



Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

ACA-Europe

Raad
van State

With the collaboration of the Council of State of The Netherlands

Implementation of the Charter of Fundamental Rights of the European

Presentation and questionnaire

De HAAG

- 24 november 2011 -
(Simultaneous interpretation French/English)

Seminar organised with the support of the European Commission

1. Seminar on the Charter of Fundamental Rights

A. Introduction

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

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

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

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

For national courts in the member states, this means that the EU Charter must be applied in disputes, provided the conditions governing such application are met. To gain a better insight into the consequences that follow from this and to create a body of knowledge concerning the interpretation of the Charter, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union ('ACA-Europe') has decided to hold a seminar on its significance for the administration of justice in the member states. The seminar will take the form of an expert meeting, i.e. the number of participants will be limited and they will all be expected to be well versed in EU law and the Charter. The results of the seminar will be used for the colloquium on the EU Charter to be organised in 2012 by the Spanish president. All members of ACA-Europe can participate in the colloquium.

B Formulation of questions and aims

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

The following themes are relevant in answering these questions:

- a. the scope *ratione temporis* of the EU Charter;
- b. the scope *ratione materiae* of the EU Charter (implementation of EU law);
- c. the question of review *ex officio* in the light of the EU Charter;
- d. the distinction between rights and principles in the EU Charter;
- e. the direct effect of the EU Charter;

¹ OJ EU 18 December 2000, C 364.

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

- f. methods for interpreting the EU Charter;
- g. the relationship between the EU Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 'constitutional traditions' of the member states and instruments other than the ECHR.

The aim of the seminar is to exchange information and experiences relating to the working of the Charter in practice. To this end, an inventory of experience to date in the member states is needed, based on the answers to this questionnaire.

C. Structure of questionnaire and deadline for replies

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

Your answers should be sent by email to Aniel Pahladsingh (a.pahladsingh@raadvanstate.nl) or Hanneke Luijendijk (j.luijendijk@raadvanstate.nl) by *Friday 10 June 2011* at the latest. If after this date new judgments concerning the EU Charter are handed down in your country or if new proceedings are instituted, please let us know, once again by email.

2. Questionnaire

A– General

1. In how many cases before your court and other administrative courts in your country has the EU Charter been at issue since 1 December 2009?
2. Which provisions of the EU Charter were at issue in these cases?
3. In which areas of law in particular does the EU Charter play a role?
4. Has your court or another administrative court in your country recently asked the European Court of Justice (ECJ) for a preliminary ruling, which has not yet been published on the ECJ website, concerning the interpretation of a provision of the EU Charter? If so, give a brief description of the content of the reference.

B– Scope *ratione temporis*

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

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

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

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

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

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

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

Category 2 – Departure from a fundamental economic freedom

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

Category 3 – a ‘binding factor’ in relation to Union law

The third category of situations falling within the scope of Union law are those in which the ECJ considers some kind of link with Union law to be present, as a result of which the situation (action taken by member state/national legislation) falls within the

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

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

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

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

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

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

scope of Union law and the fundamental rights it guarantees become applicable.⁹ This category of situations, however, has by no means been clearly formulated in ECJ case law.

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?

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

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

E– Distinction between rights and principles

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

Article 51, paragraph 1 reads as follows:

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

Article 52, paragraph 5 reads as follows:

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

According to the Explanation accompanying article 52, paragraph 5,

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

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

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

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?

F- Scope and interpretation of rights and principles

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

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

G- Direct effect

14. Has the EU Charter been transposed into your national law, in full or in part, or via reference? If so, please state whether this also applies to the ECHR.
15. Are the rights contained in the EU Charter directly applicable in your country? If so, which provisions already have direct effect?
16. What criteria do your national administrative courts apply in determining whether a provision of the EU Charter has direct effect?
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.)?
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?

H- Interpretation methods

Explanations of the Charter were published when the EU Charter was proclaimed.¹¹ The ECJ judgment of 22 December 2010 in the case of DEB Deutsche Energiehandels- und

¹¹ OJ EU 14 December 2007, C 303.

Beratungsgsgesellschaft mbH (case C-279/09, paragraph 32) confirmed that in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the Explanation have to be taken into consideration for the interpretation of the Charter.

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

I– Relationship between EU Charter and ECHR

Article 52, paragraph 3 of the EU Charter reads: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

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

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

21. In cases where the text of the ECHR and the EU Charter is identical, do your national administrative courts apply the ECHR and/or the Charter?
22. What role does the case law of the European Court of Human Rights (ECtHR) play in the interpretation of the EU Charter?

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

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

According to the Explanation accompanying article 52, paragraph 4, rather than following a rigid approach based of ‘a lowest common denominator’, the Charter rights in question should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

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

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

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)?
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?

K– Relationship between the EU Charter and other instruments

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

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

L– Other

27. Is there a structure in your member state for consultation between administrative courts on EU law issues to ensure that interpretations are uniform? Would you like to see a similar structure at the level of ACA-Europe?
28. Do you have any other questions or comments on the EU Charter which have not been addressed in this questionnaire?

**Judgments/orders of the European Court of Justice relating to the EU Charter
(1 December 2009 – 16 March 2011)**

- ECJ 19 January 2010, case C-555/07, Küçükdeveci (article 21 EU Charter)
- ECJ 4 March 2010, case C-578/08, Chakroun (article 7 EU Charter)
- ECJ 1 July 2010, case C-407/08/P, Knauf Gips/Commission (article 47 EU Charter)
- ECJ 16 September 2010, case C-149/10, Chatzi (articles 20 and 33, paragraph 2, EU Charter)
- ECJ 5 October 2010, case C-400/10 PPU, J. McB (articles 7, 24 and 51 EU Charter)
- ECJ 7 October 2010, case C-162/09, Lassal (article 45 EU Charter)
- ECJ 14 October 2010, case C-243/09, Günther Fuß (article 47 EU Charter)
- ECJ (order) 12 November 2010, case C-339/10, Estov (article 51 EU Charter)
- ECJ 9 November 2010, cases C-92/09 and C-93/09, Schecke et al. (articles 7 and 8 EU Charter)
- ECJ 11 November 2010 (order), case C-20/10, Vino (article 51 EU Charter)
- ECJ 22 December 2010, case C-208/09, Sayn Wittgenstein, (article 20 EU Charter)
- ECJ 22 December 2010, case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH (article 47 EU Charter)
- ECJ 22 December 2010, case C-491/10 PPU, Zarraga (article 24 EU Charter)
- □ECJ EU 1 March 2011, case C-236/09, Association belge des Consommateurs Test-Achats ASBL (articles 21 en 23 EU Charter)
- ECJ 17 March 2011, case C-221/09 , AJD Tuna Ltd, (articles 41 and 47 EU Charter)