

**Association of the Councils of State and Supreme Administrative
Jurisdictions of the European Union
Seminar on the Charter of Fundamental Rights
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Questionnaire

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Preliminary observations

It should be made clear at the outset that the questionnaire has been answered to the extent that appears judicious from the point of view of the Court of Justice and that of the author. The Court of Justice has not yet ruled on the merits of most of the questions that have been posed. In the absence of case law on a given question, answers are drawn from sources, explanations and doctrine, and reflect the author's personal opinion in particular. They may not, therefore, be imputed to the court of which he is a member.

A- General

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

Between 1 December 2009 and 10 June 2011, the Court gave 38 decisions in which the reasoning referred to the Charter, of which 34 were Judgments and 4 Orders¹.

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

The article of the Charter most frequently referred to in these decisions is Article 47 (10 occurrences). Others that have been repeatedly mentioned are Articles 7, 8, 20, 21, 23, 24, 45, 51 and 52. Articles 22, 28, 33, 35, 41, 48, 49, 53 of the Charter have each been mentioned once in these decisions. In addition, four decisions contain a general reference to the Charter.

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

The areas of Union law in which the role of the Charter is most pronounced are employment law, the right to free movement of persons and citizenship, freedom of establishment and freedom to provide services, and refugees. Other areas in which there are a number of decisions containing references to the Charter are competition law, judicial cooperation in civil matters, data protection, telecommunications law and institutional law.

4. Has your court or another administrative court in your country referred a case to the European Court of Justice (ECJ) for a preliminary ruling, which has not yet been published on the ECJ website, concerning the interpretation of a provision of the EU Charter? If so, give a brief description of the content of the reference.

Three preliminary ruling cases currently pending before the Court of Justice should be mentioned as they raise issues relevant to the questions in the questionnaire.

The first² concerns employment law, specifically the notion of the right to paid leave, and the extent to which Article 31, paragraph 2 of the Charter contains a right or a principle that might be relevant in this case. The other two cases³, which have been joined, concern the

¹ See attached table.

² Reference for a preliminary ruling from the *Cour de cassation* (France) on 7 June 2010 - Maribel Dominguez/Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre, JO C 234 of 28.08.2010 p. 24, case C-282/10.

³ Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) 18 August 2010 - NS/Secretary of State for the Home Department, JO C 274 of 09.10.2010 p. 21, case C-411/10.

common European asylum system, and in particular the question whether and to what extent a Member State must respect fundamental rights when sending an asylum seeker back to the Member State responsible within the meaning of Article 3, paragraph 1 of Regulation No. 343/2003. These cases raise issues relating to the scope of application of the Charter, the obligation to exercise the prerogative referred to in Article 3, paragraph 2 of that regulation, and the extent of the protection conferred by the Charter compared to that conferred by the ECHR and the interpretation of Protocol 30 on the application of the Charter to Poland and the United Kingdom.

B- Scope *ratione temporis*

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

The Charter has no transitional provisions concerning its scope *ratione temporis*.

The Court of Justice reviews the lawfulness of legislative acts of the Union that came into force prior to 1 December 2009 and have effects beyond that date, under the terms of the Charter⁴. In principle, the same should apply with respect to administrative acts with permanent effect which were issued prior to that date. However, in principle, the scope of the Charter should not extend to situations that had arisen prior to the Charter itself.

6. Does the EU Charter of 2000 play any role in your national legal system even though it did not have the status of primary Union law? If so, in what way and with what result(s)?

C- Scope *ratione materiae*

7. How is the phrase ‘implementing Union law’ in article 51, paragraph 1 of the EU Charter interpreted in national proceedings? Can you give details of situations that have to date fallen within its scope? Do rulings explicitly state that a situation falls within the scope *ratione materiae* of the Charter?

The purpose of Article 51 is to determine the scope of the Charter⁵, which is essential for its application. According to paragraph 1 of that article, the Charter shall apply:

- to the institutions and bodies of the Union, and
- to the Member States “only when they are implementing Union law”.

Reference for a preliminary ruling from the High Court (Ireland) of 15 October 2010 - M. E. et. al/Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, JO C 13 of 15.01.2011 p. 18, case C-493/10.

⁴ See Judgments of 9 November 2010, Volker and Markus Schecke, C-92/09 and C-93/09, not yet published in the Reports, para. 46, and March 2011, Association belge des Consommateurs Test Achats et.al, C-236/09, not yet published in the Reports, para. 17.

⁵ See explanations concerning Article 51.

With regard to the question at hand, we will confine ourselves to discussing the scope of the Charter as it relates to Member States. The Court of Justice has not yet been called on to pronounce in depth on the scope of the Charter as it relates to Member States.

(1)

In order to understand the scope of the Charter as it relates to Member States, it is, in the author's view, essential to consider the teleology and language of Article 51, paragraphs 1 and 2 of the Charter, the explanations relating to it, and, in particular, the genesis of the provision⁶. These elements, according to the author, show that the Charter is not intended to apply except when Member States are "implementing Union law"⁷, and not as part of their national legal systems, which are a matter for the competence of the Member States themselves⁸.

(a)

From a teleological standpoint, the idea underlying the Charter – aimed at strengthening legal certainty, by bringing together in a single, readily understandable document existing laws – is to create, at Union level, a catalogue of fundamental rights setting limits to the powers of the Union, its organs and institutions and the way in which those powers are exercised, in the same way as the fundamental rights laid down in their respective constitutions limit the powers of the Member States at national level. The function of the Charter, therefore, is to create a catalogue of fundamental rights of the Union that is binding, in the first instance, on the Union and its organs and institutions.

The catalogue of fundamental rights laid down by the Charter is also binding on Member States. Where they are concerned, three different systems apply for the protection of fundamental rights, namely their own systems of fundamental rights, the ECHR and the Charter, the latter however only when they are implementing Union law. For all other State action falling within the Member States' own competences, they are bound by their own systems of fundamental rights and by the ECHR.

This plurality of systems for the protection of fundamental rights requires, in my view, a very clear delimitation of the respective scope of application of these systems to avoid any conflicts between these systems of protection of fundamental rights and their institutional upholders, namely the national constitutional courts and the European Court of Human Rights on the one hand, and the Court of Justice on the other.

In this regard the function of the Charter should be taken into account, as it does not serve to harmonise the Member States' systems for the protection of fundamental rights, or, put another way, establish a minimum standard generally applicable to them, this being the function of the ECHR. The *raison d'être* of the Charter is not so much that there is a need to create such a standard, rather that there is a fundamental need for uniformity in the way Union law is applied. Obviously, Union law must not be interpreted and applied in accordance with the different requirements flowing from the various national standards of protection for fundamental rights. That is true *a fortiori* for issues of the validity of Union law. Otherwise,

⁶ See *Braibant*, La Charte des droits fondamentaux de l'Union européenne, Témoignage et commentaires, 2001, hereafter "La Charte", p. 251 to 253, who was Vice-President of the Convention and a member of the five-person drafting group. *Tettinger/Stern/Ladenburger*, Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta, 2006, Art. 51, paras. 20 to 23, who is a member of the Legal Service of the European Commission and was seconded to the Secretariat of the Convention.

⁷ See, in particular, (2) and (3) for the various views expressed on the meaning of that expression.

⁸ *Benoît-Rohmer*, La Charte des droits fondamentaux de l'Union européenne, Rep. Dalloz 2001, p. 1483 (1490); *Jacqué*, La démarche initiée par le Conseil européen de Cologne, RUDH 2000, p. 3 (6).

within the Union, there would be a risk of having to deal with 27 different standards of protection of fundamental rights compared to the measures taken by the Union, and thence a heterogeneous application in practice.

However important the uniform application of Union law within the Member States might be from the point of view of the Court of Justice, it is also obvious that the duty of Member States to respect the provisions of the Charter requires that the national measure in question be one that is taken in order to implement Union law.

Thus, the Charter is not intended to be superimposed on national constitutional provisions⁹, nor is it intended to duplicate the general system of protection of fundamental rights in the ECHR¹⁰.

(b)

As to the wording of Article 51 of the Charter, the use of the term “only” when referring to the Member States is unequivocal in this respect. Moreover, the use of such a categorical term is unusual in Union law. In addition, this wording is reinforced by the references in paragraph 1 to the limits on powers, whereby the Charter applies to the Union only “with due regard for the principle of subsidiarity” and imposes obligations on it and on the Member States only “in accordance with their respective powers” and “respecting the limits of the powers of the Union as conferred on it in the Treaties”¹¹. Similarly, paragraph 2 includes several references to the neutrality of the Charter concerning the division of competencies between the Union and the Member States: first, the Charter “does not extend the field of application of Union law beyond the powers of the Union”; secondly, it “does not establish any new power [...] for the Union”, and thirdly, it does not “modify powers and tasks defined by the Treaties”.

(c)

The explanations for the first sentence of Article 51, paragraph 1 of the Charter, which refer to the decisions of the Court of Justice in *Wachauf*, *ERT* and *Annibaldi*¹², make it clear, where the scope of the Charter is concerned, that “it follows unambiguously from the case law of the Court of Justice that the obligation to respect fundamental rights defined in a Union context is only binding on Member States when they act in the scope of Union law”, as confirmed by the decision in *Karlsson*¹³.

(d)

When the Charter was being drafted, a number of formulations were proposed and discussed to define in what ways it would apply to the Member States¹⁴. According to these formulations, proposed in the following chronological order, the provisions of the Charter

⁹ *Benoît-Rohmer*, La Charte des droits fondamentaux de l'Union européenne, Rep. Dalloz 2001, p. 1483 (1490); *Jacqué*, La Charte des droits fondamentaux de l'Union européenne: Aspects juridiques généraux, REDP 2002, p. 108 (110). See also, in this context, the Commission communiqué of 11 October 2000, COM(2000) 644 final, para. 9.

¹⁰ *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 24.

¹¹ See, on this topic, *Prechal*, Competence Creep and General Principles of Law, Review of European Administrative Law, 2010, p. 5.

¹² Judgments of 13 July 1989, *Wachauf*, 5/88, Rep. p. 2609; 18 June 1991, *ERT*, Rep. p. I-2925; Judgment of 18 December 1997, C-309/96 *Annibaldi*, Rep. p. I-7493.

¹³ Judgment of 13 April 2000, C-292/97, Rep. p. I-2737, para. 37.

¹⁴ *Braibant*, La Charte, cited above, p. 251; *Meyer/Borowski*, Charta der Grundrechte der Europäischen Union, 2nd ed. 2006, Art. 51, para. 9; *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 20.

shall be “binding on the Member States only when they are transposing or applying Union law”¹⁵, shall be “applicable [...] to Member States when they are implementing Community law”¹⁶ or “are addressed to Member States [...] exclusively within the framework of implementing Community law”¹⁷ or “are addressed to Member States [...] exclusively within the scope of Union law”¹⁸. This last formulation was heavily criticised by some members of the Convention to whom it appeared vague and too broad¹⁹, with the result that the Convention then reverted to the “implementation”²⁰ formulation, understood to be more restrictive²¹, so as to limit the scope of the Charter and better uphold the principle of subsidiarity²². Since some members of the Convention had expressed the concern that the scope of the Charter might be considered too broad²³, the reference to the *Annibaldi* decision of the Court of Justice was then added to the explanations²⁴. Thus, the mere fact that a national measure falls within an area in which the Union enjoys powers cannot render the Charter applicable²⁵.

In this context, one must also note the position of the Commission on the language finally adopted²⁶, expressed at the hearing of the Director-General of its Legal Service by Convention Working Group II, when the concern of members of the Convention that the Charter could be too broad in scope in terms of national legislative and administrative measures was rejected as unfounded. According to the Commission, fundamental rights are applicable to national measures only in the situations put forth in *Wachauf*, where the national measure applies or implements Union law, and *ERT*, a Member State restricts a fundamental freedom for reasons of public order, public security or public health. According to the Commission, while the Court of Justice sometimes uses the somewhat broad formulation whereby Member States must respect fundamental rights “within the scope of Community law”, those rights only apply, in reality, in the situations cited above, as confirmed in particular by the *Annibaldi* Judgment. In its analysis of the applicability of the Charter, the Court would require the existence of a national measure specifically transposing or implementing Union law and would not consider it sufficient that a Member State simply

¹⁵ See document CHARTE 4123/1/00 REV 1 CONVENT 5 of 15 February 2000, p. 9.

This proposal was accompanied by the following commentary: “its purpose is to indicate clearly that the scope of [the Charter] is limited to the European Union and to avoid application to member states when they are acting on the basis of their own powers [...]”.

¹⁶ See document CHARTE 4149/00 CONVENT 13 of 8 March 2000, p. 2, 17 and 18.

¹⁷ See document CHARTE 4235/00 CONVENT 27 of 18 April 2000, p. 1.

¹⁸ See document CHARTE 4316/00 CONVENT 34 of 16 May 2000, p. 9.

¹⁹ *Braibant*, La Charte, cited above, p. 251; Meyer/*Borowski*, cited above, Art. 51, para. 9; Tettinger/*Stern/Ladenburger*, cited above, Art. 51, para. 20.

²⁰ See documents CHARTE 4373/00 CONVENT 40 of 23 June 2000, p. 5 and CHARTE 4422/00 CONVENT 45 of 28 July, p. 15 where the formulation finally adopted was proposed.

²¹ *Braibant*, La Charte, cited above, p. 251; Meyer/*Borowski*, cited above, Art. 51, paras 7 to 9; Tettinger/*Stern/Ladenburger*, cited above, Art. 51, para. 20.

²² *Braibant*, La Charte des droits fondamentaux, Droit social, 2001, p. 69 (73).

²³ During the discussions of the scope of this formulation, there were even some calls for the reference to Member States to be deleted altogether. See Meyer/*Borowski*, cited above, Art. 51, point 6.

²⁴ Tettinger/*Stern/Ladenburger*, cited above, Art. 51, footnote 39.

²⁵ See *Annibaldi* Judgment, cited above, paras. 13 to 24; Tettinger/*Stern/Ladenburger*, cited above, Art. 51, para. 29.

²⁶ See working document 13, 5 September 2002, Working Group II "Incorporation of the Charter/accession to the ECHR", Hearing on 23 July 2002 of Mr. Petite, p. 37 et seq., <http://european-convention.eu.int/docs/wd2/1821.pdf>.

acted within the scope of Union law. Thus, in practice, fundamental rights would apply only to a limited number of national legislative or administrative measures, as confirmed by the use of the expression “when they are implementing Union law”. This expression is more comprehensible and less susceptible than others to a broad interpretation²⁷.

(2)

While the position taken by the Commission describes the scope of this provision clearly and with certainty, the question arises, as shown by the conclusions and commentaries of learned writers, whether it was the intention of the authors of the Charter that this provision be limited to apply only in cases covered by the *Wachauf* line of authority, and thus whether the Charter applies to Member States only when they are implementing Union law in the strict sense of the term, namely when they are transposing a directive or implementing a regulation²⁸. It is debated whether this provision covers the so-called *Wachauf* and *ERT*²⁹ lines of authority and also if – beyond them – it also covers the praetorian definition of the scope of general principles of Union law, which goes considerably further than these lines of cases³⁰.

The decisions of the Court of Justice dealing with Article 51, paragraph 1 of the Charter do not address these issues specifically and do not, therefore, permit any definitive conclusion to be drawn in this respect³¹. It should be pointed out, though, that in *McB*, recalling the language of Article 51, paragraphs 1 and 2 of the Charter, the Court of Justice ruled that the Charter must be taken into account solely for the purpose of interpreting the regulation in issue³².

(3)

The issues mentioned above are raised, in particular, given the fact that the explanations use the expression that Member States are acting “in the scope of Union law” to explain the scope of the Charter, while that very expression was rejected and replaced by the term “when they

²⁷ See pages 39 and 40 of the document cited above.

²⁸ Thus it is argued that the so-called *ERT* line of cases should be taken as having been “abandoned”, and not applicable in respect of the Charter. See *Meyer/Borowski*, cited above, Art. 51, para. 29.

Others say that, while the members of the Convention chose the most restrictive wording, it is not clear that they intended to go back on the *ERT* case law. See *Jacqué*, cited above, REDP 2002, p. 108 (111).

²⁹ See, for example, the conclusions of Advocate-General *Stix-Hackl* of 18 March 2004, in the case of *Omega*, C-36/02, para. 55 and footnote 29; *De Kerchove/Ladenburger*, The point of view of those involved in the convention, in: *Carlier/de Schutter*, La Charte des droits fondamentaux de l'Union européenne, son apport à la protection des droits de l'homme en Europe, 2002, p. 213 (215, 216); *Rengeling/Szczekalla*, Grundrechte in der Europäischen Union, 2004, para. 295; *Reseau UE d'experts indépendants en matière de fundamental rights*, Commentary of the Charter of fundamental rights of the European Union, June 2006, p. 393; *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 23.

³⁰ See, as to this, the conclusions of Advocate-General *Bot* of 5 April 2011, in the case of *Scattolon*, C-108/10, para. 118; *Lenaerts/Gutiérrez-Fons*, The constitutional allocation of powers and general principles of EU law, *Common Market Law Review*, 2010, p. 1629 (1657 to 1660); *Tridimas*, The general principles of EU law, 2nd ed. 2006, p. 363.

³¹ Judgments of 5 October 2010, *McB*, C-400/10 PPU, not yet published in the Reports, paras. 51, 52; 10 December 2009, *Rodríguez Mayor and others*, C-323/08, Rep. p. I-11621, paras. 58, 59; 22 December 2010, *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, C-279/09, not yet published in the Reports, paras. 30, 31.

Orders of 11 November 2010, *Vino*, C-20/10, not yet published in the Reports, paras. 52 et seq; 12 November 2010, *Asparuhov Estov and others*, C-339/10, not yet published in the Reports, paras. 12 to 14; 1 March 2011, *Chartry*, C-457/09, not yet published in the Reports, paras. 22 to 26; 23 May 2011, *Rossius*, C-267/10 and C-268/10, not yet published in the Reports, paras. 16 to 20.

³² Judgment cited above, paras. 51 and 52.

are implementing” in Article 51, paragraph 1, of the Charter by the Convention. In addition, the Court uses this term for different purposes in different situations in its case law. The use of the expressions “implementing Union law” and “acting within the scope of Union law” does not simply lead to an argument over pure terminology, but in fact raises the question as to the real significance of these terms in a particular context³³.

According to the author, it follows from the elements of interpretation set forth above that the Charter applies to Member States when they implement Union law, in other words when they act as a decentralised administration of the Union and apply or implement a regulation, transpose a directive or carry out a decision of the Union or a Judgment of the Court of Justice (*Wachauf*). Likewise, it applies to Member States when they restrict from a fundamental freedom (*ERT*)³⁴. These elements do not, however, allow the conclusion that the Convention intended to limit the scope of the Charter to those situations referred to in the *Wachauf* case and to abandon, in this respect, the line of cases following *ERT*³⁵.

Beyond these two situations, the explanations support the conclusion that the Charter does not apply to Member States where they only act within the context of the Union’s powers, without there being a specific link between the national measure in question and Union law (*Annibaldi*)³⁶, as confirmed by the recent decisions in *McB*³⁷, *Gueye*,³⁸ as well as *Dereci*³⁹. According to this case law, when a national measure concerns a field covered by a secondary legislation of the Union that does not contain provisions regarding the subject-matter of the national measure in question, it cannot be evaluated under the provisions of the Charter⁴⁰. Furthermore, a measure that does not come within the scope of application of Union law cannot be examined under the Charter but only the ECHR⁴¹. Otherwise, one would run the risk of infringing article 51, paragraph 2, of the Charter⁴².

In this context, a question has been raised as to whether this understanding of article 51 of the Charter and the related explanations are entirely compatible with the existing case law of the Court. In particular, the decisions of *Carpenter*⁴³ and *K.B.*⁴⁴ have been mentioned in this regard. Nonetheless, a closer look at these judgments reveals that the Court used an approach that exactly conforms to the *Wachauf* and *ERT* lines of jurisprudence. Therefore, in *Carpenter*, the application of article 8 ECHR was triggered by the freedom to provide

³³ See, on this question, von Danwitz, Grundrechtsschutz im Anwendungsbereich des Gemeinschaftsrechts nach der Charta der Grundrechte, dans: Herdegen/Papier/Scholz/Klein, Festschrift für Roman Herzog zum 75. Geburtstag, 2009, p. 19 (24 to 29).

³⁴ The application of this case law is justified by the fact that when a Member State restricts a fundamental freedom, in principle, it is applying Union law, and, depending on the case, the examination of whether the principle of proportionality has been respected is difficult to accomplish without taking fundamental rights into consideration, in particular when balancing the interests of the concerned parties.

³⁵ See also *De Kerchove/Ladenburger*, cited above, p. 213 (215).

³⁶ *Tettinger/Stern/Ladenburger*, cited above, Art. 51, paras. 25 to 28.

³⁷ Judgment of 5 October 2010, *McB.*, C-400/10 PPU, not yet published in the Reports.

³⁸ Judgements of 15 September 2011, *Gueye*, C-483/09 and C-1/10, not yet published in the Reports.

³⁹ Judgment of 15 November 2011, *Dereci e.a.*, C-256/11, non not yet published in the Reports, para. 72.

⁴⁰ *Gueye* Judgment, cited above, para. 69.

⁴¹ *Dereci* Judgment, cited above, para. 72.

⁴² *McB* Judgment, cited above, paras. 52 and 59.

⁴³ Judgment of 11 July 2002, *Carpenter*, C-60/00, Rep. p. I-6279.

⁴⁴ Judgment of 7 January 2004, *K. B.*, C-117/01, Rep. p. I-541.

services, in conformity with *ERT*. The case *K.B.* came within the ambit of article 141 EC so that the application of article 12 ECHR falls within the context of a classic situation of «implementation» as covered by the *Wachauf* line of jurisprudence. The criticism of these decisions relates to an expansive interpretation of the directly applicable substantive provisions of Union law rather than to the fact that the Court has departed from the *Wachauf* and *ERT* lines of jurisprudence. As a consequence, these decisions do not pose a problem in terms of the interpretation of article 51 of the Charter, but, eventually, in terms of the interpretation of the substantive Union law.

It results from what has been said above that a mere link with or connecting factors to Union law would not render the Charter applicable. Thus, the consideration of the hypothesis of a «third category» as conceived by the questionnaire does not seem useful for the purpose of determining the applicability of the Charter. While the Court, in its recent Orders, has not only used the expression «implementation of Union law» concerning the applicability of the Charter, but also «other criteria of connecting factors to Union law»⁴⁵, it should be noted that the Court stated that these cases did not fall under the scope of application of Union law and that it did not have competence to respond to preliminary questions relating to the Charter. In any event, the sole fact that the Court has used the expression «other criteria of connecting factors to Union law» does not confirm the existence of a «third category». Neither can the Opinions in *Bartsch*⁴⁶ and *Scattolon*⁴⁷ be relied upon for this purpose. *Bartsch* clearly demonstrates that the Court used a reasoning in keeping with the decisions in *Wachauf* and *Annibaldi*. In *Scattolon*, contrary to the Opinion, the Court decided that there was no room to examine the national legislation in question in light of the Charter. Moreover, it should be noted that while Advocate General *Sharpston* identified in her Opinion three categories of cases that fall within the scope of Union law when determining the applicability of general principles of Union law, to this date the Court has never made use of such an approach. Regarding the case law cited in the questionnaire in order to define a «third category», it should be observed that the decision in *DEB* concerned procedural questions related to an claim seeking to establish State liability for a violation of Union law and therefore, certainly, an implementation of Union law by a national jurisdiction. *Molenheide* concerned the right of deduction of VAT, a fundamental principle of the common system of VAT, with regard to a provision of national law limiting the scope of the said right of deduction⁴⁸, and thus falls under the context of a classic situation covered by the *Wachauf* line of jurisprudence. As for *Karner*, though certainly criticized since it is difficult to understand why a national legislation should be scrutinized in relation to fundamental rights of the Union while there is no interest to review it in relation to the fundamental freedoms granted by the treaties, based on the reasoning in this decision⁴⁹, one could still consider that the national legislation in question was enacted in the ambit of article 49 EC. Under these conditions, *Karner* can be considered as being covered by the *ERT* line of jurisprudence.

⁴⁵ See Orders of 12 November 2010, *Asparuhov Estov e.a.*, C-339/10, not yet published in the Reports, para. 14; of 1 March 2011, *Chartry*, C-457/09, not yet published in the Reports, para. 25 and of 23 May 2011, *Rossius*, C-267/10 et C-268/10, not yet published in the Reports, para. 19.

⁴⁶ Opinion of 22 May 2008, *Bartsch*, C-427/06, Rep. 2008 p. I-7245.

⁴⁷ Opinion of 5 April 2011, *Scattolon*, C-108/10, not yet published in the Reports.

⁴⁸ See, in particular, para. 48.

⁴⁹ See paras. 45 to 47.

In addition, it seems clear, in the opinion of the author, that the case law of the Court of Justice on non-discrimination on the basis of nationality⁵⁰, which also uses the term “within the scope of Union law” to determine the applicability of Article 18 TFEU, cannot be relied upon to determine the scope of the Charter⁵¹. The use of this term in the context of this case law can be explained, among other things, by the specific situation Article 18 TFEU is designed to address, and cannot therefore be transposed to the question arising here⁵². Moreover, this case law was not taken into consideration in the drafting of Article 51 of the Charter, nor is it mentioned in the explanations. Furthermore, its application would considerably extend the scope of the Charter, which seems to be in contradiction with the concern, as seen from the genesis of Article 51 of the Charter, of those authors to limit its scope *vis à vis* the Member States and not to go beyond the situations covered by these two lines of cases.

(4)

In practice, a cautious determination of the field of application of the Charter cannot lead us to the conclusion that the Charter would cover only a small number of cases. Based on the two lines of cases referred to by the authors of the Charter, it will apply in a multitude of situations, thus covering all measures taken by Member States deriving from the obligations under Union law⁵³.

To take just some of the many examples⁵⁴, any national administrative measure specifically implementing an act of secondary Union law falls within the scope of the Charter. In this context, the said scope should not cover measures that, while relating to an area covered by a specific Union regulation, are not governed by it⁵⁵. The same is true for national legislative measures taken in the context of the transposition of a Union directive, which go further than the field the directive governs⁵⁶. As for national court procedures, the Charter applies where the right protected by the courts is a right under Union law⁵⁷. The same is true where the national authorities or courts apply national procedural law, in the absence of specific Union regulations, by virtue of the principle of procedural autonomy of the Member States⁵⁸. However, the mere fact that an international rule of procedure of the Union is relevant in the context of a legal proceeding does not mean that the Charter is generally applicable in order to

⁵⁰ See, for example, Judgments of 20 October 1993, *Phil Collins and others.*, C-92/92 and C-326/92, Rep. p. I-5145; 12 May 1998, *Martínez Sala*, C-85/96, Rep. p. I-2691; 7 September 2004, *Trojani*, C-456/02, Rep. p. I-7573.

⁵¹ *De Kerchove/Ladenburger*, cited above, p. 213 (216); *Eeckhout*, *The EU Charter of fundamental rights and the federal question*, CMLR 2002, p. 945 (969); *Jacobs*, *Human rights in the European Union: the role of the Court of Justice*, E.L.Rev. 2001, p. 331 (337); *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 29.

⁵² *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 29.

⁵³ See, in this regard, Judgment of 22 June 2010, *Melki*, C-188/10 and C-189/10, not yet published in the Reports, para. 56.

⁵⁴ See, for examples of cases of application, *Tettinger/Stern/Ladenburger*, cited above, Art. 51, paras. 35 to 50.

⁵⁵ Judgment of 13 June 1996, *Maurin*, C-144/95, Rep. 1996 p. I-2909.

⁵⁶ *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 29.

⁵⁷ *Tettinger/Stern/Ladenburger*, cited above, Art. 51, para. 38.

⁵⁸ Judgment of 18 March 2010, *Alassini*, C-317/08 to C-320/08, not yet published in the Reports, para. 61. See, in relation to this Judgment, *Prechal/Widdershoven*, *Effectiveness or Effective Judicial Protection: A Poorly Articulated Relationship*, in: *Liber Amicorum in Honour of Arjen W.H. Meij*, *Today's Multilayered Legal Order: Current Issues and Perspectives*, 2011, p. 283 (292 et seq.).

resolve the merits of the dispute⁵⁹. Where the rules on competition are concerned, measures taken by the Union based on Articles 101, 102 and 106 to 108 TFEU are subject to the Charter, while that cannot, in principle, be the case for interventions by a Member State giving rise to control by the European Union, in accordance with these articles.

D- Review *ex officio* (on its own motion)

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

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

The Court of Justice has not had occasion to rule on the question of *ex officio* review of the lawfulness of legal measures in the light of the provisions of the Charter.

It does, however, seem that the case law of the Court on *ex officio* review by the national courts of arguments based on Union law could, in principle, be considered transposable to this question. In particular, this case law shows that, in principle, Union law does not require national courts to exercise an *ex officio* review of a violation of Union law⁶⁰. Yet, if national jurisdictions are under an obligation to exercise an *ex officio* review, or have the ability to do so, they are obliged to proceed accordingly with respect to a binding provision⁶¹.

E- Distinction between rights and principles

- 9. Does your national law make a distinction between rights and principles comparable with that in article 52, paragraph 5 of the EU Charter? What implications does this have for review by the courts?**
- 10. How do you determine whether a provision in the EU Charter can be deemed to constitute a ‘right’ or a ‘principle’ as referred to in article 52, paragraph 5 of the Charter?**
- 11. How do the national administrative courts examine for compatibility with principles such as that contained in the second sentence of article 52, paragraph 5 of the EU Charter? (full review/limited scope of judicial review/etc.)?**
- 12. What are the legal consequences of a violation of a principle in national proceedings with no European dimension? Are these different from those that follow from the violation of a right?**

⁵⁹ See, as to this, *McB*. Judgment, cited above, paras ; 51 and 52.

⁶⁰ See, for example, Judgments of 7 June 2007, *van der Weerd and others.*, C-222/05 to C-225/05, Rep. p. I-4233, point 36; 7 of 12 February 2008, *Kempter*, C-2/06, Rep. p. I-411, para. 45, and 17 December 2009, *Martin Martin*, C-227/08, not yet published in the Reports, para. 19.

⁶¹ See Judgment in *Kempter*, cited above, para. 45 and the case law cited.

The preamble and Article 51, paragraph 1, second sentence, of the Charter explicitly introduce the distinction between “rights” and “principles”. Article 52, paragraph 5 states the legal nature of the “principles”⁶².

(1)

As to this latter, the language of Article 52, paragraph 5 of the Charter, and the explanations relating to it, are confirmed by the genesis of this provision and of Article 51, paragraph 1, second sentence, which, in the author’s view, is particularly significant.

(a)

Article 52, paragraph 5 provides that the principles “may be implemented” by institutions, bodies, offices and agencies of the Union, and by Member States when they are implementing Union law, in the exercise of their respective powers, and that they “shall be judicially cognisable only in the interpretation of such acts and the ruling on their legality”.

(b)

The explanations to Article 52, paragraph 5, of the Charter, refer to Article 51, paragraph 1 and state that “subjective rights shall be respected, whereas principles shall be observed”. In addition, referring to the case law of the Court of Justice⁶³ and to the approach the constitutional systems of the Member States take to “principles”, in particular in the field of employment law, they point out that principles “do not however give rise to direct claims for positive action by the Union’s institutions or Member States’ authorities”.

(c)

The distinction between “rights” and “principles” – appearing in the Preamble to the Charter and in Article 51, paragraph 1, second sentence (Art. II-111, para. 1, of the draft Constitution) – played an important role in the drafting of the Charter. In this regard, the Convention drew, among other sources, on Spanish constitutional law, in particular Article 53, paragraph 3, of the Constitution on the justiciability of the guiding principles of social and economic policy⁶⁴ and French constitutional law, which features a distinction between rights that are fully justiciable and “principles of constitutional value”, the justiciability of which is on the level of norms that do not confer a right of individual action but only to a right to have the Constitutional Council review whether the measures taken by the legislator contravene those principles⁶⁵. This distinction between “rights” and “principles” was to reduce the differences between the constitutional traditions of the Member States to a common denominator⁶⁶. It served as a compromise to the intense and hotly debated discussions at the Convention regarding norms that contained subjective rights and those that only contained objective rights, especially in relation to social rights, whose justiciability had been wholly contested by

⁶² To date, the Court has not been called on to rule on the distinction between rights and principles.

⁶³ Judgment of the Court of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)/EEC*, 265/85, Rep. p. 1155 and Judgment of Court of First Instance 11 September 2002, *Pfizer Animal Health/Conseil*, T-13/99, Rep. p. II-3305.

⁶⁴ Article 53, paragraph 3, of the Spanish Constitution states: “Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them”.

⁶⁵ See *Braibant*, *La Charte*, cited above, p. 46 and 85; *Tettinger/Stern/Ladenburger*, cited above, Art. 52, para.7.

⁶⁶ See *Tettinger/Stern/Ladenburger*, cited above, Art. 52, paras. 7 and 10.

some members of the Convention⁶⁷. The divergences between the positions taken can be explained by the different political sensibilities⁶⁸ and distinct constitutional traditions with regarding the existence and scope of subjective and objective rights, in particular social rights⁶⁹.

Moreover, paragraph 5 of Article 52 did not appear in the original version of the Charter proclaimed at the opening of the Nice summit in December 2000, and was added during the Treaty negotiations establishing a Constitution for Europe as proposed by the European Convention. This addition provided a way to overcome the reluctance of the United Kingdom towards the insertion of the Charter in the draft Constitution and concluded the work on the drafting of the Charter⁷⁰. It was intended, among other things, to confirm the distinction between rights and principles laid down in the Preamble and Article 51, paragraph 1, second sentence of the Charter (Art. II-111 para. 1 of the draft Constitution) and clarify the legal nature of principles⁷¹ so as to reinforce legal certainty⁷².

(2)

As to what is a “right” and what is a “principle”, the Charter does not determine which provisions contain rights, principles or both at once. The intention of the Convention was to leave this characterisation to the case law, which will take into account the guidance provided in the explanations⁷³. The explanations to Article 52, paragraph 5 of the Charter list Articles 25, 26 and 37 as principles recognised in the Charter. In addition, according to these explanations, Articles 23, 33 and 34 contain elements of both rights and principles⁷⁴. Furthermore, based on their respective wording and the related explanations, Articles 35, 36 and 38 can be defined as principles⁷⁵. It should also be mentioned, as already pointed out under question 4, that following case C-282/10, *Dominguez*, a question might arise to what extent Article 31, paragraph 2 of the Charter contains a right or a principle.

(3)

⁶⁷ These discussions were triggered by the conclusions of the European Council of Cologne in 1999, according to which the Charter should contain economic and social rights and not norms that merely contained objective rights.

See *Benoit-Rohmer*, *La Charte des droits fondamentaux de l'Union européenne*, Rep. Dalloz 2001, p. 1483 (1485); *Jacqué*, *La démarche initiée par le Conseil européen de Cologne*, RUDH 2000, p. 3 (5); *Tettinger/Stern/Ladenburger*, cited above, Art. 52, para. 7; *Meyer/Borowski*, cited above, Art. 51, paras. 10 to 13 and 33 et seq.

⁶⁸ *Braibant*, *La Charte des droits fondamentaux*, Droit social, 2001, p. 69 (74).

⁶⁹ For example, there are constitutional concepts that distinguish between subjective rights that are fully justiciable and “programmatic rights” that are not justiciable at all (Art. 45 of the Irish Constitution) or are to a limited extent (Art. 53, para. 3, of the Spanish Constitution) even though formulated in a subjective way, while the German Basic Law is founded on a narrow conception of the notion of rights, limited to justiciable individual rights. See, for more examples, *Tettinger/Stern/Ladenburger*, cited above, Art. 52, para. 7 and footnotes on pages 40 to 43.

⁷⁰ *Tettinger/Stern/Ladenburger*, cited above, Art. 52, para. 10.

⁷¹ *Meyer/Borowski*, cited above, Art. 52, para. 45; *Tridimas*, cited above, p. 367.

⁷² See document CONV 354/02 of 22 February 2002, p. 8.

⁷³ See document CONV 354/02 of 22 February 2002, p. 8. See also *Reseau UE d'experts indépendants en matière de droits fondamentaux*, Commentary of the charter of fundamental rights of the European Union, June 2006, p. 407, 408.

⁷⁴ The explanations to this provision reveal that paragraphs 1 and 3 should be considered as principles.

⁷⁵ See also *Lenaerts*, *La solidarité ou le chapitre IV de the Charte des droits fondamentaux de l'Union européenne*, *Revue trimestrielle des droits de l'homme*, 2010, n°82, p. 217 (224).

The question which of the provisions of the Charter must be characterised as a principle is no easy task. It involves asking, among other things, what criteria must be used to make such a characterisation.

In particular, given the wording of Article 52, paragraph 5 of the Charter, the related explanations and the genesis of the distinction the Charter makes between “rights” and “principles”, it seems clear that the latter do not confer a subjective right that can be invoked by individuals⁷⁶, an observation that will serve as the starting point for any analysis. In this regard, the explanations can, at least in some cases, provide some guidance. Moreover, during the deliberations of the Convention, it was emphasised that the wording of the Charter should, in principle, provide important guidance⁷⁷. The same can be said for the genesis of the provisions and their respective purpose. Other essential factors are the degree of specificity of a provision and the need of materialization of its content by the legislature⁷⁸.

(4)

As to the legal effects and their implications for review by the courts to determine whether there has been a violation of rights or principles, the fact that such principles do not confer subjective rights that can be invoked by individuals implies that these only have limited justiciability⁷⁹.

While views may of course diverge on the extent of the distinction between full justiciability of fundamental rights and limited or "normative" justiciability of principles, the author at any rate believes that this implies that principles must be taken into account when reviewing the legality of secondary legislation, and interpreting secondary legislation and Member States legislation implementing Union law⁸⁰. However, principles do not create rights for their implementation by the Union or the national legislator, or, therefore, grant any positive benefits, nor do they confer the capacity to take legal action. Furthermore, the right to an effective remedy, as provided for under Article 47 of the Charter, does not result in, or serve as the basis for, a claim for damages based on the non-contractual liability of the Union under Article 340, paragraph 2, TFEU or the non-contractual liability of Member States for a violation of a principle⁸¹.

⁷⁶ *Jacqué*, La Charte des droits fondamentaux de l'Union européenne: Aspects juridiques généraux, REDP 2002, p. 108 (115); *Lenaerts*, La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne, *Revue trimestrielle des droits de l'homme*, 2010, n°82, p. 217 (224); *Prechal*, Rights vs. principles, or how to remove fundamental rights from the jurisdiction of the courts, *Liber Amicorum Alfred E. Kellermann*, 2004, p. 177 (179); *Reseau UE d'experts indépendants en matière de droits fondamentaux*, Commentary of the charter of fundamental rights of the European Union, June 2006, p. 407.

⁷⁷ *Tettinger/Stern/Ladenburger*, cited above, art. 52, para. 98.

⁷⁸ *Jacqué*, La Charte des droits fondamentaux de l'Union européenne: Aspects juridiques généraux, REDP 2002, p. 108 (114); *Tettinger/Stern/Ladenburger*, cited above, art. 52, para. 98.

⁷⁹ *Jacqué*, La Charte des droits fondamentaux de l'Union européenne: Aspects juridiques généraux, REDP 2002, p. 108 (115); *Lenaerts*, La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne, *Revue trimestrielle des droits de l'homme*, 2010, n°82, p. 217 (224); *Reseau UE d'experts indépendants en matière de droits fondamentaux*, Commentary of the charter of fundamental rights of the European Union, June 2006, p. 407.

⁸⁰ The question is raised in this context of whether the measures referred to must be intended to implement the principle invoked. See *Prechal*, cited above, p. 179; *Reseau UE d'experts indépendants en matière de droits fondamentaux*, Commentary of the charter of fundamental rights of the European Union, June 2006, p. 407.

⁸¹ *Tettinger/Stern/Ladenburger*, cited above, art. 52, para. 86. See also *Lenaerts*, La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne, *Revue trimestrielle des droits de l'homme*, 2010, n°82, p. 217 (224).

As for the extent of judicial review of respect for a principle, it could be said that the Court of Justice will recognise, in principle, that both the Union legislature and the national legislature have, subject to the limits imposed by Union law, a broad margin of appreciation with regard to the implementation of a principle so that the extent of judicial review is limited to examining manifest errors of law.

F- Scope and interpretation of rights and principles

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

To date, there is no case law of the Court of Justice regarding the interpretation of Article 52, paragraph 1 of the Charter.

Unlike the ECHR, which lists specific limitations in each article, the Charter provides, in Article 52, paragraph 1, a general limitations clause that foresees cumulative conditions for legality of a limitation on the exercise of the rights and freedoms recognised by the Charter⁸². These conditions are that the limitation be provided by law⁸³, that it respect the essence of the rights and freedoms being limited⁸⁴ as well as the principle of proportionality and, as to this, that the restriction is in pursuance of particular objectives. This general limitation clause also applies to the rights and freedoms under Article 52, paragraph 3 of the Charter⁸⁵, whereby the rights corresponding to the ECHR are subject to the limitations set by the ECHR⁸⁶. It does

⁸² In principle, this clause cannot apply to principles in the light both of their legal nature and of the language of Article 52, paragraph 1 of the Charter, which refers only to rights.

⁸³ See, as to this, the submissions of 14 April 2011 in the Scarlet Extended case, C-70/10, paras. 93 to 113.

⁸⁴ See, as to this, Judgments of 15 July 2010, Commission/Germany, C-271/08, not yet published in the Reports, para. 47; *McB.*, cited above, para. 57; 5 May 2011, *Deutsche Telekom*, C-543/09, not yet published in the Reports, para. 66.

⁸⁵ See Judgment *McB.*, cited above, paras. 53 and 59, where Article 52, paragraph 1, of the Charter is applied to a right recognised by the Charter corresponding to a right guaranteed by the ECHR.

In the doctrine, some authors have contended that Article 52, paragraph 1 does not apply to rights based on the treaties or to rights corresponding to the ECHR. See for example, as to this, *Barriga*, *Die Entstehung der Charta der Grundrechte der Europäischen Union: eine Analyse der Arbeiten im Konvent und kompetenzrechtlicher Fragen*, 2003, p. 157; *Meyer/Borowski*, cited above, Art. 52, para. 18; *Rengeling/Szczekalla*, cited above, paras. 463, 473.

⁸⁶ See explanations relating to Article 52, according to which paragraph 3 of the article seeks to achieve a consistency between the Charter and the ECHR, in so far as the rights in the Charter correspond to rights guaranteed by the ECHR, implying that the detailed system of limitations laid down in the ECHR must be applied, unless this application undermines the autonomy of Union law or the Court of Justice of the European Union.

However, in accordance with Article 53 of the Charter, while the limitation clause in paragraph 1 applies to rights recognised by the ECHR, such application cannot result in a level of protection that is inferior to that provided in the ECHR. In practice, tension might arise from the fact that the conditions imposed on the review of the principle of proportionality laid down in the ECHR, which is closely linked to the specific

not, however, apply to rights derived from treaties that are only subject to conditions and limits defined by those treaties (Article 52, paragraph 2).

As to the interpretation of the general limitation clause laid down in Article 52, paragraph 1 of the Charter, this is derived, as can be seen from the explanations, from the case law of the Court of Justice on fundamental rights whereby “*restrictions may be imposed on the exercise of fundamental rights, , [...] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights*”⁸⁷.

Bearing in mind that this is a general limitation clause specific to the system of fundamental rights under the Charter, this clause must, in principle, be interpreted autonomously, taking into consideration the case law of the Court of Justice pertaining to the review of the principle of proportionality in the context of fundamental rights⁸⁸. In this context, the principle of proportionality requires, in principle, a review of the ability of a given measure to achieve its objective and its necessary character, as well as a review of the suitability of the measure in question⁸⁹. This entails an evaluation determining whether the disadvantages resulting from the measure in question are not disproportionate to the aims pursued⁹⁰, and examining whether the means applied by that measure to achieve its aim correspond to its importance⁹¹. Therefore, this determination includes a cost-benefit analysis of the said measures, including the value of the protected fundamental right that has been limited⁹².

As to the question put, it should be also noted, that in the context of examining the principle of proportionality one must determine what kind of objectives may be pursued by a measure that limits a right recognized by the Charter. According to Article 52, paragraph 1 of the Charter, limitations may be made “to protect the rights and freedoms of others”⁹³ and to meet “objectives of general interest recognised by the Union”. The latter notion includes, among

limitations on the exercise of a particular right under the ECHR, and under Article 52, paragraph 1 of the Charter, are different. Any conflict arising out of a difference in the conditions for such a review should, in principle, be resolved by the application of the one that provides the higher level of protection of the fundamental right in question. See Tettinger/Stern/von Danwitz, *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, 2006, Art. 53, paras. 12, 19 et seq.

⁸⁷ Judgments in *Wachauf*, cited above, para. 18; *Karlsson and others.*, cited above, para. 45.

⁸⁸ Clearly, the case law of the European Court of Human Rights must be taken into account where the rights in question recognised by the Charter correspond to rights guaranteed by the ECHR, given that under Article 52, paragraph 3 of the Charter, the meaning and scope are the same as those conferred to the ECHR, unless the protection offered by the Charter is more extensive.

⁸⁹ Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, Rep. p. I-11453, paras. 149 to 153.

⁹⁰ See the traditional case law of the Court of Justice on the principle of proportionality: Judgments of 11 July 1989, *Schröder HS Kraftfutter*, 265/87, Rep. p. 2237, para. 15; 25 February 2010, *Müller Fleisch*, C-562/08, not yet published in the Reports, para. 43, and 8 July 2010, *Afton Chemical*, C-343/09, not yet published in the Reports, para. 45.

⁹¹ See the traditional case law of the Court of Justice on the principle of proportionality: Judgments of 23 February 1983, *Fromançais*, 66/82, Rep. p. 395, para. 8; 22 January 1986, *Denkavit France*, 266/84, Rep. p. 149, para. 17; 27 June 1990, *Lingenfeller*, C-118/89, Rep. p. I-2637, para. 12, and 21 January 1992, *Pressler*, C-319/90, Rep. p. I-203, para. 12.

⁹² Judgment in *British American Tobacco (Investments) and Imperial Tobacco*, cited above, paras. 149 to 153.

⁹³ Here, the Charter drew on Article 31 of the European Social Charter.

other things, public policy, public security and public health⁹⁴. Where national measures are concerned, the Court of Justice accepts, in principle, that Member States have different levels and systems of protection⁹⁵, which may influence the balancing of the interests concerned⁹⁶. The Court has also acknowledged that Member States themselves have the power to establish the right balance between the different fundamental rights Union law aims to guarantee on the basis of a provision of secondary legislation⁹⁷. Consequently, requirements deriving from national law can also be relevant when interpreting the general limitations clause.

G- Direct effect

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

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

In the author's view, in the absence of any relevant case law of the Court of Justice, the answer to this question mainly depends⁹⁸ on the extent of the field of application of the Charter, as defined in Article 51, paragraph 1⁹⁹. Moreover, questions will arise as to the possible horizontal direct effect of the rights recognised by the Charter, which involves taking account of the case law of the Court of Justice as to whether the fundamental freedoms¹⁰⁰ and general principles of Union law¹⁰¹ have horizontal direct effect, as well as of the fact that directives have no such effect¹⁰².

⁹⁴ See the explanations on the objectives mentioned in Article 3 TEU and other interests protected by specific treaty provisions such as Article 4, paragraph 1, TEU, Article 35, paragraph 3, and Articles 36 and 346 TFEU.

⁹⁵ According to this case law, Member States essentially remain free to determine the requirements of public policy in accordance with their national needs.

See, on these lines, Judgments of 28 October 1975, *Rutili*, 36/75, Rep. p. 1219, paras. 26 to 28; 14 March 2000, *Church of Scientology*, C-54/99, Rep. p. I-1335, para. 17; 19 June 2008, *Commission/Luxembourg*, C-319/06, Rep. p. I-4323, para. 50; 10 July 2008, *Jipa*, C-33/07, Rep. p. I-5157, para. 23; 26 March 2009, *Commission/Italy*, C-326/07, Rep. p. I-2291, para. 70.

See also Judgments in *Omega*, cited above, paras. 37 and 38; *Sayn-Wittgenstein*, cited above, para. 87.

⁹⁶ See Judgments in *Omega*, cited above, para. 39; *Sayn-Wittgenstein*, cited above, paras. 93, 94.

⁹⁷ Judgment of 29 January 2008, *Promusicae*, C-275/06, Rep. p. I-271, para. 68.

⁹⁸ According to the author, principles must not have direct effect as a matter of principle.

⁹⁹ See, as to this, *Tettinger/Stern/Ladenburger*, cited above, Art. 51, paras. 10 et seq.

¹⁰⁰ See Judgments of 12 December 1974, *Walrave and Koch*, 36/74, Rep. p. 1405; 15 December 1995, *Bosman*, C-415/93, Rep. p. I-4921; 18 December 2007, *Laval un Partneri*, C-341/05, Rep. p. I-11767; 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, Rep. p. I-10779.

¹⁰¹ See Judgments of 24 March 1994, *Bostock*, C-2/92, Rep. p. I-955; 10 November 1993, *Otto*, C-60/92, Rep. p. I-5683 where the Court of Justice denied any such effect, having regard to the circumstances of the cases. See also 19 January 2010, *Küçükdeveci*, C-555/07, not yet published in the Reports, where the Court of Justice admitted such an effect.

¹⁰² See Judgments of 5 April 1979, *Ratti*, 148/78, Rep. p. 1629; 26 February 1986, *Marshall*, 152/84, Rep. p. 723; 8 October 1987, *Kolpinghuis Nijmegen*, 80/86, Rep. p. 3969; 3 May 2005, *Berlusconi and others*, C-387/02, C-391/02 and C-403/02, Rep. p. I-3565.

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

17. In what way do your national administrative courts examine for compatibility with a provision of the EU Charter that has direct effect (full review/limited scope of judicial review/etc.)?

Whether or not a provision having direct effect is respected must, in principle, be the subject of exhaustive review by the national administrative courts, exercised in cooperation with the courts of the Union.

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

In principle, the consistent case law of the Court of Justice on the primacy of Union law¹⁰³ and the principle that national law must be interpreted in conformity with it, should be transposable.

On this last point, according to the case law of the Court of Justice when a national court applies domestic law, it is bound to interpret it, to the greatest possible extent, in the light of the text and purpose of the Union law in question, in order to achieve the result that the law intends¹⁰⁴. If application in conformity with Union law is not possible, the national court has the duty to apply Union law in its entirety and to protect the rights it confers on individuals, if necessary by refraining from applying any provision of domestic law whose application, in the circumstances of the particular case, would lead to a result contrary to Union law¹⁰⁵.

H- Interpretation methods

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

In accordance with Article 6, paragraph 1, subparagraph 3 TEU and Article 52, paragraph 7 of the Charter, the explanations must be given due regard when interpreting the Charter. To date, the Court of Justice has expressly referred to them in only one decision¹⁰⁶.

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

¹⁰³ See, for example, Judgment of 15 July 1964, *Costa*, 6/64, Rep. p. 1158 and Opinion 1/91, of 14 December 1991, Rep. p. I-6079, para.21; Opinion 1/09 of 8 March 2011, not yet published in the Reports, para. 65.

¹⁰⁴ See, for example, Judgments of 4 February 1988, *Murphy et al.*, 157/86, Rep. p. 673, para. 11; 7 January 2004, X, C-60/02, Rep. p. I-651, para. 59.

¹⁰⁵ See, for example, Judgments of 18 December 2007, *Frigerio Luigi & C.*, C-357/06, Rep. p. I-12311, para. 28; 11 January 2007, *ITC*, C-208/05, Rep. p. I-181, para. 69; 27 October 2009, *ČEZ*, C-115/08, Rep. p. I-10265, para. 140.

¹⁰⁶ Judgment of 22 December 2010, *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, C-279/09, not yet published in the Reports, paras. 32, 35, 36 and 39.

From the author's viewpoint, there is no obvious reason for derogating from the traditional methods of interpretation¹⁰⁷. It should be noted, however, that particular importance should be attached to the genesis of the Charter because of the obligation in Article 52, paragraph 7 to give due regard to the explanations¹⁰⁸. In addition, in accordance with Article 52, paragraphs 4 and 6, and subject to certain conditions, the legal traditions common to Member States and national laws and practices must also be taken into account.¹⁰⁹

I- Relationship between EU Charter and ECHR

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

In accordance with Article 6 TEU, the Charter has been accorded the same legal value as the Treaties¹¹⁰. These, in line with the consistent case law of the Court of Justice, and by contrast with ordinary international treaties, have established a specific legal order integrated into the legal systems of the Member States and have primacy over national law¹¹¹. Thus, as far as the texts of the ECHR and the Charter are identical, national courts are bound to apply the Charter, in accordance with Article 51, paragraph 1 thereof, when Member States are implementing Union law, as well as applying the ECHR as the case may be. In the author's view, Article 53 of the Charter has no effect as far as the obligation to apply the Charter is concerned, since in practical terms all it requires is that the level of protection offered by the ECHR be respected.

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

To the extent that the Charter contains rights corresponding to rights guaranteed by the ECHR, the Court of Justice gives those rights, in accordance with Article 52, paragraph 3 of the Charter, the same meaning and scope as it does to the ECHR, as interpreted in the case law of the European Court of Human Rights¹¹². Thus, the Court examines the case law of the European Court of Human Rights and applies it faithfully. That case law is regularly cited in support of the reasoning of the Court's decisions in cases involving fundamental rights¹¹³.

¹⁰⁷ Interpretation of a norm according, in particular, to its language, system, genesis and teleology.

¹⁰⁸ See also, as to this, the fifth paragraph of the Preamble to the Charter.

¹⁰⁹ Even before the Charter entered into force, the Court of Justice drew, where fundamental rights were concerned, on the constitutional traditions common to Member States and the guidance provided by international instruments on the protection of human rights in which Member States had cooperated in or adhered to (Judgments of 26 June 2007, *Ordre des barreaux francophones et germanophone et al.*, C-305/05, Rep. p. I-5305, para. 29 and 3 September 2008, *Kadi et Al Barakaat International Foundation/Conseil and Commission*, C-402/05 P and C-415/05 P, Rep. p. I-6351, para. 283).

¹¹⁰ See, as to this, Judgment of 15 July 2010, *Commission/Germany*, C-271/08, not yet published in the Reports, para. 37.

¹¹¹ Judgment *Costa*, cited above, and opinion 1/91, cited above, point 21; opinion 1/09, cited above, para. 65.

¹¹² Judgments *McB.*, cited above, para. 53; *Volker and Markus Schecke*, cited above, paras. 51 and 52, *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, cited above, paras. 35 et seq.

¹¹³ See Judgments of 18 March 2010, *Alassini*, C-317/08 to C-320/08, not yet published in the Reports, para. 63; *McB.*, cited above, paras. 54 and 56; *Volker and Markus Schecke*, cited above, paras. 52, 59 and 87; 23 November 2010, *Tsakouridis*, not yet published in the Reports, paras. 52 and 53; 22 December

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

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

When a question of interpretation of a provision of the Charter based on “common constitutional traditions” arises before a national court, it would seem appropriate and, in some cases necessary, for that court to refer it to the Court of Justice for a preliminary ruling pursuant Article 267 TFEU.

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

25. Would you consider it useful for ACA-Europe to set up a central register containing judgments handed down by the national courts concerning their constitutions which members of the Association could consult?

Such a register could be helpful to the work of the Court of Justice.

K- Relationship between the EU Charter and other instruments

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

In contrast with what is provided in Article 52, paragraph 3 of the Charter, regarding rights corresponding to rights guaranteed by the ECHR, the Charter contains no rule that requires specific interpretation in such a case. It might however be assumed that the Court would, as far as possible, give the corresponding provisions of the Charter the same meaning as, and in any event draw upon, the relevant agreements¹¹⁴.

2010, Sayn-Wittgenstein, C-208/09, not yet published in the Reports, para. 52 and DEB Deutsche Energiehandels- und Beratungsgesellschaft, cited above, paras. 45 to 51.

It should also be mentioned that even before the entry into force of the Charter and Article 52, paragraph 3 thereof, the Court of Justice examined and followed the case law of the European Court of Human Rights. See, for example, Judgments of 14 February 2008, Varec, C-450/06, Rep. p. I-581, paras. 46 to 48; 28 June 2005, Dansk Rørindustri et al./Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Rep. p. I-5425, paras. 66, 69 to 71, 202 and 215 to 216, and 1 July 2008, Chronopost and La Poste/UFEX et al., C-341/06 P and C-342/06 P, Rep. p. I-4777, paras. 44 to 46 and 59.

¹¹⁴ See, in this context, Judgments of 10 January 2006, IATA and ELFAA, C-344/04, Rep. p. I-403, paras. 41 to 48; 22 December 2008, Wallentin-Hermann, C-549/07, Rep. p. I-11061, paras. 28 to 33.

It should also be noted that the agreements concluded by the Union, in accordance with Article 216, paragraph 2, TFEU, are binding on the organs and the Member States. According to the case law of the Court of Justice, such agreements have primacy over secondary legislation (Judgments IATA and ELFAA, cited above, para. 35; 3 June 2008, Intertanko et al., C-308/06, Rep. p. I-4057, para. 42). As for their

relationship to primary law, while there is no actual case law directly on point, the obligations under an international agreement cannot have the effect of undermining the constitutional principles of the EC Treaty in any event (Judgment Kadi and Al Barakaat International Foundation/Council and Commission, cited above, para. 285).

ANNEX

1. Judgment of 10 December 2009, Rodríguez Mayor et al., C-323/08, Rep. p. I-11621, Article 51, paragraph 1 (implicit reference), employment law, collective dismissals, directive 98/59.
2. Judgment of 23 December 2009, Detiek, C-403/09 PPU, not yet published in the Reports, Article 24, paragraph 3, judicial cooperation in civil matters, regulation 2201/2003.
3. Judgment of 19 January 2010, Küçükdeveci, C-555/07, not yet published in the Reports, Article 21, employment law, equal treatment in employment and the workplace, directive 2000/78.
4. Judgment of 2 March 2010, Salahadin Abdulla, C-175/08, C-176/08, C-178/08 and C-179/08, not yet published in the Reports, general reference to the Charter, refugee status, directive 2004/83.
5. Judgment of 4 March 2010, Chakroun, C-578/08, not yet published in the Reports, Article 7, immigration, right to family life, directive 2003/86.
6. Judgment of 18 March 2010, Alassini, C-317/08 to C-320/08, not yet published in the Reports, Article 47, electronic communications, compulsory attempts to settle out of court, directive 2002/22.
7. Judgment of 1 June 2010, Blanco Pérez and Chao Gómez, C-570/07 and C-571/07, not yet published in the Reports, Article 35, freedom of establishment, Article 49 TFEU.
8. Judgment of 17 June 2010, Bolbol, C-31/09, not yet published in the Reports, general reference to the Charter, refugee status, directive 2004/83.
9. Judgment of 22 June 2010, Melki, C-188/10 and C-189/10, not yet published in the Reports, general reference to the Charter, institutional law, preliminary reference, Article 267 TFEU.
10. Judgment of 1 July 2010, Knauf Gips/Commission, C-407/08 P, not yet published in the Reports, Articles 47 and 52, paragraph 1, competition law.
11. Judgment of 1 July 2010, Povse, C-211/10 PPU, not yet published in the Reports, Art. 24, paragraph 3, judicial cooperation in civil matters, regulation 2201/2003.
12. Judgment of 15 July 2010, Commission/Germany, C-271/08, not yet published in the Reports, Articles 28 and 52, paragraph 6, markets in public services.
13. Judgment of 29 July 2010, Commission/Austria, C-189/09, not yet published in the Reports, Article 8, electronic communications, data protection.
14. Judgment of 8 September 2010, Winner Wetten, C-409/06, not yet published in the Reports, Article 47, freedom of establishment and freedom to provide services, Articles 43 and 49 EC.

15. Judgment of 14 September 2010, Akzo Nobel Chemicals and Akcros Chemicals/Commission et al., C-550/07 P, not yet published in the Reports, Articles 20, 21 and 48, paragraph 2, competition law.
16. Judgment of 16 September 2010, Chatzi, C-149/10, not yet published in the Reports, Articles 20, 24 and 33, paragraph 2, employment law, right to parental leave, directive 96/34.
17. Judgment of 5 October 2010, McB., C-400/10 PPU, not yet published in the Reports, Articles 7, 24, paragraphs 2 and 3, 51, paragraphs 1 and 2, and 52, paragraphs 1 and 3, judicial cooperation in civil matters, regulation 2201/2003.
18. Judgment of 7 October 2010, Lassal, C-162/09, not yet published in the Reports, Article 45, free movement of persons, directive 2004/38, right of permanent residence.
19. Judgment of 14 October 2010, Fuß, C-243/09, not yet published in the Reports, Article 47, employment law, health and safety of workers; working time, directive 2003/88.
20. Judgment of 9 November 2010, Volker and Markus Schecke, C-92/09 and C-93/09, not yet published in the Reports, Articles 7, 8, paragraphs 1 and 2, 52, paragraphs 1 and 3, and 53, common agricultural policy, data protection.
21. Judgment of 9 November 2010, B, C-57/09 and C-101/09, not yet published in the Reports, general reference to the Charter, refugee status, directive 2004/83.
22. Judgment of 11 November 2010, Danosa, C-232/09, not yet published in the Reports, Article 23, employment law, health and safety of pregnant workers, directive 92/85.
23. Order of the President of the Sixth Chamber of the Court of 11 November 2010, Vino, C-20/10, not yet published in the Reports, Articles 20, 21 and 51, paragraphs 1 and 2, employment law, framework agreement on fixed-term contracts.
24. Order of 12 November 2010, Asparuhov Estov et al., C-339/10, not yet published in the Reports, Articles 47 and 51, paragraph 1, Article 92 of the Rules of Procedure of the Court, manifest lack of jurisdiction.
25. Judgment of 23 November 2010, Tsakouridis, C-145/09, not yet published in the Reports, Article 7, free movement of persons, removal measures, directive 2004/38.
26. Judgment of 22 December 2010, Aguirre Zarraga, C-491/10 PPU, not yet published in the Reports, Article 24, judicial cooperation in civil matters, regulation 2201/2003.
27. Judgment of 22 December 2010, Gavieiro Gavieiro, C-444/09 and C-456/09, not yet published in the Reports, Article 47, employment law, directive 1999/70, framework agreement on fixed-term contracts.
28. Judgment of 22 December 2010, DEB Deutsche Energiehandels-und Beratungsgesellschaft, C-279/09, not yet published in the Reports, Articles 47, 51, paragraph 1, and 52, paragraphs 3 and 7, right of access to the courts.

29. Judgment of 22 December 2010, Sayn-Wittgenstein, C-208/09, not yet published in the Reports, Articles 7 and 20, European citizenship.
30. Order of the President of the Fifth Chamber of the Court of 1 March 2011, Chartry, C-457/09, not yet published in the Reports, Articles 47 and 51, paragraph 1, institutional law, reference for a preliminary ruling, Article 234 EC.
31. Judgment of 1 March 2011, Association Belge des Consommateurs Test-Achats et al., C-236/09, not yet published in the Reports, Articles 21 and 23, equal treatment of men and women, directive 2004/113.
32. Judgment of 17 March 2011, Penarroja, C-372/09 and C-373/09, not yet published in the Reports, Article 47, freedom of establishment and freedom to provide services, Articles 43 and 49 EC.
33. Judgment of 17 March 2011, AJD Tuna, C-221/09, not yet published in the Reports, Articles 41 and 47, fisheries policy.
34. Judgment of 29 March 2011, ThyssenKrupp Nirosa (formerly ThyssenKrupp Stainless)/Commission, C-352/09 P, not yet published in the Reports, Article 49, paragraph 1, competition law.
35. Judgment of 5 May 2011, Deutsche Telekom, C-543/09, not yet published in the Reports, Article 8, paragraphs 1 and 2, electronic communications, directives 2002/22 and 2002/58, data protection.
36. Judgment of 5 May 2011, McCarthy, C-434/09, not yet published in the Reports, Article 45, free movement of persons, citizenship, article 21 TFEU, directive 2004/38.
37. Judgment of 12 May 2011, Runevi-Vardyn and Wardyn, C-391/09, not yet published in the Reports, Articles 7, 21 and 22, free movement of persons, citizenship, Articles 18 and 21 TFEU, directive 2000/43.
38. Order of 23 May 2011, Rossius, C-267/10 and C-268/10, not yet published in the Reports, Article 51, paragraph 1, Article 92 of the Rules of Procedure of the Court, manifest lack of jurisdiction.