Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union
Seminar on the Charter of Fundamental Rights, 24 November 2011

Answers to the Questionnaire

***Questions**:*

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.

Answer:

i) The judicial control of administrative acts is performed by two Supreme Courts, the Verfassungsgerichtshof (Constitutional Court, **VfGH**) and the Verwaltungsgerichthof (Administrative Court, **VwGH**). Each court has its specific controlling angle: the VfGH checks the constitutionality[1], the VwGH the (general) legality of an opposed act[2]. As legality comprises the question of conformity with Union law, an important burden for its application is within the duties of the VwGH. Both courts are courts of cassation, their decisions do not replace administrative acts, they only quash the act or dismiss the complaint. It is in the hands of the affected party to challenge an administrative act either simultaneously before both courts or only before one court; a complaint solely lodged with the VfGH can be referred to the VwGH in cases where the VfGH dismisses the complaint (on formal or material grounds). The VwGH is also competent for complaints for breach of the onus to take a decision by administrative authorities[3].

The third Court competent to control administrative acts is the Asylgerichtshof (Asylum Court, **AsylGH**). The AsylGH pronounces judgement on decisions of the administrative authorities in asylum cases and on complaints on the grounds of breach of the onus to take a

[1] Art 144 of the Federal Constitutional Law.
[2] Art 131 of the Federal Constitutional Law.
[3] Art 132 of the Federal Constitutional Law.

decision in asylum cases[4]. A complaint against decisions of the AsylGH can be filed with the VfGH (which checks the constitutionality[5]) but not with the VwGH. The VwGH only controls principal decisions (Grundsatzentscheidungen) of the Asylum Court[6].

ii) Since 1 December 2009 references to the EU Charter (EC) can be found in about dozen decisisons oft the VwGH. Particularly at issue were questions concerning legal protection (Art. 6 European Convention on Human Rights [ECHR], Art. 47 EC, legal protection clauses in Directives).

a) In autumn 2010 the VwGH decided in several cases[7] concerning the environmental impact assessment for projects in the field of railway-construction, that the legal protection clause in Art 10a of the Directive on the assessment of the effects of certain public and private projects on the environment[8] demands the possibility to appeal the administrative decision of the Federal Minister before the independent Environmental Senate (Umweltsenat) before the lodging of a complaint with the VwGH. The Austrian law on environmental impact assessment does not provide for such an appeal, the tribunal is competent for environmental impact assessments excluding projects of infrastructure. Environmental impact assessment cases in general involve complex questions of fact, which need to be discussed and clarified usually on the basis of conflicting expert opinions. This clarification is only possible before the tribunal which has full jurisdiction concerning the law and the facts. In contrast the control exercised by the VwGH concentrates on questions of law, concerning facts the VwGH only controls the conclusiveness but not the trueness of the establishment of facts. The VwGH's decision deems to be in line with the Judgement of the European Court of Human Rights (ECtHR) in the Zumtobel-Case[9], where the ECtHR (in confining itself as far as possible to examining the question raised by the case before it) held it under the view of Art 6 ECHR sufficient that the VwGH considered the submissions concerning the facts point by point on their merits, as the VwGH held such an environmental impact assessment case being too complex to limit judicial control to the point by point approach. The VwGH based the reasoning explicitly on the said Art 10a and not on Art 47 EC, furthermore (in particular) on the principle of effective judicial protection (referring to the Allassini-Judgement[10]), on the

[4] Art 129c of the Federal Constitutional Law (B-VG).
[5] Art 144a of the Federal Constitutional Law.
[6] Art 132a of the Federal Constitutional Law; up to now no cases have been lodged with the VwGH.
[7] VwGH 30.9.2010, 2010/03/0051,0055; VwGH 30.9.2010, 2009/03/0067; VwGH 21.10.2010, 2010/03/0059.
[8] Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, 85/337/EEC, OJ L 175, 5.7.1985, p. 40, as amended on Council Directive 97/11/EC of 3 March 1997(OJ L 73 5 14.3.1997), Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ L 156 17 25.6.2003).
[9] ECHR 21.9.1993, 28/1992/323/447 (in particular para 32).
[10] ECJ 18.3.2010, Allassini, C-317/08, para 61 (referring to Art 6 and 13 ECHR and Art 47 EC).

guarantee concernnig effective participation in environmental decision-making procedures for the public concerned (referring to the Djurgarden-Judgement[11]) and on the principle that the procedural rules governing actions relating to a breach of Community law must not be less favourable than those governing similar domestic actions (referring inter alia to the Dounias-Judgement[12]). From the Kücüdeveci-Judgement[13] the VwGH derived that the said Directive brings the Austrian law on environmental impact assessment within the scope of European Union law (in den "Anwendungsbereich des Unionsrechts"). Concerning the point by point approach the VwGH referred to the Wilson Judgement[14] according to which a court limited to questions of law does not have full jurisdiction.

These decisions were criticised heavily by academics[15].

On the parliamentary level in response toVwGH's Decision 2010/03/0051 a bill was recently introduced by Members of the National Council to establish a special appeal tribunal competent for environmental impact assessment concerning projects of infrastructure (Infrastruktursenat)[16]; according to the explanatary note this is required by the principle of legal certainty in the field of railway construction.

The Austrian Constitutional Court (VfGH) controlling an adminstrative decision of the Federal Minister on the restitutio in integrum [means of redress available to an applicant who has failed to meet a time limit in spite of exercising all due care required by the circumstances] regarding the time limit for filing the appeal before the Umweltsenat based on the decisison of the VwGH did not share the view taken by the VwGH and quashed the administrative decision on the reinstatement[17].

As a consequence the independent Environmental Senate (Umweltsenat) dismissed the appeal against the administrative decision of the Federal Minister filed before the Environmental Senate on the basis of the decisisons of the VwGH mentioned above.

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[11] ECJ 15.10.2009, Djurgården-Lilla Värtans Miljöskyddsförening, C-263/08, para 36 (regarding Art 6 para 4 of the Directive on the assessment of the effects of certain public and private projects on the environment).
[12] ECJ 3.2.2000, Dounias, C-228/98, ECR I-577, para 58, 69.
[13] ECJ 19.1.2010, Kücükdeveci, C-555/07, para 25.
[14] ECJ 19.9.2006, Wilson, C-506/04, para 61.
[15] *Wiederin*, wbl 2011, 53, 56 f; *Altenburger/N. Raschauer*, Was folgt auf „Angerschlucht“ und „Brenner-Basistunnel“?, RdW 2011, 130; *Potacs*, Kein EU-Rechtschutz durch den österreichischen Verwaltungsgerichtshof?, ZÖR 2011, 119; *Mader*, Effektiver gerichtlicher Rechtsschutz, Anwendungsvorrang und zuständige gerichtliche Kontrollinstanz, ZfV 2011, 1; *Kneihs*, VwGH 2010/03/0051 und andere vom 30. September 2010 – kritische Anmerkungen, ZfV 2011, 147.
[16] Antrag der Abgeordneten …. betreffend ein Infrastruktursenat-Einführungsgesetz, 16.6.2011, 1614/A, XXIV. GP (the Members belong to the political parties forming the Federal Government; by reference to the decision of the VfGH 28.6.2011 the competent Federal Minister holds the installation of this tribunal being no longer required).
[17] VfGH 28.6.2011, B 254/11.

After this the railway company filed an application with the VfGH for a decision of the negative conflict of competence between the VwGH and the Environmental Senate. The VfGH (Decision 26.09.2011, KI-1/11) pronounced, that the VwGH is competent to decide (directly) on the administrative decision of the Federal Minister concerning the environmental impact assessment. Already prior to that the VwGH followed the line taken by the VfGH in a case concerning road construction[18].

b) In a case concerning a complaint for breach of the onus to take a decision against the Minister for Science and Research the VwGH decided that the principle of effective judicial protection does not require to shorten the period of time open for the Minister to take her decision; the party has rather to file the applications with the Minister in due time to allow the Minister to observe the time limit of six month according to the Austrian General Administrative Procedure Act [19]. In this case the party (a university professor) challenged the Austrian regulation of the age of retirement to be in contradiction with the prohibition on age discrimination under EU law. Moreover the VwGH did not follow the party's application for an interim measure to prolong against the Austrian law the employment as an active university professor[20].

c) The VwGH denied an interim measure in the field of banking law (a manager was decided not to reliable) stating that Art 47 EC does not change the requirement of fumus boni iuris for such a measure[21].

iii) A recent amendment to the Austrian law on foreigners[22] establishes the competence of the independent administrative tribunals in the Laender for the return decisions concerning asylum seekers under the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals[23]. The amendment entered into force as from 1st of July 2011. The explanatory note (comprising no reference to VwGH's Decision 2010/03/0051) held the legal protection clause in Art 13 of the Directive[24] as direct applicable and in connection with Art 47 EC the competence of the tribunals as necessary.

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[18] VwGH 24.8.2011, 2010/06/0002.
[19] VwGH 16.9.2010, 2010/12/0126.
[20] VwGH 13.10.2010, 2010/12/0169.
[21] VwGH AW 2010/17/0015.
[22] Fremdenrechtsänderungsgesetz 2011, BGBl I Nr. 38/2011 (cf. § 9 Abs 1a des Fremdenpolizeigesetzes 2005).
[23] Directive 2008/115/EC of the European Parliament and oft he Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[24] The text of Art 13 is similar to Art 10a of the Directive on the assessment of the effects of certain public and private projects on the environment.

Based on the considerations in the explanatory note the VwGH decided, that this competence is already applicable since 24 December 2010, because by this date the Member States of the EU had to bring in line their legal systems with the Directive[25].

iv) In a decision dealing with Article 4 of Protocol No. 7 of the ECHR (right not to be tried or punished twice) the VfGH referred in its reasoning to Art 50 EC[26] already before 1 December 2009.

The AsylGH recently asked the ECJ for a preliminary ruling[27] concerning the meaning of provisions of the Regulation No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national[28]. Inter alia it rose the question whether Art 3 para 2 of the Regulation is in line with Art 3 resp. Art 8 ECHR and Art 4 and Art 7 EC.

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)?

Answer:

[25] VwGH 31.5.2011, 2011/22/0097.
[26] VfGH 2.7.2009, B 559/08.
[27] AsylGH 20.5.2011, S 13 400.904-1/2008/15E.
[28] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (JO L 50, 25.2.2003, p. 1), as amended on Regulation (EC) No 1103/2008 of the European Parliament and of the Council of 22. October 2008 (JO L 304, 14.11.2008, p. 80)

Before 1 December 2009 the VwGH in several decisions – answering to the explicit reference of parties to the EC – did not apply the EC of 2000[29].

But the VwGH in some decisions observed the fundamental rights in line of Art 6 Para 3 of the Treaty on European Union (EUT). Direction to this praxis gave the way the ECJ applied the fundamental rights in the field of EU-law. Based thereon the VwGH analyzed in particular the case law of the ECtHR and the ECJ (which in general reflects in its decisions the ECHR, the jurisprudence of the ECtHR or the European Social Charter [ESC]). A lot of cases decided by the VwGH concern the right to a fair trail (Art 6 ECHR)[30] (in particular question in connection with the independence and impartiality of a tribunal), other cases concern the principle of equal treatment developed by the ECJ[31].

The VwGH also clarified that the case law of the VfGH confining the right to a fair trial in the field of civil rights and obligations to the core area of civil law – in particular the Austrian Civil Code – is (because of the referendum changing the principles of the Austrian Federal Constitutional Law) not relevant for the application of the EU-law[32].

Decisions taken by administrative authorities applying EU-law on 1 December 2009 and later have to pay regard to the EC, before that date such decisions had to respect the fundamental rights in line with Art 6 Para 3 EUT.

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] 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.
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enforcement of Regulations;[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-

[29] E.g. VwGH 5.4.2002,2002/18/0021, VwGH 26.6.2003, 2001/18/0191, VwGH 23.11.2005, 2004/09/0150.
[30] Cf. for instance VwGH 15.12.2003, 99/03/0423; VwGH 20.7.2004, 2003/03/0103; VwGH 24.6.2009, 2007/05/0101; VwGH 8.10.2010, 2007/04/0134.
[31] E.g. VwGH 29.1.2004, 99/17/0135; VwGH 20.12.2006, 2005/08/0057 [(based on a decision of the ECJ with a reference to the ESC)]; VwGH 25.5.2011, 2007/08/0035.
[32] VwGH 20.7.2004, 2003/03/0103.

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.
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enforcement of other secondary law (for example Decisions);
enforcement of primary law;[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.
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application of EU rules;[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.
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the application of general principles of Union law.[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.
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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] Case C-260/89, ERT, ECR 1991, p. I-2925, paragraphs 42-45.
8 the Court held that if a member state relies on imperative grounds (such as public policy, public security or public health) to justify a statutory provision which is likely to obstruct the exercise of the freedom to provide services, such justification, provided by Community (now Union) law must be interpreted and applied in the light of general principles of law and of fundamental rights.

Category 3 – a 'binding factor' in relation to Union law
The third category of situations falling within the scope of Union law are those in which the ECJ considers some kind of link with Union law to be present, as a result of which the situation (action taken by member state/national legislation) falls within the scope of Union law and the fundamental rights it guarantees become applicable.[9] 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.
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?

Answer:

The VwGH saw (as already mentioned) no problem to include the implementation of Directives in applying the fundamental rights of the EU[33].

Up to now, however, there were no cases decided by the VwGH which declare that under Art 51 EC the aforementioned categories are included.

[33] Cf. e.g. VwGH 30.9.2010, 2010/03/0051,0055 (referring to the Kücükdeveci-Judgement).

But as the VwGH already included the implementation of Directives there is no indication that the VwGH – on the basis of the case law of the EC – would not follow a comprehensive approach.

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

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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 ?

Answer:

In cases concerning the control of the lawfulness of administrative rulings the VwGH on the basis of § 41 of the Administrative Court Act 1985 (VwGG) shall review the contested ruling of an administrative authority on the grounds of the facts assumed by the authority within the scope of the claims submitted by the petitioner (definition of the right he or she considers having been violated [points of complaint[34]]). Concerning this definition the case law of the VwGH – although showing some scope for decision-making – requests the claim of violation of a concrete right but not the citation of a specific legal provision (thus with regard of the EC it may be sufficient for a petitioner to consider a violation of fundamental rights). The points of complaint determine the matter in dispute.

Within this scope the VwGH is not bound by the legal arguments on which the claim of unlawfulness is based by the petitioner. These arguments (reasons) form a second element of the petitioner's submissions required by the VwGG[35]. Therefore within this scope the VwGH is competent to examine the compatibility of an administrative ruling with the EC even without such a claim.

In cases of complaints for breach of the onus to take a decision by administrative authorities[36] the VwGH in establishing the facts is free to arrange for the investigation proceedings necessary to ascertain the relevant facts or have them investigated by court or

[34] § 28 para 1 nr 4 VwGG.
[35] § 28 para 1 nr 5 VwGG.
[36] Art 132 of the Federal Constitutional Law.

administrative authorities to be determined at its discretion[37]. In such cases the VwGH in general has to establish the facts and apply the law (including the EC) ex officio.

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. 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?

[37] § 41 para 2 and § 36 para 9 VwGG.

Answer:

i) In Austrian constitutional law some leading (basic) principles (developed by the VfGH and academic jurisprudence on the basis of the Federal Constitutional Law[38]) form the primary layer of the Constitution (principle of democracy, principle of federalism, republican principle, rule of law, separation of powers, liberal principle [human rights and freedoms])[39]. The violation of such a principle has the same effect as the infringement of a provision of constitutional law or a constitutional right respectively.

In the field of constitutional law furthermore exist constitutional provisions with binding force only for the state authorities concerning implementation by legislation and observance by interpreting legal provisions (Staatszielbestimmungen). So e.g. the Republic of Austria (Federation, Laender and municipalities) acknowledges its responsibility for the comprehensive protection of the environment[40], the Republic (Federation, Laender and municipalities) subscribes to its linguistic and cultural diversity expressed in the autochthonous ethnic groups[41], the Republic (Federation, Laender and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of every-day life[42], the Federation, Laender and municipalities subscribe to the de-facto equality of men and women[43], and Austria subscribes to comprehensive national defence[44].

The case law of the VfGH and the VwGH[45] makes clear that such constitutional provisions may give guidance for the interpretation of other legal provisions. If a legal provision is not applied in line with such a constitutional provision this may constitute a violation of the legal provision.

ii) At present no case law of the VwGH exists in connection with the distinction of rights and principles in the EC. Thus it is not possible to describe how the VwGH handles the aforementioned legal problems originating from this distinction.

However one can imagine that the VwGH would make use of the experiences gained in the field of the application of Staatszielbestimmungen, and (with respect to Art 52 para 5

[38] Cf. Art 44 para 3 of the Federal Constitutional Law.
[39] Cf. Mayer, B-VG, 2007, 4th ed., Art 44, II; Oehlinger, Verfassungsrecht, 8th ed., 2009, No. 62 et seqq; Hausmaninger, The Austrian Legal System, 4th ed., 2011, p. 20 et seqq.
[40] Federal Constitutional Act for comprehensive protection of the environment, BGBl. Nr. 491/1984.
[41] Art 8 para 2 of the Federal Constitutional Law.
[42] Art 7 para 1 of the Federal Constitutional Law.
[43] Art 7 para 2 of the Federal Constitutional Law.
[44] Art 9a of the Federal Constitutional Law.
[45] E.g. VfGH 8.10.1990, G323/98, V112/98; VfGH 12.6.2008, B1085/07; VfGH 11.6.2010, B450/09; VwGH 25.1.1996, 95/07/0230; VwGH 28.3.2006, 2003/03/0177.

EC) the VwGH would interpret legal (Austrian and EU-) provisions in line with principles enshrined in the EC.

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?

Answer:

i) First of all up to now there is no jurisdiction of the VwGH in regard to these questions.

ii) For cases where the text of the EC follows the ECHR the provision of Art 52 para 3 EC indicates an understanding of the limitation clause in Art 52 para 1 EC which is in accordance with the ECHR (including its limitation clauses).

This leads to the conclusion that in such cases the economic freedoms under EU-law have to be taken into consideration in the framework of the restriction clause in Art 52 para 1 EC[46].

Art 52 para 3 EC points into the direction that the balancing between the rights under the EC and the economic freedoms should be based on the structure for the arguing enshrined in Art 52 para 1 EC. Even if (the other way round[47]) the arguing does not follow this structure but the concept of limitations to restrictions imposed on economic freedoms, the arguing along this approach should lead to a result in line with Art 52 para 3 EC.

[46] ECJ 12.6.2003, Schmidberger, C-112/00.
[47] ECJ 14.10.2004, Omega, C-36/02; ECJ 11.12.2007, International Transport Workers' Federation und Finnish Seamen's Union, C-438/05.

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?

Answer:

The EC was not transposed in Austrian law. The EC is applicable in Austria; provisions of the EC directly applicable under EU-law are directly applicable in Austria including direct effect (rights enshrined in the EC). The criteria for direct application and direct effect developed by the ECJ are relevant for the case law of Austrian courts and the decisions of administrative authorities. EC-provisions which are directly applicable have the same legal standing as rights enshrined in Austrian law, in addition such provisions have primacy in application concerning conflicting Austrian provisions[48]. Up to the present the VwGH has applied fundamental rights under EU-law (cf. Art. 6 para 3 EUT) following the full review-approach.

H– Interpretation methods

Explanations of the Charter were published when the EU Charter was proclaimed.[11]
11 OJ EU 14 December 2007, C 303.
The ECJ judgment of 22 December 2010 in the case of DEB Deutsche Energiehandels- und Beratungsgsgesellschaft mbH (case C-279/09, paragraph 32) confirmed that in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, the Explanation have to be taken into consideration for the interpretation of the Charter.

[48] Primacy in application of EU-law is effective also with respect to provisions of constitutional rank in the Austrian legal order, cf. e.g. VfGH 24.2.1999, B1625/98, VfGH 28.11.2003, KR1/00 et.al., VwGH 30.9.2010, 2010/03/0051,0055, (except the leading principles of the Austrian Constitution and blatant ultra-vires activities of EU institutions, cf. for instance Oehlinger, Verfassungsrecht, 8th ed., 2009, No. 156 et seqq, No. 191).

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?

Answer:

i) The VwGH pointed to the Explanations in the decision taken on 30.9.2010, 2010/03/0051 (already mentioned in section A), in order to clarify that the scope of Art 47 EC – being not confined to disputes relating to civil law rights and obligations – goes beyond the scope of Art 6 ECHR.

ii) Up to now Austrian courts and administrative authorities in applying Union law in general do not limit themselves to only one or a few of the interpretation methods mentioned in question 20. They mostly try to follow the interpretative approach demonstrated by the ECJ in the given legal context. For this reason the interpretation of Union law as well as national law often observes the purposive approach adopted by the ECJ; nevertheless concerning Austrian legal provisions courts and administrative authorities usually respect the limits given by the wording and apply other interpretation methods only within these limits.

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. 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.

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?

Answer:

i) Concerning question 21 the case law developed until now on the national level does not allow to take a firm stand. As *sedes materiae* for a right or principle enshrined in the EC being the respective provision of the EC, it is consequent to refer to the EC. As far as could be ascertained, the VwGH follows this approach[49]. The AsylGH in its recent request for a preliminary ruling[50] at the same time referenced the EC (Art 7) and the ECHR (Art 8).

ii) „The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union."[51] From this explanation it follows that the case law of the ECtHR is fundamental for the interpretation of provisions in the EC texted in line with provisions of the ECHR[52].

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.

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

[49] E.g. VwGH 30.9.2010, 2010/03/0051,0055.
[50] AsylGH 20.5.2011, S 13 400.904-1/2008/15E.
[51] Explanations of the Charter, OJ 14.12.2007, C 303, Explanation on Article 52.
[52] In its decision 2010/03/0051,0055 the VwGH referred to the Zumtobel-Judgement of the ECtHR in order to apply Art 6 ECHR as a human right in the sense of Art 6 para 3 EUT in the field of Union-law.

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?

Answer:

i) So far there has been no case law developed which in interpreting the EC explicitly refers to common constitutional traditions of the Member States.

ii) A central register as outlined in question 25 could be helpful for administrative courts. The same is true for the Forum for an exchange of views both on decisions and underlying constitutional problems (question 24).

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?

Answer:

Up to now in this respect there is no established practice developed the VwGH. Of importance seems to be the context of the Union-law in which such a provision exists. The same is true for a respective approach already taken by the ECJ.

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?

Answer:

A formal structure for consultation has not been established. Consultations – if they take place at all – are effected on an informal level.