Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

Seminar on the Charter of Fundamental Rights of the European Union
24 November 2011

Answers to the questionnaire

Council of State of Belgium

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Preliminary Observation

As will be explained below, the number of decisions in which Belgian administrative courts have applied the Charter of Fundamental Rights of the European Union is very low.

This report, therefore, cannot be taken as representing a real body of case law on these issues, as this is still work in progress.

It goes without saying that between now and the date of the seminar on 24 November 2011, other cases might be decided, which will be notified at once to the organisers and commented upon at the seminar, if necessary.

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?**

A.1.1. A review of the published case law of the Belgian Council of State (*Conseil d'État*) and other Belgian administrative courts shows only a very small number of decisions applying the Charter of Fundamental Rights of the European Union.

A.1.2. For the Council of State itself, prior to the entry into force of the Charter on 1 December 2009, three judgments were found, two of which involved the same case, the first

being a ruling on the application for suspension and the second on the application for annulment of the same measure[1].

For the same period, there was one judgment by the Council for disputes involving foreigners (*Conseil du contentieux des étrangers*, or CEE)[2].

A.1.3. for the period subsequent to 1 December 2009, only judgment No. 212.557 of 7 April 2011, in the case of *Ville de Wavre c. Commission de régulation de l'électricité et du gaz (CREG)*, can be mentioned where the Council of State is concerned, on an administrative sanction imposed by the CREG on the town of Wavre in its capacity as manager of the electricity distribution network in the territory of the commune.

The Council for disputes involving foreigners gave a judgment on 18 May 2010 which, in ruling on a decision of 2 February 2010 by the representative of the Secretary of State for Migration and Asylum Policy refusing residence to an applicant for refugee status and his family and ordering them to leave the territory, examined an argument based on the violation of the Charter of Fundamental Rights of the European Union, more particularly Article 24, paragraph 2 thereof[3].

A.1.4. It should however be pointed out that the courts in Belgium can also review the legality of administrative measures, both in a general sense in interlocutory proceedings by way of an objection based on illegality[4], and where a legislative provision provides for this by way of a derogation from the general jurisdiction of the Council of State, as for instance in most tax-related cases.

Thus, for example, the Court of First Instance of Namur, in a judgment of 24 March 2010[5], asked the Court of Justice of the European Union to rule on the question whether the right to public health, as protected by the Treaty on the European Union and the Charter of Fundamental Rights prevents a State from allowing the continued manufacture, import, promotion and sale in its territory of tobacco for smoking, while that same State officially recognises that those products are seriously harmful to the health of those who use them and are

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[1] These, in the same case, *a.s.b.l. Ligue des droits de l'homme et a.s.b.l. Coordination national d'action pour la paix et la démocratie*, were judgments No. 197.522 of 29 October 2009 (suspension) and No. 212.559 of 7 April 2011(annulment), on the decision by the Government of Wallonia to grant the company FN-Herstal licences to export weapons to Libya. The third decision is judgment No. 197.433 of 28 October 2009, concerning the limited liability cooperative *Pharmacies populaires liégeoises*, rejecting the application for annulment of the decision rejecting an application for the transfer of a dispensing pharmacy.

[2] C.C.E., No. 8945, 19 March 2008, partially reproduced in judgment No. 191.585 of 18 March 2009 of the Council of State.

[3] C.C.E., No. 43.462, 18 May 2010 (summary, *Tijdschrift Vreemdelingenrecht*, 2010, book. 3, p. 264, full text in Dutch on www.vreemdelingenrecht.be).

[4] Article 159 of the Constitution: "the courts shall only apply decrees and general rules, provincial and local, to the extent that they conform to the law".

[5] *Revue de jurisprudence de Liège, Mons et Bruxelles*, 2010, p. 997.

identified as the cause of a number of disabling illnesses and premature deaths, which, logically, would justify their prohibition. The same judgment asks the Court of Justice whether by treating tobacco manufactured for smoking as a taxable base for excise duties while, on the other hand, formulating the previous statement, the State is thus itself frustrating any genuinely dissuasive impact of the measures adopted to effectively stamp out smoking.

As a matter of information, in a field other than that of administrative disputes, but on issues also relevant to such disputes, the Court of Appeal of Ghent made the following statement with regard the right of access to the courts in a judgment of 21 March 2006[6]. It is of cardinal importance for public policy in private international law that a party should always in principle have the opportunity to go before the ordinary courts and the court of the authority. The fact of inflicting substantial financial sanctions on a party that has gone to the ordinary court, which upheld its claim, because it had refused an offer of informal settlement by the losing party, which afterwards turned out to be more favourable, appears to be contrary to that right of free access to the court of the authority, a right expressed, inter alia, in Article 13 of the Constitution […], which constitutes a general principle of law, so essential that it is a matter of public policy. This free access is also guaranteed by Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union of 7 December 2000. […] A foreign decision (of the United States in this case) that is based on violation of these principles cannot be enforced in this country, nor granted enforcement under Article 570 of the Judicial Code.

In the rest of the questionnaire, there will be no further mention of these court decisions, which fall outside the scope of the current research and the seminar.

A.1.5. Generally speaking, the judgments mentioned here deal only in a marginal sense with the Charter of Fundamental Rights of the European Union, incidentally to other instruments, such as, for example, where access to the courts is concerned, Article 6 of the European Convention on Human Rights or, where the rights of the child are concerned, Article 3 of the Convention on the Rights of the Child.

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

The articles of the Charter mentioned in the judgments found of the administrative courts strictly so called are the following:

- 15 (freedom to choose an occupation and right to engage in work) and 16 (freedom to conduct a business);

[6] *Nieuw juridisch Weekblad*, 2007, p. 322, note J. De Mot; *Tijdschrift voor Gentse rechtspraak*, 2006, book 3, p. 171; *Revue@dipr.be*, 2006, book 2, p. 51; http://www.dipr.be.

- 24, paragraph 2 (rights of the child);

- 47, second para. (right to a fair trial).

The two judgments of the Council of State mentioned above under No. A.1.2 (judgments Nos.197.522 of 29 October 2009 and 212.559 of 7 April 2011) in the same case refer to the Charter in a general manner, by reference to the values it contains relating to the defence of fundamental rights.

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

Given the small number of decisions handed down by the Belgian administrative courts, the answer to question No. A.3 can only be indicative, and cannot be taken as reflecting a general trend.

Subject to that reservation, it seems that the right of access to the courts and the right to a fair trial, guaranteed by Article 47 of the Charter, have the greatest potential for being applied by the Belgian administrative courts. This might well be explained by the fact that many aspects of the subject matter brought before the administrative courts and the Council of State fall outside the field of application of Article 6 of the European Convention on Human Rights, while Article 47 of the Charter does not have the same limits on its field of application as does the said Article 6.

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.**

No Belgian administrative court has asked the Court of Justice of the European Union for a preliminary ruling concerning the Charter of Fundamental Rights of the European Union.

Reference is made, however, to No. A.1.4 above, on a reference for a preliminary ruling by a Belgian court relating to the right to health care (Article 35 of the Charter).

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)?**

B.5.1. No judgment has expressly ruled on this question.

B.5.2. That said, by virtue of the general principles on the temporal application of rules of law, it seems that only facts occurring and acts done after 1 December 2099, the date the Charter of Fundamental Rights of the European Union entered into force, can be subject to the direct application of that instrument.

Thus, in judgment No. 8945 of 19 March 2008, the Council for disputes involving foreigners, referring to Order No. 1400 of 18 October 2007 of the Council of State, both of which dates were prior to 1 December 2009, took the view that the Charter was not an instrument binding on those subject to the law ("Het Handvest [is] geen bindend rechtsinstrument […]")[7].

B.5.3. The same Council for disputes involving foreigners, ruling in a judgment of 18 May 2010 on a measure taken after the entry into force of the Lisbon Treaty, examined an argument based among other things on violation of Article 24, paragraph 2 of the Charter of Fundamental Rights, on the rights of the child.

It took the view, however, that, like Article 3 of the Convention on the Rights of the Child, that provision had no direct effect and could not, therefore, be invoked:

> "While, by their explanations, the appellants seem to wish to rest their case on a violation of Article 3 of the Convention of 20 November 1989 on the Rights of the Child and Article 24, second paragraph of the Charter of Fundamental Rights of the European Union, the Council would observe that the provisions cited above, in spirit, content and terms, do not suffice, of themselves, to be applicable without the need for any other regulation to clarify and supplement them. These provisions are not clear, legally complete provisions that impose on the parties bound by the Convention on the Rights of the Child or the Charter an obligation to refrain from acting, or an obligation strictly so called to act, in a clearly defined way. Therefore, no direct effect may be attributed to these provisions. The appellants cannot, therefore, successfully invoke the direct violation of Article 3 of the Convention on the Rights of the Child or Article 24, second paragraph, of the Charter of Fundamental Rights of the European Union. Furthermore, it must be noted that the decisions challenged cannot be considered to be 'actions relating to children', so that it is in any event impossible to understand why the respondent should be obliged to include those provisions in its decision-making process"[8].

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[7] *Conseil du contentieux des étrangers* (hereeafter C.C.E.), No. 8945, 19 March 2008, reproduced in judgment No. 191.585 of 18 March 2009 of the *Conseil d'État*.

[8] C.C.E., No. 43.462, 18 May 2010, summary, *Tijdschrift Vreemdelingenrecht*, 2010, book 3, p. 264 (this summary is a free translation of the reasoning in 3.4.4.1 of this judgment (www.vreemdelingenrecht.be).

This analysis is not specific to the Charter, as, as we have just read, the examination covered the rights of the child as a whole under that instrument and under the New York Convention of 20 November 1989 itself.

B.5.4. That said, when the Council of State was called upon to take a procedural measure in a judgment given after 1 December 2009, which however concerned facts or an act prior to that date, it applied Article 47, second paragraph, of the Charter, in particular. A judgment of the Council of State of 7 April 2011 states as follows:

> "Whereas the second and sixth grounds are such as to result in an annulment more extensive in effect than do the grounds held well founded, above; whereas, however, their examination would require preliminary questions to be referred to the Constitutional Court; whereas to put such questions when there are other well founded arguments that will result in the total annulment of the measure challenged would unreasonably delay the proceedings when the case has a decisive impact on whether or not a criminal charge is justifiable within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights; whereas these provisions, as well as Article 47, second paragraph, of the Charter of Fundamental Rights of the European Union, determine the effects of Article 26 of the Special Law of 6 January 1989 on the Constitutional Court [9] in that the said article prohibits the putting of a preliminary question that is not necessary to solve the dispute; whereas there is no need to examine those arguments"[10].

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)?**

B.6.1. As explained above, under No. B.5.2, in judgment No. 8945 of 19 March 2008, the Council for disputes involving foreigners, referring to Order No. 1400 of 18 October 2007 of the Council of State, took the view that the Charter was not an instrument binding on those subject to the law ("Het Handvest [is] geen bindend rechtsinstrument […]")[11].

B.6.2. Other judgments, dealing with facts dating from prior to 1 December 2009, have applied the Charter, but only in a marginal way, in association with other provisions comparable in scope to the one invoked by the parties.

B.6.3. Thus, in Council of State judgments Nos. 197.522 of 29 October 2009 and 212.559 of 7 April 2011, cited above, in which the appellants, not-for-profit (*associations sans but lucratif*, or a.s.b.l.) *Ligue des droits de l'homme* and *Coordination national d'action pour la paix*

[9] Article 26 of the Special Law of 6 January 1989 on the Constitutional Court requires the courts in the Kingdom, including the Council of State, subject to exceptions that must be restrictively interpreted, to refer preliminary questions to the Constitutional Court whenever they are faced with an issue of constitutionality of a law.

[10] C.E., *Ville de Wavre*, No. 212.557, 7 April 2011.

[11] C.C.E., No. 8945, 19 March 2008, reproduced in judgment No. 191.585 of 18 March 2009 of the Council of State.

et la démocratie, questioned the decision of the Government of Wallonia to grant the company FN-Herstal licences to export weapons to Libya, the interest of the first of these associations was challenged by the respondent Government, which, in substance, took the view that the acts attacked did not produce effects in Belgian territory and therefore did not damage the social purposes of that association, which were defined too generally, with the result that the appeal had the appearance of a "*recours populaire*" not based on any real interest.

The association defended itself by invoking Article 3 of its statutes under which its purpose is to "combat injustice and all arbitrary infringements of the rights of an individual or a collectivity" and "defend the principles of equality, solidarity and humanism", basing these ideals on the Belgian Constitution and various international instruments, namely the Universal Declaration of Human Rights, the UN Covenants of 1966, the European Convention on Human Rights, the European Social Charter and also the Charter of Fundamental Rights of the European Union. The association also relied upon Article 4 of its statutes, which set out its links with international bodies defending human rights.

Basing itself on those provisions, but without singling out the Charter of Fundamental Rights of the European Union, the Council of State accepted that the association concerned had standing to act, in the following terms:

> "Whereas the line of argument made both in support of the admissibility of the appeal and of the second, third and fourth grounds of claim consists of maintaining that Libya is a country that does not respect human rights (2nd ground), encourages terrorism and organised crime (3rd ground), and might divert the weapons delivered to it to other countries (4th ground), so that the export of weapons to that country runs counter to the goals that the first appellant has committed to defend; whereas the statutory purpose of the first appellant is not limited to respect for human rights in Belgium but is part of an international cooperation network; whereas this purpose authorises it to intervene with the authorities, in particular in pursuing the annulment of decisions that might, outside the territory, damage fundamental rights; whereas this statutory purpose is, furthermore, limited to the defence of the values listed in Article 3 of the statutes and does not cover every form of illegality, so that this appeal is not a "recours populaire"; the appeal is admissible as pleaded by the first appellant".

B.6.4. In a case in which a dispensing pharmacy sought annulment from the Council of State of the refusal to allow it to transfer its place of establishment, it based itself on the freedom of trade and industry, the principle of proportionality, Articles 43 and 49 of the Treaty of Rome, Articles 81 et seq. of the Treaty of Rome taken together with Articles 3 and 10 of the same Treaty, and also Articles 15 and 16 of the Charter of Fundamental Rights of the European Union, maintaining that it had been deprived, in a way that was at least disproportionate, of the freedoms that those principles and instruments guaranteed. Articles 15 and 16 of the Charter enshrine professional freedom, the right to work in the occupation of one's choice and freedom to conduct a business.

This ground was rejected, but without any more specific examination of these last provisions. As can be seen from the extract reproduced below, it was, generally speaking, the admissible limitations on the freedoms of trade and industry that were taken into account:

> "Whereas the appellant alleges in vain that the decision challenged is against freedom of trade and industry, as that freedom is not absolute; whereas the regulations governing the siting of pharmacies liits its exercise in a way that is not disproportionate; whereas that ground is not well founded as it is based on the violation of that freedom;
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> Whereas the access of the population to pharmaceuticals specialists is closely linked to public health; whereas it is clear from the case law of the Court of Justice, from Article 152, paragraph 5, of the EC Treaty and from the twenty-sixth preambular paragraph of Directive 2005/36 of 7 September 2005 on recognition of professional qualifications that Community law does not undermine the powers of the Member States to arrange their social security systems and in particular to take measures intended to organise the health services such as pharmacies; whereas, however, in exercising that power, Member States must respect Community law, in particular the provisions of the Treaty on freedom of movement, including the freedom of establishment; whereas the said provisions prohibit Member States from introducing or maintaining unjustified restrictions on the exercise of these freedoms in the field of health care (see the judgments to that effect of 16 May 2006, Watts, C-372/04, Rep. p. I-4325, paras. 92 and 146, 10 March 2009, Hartlauer, C-169/07, not yet published, para. 29 and 19 May 2009, Apothekerkammer des Saarlandes, C-171/07);
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> Whereas, in assessing whether this obligation has been respected, account must be taken of the fact that people's health and life is foremost among the property and interests protected by the Treaty and that it is up to Member States to decide what level of protection of public health they will provide, and the manner in which that level must be reached; whereas, since that level may vary from one Member State to another, they should be allowed a margin of discretion (see judgments on these lines of 11 December 2003, Deutscher Apothekerverband, C-322/01, Rep. p. I-14887, para. 103; 11 September 2008, Commission/Germany, C-141/07, not yet published, para. 51, and 10 March 2009, Hartlauer, cited above, para. 30 and 19 May 2009, Apothekerkammer des Saarlandes, C-171/07);
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> Whereas, taken on the basis of Article 4 of royal decree No. 78 of 10 November 1967, the royal decree of 25 September 1974 lays down criteria for the appropriate spread of pharmacies open to the public, including a limitation on the number of pharmacies per commune and the number of inhabitants per commune;
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> Whereas, as established in the examination of the third ground, 'inhabitants', in the sense of Article 1, paragraph 3, of the royal decree of 25 September 1974, must be taken to mean person having permanent residence in an area or place in the vicinity of the proposed pharmacy, such that they would regularly buy their medicines from that pharmacy;

Whereas, by the provisions cited above, the opposing party[12] has exercised the discretionary power recognised by the Court of Justice; whereas the higher court is not bound to put the question once the Court of Justice has already answered it in an earlier judgment; whereas the preliminary questions put by the appellant are therefore superfluous; whereas, in addition, it is not for the Council of State to substitute its own interpretation of public health imperatives for that of the opposing party, except in the case of a manifest error of discretion, which has not been found here; the fourth ground is not well founded"[13].

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?**

C.7.1. The case law referred to above contains nothing that would permit a precise answer to this question.

C.7.2. The only judgment of the Council of State applying the Charter within the period starting on 1 December 2009 concerns an administrative sanction that could be characterised as penal within the meaning, inter alia, of Article 6 of the European Convention on Human Rights and for which, as explained above[14], the Council of State considered that the requirement of reasonable time made it inappropriate to refer a preliminary issue to the Constitutional Court.

The Charter of Fundamental Rights of the European Union was not relied on in that case as a principal argument, but to supplement Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights. The Council of State does not refer, either implicitly or explicitly, to the fact that the legislation applied "implements Union law", even though it concerned the regulation of the electricity market and the said legislation transposed a European directive, namely directive No. 96/92/EC of 19 December 1996 on common rules for the internal market in electricity[15].

The same observation could be made with regard to judgment No. 43.462 of 18 May 2010 of the Council for disputes involving foreigners, mentioned above[16], which links Article 24,

[12] The "opposing party" in Belgian administrative cases means the administration that is the respondent before the court.

[13] C.E., *s.c.r.l.* Pharmacies populaires liégeoises, No. 197.433, 28 October 2009.

[14] See No. B.5.4.

[15] C.E., *Ville de Wavre*, No. 212.557, 7 April 2011.

[16] See No. B.5.3.

paragraph 2 of the Charter with Article 3 of the Convention on the Rights of the Child without questioning whether the applicable legislation or regulation "implements Union law".

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 case law found does not give any precise indication on these questions.

Since respect for fundamental rights is a matter of public policy, it might nonetheless be assumed that a problem concerning the proper application of the Charter could be raised by the administrative court on its own motion.

Besides that, in the *Ville de Wavre* judgment of 7 April 2011, the Council of State itself, seemingly on its own initiative, raised Article 47, second paragraph, of the Charter in order to refuse to refer a preliminary question to the Constitutional Court.

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?**

Belgian law does not make any distinction comparable to the one in Articles 51 and 52 of the Charter of Fundamental Rights of the European Union between the "rights" and "principles" it proclaims.

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?**

The case law found does not operate the distinction between “rights” and “principles” proposed by Articles 51 and 52 of the Charter of Fundamental Rights of the European Union. This question therefore does not call for an answer.

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.)?**

For the reason given in the answer to question No. 10, this question does not call for an answer.

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?**

For the reason given in the answer to question No. 10, this question does not call for an answer.

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?**

The case law found does not offer any indication that would allow this question to be answered.

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**.

The Charter of Fundamental Rights of the European Union has not been transposed into domestic law by the legislator, apart, naturally, from the assent given by the Federal Parliament

and the federated entities to the Lisbon Treaty. That assent cannot be taken as a measure of "transposition", in the sense of the transposition of a directive.

No such "transposition" is necessary, by virtue of the principles in the Belgian legal system that govern the application of international treaty law and Community law, including primary law.

On 27 May1971, the *Cour de cassation*, in a judgment of principle that has become established jurisprudence and has been applied by the Council of State, took the following view:

> "Given that, even where the assent to a Treaty, required by Article 68, paragraph 2, of the Constitution[17], is given in the form of a law, in performing that act, the legislative power is not exercising a normative power;
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> That the conflict between a legal norm established by an international treaty and a norm established by a law enacted later is not a conflict between two enacted laws;
>
> Given that the rule according to which a law repeals an earlier law to the extent that it contradicts it is not applicable in the case of a conflict between a treaty and a law;
>
> Given that, where there is a conflict between a domestic law norm and an international law norm having direct effects in the domestic legal system, the rule established by the treaty must prevail, and its predominance results from the very nature of international treaty law;
>
> Given that this is *a fortiori* the case where, as in the present case, the conflict is between a norm of domestic law and a norm of Community law;
>
> Given that, in effect, the Treaties that created Community law set up a new legal system for the benefit of which the Member States have limited the exercise of their sovereign powers in the fields determined by those Treaties".

The judgment deduces from this

> "that the court has a duty to refuse to apply provisions of domestic law that are contrary to a Treaty provision [which has direct effect]"[18].

This jurisprudence also applies to the European Convention on Human Rights, for which, therefore, there is "transposition" legislation.

This does not prevent the rights and freedoms under the Belgian Constitution receiving, as a rule, the same interpretation as in the case law of the European Court of Human Rights, subject to any more favourable provisions in the Belgian legal system.

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[17] Article 68, para. 2, of the Constitution has since become Article 167, para. 2, of the Constitution, after its renumbering on 17 February 1994.

[18] Cass., 27 May 1971, *Journal des Tribunaux*, 1971, p. 460.

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

Subject to the *Ville de Wavre* judgment, discussed earlier, which is of strictly procedural relevance in terms of the application of the Charter of Fundamental Rights of the European Union, no judgment of the Council of State has applied the substantive provisions of the Charter of Fundamental Rights of the European Union to measures or facts taking place since 1 December 2009.

For the Council for disputes involving foreigners, see No. B.5.3 above, for a judgment given after the entry into force of the Lisbon Treaty involving a measure prior to that date, which shows that, under that decision, no direct effect can be conferred on Article 24, paragraph 2 of the Charter of Fundamental Rights.

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

Again, see No. B.5.3 above for the criteria adopted by the Council for disputes involving foreigners in order to refuse direct effect to the provision concerned (Article 24, paragraph 2 of the Charter).

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.)?**

There is insufficient Belgian case law to give a documented answer to this question, but it would be surprising if, in the future, the Belgian courts, including the administrative courts, did not adopt a comparable attitude to the Charter of Fundamental Rights of the European Union as they do to other international legal instruments, including the European Convention on Human Rights or the United Nations Covenants of 1966, namely full review and faithful application of the supranational case law that interprets those instruments.

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?**

G.18.1. If the case law applies the jurisprudence of the case known as “Le Ski”, recalled above, in reply to question No. 14 – and it is hard to see why it would do otherwise - the court must reject the application of a provision of domestic law that is contrary to a provision of the

Charter having direct effect. If seised of an application for annulment of a measure based on the grounds of the violation of such a provision of the Charter, the Council of State would annul the measure.

That would certainly be the case if the provision of domestic law in question were a statute law[19] or an instrument of lesser value such as a regulation.

G.18.2. If a conflict were to arise between the Belgian Constitution and the Charter, the Belgian administrative courts would have to take a position on the opposing views of the Constitutional Court and the *Cour de cassation* on the rule to be applied.

The Constitutional Court considers, in principle, that it is authorised under the Constitution to review the validity of a law giving assent to an international treaty, even on a preliminary basis in an actual dispute, which implies recognition of the primacy of the Constitution over international and supranational law. It should be noted, however, that the Constitutional Court seems disposed to grant a sort of immunity to measures of secondary law emanating from European institutions, in the light of Article 34 of the Constitution, which provides that "the exercise of given powers may be granted by a treaty or a law to institutions of public international law". Moreover, immunity from preliminary review mainly affects the Treaties "constituting the European Union", which would have to include the Charter of Fundamental Rights of the European Union to which Article 6, paragraph 1, subparagraph 3, now refers. This however leaves open the question of which instrument, the Constitution or the Charter, the court must apply in the event of a conflict, on the understanding that the provision most favourable to the freedom must in any event have preference, having regard, in particular, to Article 53 of the Charter.

According to the *Cour de cassation,* in case of conflict between a rule of international treaty law and the Constitution, the latter must give way. The supreme jurisdiction thus advances in a radical way the logic of its so-called "Le Ski" jurisprudence, discussed above in the answer to question No. 14.

In order to resolve this controversy, the Special Law of 1989 on the Constitutional Court was amended on 12 July 2009. Article 26, para. 4, now provides as follows:

> "Where it is argued before a court that a law, decree of rule referred to in Article 134 of the Constitution violates a fundamental right guaranteed in a wholly or partially similar manner by a provision of Title II of the Constitution and by a provision of European or international law, the court is bound first to put the preliminary question to the Constitutional Court of whether it is compatible with the provision of Title II of the Constitution.

[19] In Belgium, laws are adopted by the federal legislative power. The organs of legislative power of the federated entities adopt decrees or orders which, subject to specific aspects limited to the orders of the Bruxelles-Capitale Region and its common Community Commission, have the same hierarchical level as a law.

By way of derogation from subparagraph 1, the obligation to put a preliminary question to the Constitutional Court shall not apply:

1° in the cases referred to in paragraphs 2 and 3;

2° where the court takes the view that the provision of Title II of the Constitution is manifestly not violated;

3° where the court takes the view that a judgment of an international court shows that the provision of European or international law is manifestly violated;

4° where the court takes the view that a judgment of the Constitutional Court shows that the provision of Title II of the Constitution is manifestly violated".

This provision enshrines the rule that priority, at least chronological, shall be given to a review under constitutional law over a review under treaty law.

Certain commentators consider that inasmuch as this applies to European Union law, it would not be in conformity with the effectiveness and primacy of that law, which every national court is bound to guarantee.

No judgment of the Belgian *Cour de cassation* has yet taken a position on this question but it cannot be ruled out that it would refuse to apply Article 26, para 4, of the Special Law of 6 January 1989 cited above when European Union law is at stake.

The Administrative Disputes Section of the Council of State has not taken a position on these controversies but its Legislation Section, in an opinion prior to the adoption of this latter provision, took the view that the order of priority it laid down was not incompatible with European Union law[20].

H- <u>Interpretation methods</u>

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

The case law examined does not give any indication that would provide an answer to this question.

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?

[20] Legislation Section of the Council of State, opinion 45.905 given on 3 March 2009 in general assembly on a preliminary draft that became the Special Law of 12 July 2009 modifying Article 26 of the Special Law of 6 January 1989 on the Court of Arbitration (*Doc. parl.*, Chamber, 2008-2009, No. 52-1283/2).

The same applies to this question.

I- Relationship between EU Charter and EHCR

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?**

It is too soon, given the small number of judgments handed down that apply the Charter of Fundamental Rights of the European Union, to answer this question.

The judgments found show, however, that in a pragmatic sense, where similar provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union are invoked, the Council of State applies both instruments cumulatively, not having had occasion to pinpoint the differences in approach between them.

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

The case law examined des not give any indication that would provide an answer to this question.

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)?**

J.23.1. The decided cases give no indication that would provide an answer to this question.

J.23.2. It is certainly useful, even if this falls outside the framework of the proposed seminar and the questionnaire, to reproduce here the general considerations on these questions formulated by the Legislation Section of the Council of State, which is the subdivision responsible for giving opinions to the Parliaments and Governments of federal Belgium, in its opinion on the preliminary draft of the law giving assent to the Lisbon Treaty:

"12. Title II of the Belgian Constitution guarantees a number of fundamental rights and freedoms. Article 6, paragraph 1, first subparagraph of the Treaty on European Union provides: "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". That Charter shall thus be a full and entire part of the regime of fundamental rights set forth in the primary law of the European Union.

In a number of cases, the protection that Title II of the Constitution attaches to certain fundamental rights is broader than that which the Charter accords to those same rights. Thus, for example, the Belgian Constitution guarantees the freedom of language (Article 30 of the Constitution), while no such right features in the Charter. With regard to certain other rights, the Belgian Constitution contains more detailed guarantees than the Charter. That is the case, for example, for freedom of education (compare Article 24 of the Constitution and Article 14 of the Charter), freedom of worship (compare Articles 19, 20 and 21 of the Constitution and Article 10 of the Charter) and protection in the event of expropriation (compare Article 16 of the Constitution and Article 17 of the Charter). For still other fundamental rights, the Belgian Constitution lays down stricter conditions for limitation. Thus, for a number of fundamental rights, it prohibits the taking of preventive measures (Articles 19, 24, 25, 26 and 27 of the Constitution), while Article 52, paragraph 1, of the Charter does not exclude such measures[21].

In addition, the Constitution provides that interference with certain fundamental rights can only be brought about by the adoption of a formal legislative measure, while the abovementioned Article 52 does not require legislative intervention.

13. The lower level of protection offered by the Charter on some points does not, of itself, undermine the broader protection guaranteed by the Belgian Constitution. In fact, Article 53 of the Charter expressly provides:

> "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

The explanations on Article 53 of the text of the Charter state, as to this:

> "This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR"[22].

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[21] *Note 32 in the opinion cited*: This provision is worded as follows: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[22] *Note 33 in the opinion cited*: Explanations on the Charter of Fundamental Rights (O.J.E.U., 14 December 2007, C, 303, pp. 17 et seq., esp. p. 35). On the weight to be given to these explanations, see Article 52, paragraph 7, of the

Article 53 means that the Charter cannot, as such, be contrary to Title II of the Belgian Constitution, as that article expressly indicates that the Charter does not intend to adversely affect the broader guarantees offered by each of the national constitutions. Ratification of the Treaty by Belgium cannot therefore have the effect that the provisions of the Belgian Constitution (or of international conventions on human rights to which Belgium is a party) would from now on be interpreted less broadly than before. As both the Belgian Constitution and the Treaty shall be applicable in a given situation[23], the fundamental right in question must be guaranteed by virtue of the broader provision.

14. The question arises whether the reference in Article 53 to the protection of the rights and freedoms in "the Member States' constitutions" means that in enacting secondary European law, the institutions of the European Union also cannot adversely affect or compel the Belgian authorities to adversely affect the specific guarantees granted by Title II of the Constitution to fundamental rights and freedoms. The Council of State finds that two interpretations have been put forward on this.

According to the first interpretation, Article 53 is limited in scope. This article contains only one rule designed to "interpret" the provisions of the Charter and only guarantees that the Charter will not, of itself, adversely affect the broader guarantees offered by the national constitutions of the Member States, without, however, implying any duty on the European institutions in the exercise of their powers to respect the specific guarantees laid down by those national constitutions to protect fundamental rights, and without the Member States being able to rely on their national constitution to avoid having to implement and apply European law. In this interpretation, the European institutions must, in enacting secondary European law, respect only those fundamental rights guaranteed by the Charter. Article 52, paragraph 4 nevertheless requires that, as those fundamental rights derive from 'constitutional traditions common to Member States', they must be interpreted in harmony with those traditions. There is no question, however, of European law being in any way subordinated to the national constitutions.

According to the second interpretation, put forward by certain authors, Article 53 is broader in scope and would also prevent the European institutions from compelling Member States, when implementing secondary European law, from going against the broader guarantees granted by their national constitution on fundamental rights. According to that interpretation, Article 53 aims to combat any backsliding with regard to fundamental rights. In this broad interpretation, that article would have the effect, as P. Cassia writes, commenting on Article II-113 of the Treaty establishing a Constitution for Europe, which corresponds to Article 53 of the Charter,

> "of conferring on all the fundamental rights recognised by the different national constitutions a higher value than those laid down in this Treaty"[24].

Charter, which provides that "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States".

[23] *Note 34 in the opinion cited*: That would be the case where a Belgian authority took a measure whereby it implemented Union law. As a Belgian authority, it is subject to the Belgian Constitution; by virtue of Article 51, paragraph 1, of the Charter, it is also subject to the Treaty.

[24] *Note 35 in the opinion cited:* P. Cassia, "Article I-6 du Traité établissant une Constitution pour l'Europe et la hiérarchie des normes", *Europe*, Revue mensuelle du JurisClasseur, December 2004, p. 9.

Admitting this broad interpretation would, again according to P. Cassia, imply that,

"in the event the Court of Justice of the European Union were to rule that a measure of secondary law did not violate any of the rights and freedoms recognised by the Treaty, a national court would be entitled, based on the Treaty, to refuse to apply that measure in the Member State on the grounds that the national "standard" of protection of fundamental rights was higher than that of the Court [...]" [25].

In the end, it is obviously up to the Court of Justice of the European Union to establish the scope of Article 53 of the Charter. The Council of State nonetheless wishes to stress from the outset that the second interpretation, the broad interpretation, of the Article cited would involve overturning the principles currently in force in the European legal order, as it sets the national Constitution above European law and allows applications and implementations of European law in the different Member States that are not uniform, while the first interpretation, the restrictive interpretation, is an extension of the fundamental principles that have, hitherto, always governed European law.

According to this first interpretation, Article 53 of the Charter does not mean that the secondary law of the European institutions might not breach the specific guarantees or oblige the Belgian authorities to breach the specific guarantees provided by Title II of the Belgian Constitution in the field of protection of fundamental rights. This breach is not laid down in the Treaty itself, but would, rather, derive from a future exercise by the European institutions of the powers attributed to them in the Treaty by virtue of Article 34 of the Constitution. As has already been explained above, it is neither possible nor desirable to anticipate that at the present time by revising the Constitution (see above, No. 10).

For this reason, the Council of State does not think the time is right for it to formulate a critique based on constitutionality. It refers, however, to a recent example of its case law, mentioned in footnote 23 above"[26].

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[25] *Note 36 in the opinion cited* : *Ibid.* Along the same lines: M. Fischbach, "Grundrechte-Charta und Menschenrechtskonvention", *in Grundrechtencharta und Verfassungsentwickelung in der EU*, W. Heusel, ed., Schriftenreihe der Europäischen Rechtsakademie Trier, Band 35, 2002, 126. G. Braibant, Vice-President of the Convention that drafted the Charter, also writes, on Article 53 of the Charter: "This provision is intended to preserve the level of protection currently offered in their respective fields of application by Union law, the law of Member States and international law. [...] [T]his means that in terms of the definition and protection of fundamental rights one can never retreat or go backwards from the instruments in force. [...]This provision did not feature in the original draft and was introduced on my proposal, with no objection from the other members of the Convention. It might seem shocking, especially so in a European instrument. In effect, it calls into question the supremacy of international law, European law in particular, over national laws that is now generally acknowledged to exist. [...] This means that a more protective provision found in a national Constitution will be given precedence over the Charter" (*La Charte des droits fondamentaux de l'Union européenne -Témoignage et commentaires*, Paris, 2001, pp. 266 to 269).

[26] Legislation Section of the Council of State, Opinion 44.028 given on 29 January 2008 in general assembly on a preliminary draft that became the Law of 19 June 2008 "granting assent to the Lisbon Treaty modifying the Treaty on European Union and the Treaty instituting the European Community, and the Final Act, signed in Lisbon on 13 December 2007" (*Doc. parl.*, Senate, 2007-2008, No. 4-568/1, pp. 334 et seq.,esp. pp. 343 to 346).

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

The answer to this question is assuredly positive.

The usefulness of the sharing of information in the forum would essentially lie not just in seeking to identify the link between a given provision of the Charter and a given provision or constitutional rule of domestic law, but mainly in identifying which of those rules or provisions deserve to be characterised as belonging to the "common constitutional traditions" of the Member States.

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

Such a register would undoubtedly be useful but in order to be relevant, it must be limited to collecting, based on a common thesaurus, those decisions that might have resonance for other legal systems, which would exclude decisions that are too specific to the State concerned.

K- <u>Relationship between the EU Charter and other instruments</u>

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?**

The current Belgian case law does not provide any material that would answer this question, but it is doubtful whether the mere fact that a provision of the Charter is derived from an instrument other than the European Convention on Human Rights would have a bearing on the interpretation of that provision.

The question whether the instrument in question can be taken to have direct effect is more likely to have a bearing on whether a given provision of the Charter is taken into consideration, even if there is an increasing tendency in the contentious administrative case law when reviewing the legality of administrative measures to blur the distinction between higher rules that have a direct effect and those that do not, given the general obligation on the executive power to respect all higher rules.

L- <u>Other</u>

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?**

No such structure exists in Belgium.

It could be useful to create such a structure at the level of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, in particular to gather information about questions of common interest, including the determination of what are the "common constitutional traditions" of the Member States[27].

28. **Do you have any other questions or comments on the EU Charter which have not been addressed in this questionnaire?**

No, subject to the now outdated question of principle as to whether it was appropriate to add another such instrument at the European level, especially with regard to the provisions that repeat those of the European Convention on Human Rights, at the time of adhesion of the Union European to that Convention.

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[27] See the answer to question No. 24, above.