Seminar on the Charter of Fundamental Rights, 24 November 2011

Statement on behalf of the Federal Administrative Court of Germany[1]

10 June 2011

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?

The German judicial system is divided into five branches: "ordinary courts" (civil and criminal cases), labour courts, administrative courts, social security courts and fiscal courts. Since the latter two deal with administrative matters as well, cases decided by social security courts and fiscal courts were also taken into account.

From 1 December 2009 until 31 May 2010, 20 cases decided by administrative courts, two cases decided by fiscal courts and one case decided by a social security court have been reported in which the EU Charter was at issue.

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

The provisions of the EU Charter at issue in these cases are listed below. In most cases, more than one provision of the Charter was at issue.

Art 2 para 1	2 cases
Art 3 para 1	3 cases
Art 4	1 case
Art 7	4 cases
Art 10 para 1	1 case
Art 15 para 1	1 case
Art 15 para 3	1 case
Art 16	1 case
Art 18	1 case
Art 19 para 2	1 case
Art 21 para 1	3 cases
Art 21 para 2	4 cases
Art 23 para 1	1 case
Art 24 para 2	2 cases
Art 24 para 3	1 case

[1] All questions are answered on the basis of cases reported to the legal database "Juris" which is the largest legal database in Germany (www.juris.de, against payment). Federal law provisions are to be found free of charge at www.bundesrecht.juris.de, state law provisions at the websites of the states. Most decisions can be found at the websites of the courts (e.g. www.bundesverfassungsgericht.de for the Federal Constitutional Court; www.bverwg.de for the Federal Administrative Court).

Art 41	1 case
Art 45 para 1	5 cases
Art 47	3 cases
Art 51 para 1	9 cases
Art 51 para 2	1 case
Art 52 para 1	4 cases
Art 52 para 3	1 case
Art 52 para 4	1 case
Art 52 para 7	1 case

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

The areas of law in which the EU Charter has played a role are listed as follows:

Air traffic	1 case
Asylum	3 cases
Citizenship	1 case
Civil service	1 case
Driving licence	4 cases
Food and drugs	1 case
Health insurance	1 case
Immigration	7 cases
Land use	1 case
Procedure	2 cases
Public transport	1 case

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.

In the relevant period, it has not been reported that administrative, fiscal or social security courts have asked the ECJ for a preliminary ruling concerning the interpretation of provisions of the EU Charter. However, five cases have been reported in which the interpretation of EU or national law in the light of provisions of the Charter is at issue. These cases are already published on the ECJ website:

- Federal Administrative Court, registered 18 February 2011 (C-71/11; Y)
- Verwaltungsgerichtshof Mannheim (Higher Administrative Court of Baden-Württemberg), registered 28 January 2011 (C-40/11; Iida),
- Verwaltungsgerichtshof Kassel (Higher Administrative Court of Hessen), registered 5 January 2011 (C-4/11; Puid),
- Verwaltungsgerichtshof München (Higher Administrative Court of Bavaria), registered 15 December 2010 (C-590/10; Köppl),
- Federal Administrative Court, registered 23 November 2010 (C-544/10; Deutsches Weintor eG).

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)?

Whether the EU Charter can be invoked in German administrative law proceedings, does not depend solely on the date of the decision to be reviewed. There is no procedural rule stating that always the legal rules in force at the time the decision was taken or, on the contrary, always the legal rules in force at the time of the court's hearing of the case shall be applied to determine the decision's legality. Instead, the judgment has to be based on the rules and facts of the time which the substantive law governing the decision in question considers as relevant[2].

Usually, claims filed against an onerous administrative decision, for example the revocation of a driving licence or the dismissal of a public servant, will have to be judged by the legal rules and the facts of the date the decision was taken. On the other hand, claims filed to gain a licence to exercise certain commercial activities like running a bank will in general have to be judged by the facts and the law in force at the date of the court's hearing of the case, because the envisaged exercise of banking activities will be legal only if the actual legal conditions are met.

The possibility to invoke the EU Charter therefore depends on its being in force and having binding effect at the time relevant for judging the act, determined by the relevant substantive law, which itself depends on the legal nature of the act in question. The official dismissed from public service will be able to invoke the Charter only if it has been in force at the time of his dismissal. The businessman applying for a banking licence can invoke the Charter if it has acquired binding effect by the day of the court's hearing, even though it may not have been binding at the time of the administrative authority's refusal to grant the licence.

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)?

Only few judgments reviewing administrative decisions by the legal standards applicable before 2009 merely stated that the provisions of the EU Charter could not be invoked because they lacked binding effect[3]. Several courts instead cited the provisions of the Charter along with those of the - already binding - European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), assuming that the Charter stated comparable fundamental rights to be respected in accordance with the constitutional tradition of states governed by the rule of law[4]. Some judgments even examined - obiter dicta - the compatibility of the decision to be reviewed

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[2] Federal Administrative Court, 21 May 1976 - BVerwG 4 C 80.74 - juris para 31 and 3 November 1994 - BVerwG 3 C 17.91 - juris para 23.

[3] E.g. Bundesfinanzhof (Federal Financial Court) 28 April 2004 - VII B 44/04 - juris para 7.

[4] Federal Constitutional Court, 4 May 2004 - 1 BvR 1892/03 - juris para 10; Bundesfinanzhof (Federal Financial Court), 14 December 2004 - VIII R 106/03 - juris para 37; Landesarbeitsgericht (Higher Labour Court) Kassel, 25 October 2001 - 3 Sa 143/01 - juris para 65.

with the provisions of the Charter[5]. In a similar way the EU Charter of 2000 might play a role even today if the decision had to be based on the law in force before 1 December 2009 (see above at B-5).

C – Scope ratione materiae

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

The applicability of the EU Charter is not expressly stated in substantive administrative law, probably because the court's procedural duty to examine the compatibility of administrative acts with the Charter ex officio includes the duty to determine, in interpreting Art 51 para 1 EUC, the Charter's scope ratione materiae.

The German national courts usually do not give a general definition of the implementation of Union law. Still it can be derived from their reasoning that there can be no implementation in areas outside the competence of the Union, especially in cases where no transnational elements can be found[6], where competences still rest exclusively with the Member States[7], or where only Third State nationals are concerned[8]. An 'implementation of Union law' opening the scope ratione materiae is mostly stated or at least assumed, however, where provisions of EU directives are transferred into national law, and where the latter has to respect the standards set up by the directive, or where one of the fundamental economic freedoms or other individual rights guaranteed by primary or secondary Union law can be invoked[9].

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[5] Verwaltungsgericht (Administrative Court) Lüneburg 5 June 2002 - 1 B 32/02 - juris para 11 et seq., 24, 31, 34 and 15 April 2004 - 1 B 30/04 - juris para 6.

[6] Oberverwaltungsgericht (Higher Administrative Court) Bremen, 15 November 2010 - 1 B 156/10 - juris para 5 et seq. (immigration law); cf. Oberverwaltungsgericht Münster (Higher Administrative Court of Northrhine-Westfalia), 19 August 2010 - 7 B 875/10 - juris para 2, 5 (building permit).

[7] Verwaltungsgericht (Administrative Court) Oldenburg, 13 December 2010 - 11 A 249/10 - juris (naturalization of foreigners).

[8] Federal Administrative Court, 30 March 2010 - BVerwG 1 C 8.09 - juris para 61 et seq., 66 stating that Third State nationals can not invoke Art 21 para 2 EUC (regarding the Turkish wife and children of a Turkish immigrant. Their immigration was denied because the wife's knowledge of German language did not meet the legally required standard of a minimum capacity permitting basic communication).

[9] Federal Constitutional Court, 6 July 2010 - 2 BvR 2661/06 - juris para 73; Federal Administrative Court, 27 April 2010 - BVerwG 10 C 5.09 - juris para 17, 25 et seq. interpreting Art 60 para 2 Aufenthaltsgesetz (Residence Act) in accordance with Art 4 para 4 EU Directive 2004/83/EG and Art 19 para 2 EUC, assuming - along with the Explanation - an identical standard as that of Art 3 ECHR, and lowering the standard of proof in favour of an asylum-seeker alleging the danger of renewed persecution on a return to his state of origin. The court states that the impeding danger of inhuman or humiliating treatment hinders a deportation even though the state of origin has ratified the ECHR and the treatment in question will not cause irreparable or otherwise grievous damage; Verwaltungsgerichtshof München (Higher Administrative Court of Bavaria), 7 October 2010 - 11 CS 10.1380 - juris para 23, 38 et seq. concerning the compatibility of Art 28 para 4 Fahrerlaubnisverordnung (Driving Licence Ordinance) with Art 11 para 4 EU Directive 2006/126/EG and Art 2 para 1, Art 3 para 1, Art 45 para 1 EUC with regard to legal impediments to the so-called driving licence tourism (e.g. the interdiction to grant a licence to someone whose licence has been revoked by the competent national authorities, or to accept such a licence as valid); Oberverwaltungsgericht (Higher Administrative Court) Bremen, 14 September 2010 - 1 A 265/09 - juris para 49 regarding the compatibility of a maximum age for the exercise of a profession with Art 21 para 1 EUC and stating the proportionality of the measure in question, deeming it justi-

Questions of applicability have been raised where administrative acts addressed solely to Third State nationals have onerous consequences for Union citizens related to them. In a case where a Third State national married to a German national was denied the right of residence, the question of applicability arose because of possible impediments to the spouse's exercise of her fundamental freedoms under Union law. The court deemed the question need not be decided, because the provisions of the Charter, even if applicable, were not violated[10]. In another case where the Third State national concerned is the father of a Member State national child residing with her mother in another Member State, the court of appeal has asked the ECJ for a preliminary ruling concerning the question whether the parent having right of custody, but living separated from their child and the other parent, can invoke the Charter on the grounds that the national law regulating the administrative decision reviewed serves partly, but not solely, as a means to transform Union law into national law[11].

In general, national administrative case law gives the impression that the courts accept the alternatives named in categories 1 to 3 of the questionnaire's explanations as examples of an implementation in the sense of Art 51 para 1 EUC. The ECJ's decision on legal aid cited in category 3 might be understood as an example of the applicability of the Charter in cases where not fundamental economic freedoms but other individual rights are at stake. In stating that Art 47 para 1 EUC gives the right to effective judicial protection when a right guaranteed by the Union has been transgressed upon, the ECJ still requires that such a right can be invoked by the claimant. If that is the case, Union law is applicable, and departing from the right guaranteed has to be justified by its standards.

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 ?

In the course of judicial review, German administrative courts have to examine the compatibility of administrative decisions with all relevant legal rules ex officio. This includes the compatibility with the EU Charter, provided its applicability, following the principles cited above (see above at B-5). This means that the administrative decision may be quashed because of a breach of the Charter, even if the latter has not been invoked by any of the parties.

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fied by the standards of Art 8 Allgemeines Gleichbehandlungsgesetz (General Act on Equal Treatment) which transforms the provisions of the EU Directive 2000/78/EG into national law.

[10] Oberverwaltungsgericht Münster (Higher Administrative Court of Northrhine-Westfalia), 29 April 2011 - 18 B 3711/11 - juris para 19. The Third State national claiming right of residence had refused to attend the integration course which can be made obligatory i.a. for immigrating Third State nationals desiring to reside permanently in Germany and lacking even basic language capacities. The court held the denial was proportionate and not discriminating. It deemed the spouse was not impeded in the exercise of her fundamental freedoms under Union law, and that the case was not comparable to that of a Third State national parent decided by the ECJ (18 June 1991 - Rs. C-260/89, ERT - para 41 et seq.).

[11] Verwaltungsgerichtshof Mannheim (Higher Administrative Court of Baden-Württemberg), 20 January 2011 - 11 S 1069/10 - juris para 113 et seq.

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?

Stating whether national law makes such a distinction is difficult because the distinction in Union law itself is a matter of legal dispute. The EU Charter distinguishes between rights which must not be violated and principles that (only) have to be respected (cf. Art 51 para 1 sentence 2 EUC, Art 6 TEU). Still the Charter does not state explicitly the criteria defining the difference[12]. The attempt to find them by interpretation is confronted with methodical problems stemming from the mixture of sources of law - as the Charter itself - and sources of (authentic) interpretation - as the Explanation referred to in Art 52 para 7 EUC[13]. This reference has been criticised for methodical and practical reasons, especially since the Explanation itself does not distinguish clearly between rights and principles but states that an article of the Charter may comprise elements of the one as well as the other[14].

Legal authors, however, have elaborated some indicators which in general permit to draw a line between rights and principles. Where the EU Charter speaks of someone having a claim or being entitled to something, or where obligations with regard to an individual are stated precisely, a right is assumed that can be invoked in court[15]. Where the text only states obligations, especially obligations of the Union in general, legal doctrine tends to assume a principle that has to be respected and transformed by individual measures which may create rights themselves[16].

According to these criteria the following provisions have been regarded as containing principles: Art 22 EUC (respect for cultural diversity); Art 23 para 2 EUC (legitimacy of gender-specific affirmative action); Art 25 EUC (recognition of and respect for the rights of the elderly[17]); Art 26 EUC (recognition of and respect for the right of persons with disabilities to integrative measures); Art 33 para 1 EUC (protection of the family); Art 34 para 1 and 3 EUC (recognition of and access to social benefits and housing); Art 35 sentence 2 EUC (guarantee of a high level of health protection with regard to measures taken by the EU); Art 36 EUC (recognition of and respect for the right for access to services of general interest as provided for in national laws and practice, in accordance with the EU treaties); Art 37 EUC (guarantee of a high level of environmental protection); Art 38 EUC (guarantee of a high level of consumer protection)[18].

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[12] Jarass, Grundrechtecharta (EUC), commentary, Art 52 sub 69, 72; Kingreen, in: Calliess/Ruffert, EUV-AEUV (TEU-TFEU), commentary, 4th ed. 2011, Art 52 EUC sub 16; concerning the different criteria cf. Sagmeister, Die Grundsatznormen in der Europäischen Grundrechtscharta, 2010, p. 338 et seq.; Meyer, Charta der Grundrechte der Europäischen Union, 3rd ed. 2010, Art 52 sub 45d.

[13] Kingreen, in: Calliess/Ruffert, op. cit., Art 52 EUC sub 19.

[14] Ibid. sub 17, 43.

[15] Jarass, op. cit., Introduction sub 51, Art 52 sub 72.

[16] Ibid. Art 52 sub 70 et seq., 73, 76; Kingreen, in: Calliess/Ruffert, op. cit., Art 52 EUC sub 16.

[17] Jarass, op. cit., Art 52 sub 70 classifies Art 25 EUC as a principle because - in his interpretation - it presupposes rights guaranteed by the Member States.

[18] Ibid. sub footnote 235; other lists at Kingreen, in: Calliess/Ruffert, op. cit., Art 52 EUC sub 17; Hirsch, in: Blank (ed.), Soziale Grundrechte in der Europäischen Grundrechtscharta, 2002, p. 18; Winner, Die Europäische Grundrechtscharta und ihre soziale Dimension, 2005, p. 154 et seq.; Sagmeister op. cit., p. 355 et seq.; Meyer op. cit., Art 52 sub 45d.

In German legal doctrine, the opinion has been voiced that the structure of these principles is parallel to that of the national objectives and the legislative mandates embedded in the constitution (Grundgesetz - Basic Law)[19]. Their character is considered to be purely objective, and not conferring any individual rights[20]. Guarantees of social participation or protection stipulated in the constitutions of the Federal States in the east of Germany are generally interpreted as principles, unless there are clear grammatical, systematic and historical indications that the provision in question intends to confer a precisely defined individual right[21].

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?

Up to now, there is no national case law defining the difference between EU rights and principles. This may be explained by the fact that the Basic Law and the ECHR in general offer at least equal guarantees of individual freedom which are undisputedly considered as individual rights. In the field of social protection and participation, the Charter's clauses, often openly or implicitly referring to the rights guaranteed by the Member States, do not confer rights exceeding those stipulated in the ECHR, secondary EU law and national law. The same seems to be true for provisions relating to environmental protection. Therefore the principles stipulated by the EU Charter are cited mostly just as a means of interpretation with a view to enforce the rights guaranteed by other provisions[22].

When called to define the criteria which mark the difference between rights and principles in the EU Charter, the German administrative courts, while respecting the jurisdiction of the ECJ and asking for preliminary rulings whenever appropriate, will probably rely on the legal theory explained above in the context of question 9. It is difficult to predict how the discussion about the methods of interpretation of EU law will influence the development of the national jurisdiction on EU rights and principles[23]. Probably the traditionally[24] rather restrictive tendency of the national courts which relies on the restrictive attitude of the constitution's creators and which has been accentuated by the German representatives in the Convent on Fundamental Rights[25] will continue to play an important, if not dominating role in the interpretation.

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[19] Sagmeister, op. cit., p. 28 footnote 52; for a dissenting opinion cf. Meyer, op. cit., Art 52 sub 45b.
[20] Schmidt-Bleibtreu/Klein, Kommentar zum Grundgesetz, 10th ed. 2004 Art 20a sub 5.
[21] Landesverfassungsgericht (State Constitutional Court) Brandenburg, 21 January 2010 - 54/09 - juris para 8 (protection of national heritage as a principle) and 15 October 2009 - 9/08 - (employees' right to participate collectively in certain decision-making processes of the company employing them).
[22] Federal Administrative Court, 11. January 2011 - BVerwG 1 C 1.10 - juris para 31 et seq. and Oberverwaltungsgericht Münster (Higher Administrative Court of Northrhine-Westfalia), 9 May 2011 - 18 B 377/11 - juris para 39 et seq., both on immigration law and the protection of families.
[23] Cf. Verwaltungsgerichtshof Mannheim (Higher Administrative Court of Baden-Württemberg), 18 March 2011 - 11 S 2/11 - juris para 51.
[24] Geesemann, Soziale Grundrechte im deutschen und französischen Verfassungsrecht und in der Charta der Grundrechte der Europäischen Union, 2005, p. 181 et seq.
[25] Cf. Winner, op. cit., p. 113 et seq., 123.

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.)?

Where German legislature aims at transferring constitutional principles in legal provisions for individual measures, the national courts recognize a wide scope of discretion with regard to the way in which the legislation defines and pursues the specific aim to be achieved. The same is true for the implementation of social protective measures exceeding the constitutionally defined minimum standard. In both areas, judicial review can only decide if the national and supranational legal limits of discretion have been respected. This implies an intensity of control which is restricted compared to the one in cases where individual rights can be invoked.

Probably the national administrative courts will exercise their power of review accordingly where EU principles are relevant. The assumption that the legislation, once having implemented a certain standard with regard to a certain principle, must not fall below that standard[26], is difficult to join with the legislature's discretion and the theory that an implementation of principles does not necessarily create individual rights.

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?

Principles under national law, even though they cannot be invoked like individual rights, have to be applied as (objective) legal provisions with equal binding force. Often they will be considered as enforcing individual rights[27]. Still they can also justify their limitation[28]. If, for example, an employer refuses to pay the rates of a public insolvency guarantee scheme and claims the fundamental right to exercise his profession was violated, the court may find that this right is subject to proportionate limitation considering the principle of social protection embedded in Art 20 para 3 Basic Law empowers the legislative to oblige the employer to contribute to a guarantee scheme protecting his employees in the event of his bankruptcy[29].

If an administrative decision is contrary to a legal or constitutional principle, it is unlawful; if a law disregards a constitutional principle, it is considered invalid. Only purely programmatical stipulations lacking binding force are irrelevant for the lawfulness of administrative decisions and legal provisions under national law[30].

The binding force of the principles of the EU Charter is undisputable. They could not be considered as purely programmatical, because the history of their stipulation pro-

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[26] Meyer, op. cit., Art 52 sub 45b; Sagmeister, op. cit., p. 29, pointing out the French and Hungarian origins of this theory; more detailed ibid. p. 176 et seq.

[27] See above footnote 22.

[28] Federal Constitutional Court, 24 November 2010 - 1 BvF 2/05 - juris para 135; Federal Administrative Court, 30 April 2009 - 7 C 14.08 - juris para 43.

[29] Federal Administrative Court, 25 August 2010 - 8 C 40.09 - juris para 34.

[30] Federal Constitutional Court, 4 May 2011 - 2 BvR 2333/08, 2 BvR 2365/09 et al. - juris para 90; Bayerischer Verfassungsgerichtshof (Bavarian Constitutional Court), 17 March 2011 - Vf. 17-VII-10 - juris para 39 and 28 May 2009 - Vf. 4-VII-07 - juris para 124; cf. an early decision of the same court (28 October 1960 - Vf. 83-VI-60 - juris sub 1) considering the right to earn a living by working under Art 166 of the Bavarian Constitution to be of purely programmatical character.

ves otherwise, and Art 51 para 1 sentence 1 EUC states explicitly the obligation of EU organs as well as the Member States - insofar as they are to transform and apply EU law - to respect the principles and promote their application[31]. Art 52 para 5 sentence 2 EUC does not permit the conclusion that the consequences of a breach of EU principles should be different from those of a breach of any other EU law[32]. This does not imply that the breach of a principle always constitutes the violation of an individual right (see above at E-9).

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?

Until now no cases have been reported in which a German administrative court has given a specific interpretation of the general limitation clause of Art 52 para 1 EUC. However, nine of the reported decisions (see above at A-1) referred to the clause and held that fundamental rights guaranteed by the EU Charter had not been infringed.

The requirements for legitimate restrictions or rather limitations of basic rights and liberties are applied according to the jurisdiction of the ECtHR and, of course, the settled case law in the member states, in Germany especially of the Federal Constitutional Court. Based on this, not every interference with fundamental rights implies a violation. In examining whether the interference is legally justified, the principle of proportionality plays a major role. With regard to Art 52 para 1 EUC and the Explanation[33] of the EU Charter, there is a tendency to rely on the previous judicature of the European Court of Justice, especially to identify objectives of general interest.

In one case the Federal Administrative Court has doubted the compatibility of the Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods[34] with Art 15 para 1 EUC (right to engage in work) and Art 16 EUC (freedom to conduct a business). The Court held that the restrictions of the Regulation mentioned above might not be necessary to achieve the objectives relating to consumer protection and therefore the provisions might fail the proportionality test[35].

G – Direct effect

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[31] Cf. Sagmeister, op. cit., p. 163.
[32] Ibid. p. 205 et seq.
[33] Despite the specific references in Art 6 para 1 subsection 3 TEU as well as in the Preamble and in Art 52 para 7 EUC the Explanation is not legally binding.
[34] Official Journal of the European Union L 404 of 30 December 2006, p. 9.
[35] Federal Administrative Court, request for a preliminary ruling, 23 September 2010 - 3 C 36.09 - juris para 14.

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 Treaty of Lisbon has been transposed into national law by the „Gesetz zum Vertrag von Lissabon vom 13. Dezember 2007“(Lisbon Treaty Act) of 8 October 2008 (BGBl. <Federal Law Gazette> 2008 II p. 1038)[36]. This implies – through article 6 para 1 TEU – the indirect transposition of the Charter, which has been published in the Federal Law Gazette (BGBl. 2008 II 1165). The EU Charter has, however, not been directly transposed.

The ECHR has been directly transposed into national law (BGBl. 1952 II p. 685 / BGBl. 2010 II p. 1198)[37].

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?

Questions 15 and 16 will be answered together

German administrative courts have, as far as can be seen from the case law considered, not yet explicitly stated whether a provision of the EU Charter has direct effect or not. Thus, they have not yet set up criteria for this decision either.

However, it is likely that the question whether provisions of the Charter have direct effect will be judged according to the same criteria that are applied by the ECJ in answering the question whether a provision of the Treaties has direct effect, i.e. that the provisions must be sufficiently clear and precise and that they be unconditional[38].

This means that a provision containing rights will certainly be considered to have direct effect, while it is questionable whether the same applies to provisions containing principles. This seems to be also the predominant academic opinion[39]. Moreover, it should be kept in mind that the question of direct effect will only arise once a national measure falls within the scope of the Charta (see above at B-5 to C-7). Whether provisions of the Charter might have direct effect between individuals is still unclear.

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[36] Federal Constitutional Court, 30 June 2009 – 2 BvE 2/08 et al. –, juris para 339, 343.
[37] Federal Constitutional Court, 14 October 2004 – 2 BvR 1481/04 –, juris para 31.
[38] ECJ, 5 February 1963, case 26/62, ECR [1963] 1 (van Gend en Loos); 15 July 1964, case 6/64, ECR [1964] 585 (Costa v ENEL).
[39] Jarass, op. cit., Art 51 sub 13 footnote 35; slightly different: Ladenburger, in: Tettinger/Stern, Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta, Art 51 sub 8-10.

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.)?

Most aspects will be subject to full judicial review. This does not exclude, however, that courts in certain cases may exercise judicial self-restraint leaving the legislator a margin of appreciation.

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?

If an individual administrative decision is incompatible with a provision of the EU Charter that has direct effect, it will be quashed.

If a general legal provision (statute, regulation, by-law, ordinance) is incompatible with such a provision, it will not be applied in cases that fall within the scope of the Charter. It will not, however, be declared void and will still be applicable in cases that have no connection with EU law.

H – Interpretation methods

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

Between 1 December 2009 and 31 may 2011, one decision explicitly referring to the Explanation was reported[40].

There is no reason why German courts should not adhere to Art 52 para 7 EUC and should not give due regard to the Explanation in the interpretation of the provisions of the EU Charter. Since German courts are obliged to outline the grounds for their decisions in written form, they will mention the Explanation in the decision if it has played a role in the court's interpretation of a provision of the Charter. It should be pointed out, however, that the importance of the Explanation is limited to that of a means of interpretation.

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?

In the relevant period, no decision which explicitly treated the methods of interpretation of provisions of the EU Charter has been reported. In general, German courts adopt the linguistic, the systematic, the teleological, the historical and the treaty-compliant method in interpreting EU law, so that it can be expected that these methods will be applied in interpreting provisions of the Charter as well. Referring to the

[40] Federal Administrative Court, 27 April 2010 – BVerwG 10 C 5.09 – juris para 17.

dynamic method, a certain reservation towards the dynamic interpretation of the Union's competences can be observed[41].

I – Relationship between EU Charter and ECHR

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

German administrative courts apply both the ECHR and the provisions of the EU Charter in cases where the rights of the Charter correspond to the rights guaranteed by the ECHR. Since the enactment of the EU Charter the courts point out the binding character of its provisions. But even before 1 December 2009 the EU Charter was used by the administrative courts as „common foundation“ of the member states to interpret EC law[42].

Especially the right to respect for private and family life in Art 8 ECHR and Art 7 EUC is mentioned in several judgements concerning immigration law. The courts tend do discuss the scope of this right under Art 8 ECHR and to emphasize that Art 7 EUC provides no further protection than Art 8 ECHR[43].

The provisions of the EU Charter and the ECHR are also used as standards for the interpretation of EC law. Again, the right to respect for private and family life in Art 7 EUC and Art 8 ECHR plays an important role in the interpretation of the national and European immigration law[44]. In an asylum-case the Federal Administrative Court referred to Art 10 EUC and Art 9 ECHR to interpret the scope of freedom of religion as guaranteed in EU Directive 2004/83 EC[45].

On the other hand, decisions can be found in which only the EU Charter is mentioned even though there is a corresponding right in the ECHR[46].

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 of the European Court of Human Rights plays an important role in the interpretation of the EU Charter. In the above-cited judgement of the Federal Administrative Court of 11 January 2011 (BVerwG 1 C 1.10 - para 31, see above at I-21)

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[41] E.g. Federal Constitutional Court, 12 October 1993 – 2 BvR 2134/92 et al. – juris para 157 and 30 June 2009 – 2 BvE 2/08 et al. – juris para 238 et seq.

[42] Federal Administrative Court, 27 April 2010 - BVerwG 10 C 5.09 - juris para 17; 30 March 2010 - BVerwG 1 C 8.09 - juris para 35; 30 June 2005 - BVerwG 7 C 26.04 - juris; cf. above at C-6.

[43] Federal Administrative Court, 11 January 2011 - BVerwG 1 C 1.10 - juris para 31, 34 -; 30 March 2010 - BVerwG 1 C 8.09 - loc. cit. para 37; Oberverwaltungsgericht Münster (Higher Administrative Court of Northrhine-Westfalia), 29 April 2011 - 18 B 377.11 - juris para 41; cf. also above at C-7 and C-8.

[44] Federal Administrative Court, 16 November 2010 - BVerwG 1 C 20.09 - juris para 31; Verwaltungsgerichtshof Mannheim (Higher Administrative Court of Baden Württemberg), 20 January 2011 - 11 S 1069.10 - juris para 99, 100, 105; 30 March 2010 loc. cit.

[45] Federal Administrative Court, 9 December 2010 - BVerwG 10 C 19.09 - juris para 20, 23.

[46] Verwaltungsgerichtshof München (Higher Administrative Court of Bavaria), 17 February 2011 - 11 CE 10.3110, juris para 33, 40 concerning Art 2 EUC.

the court emphasized that due to Art 52 para 3 EUC the established case law of the ECtHR is relevant for the interpretation of Art 7 EUC.

The importance of the case-law of the ECtHR for the interpretation of the EU law including the EU Charter is stressed in several other decisions of the Federal Administrative Court[47].

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)?

German administrative courts have not yet referred to the common constitutional traditions of the member states in interpreting the EU Charter. There are no references to those constitutional traditions in rulings coping with the Union's fundamental rights as general principles of the Union's law as laid down in Art 6 para 3 TEU either.

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?

Questions 24 and 25 will be answered together

The application of Art 52 para 4 EUC will most certainly be one of the major challenges for any national judge in his role as first judge of Union law as well as for the ECJ. Interpreting fundamental rights in harmony with traditions common to 27 Member States requires knowledge of the common constitutional traditions concerned. In this regard we would like to draw ACA's attention to the European Parliament's resolution of 9 July 2008 on the role of the national judge in the European judicial system (OJ 2009 C 294 E/27). In its Paragraph 9 it is stated that a true European judicial area, in which effective judicial cooperation can take place, requires not only knowledge of European law but also mutual general knowledge of the legal systems of the other Member States. In our view, determining common constitutional traditions also relies on such knowledge. The ACA-Europe Forum is a perfect place for discussing whether provisions of the Charter result from common constitutional traditions of the Member States. Assuming there will be participants of at least most of the Member States involved in the discussions, the forum can be seen as a first step approach to the other Member States' constitutional traditions. A central database of national rulings run or initiated by ACA-Europe might be useful as well.

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[47] Federal Administrative Court, 27 April 2010 - BVerwG 10 C 5.09 - loc. cit., para 17; 9 December 2010 - BVerwG 10 C 19.09 - loc. cit., para 20; 5 March 2009 - BVerwG 10 C 51.07 - juris para 13.

However, ACA-Europe has to be aware that compiling a user-friendly European-wide database is a major task as far as workload and funding are concerned. First, as to the national courts, the selection of relevant judgements is difficult. Setting up a database with current decisions only will not lead to an effective understanding of the member states' traditions. Going back (much) further, however, might overburden the participating courts. Second, as to the database, compiling a user-friendly database requires decisions being translated into a common work language, which should be English or French. As one can easily imagine, expenses for such translations would be enormous. Even if such a database was generated it would still be a difficult task for the user to elaborate on the common constitutional traditions. This might discourage national judges from using the database as well as from coping with the common traditions at all.

K – Relationship between the EU Charter and other instruments

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

Up to now there are no recognisable consequences in the case law of German administrative courts applying provisions of the EU Charter that are derived from an instrument other than the ECHR.

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?

There are no special structures that could ensure uniform interpretations of EU law. There are regular informal consultations between the judges of the different chambers of the Federal Administrative Court. There are no such consultations between the Federal Administrative Court and the other two Supreme Courts dealing with administrative law, which are the Federal Social Court and the Federal Fiscal Court.

The administrative courts and the higher administrative courts are not federal courts. They are courts of the 16 federal states (Länder). There are some more formal structures for consultation on Union Law interpretation. For example, in Baden-Württemberg meetings are held once a year at which recent decisions of the administrative courts concerning European Union Law are discussed. Finally, every year several training courses on the Law of the Union are offered on a federal level.

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

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