Discussion papers

Theme I – Scope *ratione materiae* of the Charter and actions by the member states
See theme C in the General Report of the Survey (question 7)

> **Article 51 Charter**
> *1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
> *2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

Introduction
It follows from article 51, paragraph 1 of the Charter that the actions of the member states only fall within the scope of the Charter *"when they are implementing Union law"*. The Explanations relating to the Charter of Fundamental Rights (the Explanation) elucidates that the EU Charter is only binding on the member states when they act *"in the scope of Union law",* with reference to the judgments in the *Wachauf* (Case C-5/88), *ERT* (Case C-309/96), *Annibaldi* (Cars C-309/96) and *Karlsson* (C-292/97) cases.

Question 1: Does the Charter have the same scope as the general principles of Union law?
The general principles of Union law[1] are applicable in situations that fall *"within the scope of Union law"*. The questionnaire indicated that there are three distinct categories of situations that fall "within the scope" of Union law and to which the general principles of Union law are therefore applicable:

> *Category 1 – Implementing obligations which fall within the scope of Union law.*
> The first category of situations which clearly fall within the scope of Union law are those in which the member states are implementing or applying EU legislation.
> This category comprises:
> · the implementation of directives;
> · the enforcement of regulations;
> · the enforcement of primary law;
> · the application of EU legal rules;
> · the enforcement/implementation of Union law.
>
> *Category 2- Departure from a fundamental economic freedom*
> The second category of situations that fall within the scope of Union law are those in which member states depart from a fundamental economic freedom guaranteed by Union law. In the ERT case, it was held that if a member state relies on imperative grounds (such as public policy, public safety or public health) to justify a statutory provision which is likely to obstruct the exercise of the freedom to provide services, such justification, which is provided for by Community (now Union) law, must be interpreted and applied in the light of the general principles of law and of fundamental rights.
>
> *Category 3- A 'binding factor' in relation to Union law*
> The third category of situations falling within the scope of Union law are those in which the European Court of Justice (CJEU) considers that some kind of link with Union law exists, as a result of which the situation (the action taken by the member state /national legislation) in question falls 'within the scope' of Union law and the fundamental rights it guarantees are therefore applicable.

[1] As referred to in Article 6, paragraph 3 of the Treaty on the Functioning of the European Union (TFEU).

An important question is whether the Charter has the same as scope as the fundamental rights based on the general principles of Union law. On the one hand, from the perspective of a coherent and uniform application of the fundamental rights guaranteed by Union law the answer would seem to be that it does. On the other hand, it is noteworthy that article 51, paragraph 1 of the Charter mentions different criteria to those adopted by the CJEU in its case law on the general principles of Union Law. The criteria for the application of the Charter set out in article 51, paragraph 1 are that the situation must involve (i) “actions by the member states” that (ii) “are implementing Union law”. The decisive factors for the application of the general principles are that it must be (i) “a situation” which (ii) falls “within the scope of Union law”. These differences suggest that the scope of the general principles of Union law is wider, since it also encompasses situations in which actions by member states which do not involve the implementation of Union law. The difference seems to arise mainly in the third category of situations.

From the reports it emerges that the situations outlined in categories 1 and 2 are regarded as falling within the scope of the Charter. The text of article 51 of the Charter and the Explanation of the article also leaves little room for doubt on this point. The Charter obviously applies in category 1 situations, in any case, since they relate to implementation *stricto sensu*. As regards its application in category 2 situations, the reference to the *ERT* judgment in the Explanation is significant. Meanwhile, the application of the Charter to situations falling outside category 1 also seems to have been confirmed by the CJEU’s rulings in the *Chartry* (Case C-457/09, point 25), *Estov* (Case C-339/10, point 14) and *Rossius* (joined cases C-267/10 and C-268/10, point 19) cases.

According to the reports, category 3 seems to raise the most questions both as to whether it exists and to what it entails. The case law of the CJEU provides no conclusive answer. In practice, the question of whether the Charter has the same scope as the general principles of Union law could therefore be rephrased as: *Is the Charter applicable in situations falling outside categories 1 and 2?*

As regards the application of the Charter in situations falling outside categories 1 and 2, the most outspoken and fundamental – conflicting – viewpoints can be found in the reports from *Lithuania* and Judge *Von Danwitz,* a judge at the CJEU. The report from *Lithuania* presumes a broad application of the Charter on the basis of the "*principle of vigilance*". Judge *Von Danwitz,* by contrast**,** ~~advocates~~ puts forth an interpretation of the phrase "only when they are implementing Union Law" (article 51, paragraph 1, of the Charter) that reflects the wording of article 51 of the Charter, as well as its purpose and genesis. In his view, the phrase "only when they are implementing Union law" includes the cases of application in the *Wachauf* and *ERT* lines of jurisprudence, given the explanations related to article 51 and the genesis of this provision. He emphasizes that the phrase "within the scope of Union law" was perceived by the Convention as being broader and was explicitly rejected during the drafting of article 51 of the Charter. In Judge *Von Danwitz*'s opinion, other situations that do not fall under these cases of application are outside the scope of the Charter, even where the actions of Member States are in a field where the Union has competence to act in so far as they were not exercised (*Annibaldi*, included in the explanations related to article 51 regarding this matter). According to Judge *von Danwitz*, under these conditions, a mere connection with Union law would not place a given situation within the scope of application of the Charter, which is affirmed by the decisions of the Court in McB, Gueye and Salmerón Sánchez, as well as Dereci. As such, a mere connection with Union law would not suffice to establish the applicability of the Charter. A third category, which does not emerge from any of the explanations, does not seem useful for the purpose of interpreting article 51, paragraph 1 and 2, of the Charter. Judge *Von Danwitz* also stresses that the Charter is not intended to introduce a generally applicable minimum standard for member states, since that is covered by the European Convention of Human Rights (ECHR).

Question 2: Is it possible to further define the criterion of a "binding factor"?

Do the judgments of the CJEU that are classified under category 3 in the doctrine[2] provide sufficient guidance for further defining the requirement of the existence of a "binding factor"?[3] If not, what might be relevant factors?

Question 3: In which of the following situations might the Charter apply?

In which of the following situations might the Charter apply? Do they include situations in which the Charter could apply but which do not fall under categories 1 and 2?

a. Is it sufficient that it is a situation arising in a field in which the EU possesses powers, although it has not yet exercised them?[4]
b. Is it sufficient that it involves a dispute involving a Union citizen from another member state?[5]
c. Is it sufficient that it involves a case in which use is made of a freedom of movement? Or must the measure concerned also qualify as a restriction?
d. Is it sufficient that there is another cross-border element which does not involve the use of free movement rights?[6]
e. Is it sufficient that the subject matter of the case is covered by a directive?[7]
f. To what extent is the Charter applicable in situations involving administrative decisions directed at third countries nationals that could have onerous consequences for the member state's own nationals (in other words, Union citizens who have not availed themselves of the freedom of movement)?[8]
g. Is it sufficient that it involves a national rule that uses the same definitions as Union law or that refers to Union law?[9]
h. Do national rules implementing EU law (for example, a directive) fall entirely under the Charter or only the part that implements the directive *in concreto*?[10]
i. To what extent is the Charter applicable when material EU law (for example, a directive or free movement provision) is invoked but does not succeed (because the conditions for the

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[2] For example, in her advisory opinion of 22 May 2008, case C−427/06, *Bartsch*, footnote 64, A-G Sharpston mentions, *inter alia*, the following judgments: case C−71/02, 25 March 2004, *Karner*, Jurispr. p. I−3025, points 48−53 and joined cases C−286/94, C−340/95, C−401/95 and C−47/96, 18 December 1997, *Garage Molenheide et al.*, Jurispr. p. I−7281, points 45−48.

[3] See the *Spanish* report, which poses the following question: *"How binding must an indirect connection with European affairs be in order to justify the compulsory application of the Charter?".*

[4] See the advisory opinion of A-G Sharpston of 30 September 2010 in case C−34/09, *Zambrano*, point 163.

[5] See the case law on the scope of Article 18 TFEU, for example case C-524/06, *Huber*, points 69-81. This provision is applicable to EU citizens from other member states regardless of the subject matter of the dispute. See Prechal, De Vries and Van Eijken, 'The Principle of Attributed Powers and the 'Scope of EU Law' ', in: L. Besselink, F, Pennings and S. Prechal, *The Eclipse of the Legality Principle in the European Union*, p. 213-247, at p.226. See also Van der Mei, 'The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality', 18 *MJ* 1-2 (2011), p. 62-85 , at 71-72. More generally, see also A-G Jacobs, case C-168/91, *Konstantinidis*, point 46.

[6] See the *Finnish* report, which mentions a judgment of the Finnish Supreme Administrative Court which seems to lead to the conclusion that the mere existence of a cross-border element is not sufficient for the applicability of the Charter. This case concerned a prosecution for tax fraud in connection with the illegal import of tobacco from Estonia to Finland. The Finnish judge found that Article 50 (*ne bis in idem*) was not applicable since the case concerned a sanction within a single member state and there was no harmonisation of those sanctions.

[7] See case C-555/07, *Kücükdeveci*, point 25 and case C-20/10, *Vino*, points 53,56,57, 63 and 64 and the advisory opinion of A-G Bot in case C-108/10, *Scattolon*, point 119: *'Scope should be understood as also including "all situations in which national legislation "concerns" or 'affects" a matter governed by a directive the period prescribed for the transposition of which has expired*." See also Editorial comments, 'The scope of application of the general principles of Union law: An ever expanding Union', 47 *CMLR* (2010), p. 1589-1596; De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU law?' 18 *MJ* 1–2 (2011), p. 109-135, at 126-127.

[8] See the *German* report. See also the *Zambrano* case (C-34/09).

[9] See also the pending *Cicala case (C-482/10)*.

[10] The *German* report refers to the pending request for a preliminary ruling by the Verwaltungsgerichtshof Baden-Württemberg in case C-40/11, *Iida*, question B.1.a. In the request, the referring judge notes that from a dogmatic perspective it seems more logical that the Charter is not applicable to the part of a national regulation that goes beyond implementation of the directive. However, he also notes that this restrictive interpretation would require more research by the legal practice. Furthermore, it will generally not be possible to establish which parts do or do not constitute transposition of the directive. For example, if there was no explicit implementation of the directive because the member state felt that the existing situation under national law already complied with the directive. The restrictive interpretation would therefore also create legal uncertainty.

application of the directive or the treaty provision are not met)? Can such reliance on the relevant material (inapplicable) legal rule activate the Charter, that is to say, as an independent ground for review?

Question 4: Should explicit reasons be given for why a situation falls under the scope of the Charter?

Would it be desirable and feasible for national courts to state explicitly in their judgments why the Charter applies in a particular case and, if necessary, to submit requests for preliminary rulings on this point to the CJEU?

Theme II: The distinction between rights and principles
See theme E in the General Report of the Survey (questions 9-12)

> **Article 52, paragraph 5 of the Charter**
> *The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.*

Introduction
The answers to the questions regarding the distinction between rights and principles vary and are difficult to compare in certain respects. What precisely does the distinction between rights and principles entail and what is the basis of the distinction?

1. **Can principles only be applied to measures that enforce principles?**

Pursuant to article 52, paragraph 5 of the Charter, the judicial competence with respect to principles is limited. In light of the final sentence of article 52, paragraph 5 of the Charter, the restriction could involve the *acts* to which principles can be applied.[11] After all, that sentence says that the competence of the courts is limited to "such acts", which is a reference to "legislative and executive acts (…) of the Union, and by acts of member states when they are implementing Union law." This could mean that the courts can only apply principles with regard to acts that are (explicitly) implementing principles. This interpretation would, however, be narrower than the application by the CJEU of the principles mentioned in the Explanation (the precautionary principle, the principle of market stabilisation and the principle of reasonable expectations). Reference is made to the *Dutch* report, which includes the following remark: *"(…) the Explanation of article 52, paragraph 5 of the Charter contains references (…) by way of illustration (…) to two judgments. In one of those judgments (Van den Berg) principles (the principle of market stabilisation and the principle of reasonable expectations) are applied to acts that clearly do not qualify as acts implementing/applying those principles."* The reports from the countries that have national equivalents of the principles in the Charter make no mention of any such restriction on the competence of the courts. It would be useful if these countries could further explain whether there is in fact any such restriction and, if so, how it works in practice.

2. **Does article 52, paragraph 5 of the Charter constitute a restriction on the method of application of principles, in other words to their application only as (i) an instrument of interpretation and (ii) as ground for reviewing legality?**

Apart from a possible restriction of the competence of the courts with respect to the category of acts (whether or not it is implementing a principle, see question 1), article 52, paragraph 5 of the Charter might also involve a restriction on the *method of application,* in the sense that the court could only apply principles (i) as an instrument of interpretation and (ii) as a ground for reviewing the legality (validity) of government acts. On the other hand, principles could not constitute independent grounds for granting claims for positive action. In other words, principles could not constitute an independent ground for granting subjective rights. Subjective rights could only be derived from acts of the Union and the member states which implement principles (*in concreto*). Support for this interpretation can be found in the closing sentence of article 52, paragraph 5 of the Charter, particularly when read in conjunction with the Explanation. The Explanation states that principles do not give rise to direct claims for positive action. The participants from *Poland, Austria, German, France and Spain* are invited to say whether claimants can derive independent subjective rights from

[11] This refers to application in a broad sense, in other words, the use of a principle as an instrument of interpretation and as an independent (autonomous?) ground for reviewing acts.

the national equivalents of the principles in the Charter. In other words, are the national equivalents subject to a more far-reaching form of autonomous review (than a review of legality)?

3. Judicial restraint?

It emerged from a large number of reports that in situations where principles serve as an independent ground for review, the judges should exercise restraint. This conclusion seems to be based more on the nature of the principles than on article 52, paragraph 5 of the Charter as such. According to these reports, by their nature principles imply considerable freedom and a wide discretion for the executive and legislative branches of government, which would call for judicial restraint. *Von Danwitz,* a judge of the CJEU, notes that there is a wide margin of appreciation for the Union legislator and the national legislator with regard to principles. The judicial review should therefore be confined to investigating for manifest errors. The *Dutch* report also refers to judicial restraint. As regards the practice in the countries with national equivalents of the principles in the Charter, reference is made to *France,* where the national equivalents of the principles in the Charter are reviewed more for conformity than for compatibility. The *Spanish* rapporteur notes that, given their vagueness, it will not easily be found that principles have been violated. In *Germany* the review is limited to deciding whether the margin of appreciation has been exceeded. The question is whether, in situations where principles serve as an independent ground for review, judicial restraint is required.. If so,

a. does this follow by definition from the nature of principles;
b. does this follow from article 52, paragraph 5 of the Charter; or
c. does this depend on the (text of) the relevant principle?

4. Is there a right to compensation for violation of a principle?

According to the *German, Finnish, Lithuanian and French* reports, the legal consequences of a violation of a principle will not differ from the legal consequences of violation of a right. The *French* and *Lithuanian* reports explicitly mention the possibility of compensation being awarded for loss arising from the violation of a principle. Judge *Von Danwitz,* on the other hand, feels that principles cannot serve as a basis for claims for compensation for non-contractual liability.

a. Does the answer to this question depend on national law (procedural autonomy) or on EU law?
b. If the answer depends on EU law, does the case law of the CJEU on state liability for violation of EU law[12] in principle apply in full to principles or does article 52, paragraph 5 of the Charter or the nature of principles play a role, restrictive or otherwise, in this respect?

[12] See the CJEU's *Francovich* judgment: joined cases C-6/90 and C-9/90, *Francovich*, Jur. 1991, p.I-5357, joined cases C-46/93 and C-48/93, *Brasserie du Pecheur en Factortame*, Jur. 1996, p. I-1029, joined cases C-178/94, C-179/94, C-188/94, C-189/94, *Dillenkofer*, Jur. 1996, p.I-4845.

Theme III: The Charter and the ECHR

See theme I of the General Report of the Survey (questions 21 and 22)

> **Article 52, paragraph 1 of the Charter**
> *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.*
>
> **Article 52, paragraph 3 of the Charter**
> *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*

Introduction

It emerges from all of the reports that the ECHR is relevant for the application of the rights in the Charter which correspond with those guaranteed by the ECHR (hereinafter referred to as: corresponding rights). This follows from article 52, paragraph 3 of the Charter. The precise significance and role of the ECHR appears to be more difficult to define. It is unclear which instrument prevails in the case of corresponding rights. The precise significance of article 52, paragraph 3 of the Charter in relation to these rights is also unclear. Finally, there is the question of the relationship between article 52, paragraph 1 and Article 52, paragraph 3 of the Charter. Questions also arise about the interpretation of article 52, paragraph 1 of the Charter.

A. Article 52, paragraph 1 of the Charter

1. How should the general limitation clause be applied?

The general limitation clause contains the following four conditions. Restrictions on the exercise of rights and freedoms included in the Charter must (1) be provided for by law, (2) respect the essence of those rights and freedoms, (3) be necessary and (4) (a) genuinely meet objectives of general interest recognised by the Union or (b) the need to protect the rights and freedoms of others. According to the Explanation, the wording is inspired by the case law of the CJEU. The Explanation refers to the following finding of the CJEU with respect to the non-discrimination principle: *"(…)It is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights."*[13] It can be assumed that the reference to the CJEU's case law does not relate to the first condition in article 52, paragraph 1 of the Charter (provided for by law); this is new and is not to be found in the earlier case law of the CJEU. However, the case law of the CJEU does have to be followed for the application of the other conditions. The question is: which case law? Is it only the case law of the CJEU on the exercise of fundamental rights (such as the principle of non-discrimination) or is the case law concerning free movement also relevant? Is it also perhaps necessary – even in the case of non-corresponding rights - to study the case law of the European Court of Human Rights? In this context, the *Spanish* rapporteur argues that the European Court of Human Rights' approach to restrictions on fundamental freedoms seems more appropriate than that of the CJEU, particularly because it is enough for restrictions of EU fundamental freedoms that there is an objective of general interest. The Spanish rapporteur does not regard this criterion as onerous enough to curtail a fundamental right. He feels in that context that a "*particularly relevant public need*" should be required.

[13] Judgment of 13 April 2000, case C-292/97, *Karlsson*, point 45.

B. Article 52,paragraph 3 of the Charter: rights corresponding with rights guaranteed by the ECHR

1. Does the Charter prevail over the ECHR?

As regards the question of which instrument (ECHR or Charter) should be applied,[14] none of the rapporteurs takes the fundamental position that the national court is required – within the limits of its jurisdiction[15] – to apply the Charter in situations falling within the scope of the Charter (article 51). Judge V*on Danwitz,* however*,* does adopt that position considering article 6 TEU and the jurisprudence on the primacy of Union law over national law. First and foremost, he argues that by virtue of the principle of primacy the Charter should be applied in any situation that falls within the scope of the Charter pursuant to article 51, paragraph 1 of the Charter. The *Hungarian* rapporteur, by contrast, seems to assume that the ECHR takes precedence, because the ECHR entered into force earlier than the Charter.

2. What is the relationship between paragraphs 1 and 3 of article 52 of the Charter?

Article 52, paragraph 1 of the Charter refers to *limitations* on the exercise of rights and freedoms recognised in the Charter. In principle, the provision therefore applies to corresponding rights as well as to rights in the Charter that do not correspond with rights guaranteed in the ECHR. Article 52, paragraph 3 of the Charter refers to the *meaning and scope* of corresponding rights, which must in principle be the same as those laid down in the ECHR. It emerges from the reports that the interpretation of article 52, paragraph 1 is closely interrelated with that of article 52, paragraph 3 of the Charter with respect to corresponding rights. Is the general limitation clause actually applicable to the corresponding rights and, if so, what is the relationship between paragraphs 1 and 3 of article 52 of the Charter?[16]

3. What level of protection is afforded in the case of rights corresponding with those guaranteed by the ECHR: ECHR level or the highest level?

In situations involving corresponding rights within the meaning of Article 52, paragraph 3 of the Charter, most rapporteurs agree that the case law of the European Court of Human Rights must be considered in interpreting the relevant provision of the Charter. Does this mean that it is sufficient for the national court to apply the case law of the European Court of Human Rights? Or should it also – in light of the closing sentence of article 52, paragraph 3 of the Charter and the Explanation of it – review the case law of the CJEU and offer the highest level of protection? The Polish rapporteur argues, with reference to the doctrine, that the intention is that the highest level of protection should be provided. The national court should therefore thoroughly review which test (that of the CJEU or of the European Court of Human Rights) offers the highest level of protection and apply that test.

4. In what respects could the EU method provide a higher level of protection?

The Explanation to article 52, paragraph 3 of the Charter makes a distinction between two types of corresponding rights. First, rights with the same meaning and scope as those in the ECHR and second, rights with the same meaning but a wider scope. It is possible, leaving aside this distinction, to identify any other specific aspects in which EU law (and particularly the application of article 52, paragraph 1 of the Charter) might offer a higher level of protection? Examples might be the intensity of the test of proportionality (and by extension the margin of appreciation that is left to the member states) or the decision on whether there is any limitation (interference).

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[14] NB: this question relates to the application of the Charter as a legal ground and therefore not to how the Charter should be interpreted (with or without the help of case law of the European Court of Human Rights).

[15] See, for example, *ex officio* review, Theme D of the General Report of the Survey.

[16] See also case C-92/09, 9 November 2010, *Schecke/Eifert*, point 50, 51 *et seq*., and case C-400/10 PPU, 5 October 2010, *McB*, point 59.