant impact on the **constitutionalization** of the Union's legal order in the long run. The Charter entails, in particular for the Court of Justice as well as for national courts, the necessity to **ensure a transfer from a system of judge made law in matters of fundamental rights to the codified system of the Charter**. This task requires on the one hand to assure the continuity of what has been achieved prior to the Charter as *acquis* in terms of fundamental rights protection and on the other a new orientation according to the accentuations which follow from the Charter itself.

Even though the Charter came into force only two years ago, the Court has already delivered quite a **significant number of judgements** in a great variety of fields of substantive law, particularly in matters of social policy, free movement of persons, the status of refugees and EU citizenship.

¹ All views expressed are strictly personal to the author and cannot be attributed to the C.J.U.E.

I. Major challenges

First of all, the application of the Charter raises the *federal question* on how its system of fundamental rights protection will have to fit in between the national systems of fundamental rights protection and the system of the European Convention on Fundamental Rights and Liberties.

The Court's principle task is to **maintain a coherent system of fundamental rights protection** given the **co-existence of three different systems of human rights protection** in Europe consisting namely of the system of national fundamental rights protection, the Strasbourg system of the Convention and the system of the Charter. This might prove to be the **most important challenge** which the Court will have to face in the years to come.

Also, when reading carefully through Art. 6 TEU, the challenge of coherence does not exist solely in terms of these three different systems of fundamental rights protection and their interplay. Even and in particular within the EU system of fundamental rights protection we are, according to the wording of Art. 6 TEU, confronted with **four different inspiring sources** of fundamental rights protection: the European Convention on Human Rights; the general principles of EU law; the fundamental rights as granted by the Charter and the common constitutional traditions of the Member States.

In that latter respect, I do not think that it is farfetched to assume that European citizens would find it difficult to accept that fundamental rights protection in the EU could, in practise, be different according to the inspiring sources which would *in concreto* find application. Therefore, the necessity to maintain a coherent system of fundamental rights protection requires that the Court applies the codified body of fundamental rights enshrined in the Charter in a way which will **substantively meet the requirements resulting from any of the other sources for the protection of fundamental rights in the EU**.

Now, let me come to a very basic point of understanding which is at the same time essential. The function of the Charter is not to bring about harmonization of the systems of protection of fundamental rights of the Member States; it does not establish a minimum standard generally applicable to Member States like the ECHR does. This is a fundamental difference between the Charter and the Convention. The Charter has rather been elaborated by **a genuine demand for a uniform application of EU law**. For the Union, it is clear that EU law cannot be interpreted and applied in conformity with, and according to, different requirements under national standards of protection of fundamental rights. This is all the more true for questions dealing with the validity of EU law. To do otherwise would create the risk of having twenty-seven different standards of protection of fundamental rights within the EU, and therefore a divergent application of EU law.

The obligation of the Member States to apply or to transpose provisions of Union law entails that they are not only bound by the primary law of the Union, but evidently that they also have to **respect the fundamental rights** granted by the Charter. Independently of

whether an administrative authority, governmental body or a jurisdiction of a Member State has to apply or implement primary or secondary Union law which is directly applicable or national law which rests on imperative requirements of a directive, it has to respect the fundamental rights guaranteed by the Charter. From the point of view of the Court it is, in order to assure a uniform application of Union law, decisive that the validity of a secondary provision of Union law **exclusively rests on its compatibility with primary law** and, in particular, with the fundamental rights granted by the Charter. To the contrary, it may not be dependent on national fundamental rights considerations.

The same applies to the possibility and the necessity of an interpretation of Union law in conformity with fundamental rights. Here again, only the primary law of the Union and notably the fundamental rights of the Charter are to be applied. In practical terms, this is in particular relevant in order to determine the **substantive content** of secondary legislation or, eventually, its **scope of application** by ways of an interpretation in conformity with the requirements of the Charter. In sum, one could, *cum grano salis*, establish the general rule that only the fundamental rights of the Union are applicable whenever a legal situation is substantively governed by a directly applicable law of the Union. Thus, the Charter is the exclusive tool of EU law ensuring the conformity of primary and secondary EU law and its application with fundamental rights.

Were a national Court to apply fundamental rights standards resulting from national constitutions in such circumstances, there would be a **risk that the relevant secondary law of the Union would not receive a uniform interpretation**, but would instead be applied in a divergent manner in different Member States. In principle, the same risk exists for an application of the Strasbourg Convention by national courts if EU law is applied in an autonomous manner. Therefore, national courts are entitled, under Article 267 TFEU, to defer questions in that respect to the European Court of Justice.

In that respect, ensuring a certain level of consistency in the degree of fundamental rights protection among the different systems is crucially important to the acceptance of a strong European fundamental rights case law by the national judiciaries. In general terms, it would certainly be detrimental to the functioning of fundamental rights protection in Europe if the different courts involved in the process entered into a **competition for “who grants the best fundamental rights protection”**. Furthermore, a maximum level of protection for the exercise of one fundamental right usually occurs at the cost of another. A race to the top for one fundamental right would inevitably lead to a race to the bottom for another.

In addition to this problem of trying to attain the “right” level of fundamental rights protection, such a judicial competition would inevitably lead to an **institutional quest for leadership in fundamental rights protection**. That kind of evolution would not only promote a detrimental “forum shopping” for fundamental rights protection in Europe, but, most importantly, it would neglect the fundamental necessity for the preservation of traditional differences in fundamental rights protection that result from national traditions, cultural specificities and historical evolutions leading to a specific conditioning of the legal culture of one or more Member States. There are plenty of examples in that respect: the

concept of human dignity, the so called armed democracy in the basic law of Germany, the laws on nobility in Austria, the status of the Catholic Church under the constitution of Poland and the particular importance attributed to the principle of *laïcité* by the French constitution. In such circumstances, the "required" protection of fundamental rights is deeply linked to the respect for the constitutional identity of Member States as it follows from Article 4 (2) TEU and as the requirement for subsidiarity of fundamental rights is understood. The Court of Justice will have to give a first answer to these questions in the *Melloni* -case (C-399/11) on the application of the arrest warrant in cases of trial in absentia upon a reference from the Spanish Tribunal Constitucional.

II. Outlook

In the final part of my remarks I would like to give a brief outlook on the European fundamental rights protection in the years to come.

A highly debated question is whether the Charter, combined with an increase in the EU's fundamental rights activity and an ever widening scope of EU law, will lead to an important shift in the currently achieved balance in human rights protection between Member States and the Strasbourg ECHR system on one hand and the EU on the other. While it is surely too early for reliable predictions, key provisions of the Charter and first experiences with their application by the EU institutions suggest that the perspective may not be appropriately framed in these terms: Firstly, the scope of the Charter in relation to Member State action is construed prudently. Secondly, the limits of EU competences in this field, unaltered by the Charter and the accession to the Strasbourg system, are acknowledged and respected. For those Charter rights corresponding to the ECHR Article 52 (3) incorporates the legal content of the Convention into the Charter. On that basis the two European Courts have already announced a "parallel" interpretation in which the Court of Justice will continue to faithfully implement the Strasbourg case law. Furthermore, several provisions suggest that the national constitutional traditions and legal systems remain relevant for the interpretation and development of the EU's corpus of fundamental rights. Finally, we will continue to observe the well-known phenomena of interaction and "commuting" between both levels, of an "osmosis of values", which have allowed the shaping of general principles of EU law.

If nonetheless, in Europe's polycentric system of human rights protection, a significant shift towards the EU level is to occur over time, it will be less a consequence of the Charter itself or of the institution's work in applying it, but rather a result from other decisions that the Masters of the Treaty have taken and may still take, namely from significant conferrals of legislative competences to the EU, both in most rights-sensitive policy areas such as justice and home affairs and as regards the realisation of specific fundamental rights such as non-discrimination in Article 19 (1) TFEU. There may also be a "spill-over" effect over time, in that interpretations given to the Charter will, even outside its scope, influence that of the ECHR and national bills of rights – but as in the past, this is not likely to be a one-way street.

By taking up these challenges lying ahead in the years to come, it is of an utmost importance to contribute to realising the vision of the Lisbon Treaty and to building a fundamental rights system in Europe in which the judicial and political actors at each level – national, Union and pan-European – will retain their importance. Under the auspices of mutual cooperation their respective missions as complementary and jointly reinforcing.

The European Court of Justice will do its share and contribute to this common European success.

FINAL REPORT

Application of the Charter of Fundamental Rights of the European Union by national courts: the experience of administrative courts

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I.- Application of the Charter in numbers

I.- When it comes to specifying the number of issues in which national courts have had to apply the Charter since it came into force, we confront a first major difficulty: that of interpreting in how many areas the Charter “has been at issue”. This is because the figures vary greatly, depending on whether we are referring to those in which the Charter has simply been mentioned or those in which it has actually been applied; and within the latter, in which ones it has been applied as an additional element of argument and those in which the application of the Charter has truly been relevant in the reaching of a verdict. This difficulty is seen clearly in the reports: as stated by the authors of the first overall report, each Member State has embraced a criterion which is not defined clearly.

That said, we can state the follow conclusions:

As of today, the Charter has been applied - in a broad sense - in all of the Member States of the European Union which responded to the questionnaire. It has not yet been applied in Turkey, Croatia or Switzerland, countries which are not now members of the EU but are part of the Association and did respond to the questionnaire. Turkey, for instance, said that its status as a candidate for EU membership would not in theory prevent it from applying the Charter as a reference point in the area of human rights, although so far it has not yet been applied. Switzerland, which is not an EU member either, does not rule out applying it at some point in the future (as is already the case with some EU norms, such as the so-called “return directive”). Croatia, meanwhile, is scheduled to become a member of the EU on 1 July, 2013.

The following table is based on another one done by those who summarized the first reports, and to whom we are grateful for their work.

Table of national judgments where the Charter was applied

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
AUSTRIA	12	12		Not reported
BELGIUM	2	1	1	Not reported
BULGARIA	246			Not reported
CROATIA	0			Not reported
CYPRUS	3			Not reported
CZECH REP.	4	4		Not reported
DENMARK	7	5	2	Not reported
ESTONIA	6	6		2 (civil law and Constitutional although

				Supreme Court in full session)
FINLAND	20	10	10	Not reported
FRANCE	95	30	65	10 (area of law unknown)
GERMANY	20	-	-	3 (2 fiscal and 1 social security)
GREECE	7	7		Not reported
HUNGARY	2	1	1	Not reported
ITALY	6 *	2	4	Not reported
LATVIA	0			Not reported
LITHUANIA	7	6	1	Not reported
LUXEMBOURG	5			Not reported
THE NETHERLANDS	49	24	25	19 (15 criminal law and 4 civil law)
POLAND	28	14	14	Not reported
PORTUGAL	15 *	8	7	Not reported
ROMANIA	100 *			Not reported
SLOVAKIA	2	2		Not reported
SLOVENIA	5		5	1 (constitutional Court)
SPAIN	6	6		
SWEDEN	?			Not reported
SWITZERLAND	0			Not reported
TURKEY	0			Not reported
UNITED KINGDOM	4	4		2 (civil law)

* Figures with an asterisk are approximate.

As one can observe, the degree to which the Charter is applied varies greatly from one country to another, and the reason for this is easy to ascertain: while 246 cases were taken up in Bulgaria, approximately 100 in Romania, 95 in France and 49 in the Netherlands, we see that in 60 percent of the Member States of the EU the Charter has been applied fewer than 10 times. The figure is 20 to 30 for countries such as Poland, Finland or Germany. The extraordinary difference between the frequency of the Charter's application in the vast majority of Member States and the first two nations mentioned makes us conclude that the figures should be taken with a grain of salt, as they depend on various factors:

- Firstly, they depend on the criteria, and the degree of leeway, with which the "application" of the Charter is interpreted, as stated at the outset of this paper. So some countries, such as Latvia, said that although the Charter has been referred to several times, it has not been applied as such in any cases at all. Other countries, such as Luxembourg or Italy, cite cases of the Charter's application, in contrast to others in which it was invoked but not applied. Yet others, like Spain, Belgium, Finland or Hungary, mention cases in which the Charter was referred to and used

only as an added argument to explain or interpret some other piece of legislation (in particular Spain and Belgium point out that so far the Charter has played only an indirect role, with just an incidental impact.) Finally, countries such as the United Kingdom, the Netherlands, Poland, Germany, Lithuania, Austria and France do in fact cite cases in which even courts examined whether a given law was compatible with the Charter.

- Secondly, the figures depend on the characteristics of the national judicial system that facilitate or, conversely, hinder, the obtaining of information. Thus, Sweden, for instance, says it is impossible to give precise data because of the features of its courts (when so-called “*leave to appeal*” – the most common outcome -- is not guaranteed, no explanation for a decision is given, and therefore one does not know if the Charter has been a relevant issue in the argumentation.) Italy, for its part, presents only approximate information on the application of the Charter in certain courts. This happens with particular frequency in some countries with regard to lower-level courts: several reports say it is impossible or extremely difficult to carry out a tally in such cases, including Spain, Portugal and Romania.
- On the other hand, not all the reports are limited to giving information on courts at the administrative level. France, the United Kingdom, Germany, the Netherlands and Slovenia, for instance, complete the questionnaire with information related to the civil, labour, penal and even constitutional fields of their justice systems, although, they compute it in their reports outside the figure that we are analysing. But from other reports one would deduce the opposite; in other words, that the final figure given includes issues from all branches of Law. Such is the case of Estonia and Greece, for instance. At times this makes it difficult to have comparable figures.

For all of these reasons the total number of issues in which the Charter has been applied in administrative courts since it came into effect is merely an approximation. However, it is important to note that the data show a clear trend toward generalized application in all Member States.

Special mention should be made of the United Kingdom and Poland, to which Protocol 30, added to the Treaty of Lisbon, is applicable. According to it, 1) *the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms, and 2) in particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.* Furthermore art. 2 declares that *to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.*

As noted by those who wrote the first reports, both the United Kingdom and Poland dedicate much of their reports to evaluating the Protocol and its effects, reaching the conclusion that perhaps it should not be treated as an “opt-out”. In fact, the British *rappporteur* goes so far as to say it is possible that the Protocol may have no practical impact

in the UK, with the Charter being applied as in any other country. In the case of Poland, the *rappporteur* said the Charter will be applied, although it will be subject to conditions called for in the Protocol which remain to be determined. It is significant (and to some extent, disconcerting) that Poland added to the signing of the Protocol a Declaration (no. 62) in which what is pledged in the Protocol appears to be left in jeopardy: *Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.* After the British report was compiled, the Court of Justice issued a verdict in the case *NS/Secretary of State for the Home Department, C-411/10*, 21 December, 2011, which was raised via reference for a preliminary ruling by the High Court of Appeal (England & Wales), in which the scope of Protocol 30, among other things, was questioned. Although this affair does not provide any information on what might be the scope of article 1.2 of the Protocol (which rules out the possibility of the Charter creating rights that could be defended in British and Polish courts if these rights were not previously featured in national legislation), as the issue at stake does not affect the disposition of the Charter that the Protocol refers to, it allows the European Court of Justice to state firmly that Protocol 30 does not challenge the validity of the Charter for the UK and Poland (FJ 119), and that article 1.1 thereof only explains article 51 of the Charter with regard to its field of application.

II.- Since the first summary produced by the Dutch Council of State, it has not been possible to find major novelties where the Charter rights are most frequently cited by national judges, or where there are reasons why some are cited and others are not.

Going in order from greater to lesser, there are three precepts of the Charter that are most commonly cited: art. 47 (the right to effective legal assistance and to an impartial judge), cited by the national courts of 17 Member States; article 41 (right to good administration) cited 14 times; and article 7 (respect for private and family life) cited 12 times. Here we list a set of precepts mentioned less frequently but also in a prominent way with respect to the rest: article 24 (children's rights) cited by the national courts of eight countries; and articles 15 (professional freedom and the right to work), 17 (right to own property) and 19 (protection in case of repatriation, expulsion and extradition), each of which is cited seven times. Of the remaining 47 precepts in the Charter, nearly 60 percent were cited a few times. In annex I to the report there is a detailed list (begun by those who carried out the summary of the first reports) with the articles cited before national courts of the different States that responded to the questionnaire.

Now, we would like to say a few words about the major absences. The Charter Titles which have been implemented the least so far before national courts were Title IV labelled "Solidarity" and V, "Citizens' Rights". There appear to be a variety of reasons: starting at the end, within the Title dedicated to Citizenship, basically it is article 41, conferring the right to good administration, which has been cited. In fact, this is one of the rights which has generated the most judicial controversy. Apart from this precept, and leaving aside an issue raised in Estonia concerning the right to vote in European Parliament elections (article

39) but outside the administrative field of justice, article 45 (freedom of movement and place of residence) was also invoked three times.

The reason for this scant application of the articles in Title V could be that the rights they contain were already enshrined some time ago in other precepts of the treaty, currently in articles 20 to 25 of the Treaty on the Functioning of the European Union, as a result of which their inclusion in the Charter can seem almost a merely rhetorical issue. In fact, looking at the data on the judicial conflicts posed by citizenship statute before the European Court of Justice, we observe that on the dates which the report uses as references (since the Treaty of Lisbon came into force) the Court of Justice has taken up cases concerning the rights of European citizens, but only on few occasions do these refer to the corresponding rights enshrined in the Charter (*Sayn Wittgenstein*, C-208/09, 22 December, 2010; *Ruiz Zambrano*, C-34/09, 8 March, 2011; *Runevic-Vardyn*, C-391/09, 12 May, 2011 and *Dereci and others*, C-256/11, 15 November, 2011 challenge before the court the interpretation of article 21 of the Treaty on the Functioning of the European Union, without at any point mentioning the corresponding article 45 of the Charter. It does however allude to other precepts of the Charter such as articles 7, 20, 21, 22, 24 and 34. The case known as *McCarthy*, C-434/09, 5 May, 2011 is a true exception, although the reference to article 45 of the charter is purely accessory).

With this in mind, one must not forget that article 52.2 of the Charter states that the rights recognized in it which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties and that the Explanation of article 52.2 indicates that among these rights are “notably the rights derived from Union citizenship”. Thus, it is quite possible that national judicial bodies have addressed issues related to rights inherent in European citizenship without there having been mention of the corresponding precept in the Charter. *A sensu contrario*, this argument can serve to explain the number of allusions to article 41 of the Charter: the main content of the right to good administration has been developed, according to the Explanations of said article, on the basis of the case law of the Court of Justice, since it was not included as such in the statute concerning European citizenship.

As for the precepts contained in Title IV on Solidarity, only 10 times have national courts made reference to any of them. Of the 12 precepts that make up Title IV, seven of them have never been invoked by Member States. If we keep in mind that among them there are four precepts which contain “principles” rather than rights (this is seen clearly in the Explanations of articles 34, 35, 37 and 38), and that three of these precepts are those which led to cases before national courts, it is possible that these cases were simply matters of putting down in writing the question of the nature of the legal concept protected in each of them.

Meanwhile, we must not lose sight of the fact that the report at hand is limited to the application of the Charter in the administrative field, which to some extent confines the precepts which were applicable in said context. In summation, only an analysis that also takes in figures on the application of the Charter in other judicial areas will give us a full picture of the issue.

III.- As for the question of the legal areas in which the Charter plays a particularly important role, the reports coincide in highlighting, within the field of Administrative Law, rules on immigration and asylum. In only a few States (Spain, the Netherlands, Austria, the Czech Republic, Italy, Slovakia and Estonia) the Charter played no role whatsoever in issues related to these areas. The other areas coincide with those of most recurring precepts, namely the right to good administration and the right to effective legal assistance. In other words, as the report from Estonia states, the Charter has been invoked “to ensure the protection of procedural rights.”

With regard to Estonia, it is noteworthy how the Charter plays a prominent role in its Constitutional Law, as higher courts apply the Charter as an auxiliary tool for interpreting constitutional precepts. We shall return to this point later.

IV.- Finally, States report nine cases in which the European Court of Justice heard preliminary rulings on the interpretation of some precept in the Charter. Although this question aimed to compile information on issues that were not yet known because they were not yet published in the Court’s database, as of now the majority of them are.

Many of them are not only published in the database of the European Court of Justice but also resolved. Such is the case with *Chatzi*, C-149/10, 16 September, 2010. Here, the court resolved a preliminary ruling raised by a Greek court with regard to the right to equality before the law and non-discrimination in a case in which there was doubt over whether the right to parental leave of absence could be multiple if it also was for the birth of a child. We also have a case referred to the Spanish Supreme Court which is related to the interpretation of Directive 95/46 on the protection of personal data. It could affect article 8 of the Charter. The Court of Justice issued a verdict in the case *ASNEF and FECEM*, C-468 y 469/10, 24 November, 2011, ruling on the scope of article 8 and urging consideration of the issues in dispute. We will come back to this point as well.

Others are simply published in the database of the Court of Justice, such as *K*, C-245/11. It was raised by an Austrian court with regard to the interpretation of Regulation 343/2003, and at issue is the possible contradiction that might exist between a precept of the regulation and the articles of the European Convention on Human Rights and the Charter which enshrine the ban on inhumane treatment and respect for family life. The Swedish report alludes to the case of *Akerberg Fransson*, C-617/10, although it warns that it involves penal law since it alludes to the compatibility of the principle *non bis in idem* of article 50 of the Charter with a national system that establishes separate procedures for punishing the same illegal behaviour. Slovak courts cite *SKP*, C-433/11, which seeks interpretation of several European norms which have to do with unfair business practices (abusive clauses in contracts) in their relations with customers, as well as article 47 of the Charter. Latvia reports the lodging of a case, *Zakaria*, C-23/12 related to the interpretation of Regulation 562/2006 on the free movement of persons within the Schengen area in line with article 47 of the Charter. Essentially, the question is whether that article forces the State to guarantee a judicial review of a border official’s decision. Bulgaria cites the case *Noscira/OAMI*, C-69/12 brought before the Court of Justice in February 2012. The Hungarian report cites, with going into further detail, a case in which the court did not file a preliminary ruling

before the Court of Justice because it felt the issue went beyond the jurisdiction of said court, which it said was limited to EU laws.

On February 16, 2012 the courts of Luxembourg raised two preliminary issues before the Court of Justice (still not located in the court's database) concerning Union citizenship in combination with certain articles of the Charter (those regarding the right to equality before the law, non-discrimination, children's rights, family and professional life and social security and social assistance). The preliminary rulings do not make any mention of article 45 of the Charter on freedom of movement and residence, even though they involve article 21 of the TFEU. The first of the two cases regards the right of a person from a third State to live in a Member State of the EU, being the father of several small children who are European citizens and have been in his custody since birth. The second case concerns family reunification. All of them recall to some extent either the circumstances of the famous *Ruiz Zambrano* case or the later *McCarthy* case. We will have to wait and see to what extent they do in fact bear similarity to them and what the court has to say on this.

Finally, the Czech Republic states in its report that the Supreme Administrative Court will raise a preliminary issue related to the scope of the right to good administration called for in article 41 of the Charter in a case involving taxation.

V.- What are the figures regarding the application of the Charter by the European Court of Justice? This issue deserves a separate chapter.

The difficulties we face in obtaining comparable data are the same: How to interpret which cases are those in which the Charter "has been at issue". In the case of the Court of Justice's case law, the variety is even greater. We shall see cases in which the Charter is alluded to marginally, others in which the allusion to the Charter is more relevant, to the point where it become a tool for interpreting other laws, and finally yet others in which the Charter itself becomes the subject of interpretation. Finally, we will make mention of issues in which the application of the Charter has been definitive in terms of their consequences.

- In many decisions in which the Charter is alluded to, the allusion is used in a very weak way, as a tool that is marginal or accessory to the interpretation. In those cases, the interpretation has been made and recourse to the Charter has been used in a rather rhetorical way, so as to strengthen the discourse. This is perhaps what happened in the first cases that reached the Court after the Charter came into force: until September 2010, it was common for any reference to the Charter to be totally accessory. A good example is *Küçükdeveci*, C-555/07, 19 January, 2010, in which it is stated that the right in question is a general principle of the EU law that "furthermore is enshrined" in the Charter. Another example is *Knaup Gips case*, C-407/08 P, 1 July, 2010. But we also find later cases with this rather symbolic reference to the Charter; among many others are *Patriciello*, C-163/10, 6 September, 2011; *Garenfeld*, C-405/10, 11 November, 2011 and *Painer*, C-145/10, 1 December, 2011.
- From the *Chatzi* case cited in the Greek report, the Court of Justice started to use the Charter as a tool to interpret another EU norm; in other words, as a primary law that must be respected by secondary law. As we shall recall, in this case brought before

the Court of Justice, a Greek court directly questioned the interpretation of a norm “in light of articles 20 and 21 of the Charter.” This was extremely important as it affected another precept of the Charter, namely 33.2, calling for the right to parental leave of absence and thus lends a fundamental character to that social right (FJ62). Since then the Court of Justice has issued many judgments in which the Charter has been used in a more substantive way, as a tool for interpretation. For instance, there is CJEU, *McB*, C-400/10 PPU, 5 October, 2010 in which questions are asked about the interpretation of a Regulation in light of articles 7 and 24 of the Charter. The Court stated that the regulation in question opposes a national law requiring that, in order for a biological father to obtain custody of his children, there be a judicial ruling, as this interpretation is in compliance with the right ensured by the Charter. In *Volker und Schecke*, C-92/09 and 93/09, 9 November, 2010 several preliminary questions are raised about the validity of regulations and directives, and in the alternative, about the interpretation of a directive. Although the European Court of Human Rights is used as a control parameter, the CJEU recalls that the Charter has the same legal validity as treaties and goes on to argue that the validity of the controversial precepts must be assessed “in line with the Charter” (FFJJ 44-46). This is without a doubt an important ruling, as it serves to reaffirm the authority of the Charter. In the same spirit we can cite *Test-Achats*, C-236/09, 1 March, 2011. It is a preliminary question as to the validity of a directive that is to be evaluated in light of article 6 of the Treaty on European Union. Again, the Charter works as a tool for interpretation and the consequence is the declaration of invalidity of a precept of secondary law. The case *Scarlet Extended*, C-70/10, 24 November, 2011 involves a preliminary question about the interpretation of various directives on Internet commerce, intellectual property rights and the information society. The Charter thus becomes a crucial tool for interpretation. Other cases which also involved interpretive use of the Charter are, for instance, *Peñarroja*, C-372 and 373/09, 17 March, 2011; *Deutsche Telecom*, C-543/09, 5 May, 2011; *Nagy*, C-21/10, 21 July, 2011 and the aforementioned *ASNEF and FECEM*.

- Finally, there are some CJEU cases in which the Charter as such becomes a direct object of interpretation, something which, naturally, only the Court can do in its capacity as supreme arbiter of EU law (at least for now). All of them involve preliminary questions of interpretation, in which the Court of Justice is asked about the scope of some precept of the Charter. Such was the first case that the Court heard after the Treaty of Lisbon took effect and thus after the Charter took on the same legal value as the Treaties: *Rodríguez Mayor*, C-323/08, 10 December, 2009. In this case, questions were raised directly as to the interpretation of article 30 of the Charter, which calls for the right to protection in the event of an unjustified dismissal of a worker. As the Court of Justice felt that the main issue did not enter the field of application of EU law, it could not answer the question. The same thing happened in *Vino*, C-20-/10, 11 November, 2010; *Estov*, C-339/10, 12 November, 2010; *Rossius and Collard*, C-267 and 268/10, 23 May, 2011 and *Cicala*, C-482/10, 21 December, 2011 cases: although questions were raised about the interpretation of articles 20 and 21, 47, 35 and 41.2c, the Court of Justice declared that it did not have jurisdiction because these issues fell outside the field of application of the Charter as stated in article 51.1 thereof (“...Member States only when they are implementing Union

Law"). *Hennigs*, C-297 and 298/10, 8 September, 2011, involve a preliminary issue of interpretation of articles 21 and 28 of the Charter and of a directive. Another particularly interesting case is the aforementioned case *NS* which interpreted for the first (and so far only) time Protocol 30, applicable to the United Kingdom and Poland. In this case the Court of Justice also confronts various questions regarding the interpretation of a regulation and various precepts of the Charter: articles. 1, 4, 18, 19.2 and 47. The Court is quite explicit with regard to the scope of article 4 of the Charter and answers the question of whether the scope of the protection granted to a person in virtue of the other articles cited is broader than the protection afforded by article 3 of the European Convention on Human Rights. We will return to this point later. The cases *G*, C-292/10, 15 March, 2012 and *Kamberaj*, C-571/10, 24 April, 2012 directly question the interpretation of articles 47, 21 and 34 of the Charter. Finally, the case *Sayn Wittgenstein*, which was already mentioned, raises an issue to which we have already referred: that of the strange silence which courts are observing with regard to the precepts of the Charter related to citizenship: the case raises a preliminary question to interpret article 21 of the TFEU, in other words, the article which enshrines the freedom of movement and of residence in the European citizenship statute, and at no point does it cite the corresponding article 45 of the Charter, despite the explicit reference to other precepts of the same such as article 7 (the same happens in the cases *Gaydarov*, C-430/10, 17 November, 2011 and *Aladzhov*, C-434/10, 17 November, 2011; in the case *Lassal*, C-162/09, 7 October, 2010 there is in fact an explicit mention to article 45 of the Charter, although it is an accessory mention). The case of *Ruiz Zambrano*, one that is without a doubt very controversial because of the enigmatic response given by the Court, also directly questions the interpretation of several precepts of the Charter.

In this overview of the Court's application of the Charter, one must finally note how the Charter has served directly to call into question the validity of a national or EU measure, or to impose a certain interpretation of EU precepts that precludes the measure that is being challenged. Many of the cases that we will point out have already been mentioned; if they are repeated now, it is because as a result of the ruling of the Court of Justice the validity of norm has been challenged and its correct interpretation established.

These are some of the cases cited: *Volker und Schecke* (FFJ85-86) in which the Court of Justice declares certain precepts of several EU regulations to be invalid because they do not properly take into account the requirements of processing personal data as established in articles 7 and 8 of the Charter. Also noteworthy is *DEB*, C-279/09, 22 December, 2010 in which the Court of Justice interpret the "jurisprudential principle of effectiveness", to determine if a legal entity has a right to free legal assistance. The Court of Justice recalls that, with the entry into force of the Treaty of Lisbon it "must" take into consideration the Charter and that the principle of effective judicial assistance, enshrined in article 47 of the Charter, must be interpreted. Aside from the thoroughness of the ruling (it does not appear to leave any stone unturned to the national courts), the interpretation that it gives to article 47 of the Charter suggests a possibly adverse result for the application of controversial national norm. In the aforementioned *Test-Achats* case the CJEU redirects 6 TEU to articles 21 and 23 of the Charter, and declares invalid a precept of a directive because it allows

affected Member States to maintain, endlessly, an exception to the rule on insurance premiums and benefits undermining the goal of equal treatment for women and men. In the *Peñarroja* case, the CJEU states that in light of article 47 of the Charter, a national norm such as the controversial one is incompatible with EU law because “the interested parties cannot obtain knowledge of the reasons for the decision taken in their regard and that decision is not open to effective judicial scrutiny enabling its legality to be reviewed”. In the *Hennigs* case, the CJEU said that the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings. The measure provides that, within each salary group, the basic pay step of a public sector contractual employee is determined on appointment by reference to the employee’s age. At the same time, the *Scarlet Extended* case concluded with a decision by the CJEU under which the directives that were challenged, when interpreted “in the light of the requirements stemming from the protection of the applicable fundamental rights”, preclude an injunction made against an internet service provider which requires it to install a system for filtering all electronic communications with a view to blocking the transfer of files the sharing of which infringes copyright. The *ASNEF and FECEM* case resolves a preliminary question raised by the Spanish Supreme Court. The final interpretation was that the directive being challenged, in the light of articles 7 and 8 of the Charter (and quoting the judgments in the cases *Promusicae*, C-275/06, 29 January, 2008 and *Volker und Schecke*) on the protection of individuals with regard to the processing of personal data and on the free movement of such data preclude national rules which require not only that the fundamental rights and freedoms of the data subject be respected, but also that the data should appear in public sources, thereby excluding, in a categorical and generalized way, any processing of data not appearing in such sources. Finally, we must once again cite the *NS* case on asylum-seekers who were due to be transferred to a given Member State under European Law: the CJEU opposes any interpretation that presumes irrefutably that the Member State responsible for assessing the asylum request respects the fundamental human rights of the EU, and believes that the States and their courts have very precise obligations in this regard as a result of article 4 of the Charter.

Now that we have noted the most relevant judgments handed down by the CJEU since the Charter came into effect, it is necessary to mention which rights are the ones most often cited by the court. Here, the data does not differ much from those seen in national jurisdictions: the Charter precept referred to most frequently is article 47 (right to an effective remedy and to a fair trial), followed by articles 20 and 21 (equality before the law and non-discrimination) and article 7 (respect for private and family life). Next come a series of precepts that are mentioned less frequently but still in a prominent way compared to the rest: article 8 (protection of personal data), article 24 (children’s rights) and article 41 (right to good administration). The CJEU’s case law in the area of equality has a well-known history, and the incorporation of the rights included in the Charter has not changed this. Meanwhile, article 8 of the Charter on data protection is proving to be very useful in the area of private and family life as per article 7, in today’s global context of rules on the information society.

There have been several cases related to precepts that feature in Title IV of the Charter, which addresses the issue of Solidarity. However, we do not find a thorough ruling on the question in all of the cases mentioned: exceptionally, there is in fact mention –to varying degrees, depending on the case -- of the content of these precepts in following cases: *Chatzi* on article 33.2 of the Charter (the right to parental leave of absence); *Hennigs* on article 28 (right to collective bargaining); *KHS*, C-214/10, 22 November, 2011 on article 31.2 (annual period of paid leave) and *Kamberaj* on article 34 (social assistance). In *Commission/Austria*, C-28/09, 21 December, 2011 there is allusion to articles 35 and 37 (protection of health and the environment) although in a very limited way, and in *Rodríguez Mayor* and *Rossius and Collard* the CJEU declared itself not to have jurisdiction, thus preventing a ruling on articles 30 of the Charter (protection in case of unjustified dismissal) and 35 (protection of health), respectively.

We already mentioned elsewhere how the fact that the articles of Title V of the Charter on Citizenship were previously featured in other precepts of EU treaties makes it difficult to depict these as rights “inherent in the Charter”. Not even the CJEU refers to them, alluding instead to its “counterparts” in the treaties.

What are the legal fields in which the Charter plays a special role, as far as we can tell from CJEU case law? Most of the cases heard by the CJEU in the two-and-a half years that the Charter has been applied are not related to administrative law: a large number of cases have to do with social law (social policy, workers’ rights, equal treatment in the workplace, age and gender, working conditions, workplace organization, wages); some cases relate to the civil and family law area (judicial cooperation on civil issues, parental responsibility, minors); or the penal field (penal legality, statutes on victims of criminal trials). The issues most closely linked to Administrative law have to do with freedom of movement and rights linked to European citizenship, those involving foreigners and asylum, the information society and processing of personal data, and finally the right to an effective remedy and to a fair trial and other procedural rights related to good administration.

II.- Field of application of the Charter

Within the general provisions governing the interpretation and application of the Charter, the first is the one related to its area of application. Article 51 of the Charter addresses this: *First, the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. And then, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.* The last part of the last sentence of article 51.1, and most of article 51.2 of the Charter were incorporated into it in the amendments undertaken in 2007. As deduced from the Explanations of said article, “explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it”.

As if that were not enough, Declaration No. 1 annexed to the Treaty of Lisbon again reiterates this issue. States' wariness on this issue is more than evident.

I.- Several questions were raised in the questionnaire about the field of application of the Charter. The first referred to the scope *ratione temporis*, in other words the issue of whether the Charter could be invoked for application to situations that emerged before it came into force, or only afterwards. Naturally, this question can only be understood in the absence of any European guideline, which was expressly questioned by the person responsible for the Spanish report: in his opinion the CJEU has jurisdiction to say if the Charter can be applied to events that happened before it came into effect (for instance, when it affected issues of "public order"). This would avert the enormous differences among States that we see here:

- On one hand there is a group of countries whose legal system does not allow the Charter to be applied to situations that emerged before it came into force on 1 December, 2009. Thus, in these States the Charter is not retroactive. These countries are France, Austria, the Netherlands, Poland, Hungary, Belgium, Lithuania, Cyprus, Italy, Greece (this country has alluded specifically to a case in which the complaint was rejected because the act being challenged took place before the Charter took effect); it does not seem to be possible either in the Czech Republic, Sweden or Estonia. Turkey, which answered in its capacity as a candidate for EU membership, says its application of the Charter will be *ex nunc* because this is the general rule in that country. In any case, this issue is complex because the reports from the Member States do not answer the question clearly.
- Then there is a group of countries that do allow for applying the Charter to events that occurred before it came into effect, so long as certain conditions exist:
 - a) In order for the Charter to be applied retroactively some countries require that the decision being challenged continue to exert an effect even after the entry in force of the Charter. The report from Finland is clear in this regard, and so was President of the Fifth Chamber of the European Court of Justice Von Danwitz when consulted by the Association; he cites the CJEU verdicts in the *Volker and Markus Schecke* and *Test-Achats* cases. Switzerland, which is not a member of the European Union, says that to the extent the Charter could be applied, it would allow retroactive application if the decision in question continue to have an effect.
 - b) Germany accepts this possibility for certain acts, as in that country the retroactive application of the Charter depends on the nature of the act in question. The judicial system in Luxembourg is similar.
 - c) Some States, such as Belgium, the Netherlands and Lithuania establish differences depending on whether it is a question of applying procedural or material precepts of the Charter. Slovenia says its general rule is *ex nunc* application of the Charter but does not rule out retroactivity for some issues.
 - d) Finally, several States allude to the possibility of using the Charter retroactively as a tool of interpretation or additional argument; these are Lithuania, Spain, Romania and Latvia
- While Slovakia states that the question of retroactive application of the Charter will be resolved in that country depending on the circumstances of each case, Portugal and Denmark simply say they have not yet faced such a circumstance.

So if we examine CJEU case law on this issue, we see that so far the European court has not provided anything particularly illuminating. The Court has not stated a general position on whether the Charter can be applied retroactively or only to situations that emerged after it came into force. The questionnaire itself pointed to the possibility that the reasons behind certain rulings, such as that of *Küçükdeveci*, might stem from the fact that events in the case precede the entry in force of the Charter on 1 December, 2009, since the CJEU argued paradoxically “from the Charter,” but then did not draw any conclusions from it. The *Salahadin Abdulla*, C-175/08, 2 March, 2010 and *Chakroun*, C-578/08, 4 March, 2010 cases also refer to the Charter, but the court does not use its precepts at all in its arguments. Might this also have to do with the fact that the events go back to 2005 and 2006? In the area of civil judicial cooperation, the CJEU has heard at different times three similar cases in which the same regulation was challenged: *Deticek*, C-403/09, 23 December, 2009 and *Povse*, C-211/10 PPU, 1 July, 2010 had to do with events that pre-dated the Treaty of Lisbon and thus the Charter. However, the *Aguirre Zárrega*, C-491/10 PPU, 22 December, 2010 case addresses events that happened after the treaty and Charter came into force. While in the first two cases the CJEU abstained from arguing “from the Charter” and alluded to it only to corroborate reasoning that had already been made, in the third case the Court goes into detail in interpreting article 24 of the Charter. And although events are not identical, it is noteworthy that the Charter was used in a different way to interpret the same norm.

II.- Even as we evaluate the application of the Charter in terms of time, it is necessary to detect if there has been any special consequence derived from its presence in European legal systems since it was proclaimed in 2000, despite the fact that it was not then binding. Indeed, one cannot ignore the fact that 10 years before it came into force along with the Treaty of Lisbon, the text of the Charter (with differences, some of them important ones) was already known in Europe.

With the exception of a few countries, such as Hungary, Austria and Sweden, (the United Kingdom did not answer this query on the questionnaire), the Charter of 2000 has played somewhat of a role in the courts of the member states of the Association. This role has, however, been secondary. The 2000 Charter was not considered more than an additional argument for the purposes of interpretation, a tool for confirming already existing European law, or even a source of legislative inspiration.

The fact that the European Convention on Human Rights was binding in the years when the Charter was not, caused some States to turn only to the convention because of its legal effects and the similar protection it provides to rights and freedoms (such is the case in Cyprus and Turkey -- in the latter probably even more so since it was not a member of the EU);

We should mention the case of Estonia because of its frequent use of the Charter of 2000 as an auxiliary tool of interpretation, mainly of the national Constitution. The Constitution dates back to 1992 and underwent some changes in the first years of the 21st century. In many cases it was interpreted with the Charter in mind, even though Estonia did not join the EU until 2004. It has even been used in the absence of any link to EU law. This indicates

that judges wanted to base their arguments on the principles generally recognized in the Union, especially in sensitive areas like the welfare state or justice.

One could conclude that people wanted to see in the Charter, even though it was non-binding from 2000 to 2009, a symbolic expression of the current state of the issue in Europe: rights and freedoms “are”, today, those which had been included in the Charter and as such recourse to them was made. Portugal said in its report that no judge could ignore the weight that would be added to his or her arguments if they were in line with the spirit of Europe.

III.- After assessing the time-related elements of the application of the Charter, the questionnaire asks Member States about the scope *ratione materiae*, specifically the scope that their courts had given to the expression of article 51.1 of the Charter. Given that this article states that the precepts of the Charter are directed not just at the institutions and other bodies of the Union, but also at Member States “only” when they apply EU law, the question is, “how do courts interpret the expression “only when (Member States) are implementing Union law”? The question is important, not just because the answer to it determines the degree of virtuality of the Charter within the Member States, but also because on this issue there is ample CJEU case law developed starting well before the Charter went into effect (and facilitated by the questionnaire).

Thus, from the consolidated case law of the CJEU one can seemingly discern three kinds of situations which involve “application of Union law” in a more or less broad sense: a) when States apply or implement EU law (implement directives, execute regulations and decisions, apply precepts of the EU treaties or general principles of EU law, etc.), b) when, for reasons of absolute necessity (for instance, maintaining public order) they adopt any kind of measure that can hinder the exercising of EU freedoms or c) when there is a link with EU law (this category is less well defined, but with regard to it there are some cases, such as the aforementioned *DEB* case).

All that said, despite the meticulous EU case law, to date the national courts have not had many opportunities to rule on the Charter, or at least to rule on this point.

From the few cases that exist on this issue, and the non-detailed nature of the reports on the question (only the Netherlands and the UK stated why or why not a case enters into the field of the Charter’s application), one can deduce that the States interpret the precept in a broad manner, assume that the Charter is applied to situations included in the first two categories, and show some reservations as to the third. In general terms, the main issues discussed in the reports are these:

- Among the issues that are in the field of *ratione materiae* application of the Charter, many reports refer in particular to the controversial “third category”: only Germany points out a case in which the Charter was applied because it was felt that there was a “link” with EU law, and Lithuania supports the existence of this category with the understanding that the Charter must be applied on the basis of the “principle of vigilance”. This does not mean the rest of the States reject that criterion: with the

exception of France, which does so specifically (and the exception of CJEU judge Von Danwitz), the rest of the states do not rule it out, nor object to considering it as a category. That said, many of them coincide in pointing out the lack of certainty surrounding it (in this regard, the author of the Spanish report raises the question of how binding an indirect connection with European issues must be to justify mandatory application of the Charter).

- Some States refer to concrete situations which do not enter into the *ratione materiae* scope of the Charter. Germany says this is the case when it is not possible to find any transnational element, when the areas of jurisdiction pertain exclusively to Member States or concern only nationals of third countries. The courts of Finland say that not even the presence of transnational elements should be interpreted automatically as “sufficient” to consider an issue as falling within the scope of the Charter. Greece, for its part, ruled out in various cases that national measures dealing with the economic crisis should be checked against article 34 of the Charter, as they were exclusively internal measures. Sweden’s report gives data from just one case – albeit from penal law – in which the scope of article 51.1 of the Charter is questioned. The court concludes that the issue fell outside the jurisdiction of the EU; it says there were judges who voted against this conclusion.
- Other States simply said there has not been any case law so far on the scope of article 51.1 of the Charter (Czech Republic, Luxembourg, Portugal, Cyprus, Romania, Denmark, Slovakia, Slovenia, Estonia and Latvia).

The case law of the CJEU does not provide much that is new on this point: from the few cases in which the court has referred to article 51 of the Charter it is possible to deduce the following:

- Article 51.1 requires confirmation that a State is applying EU law or presents some connection with it. In this regard, and keeping in mind the fact that the immense majority of the cases involve the first category (when Member States implement or apply EU norms in a broad sense) such as for example *NS*, we point out the *Tsakouridis*, C-145/09, 23 November, 2010, *Sayn-Wittgenstein* and *Peñarroja* cases which seem to refer to the second category of situations which enter into the scope of EU law, following the case law highlighted in *ERT*, C-260/89, 18 June, 1991.
- And by virtue of 51.2, attribution of legal value to the Charter does not have special consequences in terms of the jurisdiction of the CJEU to hear a case, as deduced from Declaration no. 1 annexed to the Treaty of Lisbon (in the case *Rossius and Collard*). As summarized in the *McB* case, its obligation is to interpret, in light of the Charter, EU law within the limits of the powers of the Union as conferred on it in the Treaties.

IV.- Finally, it is important to know if judges, on their own, review whether controversial decisions are compatible with the Charter, or on the other hand only do so if asked by one of the parties in the case. This furthermore allows us to understand who has jurisdiction first to assess the scope of the Charter *ratione temporis* and *ratione materiae*.

As stated by those responsible for summarizing the first reports received, the response to this question is generally reached by providing the theory on the issue as it exists in national procedural norms (only Finland and Belgium specify cases in which the Charter was reviewed *ex officio*): it seems that wherever a court is competent to review a national law at its own initiative, it will do the same with EU law and thus the Charter.

National systems vary. While there are states that opt for one system or another (in France review is carried out only at the request of one of the parties; but only *ex officio* in Sweden, Croatia, Slovakia, Denmark and Turkey), one can say that the general rule is a combination of both, with one or the other used more frequently. The difficulty lies in knowing when the system is more or less rigid.

In theory, compatibility with the Charter should be determined at the request of a party in Austria, Poland and Spain; however, these countries allow for the possibility of some action on the part of the court in this respect. Such is the case in Spain, for instance: lower courts, after hearing from the parties, may supplement legal grounds; so there may be here some room for application of rules *ex officio*. The rules in Austria and Poland also allow for this kind of review, although only in very exceptional circumstances.

The vast majority of countries allow review both at the request of a party or *ex officio*. The latter is because in the end it is the judge who rules what law is applicable to the case. It works this way in Lithuania, Germany, Finland, Poland, Romania, Latvia, Bulgaria, Slovenia, Estonia and Italy. Italy allows for so-called “control of conventionality”, which leads judges (and, depending on the case, the Constitutional Court) *ex officio* to determine the compatibility of any international treaty with a domestic law.

At other times, review *ex officio* must take place when an issue deemed to involve public order comes into play. And this circumstance emerges in many countries when fundamental rights and freedoms are affected. Such is the case of the Czech Republic (so long as the rights violation seems serious), Luxembourg, Cyprus and Belgium. The condition that several countries introduce is that the judge must advise the parties of his decision to examine the compatibility of the challenged decision with the Charter so they can present their own observations. This happens in Luxembourg and Portugal. In the case of Greece, the procedural rules call for *ex officio* review to monitor the correct application of the European Convention on Human Rights and EU law in general. In Switzerland, the situation is the exact opposite: judges generally act on their own initiative, but in the case of constitutional rights or the Convention on Human Rights they are subject to an “allegation” duty (it is understood these would come from the parties). Switzerland believes that this would also happen with the Charter.

III.- The Charter's content: the rights, freedoms and principles it guarantees

The Charter of 2000 said in its article 51.1 that those institutions to which it was addressed “shall therefore respect the rights, observe the principles and promote the application” but did not further give any clarification about this expression. In other words it did not clarify the legal consequences of that distinction between “rights” and “principles”. The 2007 Charter incorporates novelties in this regard, establishing in the new fifth section of article 52 what regime is applicable to the “principles”: *The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.* The Explanations of article 52.5 of the Charter explain the difference with rights by saying principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. Principles do not give rise to direct claims for positive action by the Union's institutions or Member States authorities, because while subjective rights must be respected, principles need only be observed. They also say this approach is consistent both with case law of the CJEU and with national constitutional systems “in particular in the field of social law.”

The questionnaire contains a series of questions on the content of the Charter, on that set of “rights and principles” distributed among its precepts and the relevance that their conceptualization as rights or principles might have. And here one must note that interpretation is particularly difficult when legal systems are compared: many of the answers are hard to compare because the interpretations given by those who wrote the reports are different and quite varied. This is so much the case that, although at times they give opposite answers, the explanation of their position shows they are saying the same thing.

I.- Firstly, the idea is to ascertain if that differentiation between rights and principles is totally “alien” to national judicial systems or, on the contrary, these do in fact feature something similar. What is being asked is, essentially, if the States recognize rights which are directly applicable and others which are not.

Some States discern clearly a distinction such as that stated in article 52.5 of the Charter; in other words, they have precepts which contain provisions that are equivalent to “principles” which the Charter alludes to. Such is the case of Spain, France, Poland, Germany, Austria, Italy, Greece, Switzerland, Portugal, Denmark, Slovakia, the Czech Republic and Slovenia. What these provisions have in common is that they a) cannot give rise in and of themselves to action before a court but rather they are applied only when lawmakers embrace them, or b) constitute rules of interpretation of other norms; and c) in many cases refer to social rights.

President of the Fifth Chamber of the CJEU Von Danwitz says Spain and France probably served as a source of inspiration for the distinction between principles and rights in the Charter. In the case of Spain, the distinction is clear because the idea underlying the principles of Chapter III of Title I of the Constitution was to include social rights without affecting legislator's freedom in the achievement of social policies. Principles in the Spanish Constitution have the same binding force as rights (an act that goes against a principle can be declared unconstitutional) but they do not normally constitute an autonomous legal foundation for claiming subjective rights; first they have to be developed by legislators. Although some principles can have a direct effect if they are formulated unconditionally (non-discrimination for reasons of childbirth, children, article 39), only rights are presumed to have direct effect except when it is clear that they need prior legislative development (the right to decent and adequate housing, article 47). In the case of France the Constitution distinguishes between *droits-libertés* and *droits-créances*; the latter are those which would seem to be like principles, and be invoked only *vis-à-vis* legislators. Judge Von Danwitz also says the distinction was a compromise result to resolve a controversial debate that had to do in particular with social rights. The idea was to distinguish between subjective rights and objective rights, and that principles could be invoked with less ease than rights.

However, other States do not make such a distinction between rights and principles. This is seen in the reports from Belgium, the Netherlands, Finland, Lithuania, Hungary, Sweden, Romania, Bulgaria, Cyprus, Estonia and Latvia.

Where there is not so much clarity is in the question of the legal consequences for legal systems of the idea of an issue involving a right or a principle. If the latter is not applicable directly, does that mean it is not binding? Not all States that make the distinction state with clarity what the consequences are. In Spain and Slovenia, this ambiguity can end up before the Constitutional Court; in Italy, any conflict between a domestic law (be it positive or programmatic) and the Constitution must be reviewed by the Constitutional Court. The last question in this set of issues will go back to this subject.

II.- The questionnaire then asks States how their judges determine if a provision in the Charter can be deemed to constitute a "right" or a "principle" as referred to in Article 52, paragraph 5 of the EU Charter. So far, only two countries have mentioned cases in which this problem arose. One of them is Slovenia, which discusses a case resolved in 2011 and was related to children's rights as outlined in article 24 of the Charter. The court distinguished between 24.2 and 24.3 to the effect that the first of these contains a principle (the child's best interests) and the second, a right (the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents); and with respect to the principle the State has some margin for interpretation. The court ruled that both CJEU case law (prior to the Charter of 2007) and doctrine must be consulted to determine if it is a case of a right or a principle, as the Explanations to which article 52.7 alludes are not much help. The other country is Estonia, in which there have been two cases on this issue. One of them, from 2010, states that, although article 37 of the Charter foresees the right to protection of the environment, this is more a goal that is being sought rather than a subjective right. Therefore, it contains more a principle than a right. The other case dates back to 2003, and therefore pre-dates the Charter of 2007. In this case the Supreme Court

states that article 49.1 of the Charter (“...if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable”) contains a principle and not a right, a distinction which is not at all evident. In no other Member State of the Association has case law over this issue emerged so far.

The 2003 case cited by the Estonian judges illustrates the difficulty of understanding (and therefore the need to find rules to help us) when one is dealing with a right or a principle. The Explanations given in article 52.5 indicate that certain articles in the Charter contain principles, such as articles 25, 26 and 37 and that others “may include elements that are derived from a right and a principle” such as articles 23, 33 and 34, but without indicating any criterion that might serve as a general rule for interpretation.

What other factors might help clear up this issue? In general the reports agree that such a task will not be easy, or not as easy as in Spain, in which principles are grouped together in a specific chapter. The Dutch report says not even the terms of the Charter or its Explanations will always be conclusive, as their use in the texts is not necessarily rigorous. Finland, besides adhering first to the literal wording of the precept, and then to the Explanations, advocates taking into account the circumstances of the case.

For their part, the reports of many countries suggest additional criteria capable of identifying principles and thus differentiating them from rights. They thus cite as criteria a) the formulation of the rule, i.e. whether it is aimed at a person or a government entity (in this case article 22, 33.1 and 38 would be principles); b) the use of the expression “in conformity with European or national rules” or the “need for implementation”, which implies that a principle is at stake; c) the degree of precision of the norm (the greater it is, the more evidence there is that what is at stake is a right and not a principle); d) whether the goal is to protect the individual or not; e) the origin of the rule, and f) even its direct effect. Some people – including judge Von Danwitz- argue that in the end the task of identifying principles is up to the CJEU, in which case preliminary questions on the issue could be raised, as stated by Romania; Luxembourg seems to say something similar when it expresses doubt over whether national judges can declare themselves to have jurisdiction to define these notions contained in the Charter.

In the debate that took place in The Hague, an important issue was stressed: in the end, the important thing is not so much how to categorize a given precept (as a right or a principle) but rather the content: as stated by Romania, the key question to be clarified is whether the difference between a right and a principle gives rise to a different legal regime *vis-à-vis* the people who seek the annulment of an act.

Here the case law of the CJEU is not very clear either, and only gives some hints.

In the *Chatzi* case the CJEU seems to indicate that article 33.2 of the Charter enshrines the right to parental leave, as it says this precept “recognizes the fundamental character of that social right.” The Explanations of article 52.5, for their part, mention only that article 33 contains rights and principles. In the case of *Rossius and Collard*, the CJEU declared it did not have jurisdiction, and thus a chance was missed to assess the scope of article 35 of the

Charter, which, according to its Explanations, contains a principle. In *Hennigs*, the Court speaks of the “fundamental right to collective bargaining as recognized in article 28 of the Charter”, although the same article raises doubt with the requirement of “in accordance with Community law and national laws and practices.” In *KHS*, the Court addresses article 31.2 when it guarantees “the right to yearly paid vacation” for workers. Neither the Explanations of article 52.5 nor article 31 itself clarify if this is a right or a principle. But from the judgment one would deduce that it is a right because the court says “it is not just a principle of social law of the Union” and that is a “right the aim of which is to protect workers.” In *Toshiba Corporation*, C-17/10, 14 February, 2012, the Court speaks of the “principle” of retroactive application of the lighter penalty as stated in article 49.1 of the Charter. There is an indirect approach in *Commission/Austria*, C-352/11, 24 May, 2012. Here, Austria argues that requirements for protecting the environment and public health “must be integrated into the definition and the carrying out of Community policies and actions” and that “the transversal and fundamental nature of those goals is reaffirmed in articles 37 and 35 of the Charter, respectively”, which suggests rather that we are talking about principles.

III.- The questionnaire then asks how courts examine the compatibility of an act with a principle that is “similar” to those mentioned in article 52.5 of the Charter: full review or limited scope of judicial review? Although this question can again be interpreted with a double meaning, referring to existing principles at the constitutional/national level or to the principles of the Charter, the vast majority of the reports opted for the second possibility. For this reason, and because of the scant case law that exists at the national level on article 52.5 (only in Slovenia and Estonia, and on this issue the reports do not add anything that is relevant) the authors of the national reports express their opinions on the subject. The overall impression is that there is not much clarity on the issue.

Some say that the scope of the test to be carried out will be the same as that of rights (this is the case of Lithuania, Finland, Italy, Romania, Slovakia and Spain; the latter says this is the case because principles have the same binding force as rights, although some are so ambiguous that it will be difficult to understand when they have been violated); others say it will be different (France, for instance -*contrôle de compatibilité* of principles versus *contrôle de conformité* of rights-, Greece also said it depends on the content); yet others, finally, say the examination will have a limited scope. In this regard different opinions are expressed on whether the “different” way - more limited- in which courts will behave with regard to a principle, will project itself onto the field of application of said principles or onto the way in which they are applied. Judge Von Danwitz says that although the principles can be invoked as an autonomous legal foundation or tool of interpretation, they cannot be used to guarantee subjective rights, to create obligations for legislators or serve as the basis for claiming damages. Furthermore, in this area national and European legislators have a greater margin of discretion so judicial review should be limited to investigating clear mistakes; reports from the Netherlands and Germany share this position.

IV.- Finally, the questionnaire asks about the legal consequences of the violation of a principle, and if they are different from those of the violation of a right. To some extent this question is essential. If there were no difference, why bother to discuss the nature of the

precept, and whether it is a principle or a right? The survey hits the nail on the head. But unfortunately it does not manage to provide clarity, as the question can also be interpreted in several ways; and no matter what interpretation is made, not all States make a difference between principles and rights.

Leaving aside some States which simply said no such case has arisen in their country (Belgium, Poland, Austria and the Netherlands) most of the reports have interpreted the issue through a national prism, namely what are the legal consequences of violation of a principle of domestic legislation (Spain, Germany, Luxembourg, Cyprus, Italy, Portugal, Turkey, Greece, Sweden, Romania, Croatia, Denmark, Slovenia, Slovakia, Estonia and Latvia). Others have answered the question of what the legal consequences would be of a violation of a principle of the Charter (Germany, Finland, Lithuania, France, Czech Republic and Bulgaria). Germany states its position on both interpretations, and Luxembourg and the Czech Republic conclude that in both cases (internal and European) the legal consequences of the violation of a principle should be the same.

Among the reports which have answered from a national point of view, the vast majority said that the most evident result of the violation of a principle is the annulment of the administrative action that caused it. Spain points out that this violation can cause the annulment of administrative regulations and even secondary legislation that implements principles; such rules can even be declared illegal or unconstitutional for going against a principle; but it is not the same for an individual decision that may have violated a principle, it cannot be revoked. Some countries such as Greece, Italy and Portugal establish conditions for such an annulment to take place: in the case of Greece, the principle has to have a direct effect; for Italy the condition is that the administrative decision not be argued in a reasonable way; Portugal just says it depends on the nature of the principle in question. Other countries such as Sweden or Slovakia say that courts themselves can give the correct interpretation by modifying the meaning the action being challenged. In Croatia, the violation of a principle is understood to be a "procedural issue" that is relevant only if has consequences on the merits of the case. Only Greece raises the possibility of the violation of a principle giving rise to payment of compensation.

As we said earlier, unfortunately not all of the States made clear if the legal consequences of the violation of a principle differ from those involved when a right is violated. Spain, Romania, Croatia, Denmark and Slovakia indicated there are in fact differences (the same conclusion can be drawn from the reports presented by Italy and Portugal); Germany, Luxembourg, Cyprus, Turkey, Slovenia and Latvia, on the other hand, say there are no differences. Other states do not specifically address the issue, or do not do so with clarity.

Among the reports from countries which answered from a European point of view (which should potentially be the consequences of the violation of a principle of the Charter), Germany, Finland, Lithuania and France feel that these should not be any different from the consequences of the violation of a right. Only the Czech Republic stresses that, as is the case at the national level, principles cannot be invoked completely if they have not been developed. So it is difficult to think about a violation, as without that act of development they are "principles without content". For his part, judge Von Danwitz says there should be

differences: in his opinion, the violation of a principle in the Charter cannot be the basis for the filing of a complaint for extra-contractual damages.

IV.- The binding effect of the Charter, its scope and interpretation

The questionnaire dedicates several sections to discussing issues related to the binding effect of the Charter, its scope and interpretation. These are issues that will be addressed in this chapter, although in an order different from that of the questionnaire. The reason for this change lies in the similarity between the questions posed in the previous chapter and those that have to do with the idea of direct effect. Therefore, we will begin with the latter.

I.- First of all, it is necessary to know if the Charter of Fundamental Rights of the European Union has a direct effect on national laws and the consequences that this creates for courts.

In the vast majority of the participating countries, the Charter has not been transposed to national legislation. In these countries constitutional law provides that, following ratification, treaties constitute part of the national legal system. When this is the case, it is so both for EU treaties and therefore the Charter, and for the European Convention on Human Rights. Furthermore, many of these countries state explicitly that the Charter in particular takes precedence over domestic law (in the case of Italy, the aforementioned treaties have the same value as the Constitution, with the limit being the fundamental principles and the inalienable rights of persons; for this reason judges would not apply domestic laws that enter into conflict with the Charter, something which does not happen with the Convention on Human Rights, in which case the judges will have to take the conflict to the *Corte Costituzionale*). 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 a direct effect in the national legal system. In this regard, the reports from the Netherlands and Belgium insist that this derives from the very features of EU law and not so much from the monist system of integrating treaties with domestic legislation: indeed, as seen from the CJEU case law since its early years, EU law has a direct effect and takes precedence over domestic law.

In the United Kingdom, the Charter was immediately transposed into national law, something which did not happen so fast with the European Convention on Human Rights (1998). It has also been transposed in Germany, Hungary, Sweden, Finland and Denmark; in the last two cases, both the Charter and the European Convention on Human Rights have been incorporated into domestic law by reference.

Slovakia answers that the Charter is binding and that the European Convention on Human Rights also prevails over domestic law. But it does not specify how they are incorporated into domestic law.

II.- Even though the Charter as such has a direct effect, the survey also asks if the rights contained in it are directly applicable in States, and if so, which ones.

So far, some specific precepts have been acknowledged implicitly as having a direct effect by the courts of France, Hungary, Luxembourg and the Netherlands: we are talking about those contained in articles 19.2, 20, 24, 41, 47, 49 (and in particular 49.3) and 50 of the Charter. The case of article 24 is noteworthy: although in France courts have recognized a direct effect, in Belgium this direct effect has been rejected. This can raise many problems which, ultimately, the CJEU will have to resolve.

In any case, it seems that States accept that the rights contained in the Charter will always have a direct effect when the requirements formulated by the CJEU are met (see below), or they say it will depend on whether it is a matter of rights or principles. In this regard we must first note that some countries, such as Belgium, Lithuania, Spain, the Czech Republic and Slovakia refer in general to the precepts in the Charter, without specifying if it is necessary to distinguish between “rights” *stricto sensu* and principles. Others respond in such a way that it is not clear if they are referring to rights *stricto sensu* or other precepts of the Charter. Finally, there are yet others which have interpreted the expression “rights” in the strict sense of the word and state in general that the direct effect will depend whether the case does in fact involve a right and not a principle (something which they did not specify when asked about this– see above).

III.- So far there have not been any cases in which criteria were explicitly established to determine whether a precept has a direct effect or not. The Dutch report simply mentions in this regard that some articles such as 7, 8 and 20 of the Charter seem to have a direct effect.

However, all the reports agree in putting forth the opinion that courts will use the criteria they usually employ to determine if a given disposition of EU law has a direct effect; in the end these criteria are the ones formulated over the years by the CJEU. Thus, the vast majority of the reports say the precept must be unconditional, clear and sufficiently precise. Denmark, for instance, states that the precept in question need not require an additional measure. Finland says that it must also guarantee rights, and the Czech Republic states it must be aimed at individuals. One particularly interesting observation is that made by the author of the report from the Netherlands: as deduced from the CJEU case law (quoting *Kraaijeveld, C-72/95*, 24 October, 1996) one can also discern a direct effect in precepts that grant discretionary powers (or at least a margin for it) to Member States. This can be of great interest for Charter provisions that contain principles rather than rights, since, as we stated earlier, in these cases not all the reports agree that said precepts have a direct effect.

IV.- In their review to determine if a provision in the Charter has a direct effect, most of the reports state that courts will conduct a full review of the issue. Isolated reports such as those of Hungary indicate that approximation to the Charter is restrictive, as Hungarian courts prefer to resort to constitutional rights or the European Convention on Human Rights when protecting rights and freedoms is at stake.

V.- Along with questions about the consequences of violating a principle (as opposed to the violation of a right), the next question is to determine the legal consequences that

emerge when a court says a certain national law is incompatible with a Charter precept that has a direct effect.

With the difficulties inherent in comparing countries' legal systems, and without any data other than that provided in the reports, it would seem that in the vast majority of the countries that answered the questionnaire the most common legal consequence is the one typical of European norms with direct effect: namely, that of not applying (Italy or Switzerland, if it ever becomes an EU member) or annulling (Belgium, the Czech Republic, Cyprus, Slovakia, Slovenia or Latvia) the incompatible domestic measure (Switzerland mentions the duty of interpreting in accordance with the Charter as a first step). Only some reports specify that the national measure will not be applied when it is featured in a law or norm of a general nature (for instance, Germany, the Netherlands, Greece, Romania or Estonia), or annulled when it is included in a regulation or administrative act (this is the case of Germany, France, Spain, the Netherlands, Luxembourg, Greece or Romania).

Some reports, such as those from Spain, Lithuania, the Netherlands, Latvia and Slovenia even mention the possibility of seeking damages. Spain and to some extent Luxembourg also allow as a consequence of incompatibility a declaration of acknowledgment of the right; Luxembourg and Sweden say it is possible the court can modify the ruling that is incompatible. Only Portugal speaks of the need to ask that the measure be declared invalid.

VI.- Within this large bloc of issues related to the binding effect of the Charter, its scope and interpretation, next came a series of questions that deal with the arrangements for the limitation of rights called for in article 52.1 of the Charter, and with the methods for interpreting the latter. According to this article *any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

The questionnaire raises the issue of how to interpret this general limitation clause referred to in 52.1, which is inspired, according to the Explanations, by the CJEU case law: in accordance with the terms spelled out in the European Convention on Human Rights and guaranteed by the ECHR, or with those stated by the CJEU case law, or some other way? The question is not irrelevant, because the criteria are not exactly the same.

It can be deduced from the national reports that courts, in general, have not yet addressed the "rights limitation regime" foreseen in article 52.1. There is only mention of some issues in which article 52.1 of the Charter is interpreted in the reports from the Netherlands (one case, although outside the area of administrative law), Germany and Greece (albeit in the area of criminal law) and Slovenia. It can also be inferred that, when the time comes, it will be difficult to interpret 52.1 judging from the disparity in the official answers provided for this study.

Indeed, no report says flat out that the interpretation of the clause that enshrines the limits has to be done necessarily in accordance with the European Convention on Human Rights

and the ECHR case law or in line with the CJEU case law exclusively. Except for the report from Bulgaria, which mentions only EU law without even referring to the European Convention on Human Rights, or that of Poland, which only cites the European Convention, all the rest are prudent in this regard. They even say it is possible to opt for one or the other (Germany, Lithuania, France, the Netherlands) or that the interpretation will be done taking both into account (Cyprus). Spain does in fact seem more inclined to adopt the convention-based approach. It says it should not be enough just to cite “objectives of general interest” in order to limit fundamental EU freedoms without confirming a “particularly relevant public need.”

The Czech Republic and Slovakia seem to prefer turning first to the European Convention on Human Rights and the ECHR case law, but “also” to the European Court of Justice. However, Greece mentions just one case in which article 52.1 of the Charter has come into play, with article 50 of the Charter being interpreted in light of EU law. Many reports allude to the terms of article 52.3 of the Charter, which indicate that, in order to interpret rights that correspond with those of the European Convention, one must take into account the terms of the latter and what the ECHR says in its case law. In fact, the Explanations of the aforementioned article 52.3 of the Charter say that not only the meaning and the scope of the rights that correspond in the two texts must be the same, but also that this will apply to the limitations that are admitted. The Explanations go on to say that, when legislators set limits on these rights they must respect the norms established by the regime of limitations of the European Convention “without this affecting the autonomy of EU law and the Court of Justice.” A similar view is expressed by Italy, Austria, the Netherlands and Sweden, for instance, although Italy adds that everything else will be interpreted in terms of “the values of the Union” and Sweden, for its part, says that for the rest one must stick to “*the most narrow of the two instruments’ limitation possibilities.*” Finally, several reports stress proportionality: that the measure must be included in a law, pursue a goal that is of general interest, be necessary and proportionate. This is the opinion of France, Germany, Romania, Spain and Slovenia.

The big missing piece is certainly the reference in article 52.1 of the Charter to the essence of the rights and freedoms, as on this subject there is no mention at all in the reports. We do not know how courts will act, although it is true that it is increasingly common to find European Court of Justice judgments, the backbone of which is the respect for “the very substance” of rights (see below).

Judge Von Danwitz said that the general clause of article 52.1 of the Charter - except for the part addressed by article 52.3 - should be interpreted in an autonomous way and taking CJEU case law on the principle of proportionality into consideration in the context of fundamental rights. In the same spirit, Mr Romero Requena of the European Commission says that, since the Charter came into effect, the test of proportionality plays an important role in the legislative initiative process; and that a model should not be regulated. Rather, the proportionality of each measure should be considered on a case-by-case basis.

As for the limitations regime, many CJEU judgments make reference to article 52.1 of the Charter, although none of them are particularly revealing.

Until the *Knaup Gips* case there were no explicit references to article 52.1 of the Charter and to the need for any limit to a right cited in the Charter to be enshrined in a law. In *McB* we see a good example of allusion to the essence of a right in the face of a possible violation: the Court said that the fact that the biological father, unlike the mother, does not have an automatic right to custody of a child does not affect the essential content of his right to a private and family life, so long as in any case the right is protected. The same case alludes furthermore to the “necessary protection of the rights and liberties of other persons” as a limit also stated in article 52.1 of the Charter. In *Fuß*, there is also an allusion to limits, when it is said that the right to effective legal assistance as stated in article 47 of the Charter “would be essentially denied” its effectiveness if it did not include a right to indemnity. In *Deutsche Telecom* it is said that the transmission of data to a company other than the one that had it initially “does not go against the very substance of the right spelled out in article 8.” In *Volker und Schecke*, the CJEU assesses interference with articles 7 and 8 of the Charter and afterward, if this is justified from the standpoint of 52.1. Its conclusion is that it was not justified because it was disproportionate by not having managed to inflict the least possible damage. In the case *ASNEF and FECEM*, what is at stake is the need to weigh the goods in conflict so as not to violate rights enshrined in articles 7 and 8 of the Charter. *Nycomed Denmark/EMEA*, T-52/09, 24 April, 2009 alludes specifically to proportionality to evaluate restrictions to the free exercise of a profession, in other words the freedom to conduct a business as guaranteed in article 16.

VII.- Still addressing the context of the Charter’s interpretation, two questions are put to the States of the Association: the first refers to the use of the Explanations published along with the Charter as a way to interpret it; the second, which is more general in nature, asks about traditional interpretation methods and how useful they are when it comes to interpreting the Charter.

Interest in using the Explanations published along with the Charter in order to “guide interpretation” of the text by courts is manifested in the Charter in article 52.7, which says the Explanations “... shall be given due regard by the courts of the Union and of the Member States”. This precept was incorporated in the reform of the Charter that was carried out in 2007. The question that immediately arises is this: do courts actually use these Explanations? And if they do, do they say so outright in their rulings?

Seven States say in their reports that their judges have used the Explanations several times, such as, for instance, to interpret articles 6, 9, 41 and 47 of the Charter (these countries are Germany, Finland, Austria, the Netherlands, the Czech Republic, Portugal and Slovenia). The rest of the reports do not say if the judicial rulings examined utilized the Explanations, although in general it is believed that they will do so and many say furthermore that they will so say outright. Several reports recall the sentence in the *DEB* case in which the European Court of Justice uses the Explanations to interpret a precept of the Charter, and say that the States will follow this line of action. Here, it is worth noting a footnote in the report from Germany pointing out that, despite what is called for in articles 6.1.3 of the Treaty on European Union and in the Preamble and in article 52.7 of the Charter, the Explanations are not legally binding.

In any case we note that Mr Romero Requena of the European Commission believes that recourse to the Explanations as a norm for interpretation will gradually ease off as both European courts case law increases.

For its part the CJEU has used the Explanations at least twice: the first was in the already mentioned *DEB* case; later in *Chalkor/Commission*, C-386/10P, 8 December, 2011 it is recalled that in accordance with the Explanations of article 47, this article incorporates into EU law the protection afforded by article 6 of the European Convention on Human Rights, which allows the court only to cite 47.

As for traditional interpretation methods, many of the reports state that conventional methods will be used, in other words those that courts tended to use in any case. However, some reports stress in particular some of these methods, suggesting that recourse to them will be more frequent when it comes to interpreting the precepts of the Charter. In that regard, the classical methods most commonly cited are the grammatical or linguistic method, the systematic, the teleological and the historical. Many allude to the systematic method to express the kind of operation that should be carried out when it is a question of interpreting rights that correspond with those that feature in other treaties like the European Convention on Human Rights: interpretation of conformity with other texts or in consonance with other texts. Slovakia draws attention to the need to use the most adequate form so as to ensure rights and freedoms are respected; in other words, to use the method that guarantees the effectiveness of the right. But the method most often used is the teleological one. Nine reports say their countries' judges rely on or will rely on it just as the CJEU itself applies it, and that the fact that the Charter features tools like the Explanations indicates that the teleological method will be of particular interest. Judge Von Danwitz says that one must also take into account the history of the drafting of the Charter and that, consequently, and according to articles 52.4 and 6 of this document, the common constitutional traditions and national legislation and practices shall be carefully considered.

At the European level, one should highlight the *Chatzi* case. It provides a good example of the use of the finalist method of interpretation in the case of the right to parental leave of absence (in conformity with the goal for which the leave was designed) and not the grammatical method, which is less appropriate when the text is ambiguous.

V.- The Charter in a broader system of guarantees: its relationship to other guaranteeing instruments.

In its last section, the questionnaire addresses the important issue of how to interpret the Charter in a global system of guarantees. The Charter of Fundamental Rights of the European Union is projected over the European continent and at the same time it draws from the experiences developed there starting with the second half of the 20th century. It cannot be understood without the European Convention on Human Rights and the rich case law accumulated by the Strasbourg Court. But at the same time, it owes its roots to constitutional traditions that are common to European states and to international treaties that are also reference points. This set of questions first directs us toward the specific and

particular relationship between the Charter and the European Convention on Human Rights; later we will look at the Charter's relationship with the Member States' common constitutional traditions; finally, we will assess its relationship with other international texts.

I.- According to art. 52.3 of the Charter *in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.* The special relationship between the rights called for in the Charter and those of the European Convention on Human Rights, and the possible interferences and inconsistencies between them try to be addressed and prevented before they emerge. This is the sense of article 52.3 of the Charter, a precept that appeared in the first text of the Charter in 2000, and this is also the intention of the Explanations given to the article.

Thus, the meaning, scope and possible limits of the Charter rights which correspond with rights in the European Convention shall be those foreseen in the latter (both in the Convention and its Protocols) and deduced from the ECHR and CJEU case law. As is easily understood, article 52.3 reserves the possibility of the Charter providing more extensive protection. Furthermore, the Explanations of article 52.3 provide a list (not an exhaustive one, as it does not rule out "evolution of Law, legislation and treaties") of rights where both the meaning and the scope are the same as the corresponding articles of the European Convention, and another list of rights where the meaning is the same as the corresponding articles but where the scope is wider.

In this context, national courts are asked if they apply the European Convention and/or the Charter when the text spelled out in a determined precept is identical in both guaranteeing instruments.

One must note first that there is hardly any national case law that specifically addresses this dilemma: as stated by the authors of the first report, the "choice" between one text and another has not yet arrived. What one sees most frequently is that courts cite both texts; 14 reports say so. It could be said that the European Convention expresses the European consensus of the post-World War II years, and the Charter updates this to the early 21st century: both are strengthened when they are quoted together, their content is strengthened to some extent. However, when judges cite only one of the texts, often they refer to the European Convention for many reasons. The most important one is the proven track record of the text and the fact that it is backed up by a guaranteeing court with solid case law. Indeed, it seems from the reports that many times courts quote the European Convention because in doing so they can easily base their argument on the ECHR case law (this is what is indicated by the reports from Luxembourg and Estonia). Only Italy defends clearly the application of the Charter in the situation described here, and so does Judge Von Danwitz. In his view, when the texts are identical and "when they apply EU law" in the sense of 51.1 of the Charter, national courts should in any case use the Charter to apply the principle of the primacy of EU law, without ruling out that they may, depending on the case, use the European Convention. The judge believes that the literal text of article 52.3 does not alter

this argument, since in this regard all it requires is that the level of protection offered by the European Convention be respected.

The following question in the questionnaire is obviously related to what we have just discussed: does the ECHR case law play any role in interpreting the Charter?

The answer is clear in the vast majority of the reports: when what is at stake are rights that have an equivalent in the European Convention on Human Rights, the case law of the ECHR must be taken into account. Some countries, such as the Netherlands, Hungary, and Germany say that for some time now this is the way they have done things in actual practice. Others such as Luxembourg, Italy, Greece or Cyprus, for instance, say they will decide the same when such a case does arise. Romania notes that the CJEU itself refers constantly to the case law of the ECHR. And the Czech Republic says this is so because the Charter “stems partially from the European Convention” and the latter is interpreted by the ECHR. Meanwhile, the reports seem to suggest also that the role of the ECHR is what it is because the CJEU does not yet have much case law accumulated.

The reports disagree, or remain silent, however, as to what would happen if the two courts have different positions. Some, such as Lithuania and Spain, feel that in such a case the ECHR’s case law should take precedence. Spain argues that the Treaty of Lisbon itself seems to seek this prevalence, since it is stipulated that the European Union embrace the European Convention on Human Rights (Slovenia also notes the EU’s relationship with the ECHR) and in light of article 52.3 of the Charter. Sweden seems to state the opposite when it says the ECHR will be decisive for the interpretation of rights that correspond with those of the ECHR, so long as the case law of the CJEU does not contradict that of the ECHR. Poland’s position is different: the intention (we understand this to refer to the two texts) is to provide the highest level of protection, so national courts should assess what test (ECHR/CJEU) offers more protection. This position was defended in the debate that took place in The Hague in November 2011: in a case of rights that are equivalent in the two texts, the higher level of protection is what should take precedence.

That seminar also yielded the conclusion that, besides the interaction between articles 52.1 and 3 of the Charter, there is some degree of interaction between Charter and the Convention at the level of jurisdiction: a judge from the ECHR said that the level of protection of rights in the Council of Europe has increased with the Charter, as the ECHR is inspired by the level of protection featured in the Charter. And a judge from the CJEU said this court learns from the experience of the ECHR (alluding, for instance, to the “full review of law and facts” and the “reasonable time of proceedings”).

If we now look at the CJEU, it is easy to imagine how the first cases decided when the Charter had just come into effect hardly cite it at all, and when they did, the quoting of it was always preceded by a corresponding one from the Convention or other texts. Thus, in *Chakroun* the CJEU said the rule being challenged should be interpreted in the light of the fundamental rights enshrined in the Convention and the Charter. While in *Painer* the CJEU makes reference to both texts and in *Tsakouridis* to both texts and to both courts, in *Nagy* it alludes exclusively to the Charter. And in the case of *Scarlet*, however, it refers to the

Convention and not to the Charter (which the court reinterprets by requiring an interpretation “in view of the prerequisites derived from the applicable protection of fundamental rights”).

The first big case in which the CJEU refers in detail to article 52.3 of the Charter is the aforementioned *McB*. It identifies article 7 of the Charter with article 8 of the Convention and adds that both should be given the same meaning and scope as interpreted by the case law of the ECHR. In line with what is stated in the Explanations of article 52.3, in *Volker und Schecke* the CJEU says, for instance, that the limitations on the right to protection of personal data that can be established legitimately correspond with the limits tolerated in the context of article 8 of the convention. In *DEB*, we recall, it identifies the scope and meaning between article 47.2 of the Charter and 6.1 of the Convention just as it is interpreted by the CJEU. In *X*, C-507/10, 21 December, 2011, again we have a case involving article 47 of the Charter along with 6 of the Convention, with reference to a judgment of the ECHR. The *G* case shows something that could be a natural evolution: the interpretation is done from the Charter, even though it is shown how the Convention provides equivalent protection.

However, the case that is the most interesting in this regard is again *NS*, since here the CJEU examines whether, if the area of protection granted to a person under Regulation no. 343/2003 in virtue of the general principles of EU law and, specifically, Charter article 1 on human dignity, 18 on the right to asylum and 47 on effective legal assistance is broader than that provided by the protection stipulated in article 3 of the Convention. The reason is the existence of an ECHR judgment that rules out the possibility challenged in the case – evaluating Greece as a safe State with respect to an asylum request. This case, which would be a clear example of broader protection provided by the Charter, is not, in fact, that: the CJEU itself says the ECHR reviewed its position in light of new evidence, which means yet again equivalent protection by the two courts.

Meanwhile, there are many judgments from the CJEU that cite the case law of the ECHR; noteworthy among them are *Volker und Schecke*, *DEB*, *X* and *G* cases.

II.- Next, the questionnaire looks at the new article 52.4 in the Charter, which was introduced in the reform enacted in 2007: *in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions*. According to the Explanations of this article, the precept is based on 6.3 of the Treaty on European Union and furthermore expresses the ideas on this issue that the CJEU maintains (quoting the now classic cases *Hauer*, C-44/79, 13 December, 1979 and *AM&S*, C-155/79, 18 May, 1982) on common constitutional traditions. According to the Explanations, Article 52.4 of the Charter does not follow a rigid “minimum common denominator” approach. Rather, it says that corresponding rights included in the Charter should be interpreted in such a way as to offer a high level of protection that is appropriate for the EU and in harmony with common constitutional traditions.

The questionnaire draws attention again to *DEB*, in which the Court carefully weighs the comparative study the Advocate General carries out in its Conclusions to arrive at the

conclusion that on the issue under discussion, there really is no true common position among the Member States.

The question is: do national courts allude to common constitutional traditions when they interpret the Charter? If they do so, how do they determine if a precept in the Charter recognizes rights stemming from the common constitutional traditions of the Member States?

To date, it does not seem that this precept has been used in any Member State; only Finland and Greece say that their courts occasionally (in the case of Greece, the Council of State) allude to the constitutional traditions of other Member States. Estonia says that, although there is no case law in this regard, as far back as 2003 its Supreme Court highlighted the importance of the Charter precisely because it was based on the common traditions of the Member States.

At the European level we can look at two examples: in *AJD Tuna*, C-221/09, 17 March, 2011 the CJEU said clearly that article 47 stems from said common constitutional traditions; and *Costa and Cifone* C-72/10, 16 February, 2012 indicates that the presumption of innocence is part of the common constitutional traditions of the Member States and is enshrined in article 48 of the Charter.

In any case it seems that in the debate that took place in The Hague, participants showed much interest in continuing to probe the question. In fact, when asked if the *ACA-Europe Forum* could play a role in this regard, all the States said yes: basically, to share experiences and information about constitutional issues and to know what precepts of the Charter derive from constitutional traditions of Member States. Asked if it would be useful for *ACA-Europe* to institute a central registry containing national statements on the various constitutional traditions, the response was also mostly in the affirmative, although many States raised objections of a practical nature, such as how expensive it would be and the perhaps excessive workload that it would require of *ACA-Europe* and the national courts. Meanwhile, many drew attention to the existence of databases such as CODICES (the Venice Commission of the Council of Europe) or Jurifast, which can already serve this purpose, although some agreed it would be useful by facilitating awareness of the judgments that would otherwise be inaccessible, so long as they were translated into a European *lingua franca*. If this tool were created, it would be a good idea to establish some kind of filter that would allow for obtaining only those rulings that might have a pan-EU dimension.

III.- Finally, the questionnaire asks about those Charter precepts that are derived from other international instruments. Does this have specific legal consequences in the interpretations that courts make of the Charter precept in question?

Again, so far there have been few cases and even those lacked significant consequences (in any case, the Dutch report alludes to a case in which a court said article 24 of the Charter had the same field of application as article 3 of the Convention on children's rights). The reports simply venture opinions on this question. France says the normal thing to do would

be to invoke the two texts together and that on few occasions will they be interpreted in an autonomous manner. But their inclusion in the Charter can strengthen the right; here, CJEU doctrine will be highly relevant. In many cases the reports just say that the legal interpretation will not contain anything special, nor do they say what steps courts should take in case of a conflict (first compare the texts with the national and European stipulations, seek auxiliary tools for interpretation, etc.). One particularly interesting issue is the question of whether there is some guarantee jurisdiction for such texts. Italy says the case law of international courts with jurisdiction over the issue should be followed but Spain notes that the European Convention on Human Rights is really the only international text that has a court with the specific mission of making sure it is respected, so the interpretation of the other international texts will be “decentralized” and will require a court like the CJEU to formulate uniform criteria.

At the European level, the *Chatzi* case addresses the issue raised with respect to the interaction between the Charter and other international instruments: the CJEU says that the right to parental leave, stipulated in article 33.2 of the Charter, stems from a precept of the EU Convention on Fundamental Social Rights, which to some extent expresses the same opinion.

VI.- Other issues

The questionnaire concludes with questions of a practical and administrative nature. Members were asked if their country has at the national level any kind of structure that allows courts to consult on EU issues to ensure a uniform interpretation. If this is not the case, they are asked if they feel this should exist at the *ACA-Europe* level.

Several States said that the task of achieving uniform interpretation is guaranteed at the procedural level by a special judicial body (Italy, France and Greece cite their Council of State; others such as Poland or Lithuania speak of the Supreme Court on administrative issues. Poland specifically notes the existence of a special section of the court which is dedicated to European Union issues. In Switzerland it is the Swiss Federal Court. Portugal alludes in a general way to the fact that its procedural norms guarantee uniformity of interpretation). This specific judicial body works like an appeals court in several States and thus manages to harmonize administrative case law with regard to EU law in each country.

As for the existence of specific structures for consultation, only the Netherlands and Hungary have permanent ones. In the rest of the countries there is nothing permanent or specific: the smaller countries say this is not necessary, as exchange of information is guaranteed. Others say judges are receiving training courses and the assistance they may require. In almost all of the countries there are informal consultation mechanisms for specific cases.

Asked if they think it is a good idea to create such a structure at the *ACA-Europe* level, many did not answer the question and others say it would be useful. But there are some

countries which feel it would be enough to develop the possibilities that already exist and take better advantage of them.

Finally, the questionnaire opens itself up to other issues that it did not address. It asks: Is there any other question that needs to be considered? Some states posed a variety of questions on the scope of the Charter. To wit: What, if anything, is the benefit of including a right/principle in the Charter when it stems from existing European legislation (for example, *habeas data*)? How does one interpret the Explanations of article 47 of the Charter? Does the Charter protect government entities? Many agreed that the questionnaire was thorough. Others expressed appreciation for this kind of initiative and proposed they continue in the future.

Case Law of the CJEU

Cases pending:

Akerberg Fransson, C-617/10
K, C-245/11
Noscira/OAMI, C-69/12
SKP, C-433/11
Zakaria, C-23/12

Cases closed:

Aguirre Zárraga, C-491/10 PPU, 22 December 2010
AJD Tuna, C-221/09, 17 March 2011
Aladzhov, C-434/10, 17 November 2011
AM&S, C-155/79, 18 May 1982
Annibaldi, C-309/96, 18 December 1997
ASNEF y FECEM, C-468 y 469/10, 24 November 2011
Cicala, C-482/10, 21 December 2011
Comisión/Austria, C-28/09, 21 December 2011
Comisión/Austria, C-352/11, 24 May 2012
Costa y Cifone, C-72/10, 16 February 2012
Chakroun, C-578/08, 4 March 2010
Chalkor/Comisión, C-386/10 P, 8 December 2011
Chatzi, C-149/10, 16 September 2010,
DEB, C-279/09, 22 December 2010
Dereci, C-256/11, 15 November 2011
Deticek, C-403/09, 23 December 2009
Deutsche Telecom, C-543/09, 5 May 2011
ERT, C-260/89, 18 June 1991
Estov, C-339/10, 12 November 2010 (Order)
Fuß, C-243/09, 14 October 2010
G, C-292/10, 15 March 2012
Garenfeld, C-405/10, 11 November 2011
Gaydarov, C-430/10, 17 November 2011
Hauer, C-44/79, 13 December 1979
Hennigs, C-297 y 298/10, 8 September 2011

Kamberaj, C-571/10, 24 April 2012
KHS, C-214/10, 22 November 2011
Knaup Gips, C-407/08 P, 1st July 2010
Kraaijeveld, C-72/95, 24 October 1996
Küçükdeveci, C-555/07, 19 January 2010
Lassal, C-162/09, 7 October 2010
McB, C-400/10 PPU, 5 October 2010
McCarthy, C-434/09, 5 May 2011
Nagy, C-21/10, 21 July 2011
NS/Secretary of State for the Home Department, C-411/10, 21 December 2011
Nycomed Denmark/EMEA, T-52/09, 24 April 2009
Painer, C-145/10, 1st December 2011
Patriciello, C-163/10, 6 September 2011
Peñarroja, C-372 y 373/09, 17 May 2011
Povse, C-211/10 PPU, 1st July 2010
Promusicae, C-275/06, 29 January 2008
Rodríguez Mayor, C-323/08, 10 December 2009
Rossius y Collard, C-267 y 268/10, 23 May 2011 (Order)
Ruiz Zambrano, C-34/09, 8 March 2011
Runevic-Vardyn, C-391/09, 12 May 2011
Salahadin Abdulla, C-175/08, 2 March 2010
Sayn Wittgenstein, C-208/09, 22 December 2010
Samba Diouf, C-69/10, 28 July 2011
Scarlet Extended, C-70/10, 24 November 2011
Test-Achats, C-236/09, 1st March 2011
Toshiba Corporation, C-17/10, 14 February 2012
Tsakouridis, C-145/09, 23 November 2010
Vino, C-20/10, 11 November 2010 (Order)
Volker und Schecke, C-92/09 y 93/09, 9 November 2010
X, C-507/10, 21 December 2011

ANNEX: Charter of Fundamental Rights of the European Union

Title I DIGNITY

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 1	Human dignity	Hungary, Netherlands	<i>NS 2011</i>
Art. 2	Right to life	United Kingdom, France, Germany	<i>Akyüz 2012</i>
Art. 3	Right to the integrity of the person	France, Germany, Bulgaria	<i>Akyüz 2012</i>
Art. 4	Prohibition of torture and inhuman or degrading treatment or punishment	Austria, United Kingdom, France, Germany, Netherlands	<i>NS 2011</i>
Art. 5	Prohibition of slavery and forced labour		

Title II FREEDOMS

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 6	Right to liberty and security	Hungary, Slovenia	
Art. 7	Respect for private and family life	Austria, United Kingdom, France, Germany, Spain, Netherlands, Luxembourg, Portugal, Greece, Denmark, Estonia, Bulgaria	<i>Chakroun 2010, McB 2010, Volker und Schecke 2010, Tsakouridis, 2010, Sayn Wittgenstein 2010, Gueye 2011, ASNEF y FECEM 2011, Comisión/Austria 2011</i>
Art. 8	Protection of personal data	United Kingdom, Spain, Netherlands, Estonia	<i>Volker und Schecke 2010, Deutsche Telekom, 2011, Scarlet Extended 2011, ASNEF y FECEM 2011, Sabam 2012</i>
Art. 9	Right to marry and right to found a family	France, Portugal	
Art. 10	Freedom of thought, conscience and religion	Germany	<i>Scarlet Extended 2011, Sabam 2012</i>
Art. 11	Freedom of expression and information	United Kingdom, France, Spain, Bulgaria	<i>Patriciello 2011, Painer 2011</i>
Art. 12	Freedom of assembly and of association		
Art. 13	Freedom of the arts and sciences		
Art. 14	Right to education	France	
Art. 15	Freedom to choose an occupation and right to engage in work	Belgium, Germany, France, Lithuania, Cyprus, Portugal, Romania	

Art. 16	Freedom to conduct a business	Belgium, France, Germany, Cyprus	<i>Scarlet Extended</i> 2011, <i>Nycomed Danmark</i> 2009, <i>Sabam</i> 2012
Art. 17	Right to property	United Kingdom, Spain, Poland, Cyprus, Portugal, Romania, Bulgaria	<i>Tay-Za/Raad</i> , 2010, <i>Scarlet Extended</i> 2011, <i>Luksan</i> 2012, <i>Sabam</i> 2012, <i>Azyüz</i> 2012
Art. 18	Right to asylum	France, Germany, Slovenia, Lithuania, Netherlands, Bulgaria	<i>NS</i> 2011
Art. 19	Protection in the event of removal, expulsion or extradition	France, Bulgaria, United Kingdom, Germany, Netherlands, Luxembourg, Slovenia	<i>NS</i> 2011

Title III EQUALITY

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 20	Equality before the law	France, Poland, Luxembourg, Italy, Romania, Bulgaria	<i>Chatzi</i> 2010, <i>Azko Nobel</i> 2010, <i>Nagy</i> 2011, <i>Sayn Wittgenstein</i> 2010
Art. 21	Non-discrimination	France, Germany, Netherlands, Italy, Romania, Estonia	<i>Azko Nobel</i> 2010, <i>Test-Achats</i> 2011, <i>Hennigs</i> 2011, <i>Küçükdeveci</i> 2010
Art. 22	Cultural, religious and linguistic diversity		
Art. 23	Equality between women and men	Germany, Italy	<i>Test-Achats</i> 2011
Art. 24	Rights of the child	Belgium, United Kingdom, France, Germany, Poland, Netherlands, Luxembourg, Slovenia	<i>Deticek</i> 2009, <i>Povse</i> 2010, <i>Chatzi</i> 2010, <i>McB</i> 2010, <i>Aguirre Zárraga</i> 2010

Art. 25	Rights of the elderly		
Art. 26	Integration of persons with disabilities		

Title IV SOLIDARITY

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 27	Workers' right to information and consultation within the undertaking		
Art. 28	Right of collective bargaining and action		<i>Hennigs 2011</i>
Art. 29	Right of access to placement services		
Art. 30	Protection in the event of unjustified dismissal		<i>Rodríguez Mayor 2009</i>
Art. 31	Fair and just working conditions	Italy	<i>Hypotecni Banka 2011, KHS 2011</i>
Art. 32	Prohibition of child labour and protection of young people at work		
Art. 33	Family and professional life	France, Luxembourg, Portugal	<i>Chatzi 2010</i>
Art. 34	Social security and social assistance	Czech Rep., Luxembourg, Greece, Estonia	
Art. 35	Health care	Bulgaria	<i>Comisión/Austria 2011</i>
Art. 36	Access to services of general economic interest		

Art. 37	Environmental protection	Estonia	<i>Comisión/Austria 2011</i>
Art. 38	Consumer protection		

Title V CITIZENS' RIGHTS

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 39	Right to vote and to stand as a candidate at elections to the European Parliament	Estonia	
Art. 40	Right to vote and to stand as a candidate at municipal elections		
Art. 41	Right to good administration	Hungary, France, Germany, Spain, Lithuania, Poland, Netherlands, Czech Rep., Luxembourg, Italy, Romania, Slovakia, Estonia, Bulgaria	<i>AJD Tuna 2011, Cicala 2011, Países Bajos/Comisión 2012</i>
Art. 42	Right of access to documents		<i>Alemania/Comisión 2012</i>
Art. 43	European Ombudsman		
Art. 44	Right to petition		
Art. 45	Freedom of movement and of residence	Germany, Lithuania, Bulgaria	<i>Lassal 2010, Aladzhov 2011, Gaydarov 2011</i>
Art. 46	Diplomatic and consular protection		

Title VI JUSTICE

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 47	Right to an effective remedy and to a fair trial	Austria, United Kingdom, France, Germany, Lithuania, Poland, Netherlands, Luxembourg, Cyprus, Portugal, Greece, Romania, Denmark, Slovenia, Estonia, Bulgaria	<i>DEB 2010, AJD Tuna 2011, Knauf Gips 2010, Peñarroja 2011, Tay-Za/Raad 2010, Fuß 2010, Hypotecni Banka 2011, Sison/Consejo 2011, KME 2011, Chalkor/Comisión 2011, X 2011, NS 2011, O'Brien 2012, G 2012</i>
Art. 48	Presumption of innocence and right of defence	Romania	<i>Fahas/Raad 2010, Akzo Nobel 2010</i>
Art. 49	Principles of legality and proportionality of criminal offences and penalties	France, Netherlands, Luxembourg	<i>Garenfeld 2011, Toshiba Corporation 2012</i>
Art. 50	Right not to be tried or punished twice in criminal proceedings for the same criminal offence	Austria, France, Luxembourg, Greece, Romania	

**Title VII PROVISIONS GOVERNING THE INTERPRETATION
AND APPLICATION OF THE CHARTER**

<i>Charter article</i>	<i>Content</i>	<i>Referred to in national administrative case law</i>	<i>Referred to in case law of the CJEU/General Court</i>
Art. 51	Field of application	United Kingdom, Germany, Netherlands, Bulgaria	<i>Rodríguez Mayor 2009, McB 2010, Estov 2010, DEB 2010, Vino I 2010, Chartry 2011, Rossius y Collard 2011, Vino II 2011, Gueye 2011, NS 2011</i>
Art. 52	Scope and interpretation of rights and principles		
52.1		Germany, Netherlands, Greece, Slovenia, Bulgaria	<i>McB 2010, Volker und Schecke 2010, Knauf Gips 2010, DEB 2010, ASNEF y FECEM 2011</i>
52.2		United Kingdom, Estonia (not added)	
52.3		United Kingdom, Germany, Netherlands, Slovenia	<i>McB 2010, Volker und Schecke 2010, DEB 2010</i>
52.4		Germany, Netherlands	
52.5		Slovenia	
52.6			
52.7		Germany	
Art. 53	Level of protection		<i>DEB 2010</i>
Art. 54	Prohibition of abuse of rights	Poland	