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COVER NOTE

From:	Presidency
To:	Delegations
Subject:	National policy application of the EU Charter of Fundamental Rights - Presidency seminar report

Delegations will find in the Annex the report of the Presidency on the outcome of the seminar on the national policy application of the Charter, organised by the Presidency in Amsterdam on 19 February 2016.

National Policy application of the EU Charter of fundamental rights

May 2016

1. Introduction

This seminar organised by the Netherlands Presidency of the Council of the European Union (EU) and supported by the European Commission explored the opportunities and challenges of applying the Charter of Fundamental Rights of the EU (Charter) when developing national policy legislation.
The Charter of Fundamental Rights of the European Union sets out the most important rights of citizens and is legally binding on EU institutions and bodies. The Charter also applies to the actions of member states when they are implementing Union law.

Since the EU Charter of Fundamental Rights became legally binding, a great deal of attention has been paid to the application of the rights it contains in court judgments. The number of cases in which the Court of Justice of the European Union has referred to the Charter has gradually increased from 47 in 2011 to 210 in 2014. So its legal importance is steadily growing. However, it is also important that policymaking and legislative processes in the member states have regard for the rights in the Charter, some of which – such as the right to asylum – are not set out in the European Convention on Human Rights and Fundamental Freedoms. Some of the rights in the Charter are specifically related to the EU, including the right to vote in local elections in the member state of residence.

The Charter sets out a series of individual rights and freedoms. It entrenches all the rights found in the case law of the Court of Justice of the EU, the rights and freedoms enshrined in the European Convention on Human Rights and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments. The Charter is a very modern codification and includes 'third generation' fundamental rights, such as data protection, guarantees on bioethics and transparent administration.

The Netherlands Presidency attaches importance to the correct application of the Charter. The seminar offered a platform for the member states to exchange information and views on the challenges they have faced in applying the Charter and the instruments they have used. Different experiences were presented during the seminar with the aim of identifying whether or not certain practices are successful, and why.

In this report you will read about the ideas that were exchanged on Charter application in chapter two. The third chapter gives a retrospective sketch of the whole day. The fourth chapter reports on the meetings of the four working groups. This report also includes furthermore the programme of the day (p. 15), the schematic overview of article 51 EU Charter situations (abstract conference paper), the Netherlands manual on national application of the EU Charter of Fundamental Rights and a list of the participants of the seminar.

The outcomes of the seminar will be followed up at the meeting of the Council Working Group on Fundamental Rights in Brussels to, be included in the annual conclusions of the Justice and Home Affairs Council on the application of the Charter.

This reports aims to highlight the primary points from the seminar. It focuses on challenges and opportunities for Charter application at the legislative processes of member states.

European Commissioner Věra Jourová and minister of the Interior and Kingdom relations, Ronald Plasterk

2. Charter application at the national level: some ideas exchanged

The Member States have to comply with the EU Charter in their national legislative processes, but only with regard to legislative acts qualifying as the implementation of Union law in the sense of Article 51(1) of the EU Charter. National legislative proposals therefore need to be assessed in the light of Article 51(1) of the Charter. This assessment is sometimes simple, but can also be a complex juridical technical exercise. As the conference paper (drafted by Mirjam de Mol) pointed out, the rather abstract concept of 'Article 51 implementation' covers a variety of concrete situations. The dividing line between on the one hand legislative proposals within the scope of EU law (need for Charter check) and on the other hand purely national legislative proposals (no need for Charter check) might be difficult to discern.

Charter specificity or holistic approach?

During the seminar many participants were of the view that the Charter should be seen, and approached as part of a larger structure of human rights instruments rather than dealt with in isolation. Rather than focusing on the creation of a separate and wholly new compliance check, the main challenge is to create more general alertness in the national legislative process for the possible application of the EU Charter and to develop methodological steps necessary to detect and to identify Article 51 proposals. Some participants suggested that in this matter instructions of the Court of Justice would be helpful. In the case of national legislation executing new incoming EU legislative acts, this alertness is (or should be) evident. However, it is also necessary to develop an awareness for the EU Charter in the process of national lawmaking that is purely nationally initiated. Participants discussed the question how to provide a basis for further thinking on how the Member States could incorporate an Article 51 EU Charter check within their national legislative processes.

Anchoring the Charter in human rights proofing methods and systems

Participants emphasised the importance of developing methodological steps necessary to detect and to identify Article 51 proposals. Many experts stressed the difficulty to assess whether nationally originating legislation or executive measures fall within the scope of the Charter. In order to improve the Charter proofing of legislation the following ideas were advanced:

- Better use of existing mechanisms and structures to ensure that Charter application is effectively pursued in policy and legislative processes;
- Take into account the Charter in the preparatory phase of the human rights proofing of legislation, e.g. by implementing a checklist on the application of the Charter. Select a few files for in depth scrutiny.
- Strengthen scrutiny in parliament (via Human Rights Committees);
- Involve external bodies (e.g. NHRI, Ombudsman) in the preparatory phase of legislation
- Develop a database for sharing European and national manuals/guidelines

In most member states no specific instruments exist to check new policies and legislation with compliance with the Charter. Well-known exceptions include Finland and the Netherlands. Many member states do have instruments available for checking new policies and legislation to EU-law and human rights in general. Furthermore, some parliaments in member states and the European Parliament have parliamentary committees for human rights that report on draft bills..

As was put forward in the conference paper a charter-check could be divided in the following two steps:

1) Assessment of whether the EU-Charter applies by virtue of Article 51;
2) Identification of whether the proposal at issue possibly interferes with Union fundamental rights and the examination of whether the proposal is in line with the EU-Charter ('compliance-check').

Raising Charter awareness

During the seminar one of the participants noted a double paradox: in Europe very few citizens know of the existence of the Council of Europe, but do know its European Convention of Human Rights; and the other way around, many Europeans evidently know the European Union but have no knowledge of the EU Charter whatsoever.

Many participants agreed that also numerous civil servants in the member states are not familiar with the Charter. That awareness needs to be raised was widely agreed. It is of importance to create more alertness in the national legislative process for the possible application of the EU Charter. Therefore, broad support was expressed for continued informal discussion, for example in the presence of FREMP or the NLO-meetings at the EU Agency for Fundamental Rights, about national experiences with the Charter. There was a clear consensus for the development of awareness among civil servants as well as enforcing the expertise at national level and the compatibility of draft legislation.

Charter awareness implementing Union law

There was a broad consensus that more work is needed to continue promoting training and best practice sharing with regard to the application of the Charter at national level. The Commission has been supporting several projects to this effect including trainings of legal professionals on the Charter under the Justice Programme and tools improving European judicial cooperation in fundamental rights practice, through the development of databases of national judgments by Charter provision under the Rights, Equality and Citizenship Programme.[1]

[1] http://www.charterclick.eu/. Further projects such as Judcoop or Actiones available at : http://www.eui.eu/Projects/

Charter awareness regarding nationally initiated lawmaking

Next to raising awareness of the Charter when implementing Union Law, it is also necessary to develop an awareness for the EU Charter in the process of national lawmaking that is solely nationally initiated. It was widely acknowledged that outside the small group of human rights specialists there is little knowledge of the Charter (or even human rights in general). Policymakers and practitioners do not need in depth knowledge of the Charter, but they at least have to know when alarm bells should go off. In that case they can seek help with the specialists. So there is much room for measures of awareness raising in this field, nationally and on the European level. The Commission has sofar supported projects under the judicial training strand of the Justice programme to train legal practitioners, judges and prosecutors. However, further funding opportunities to train civil servants/policy makers should also be explored by all actors to reflect the needs of member states administrations.

In order to achieve more awareness, the following suggestions were made:

- Conduct awareness-raising for policy and executive officials on Charter compliance in the legislative and policy process of the Member States; get inspired by the HELP Project of the Council of Europe (Human Rights Education for Legal Professionals);
- Use FREMP and/or the NLO meetings at the FRA as a structural platform to exchange on a yearly basis tools, procedural safeguards and awareness raising methods at European and national level;
- Invite the Commission and FRA to assist the member states by conducting studies, meetings and training facilities. Suggestions were made on drafting a handbook on the Charter for non specialists or making Commission budget available for training of civil servants.
- Another proposition was to draft a handbook on ECJ case law regarding article 51 EU Charter.

3. The seminar – a retrospective sketch of the meeting

The minister of the Interior and Kingdom of the Netherlands, Ronald Plasterk, officially opened the seminar. In his speech he underlined the old Dutch constitutional tradition, the intrinsic value of the Charter for an Europe that in difficult times remains based on values and the growing legal meaning of the document.

European Commissioner Věra Jourová stressed the fundamental importance of the Charter for European legislation in her key-note speech. Especially in these times, when Europe is facing many challenges, including a major migration crises, Jourová stated it is more important than ever that the EU's response is based on fundamental rights. This means not only conformity of all EU-decisions with the Charter, but also that these decisions reflect and promote their values. She further clarified what tools are available for the Member States to set up and improve their existing mechanisms of fundamental rights proofing at national levels (e.g. funding programmes relevant for training and tools such as databases of case-law, handbooks for practitioners, existing projects such as E-Justice website, ECLI, Charterclick, FRA project CLARITY etc.). The Commissioner reminded that the European Court of Justice expects the legislator to demonstrate that a strict assessment of the conformity with fundamental rights was carried out before adopting a legislative proposal and that a robust fundamental rights protection is also a pre-requisite for the mutual trust between Member States.

Subsequently Michael O' Flaherty, the director of the Fundamental Rights Agency, called in his speech for fostering greater public awareness of the Charter of Fundamental Rights. He noted that the Charter is rarely considered in national procedures to assess the impact or legality of draft national legislation. He therefore supported entirely the findings of the conference paper (drafted by the independent expert Mirjam de Mol); the need for more consistent and convincing Article 51 screenings whenever forthcoming legislation is discussed. O'Flaherty identified 4 gaps, namely: in *awareness*, in *understanding* , in *accessibility* for citizens , and in *implementation*.

In the following part of the seminar six delegates of the member states were interviewed. In the first interview the delegates of Latvia and Belgium were asked to give their view on the added value of the Charter. The delegates have the impression that the Charter has a certain threshold to invoke it, in comparison to the European Convention on Human Rights. The mentality among lawyers in the member states seems to be: "if the instrument is useful in helping promoting human rights, use it". It was recalled by the delegates too that the Charter is a broader instrument than other human rights documents and modern and precise in the sense that the instrument entails some specific new human rights.

In the following interview the delegates of Germany and Italy debated on how to organise the lawmaking process in order to Charter proof legislation. In Germany a systematic check is applied to assess whether the Charter is applicable. This is integrated in the manual for drafting legislation. Even in the member states where no formal systematic checks are in place, in practice a lot is already happening. In Italy for example parliament and external bodies such as the ombudsman are referring more and more to the Charter. In the third and last interview Finland and the United Kingdom talked about different tools that can be instrumental in executing a Charter check. In Finish legislation a special Charter check has been developed to proof new laws, whereas in the United Kingdom a comprehensive human rights check (i.e. one that considers the Charter next to many other human rights instruments) is used.

The second session of the conference aimed at an open deliberation about Charter compliance and - of course – the scope of application of article 51 at the national level. In parallel working groups, the delegates and experts participated in an in-depth discussion on strategies to ensure Charter compliance in legislation and policy at national level. Thanks to the institutional diversity in Europe, different inspiring examples were available regarding application of the Charter. These include procedural safeguards and specific tools, but also awareness raising methods, the role of external actors, etc. To support an exchange of various and promising practices of Charter application, the focus was on compliance by Member States. Experiences from the European level however, were also a valuable source for lessons learned. The session consisted of a stocktaking/brainstorm about current and new tools in legislative procedures and about challenges. In chapter 4 more detailed reports of the four working groups are included.

Furthermore, Nuale Mole, founder of the AIRE Centre, and Jean Paul Jacqué, honorary Director General in the Council, also greatly contributed to the seminar with speeches that fueled the seminar with constitutional experience, fresh legal perspectives and fundamental rights inspiration. Mr Jacqué turned the discussion upside down, by pleading unorthodoxically that member states should first perform a charter compliance check and subsequently should check whether the Charter is applicable at all. Ms Mole reminded the seminar that the Charter was not perceived as a 'litigators law' in the beginning, but it cán be articulated in black letter law. It has even been integrated in the case law of the ECHR now. The question is how we can ensure that the Charter is used, implemented and articulated in a legal discourse in Europe.

4. Summaries of the working groups

Summary of working group 1

Chair: Louisa Klingvall (European Commission)
Report: Willem Pedroli (Dutch Ministry of the Interior and Kingdom Relations)

National experiences
In the intense discussion in this working group the focus was firstly on national experiences with the implementation of the EU Charter of fundamental rights.

Most member states do not have specific instrument to check the compliance of new policies and legislation with the Charter. Well-known exceptions include Finland and the Netherlands. Many member states do have instruments for checking new policies and legislation to EU-law in general. This of course includes a review of the rights in the Charter. The majority of member states also have systematic reviews on human rights application in new legislation. The most important and well-known checks are on the UN Treaties as well as the European Convention. Here too, the Charter is presumed to be included in these checks as well. In this context several speakers doubt the necessity of a separate systematic instrument for the review of national measures to the Charter.

Many speakers mentioned that it is not easy to see where the Charter presents additional rights compared with already longer existent human rights instruments.

A second problem mentioned, was the lack of jurisprudence on the different articles of the Charter. This makes it the more difficult to assess the possible added value of the Charter. In the meantime it is a question of trial and error. In general it is clear to all that the Charter has to be respected when implementing (transposing) European law into national law. It is much more difficult to assess whether nationally originating legislation or executive measures fall into the scope of the Charter.

In many member states NGO's and Parliament also check the compliance of national measures with human rights including the Charter.

Special attention was paid to the European experience. The Commission, as a rule, produces an Impact Assessment regarding new measures, which includes an assessment of compliance with human rights (including the Charter). In the European Parliament, services summarize these IA's and provide these to the MEP's. It is up to them to decide whether to use these or not.

The question was raised where in the process of drafting policies and/or legislation, knowledge of human rights issues should be raised. Most speakers favored an 'as soon as possible' approach in this matter. This should not prevent specialized entities to raise human right issues later in the process.

Training
It was widely acknowledged that outside the small circle of human rights specialists, there is little if none whatsoever knowledge of the Charter (or even human rights in general). Policymakers and practitioners do not need thorough knowledge of the ins and outs of the Charter, but they have to know when alarm bells should go off. In that case they can seek the help of specialists. So there is much room for measures of awareness raising in this field, nationally and on the European level.
The European Commission has budget available for practitioners, judges and prosecutors; not for civil servants/policy makers. Some thought that the European Commission might consider this.

Ways forward
Broad support was expressed for continued informal discussion about national experiences with the Charter. National focal points might be appointed and come together on a yearly basis to discuss developments and best practices. Furthermore the European Commission and FRA were invited to take initiatives for studies and meetings in this field. Another proposition was to undertake a study into the added value of the Charter and not wait on jurisprudence in this field, because this could take years. In this context member states might consider asking prejudicial questions to help the ECJ to clarify difficult cases.

Summary of working group 2
Chair: Janneke Gerards (Radboud University)
Report: Jorieke van Leeuwen (Dutch Ministry of the Interior and Kingdom Relations)

Scope of application of the Charter
The working group started with a brief discussion of the conference paper by Mirjam de Mol, Maastricht University. There was appraisal for her schematic overview of article 51 EU Charter-situations. A more detailed discussion then ensued on the role of the ECJ, and whether more case law is required to interpret the Charter's scope. Views differed.

One speaker suggested that National Human Rights Institutes and National Ombudsmen could play a role in bringing cases to the national courts and suggesting them to refer preliminary questions to the ECJ regarding the scope of application. In that way they could help to clarify the scope of interpretation of the Charter. Another speaker also considered the ECJ case law to be essential: even if member states interpret the scope themselves, they can be overruled by the ECJ. In the end, therefore, more clarification by the ECJ is needed. Several speakers indicated that such clarification is especially needed in regard to the 'goldplating' situations and the situations where there is some connection to typical EU law topics, yet the Court has not accepted applicability of the Charter. Eventually, schematic overviews like the one in the conference paper can be updated to reflect any of the Court's new interpretations.

The chair then put forward the question whether we are all just waiting for the ECJ to provide for an interpretation of the Charter's scope, or whether there also could be room (or even a responsibility) for national authorities to step in? Two speakers stated that there seems to be an unwillingness of other actors to assert when they think the Charter applies or should apply. However, these speakers both pointed out that the judgements of the ECJ have proven to be a moving target (in other words: they are not predictable) and therefore only provide for very general guidelines that do not really work to the advantage of national practice. This led one of those speakers to conclude that the system itself is wrong – not our understanding of the system – that national parliaments should have a role in deciding on the application – not the Court – and that we should be looking for the minimum: when does the Charter *need* to apply? But this led the other of these two speakers to conclude that judges reflect the political climate, and that if the political climate happens to be opposed to a broad interpretation, then judges will do the same. According to this speaker, the wording of Article 51 is very defensive. In this speaker's opinion, if it is the Charter of *Fundamental Rights*, then that should mean that it applies in all cases (at least the principle). Yet another speaker indicated that the limitations of Article 51 more generally should be removed and the Charter should be regarded as a real bill of rights for Europe, which could also apply in purely national situations.

In the end, it seems that a majority of those present regard it as the ECJ's main task and responsibility to further clarify the applicability of the Charter, rather than (also) leave this to national (non-judicial) authorities. Generally, those present regard it as desirable that the Charter only applies to cases and situations falling within the scope of EU law.

National experiences
There was considerable agreement regarding the fact that the Charter should be seen as part of a larger structure of human rights instruments, rather than as a highly exceptional instrument that should be given a special position in policy-making and legislation. In the words of one speaker: it is not the Fundamental Charter of Rights (and therefore special), but the Charter of Fundamental Rights. Where the Charter has added value over other fundamental rights instruments such as the ECHR, national constitutions or international treaties, it should certainly be considered in ex ante evaluations and legislative/policy-making processes. This could be the case, for example, when the Charter specifies rights that are not explicitly protected in other instruments, or when the Charter provides for a higher level of protection. It generally seemed to be accepted, however, that in drafting processes more generally a 'fundamental rights check' should be carried out, rather than only or specifically a 'Charter check'.

Several national instruments for human rights protection were put forward as examples of more specific Charter checks and/or more general fundamental rights checks. Germany does systematic checks on the basis of a manual, of every draft law according to, amongst others, the Charter. The Netherlands has a specific Charter checklist for policymakers and offers a course on the Charter for governmental legal specialist, which is to be evaluated soon. The EP and the UK each have a parliamentary committee for human rights that reports on draft bills. When a UK minister presents draft legislation, he or she is obliged to make a statement regarding the compatibility of the law with Convention rights, as defined in the Human Rights Act. Spain has impact assessments for many aspects of legislation but nothing specifically for human rights. Ireland does not have a specific Charter check.

Ways forward
This working group found common ground in the conclusion that systematic checks in one form or another have an added value, but for most of those participants who actively participated in the debate, such checks are only really useful when they look at human rights in a broad sense, not just focussing on the Charter. In the end, the main issue is that fundamental rights are protected in an effective manner.

A word of warning was given that checklists should not be applied automatically. Advice was also given by one of the participants to pick your battles and choose those policy areas where a Charter check is most necessary.

With regard to informing officials about the Charter, lessons could be learned from how this has been done by the Council of Europe for the ECHR through its HELP Project: Human Rights Education for Legal Professionals (with a toolkit informing national officials of the use of the ECHR and flow charts for people who only require basic knowledge).

To conclude, a current large scale FRA study was mentioned in which people in Europe are asked about their experiences of, and knowledge on, fundamental rights issues. Results are expected in 2017.

Summary of working group 3
Chair: Jurian Langer (Ministry of Foreign Affairs, the Netherlands)
Report: Hans Klok (Dutch Ministry of the Interior and Kingdom Relations)

The working group was structured alongside the following questions:

1) Do we need an holistic or special approach for Charter application?
2) How is the application of the Charter done systematically (article 51)?
3) Can we define a Toolbox for national application?
4) What do we bring home and what to Brussels?

1. *Holistic v special approach*

Participants agreed that this might be a false dichotomy and that we need both a holistic and special approach to deal with the Charter.
The starting point is holistic, because we should look at the result of fundamental rights proofing of the issue at hand (and also take the interpretation of the ECHR into account). However, within the EU legal framework the Charter has a special position (recognized by the ECJ). Some speakers recalled that the Charter itself has a holistic view: one of the goals of the Charter is to promote fundamental rights and article 52 of the Charter does explicitly refer to other human rights instruments.
The Charter is special because in the EU legal framework the Charter plays a role that national constitutions cannot play (although the Charter and constitutions need to interconnect when implementing EU law). Another speaker suggested that Charter application is not a matter of love but of avoiding pain (avoid annulment).
Participants discussed about the awareness of the Charter in a more holistic approach. An example was put forward in drafting laws on surveillance by intelligence services. National security is out of the scope of the Charter but there is a Charter obligation to ensure a right level of data protection.
An example of the special position of the Charter is the political discussion on the increase of asylum seakers based on the Directive on the right to family reunification. In this, Charter application plays a crucial role.
A participant noted that the added value of a Charter check was different from country to country. Others were hesitant to connect the added value to the situation in a specific member state. They noted that if the state is under obligation of a fundamental right it has to take all the steps to ensure this obligation. Some asked if the political-democratic dimension should not be taken more into account in this discussion and not only the legal-technical view. Participants recalled that fundamental rights are not policy factors, while others argued that the political-democratic dimension is not new and that it needs to be backed by legal protection.

2. *Systematic analysis*

In any approach we need to define at some moment if the Charter is applicable (article 51). But do we have a systematic or ad hoc approach on this? Experiences from some member states are aiming for a systematic internal check, but practice can be 'really wild'. The manual of the Netherlands and Finland are mentioned in this regard, but need more storytelling if they are successfull. Germany has a mechanism that a draft proposal of every ministry is reviewed by the ministry of Justice – and can be vetoed - on conformity with EU law and the constitution. Next to internal checks, additional checks in the different member states are offered by advisory bodies - like the Council of State in the Netherlands, the courts and in some cases parliament.

The chair asked how to make your (non specialist) colleagues aware of the Charter and of the situations in which the Charter needs to be taken into account.
One participant noted a paradox that on the one hand everybody knows the European Convention but not the Council of Europe, and on the other hand everybody knows the European Union but not the Charter. More awareness and Charter expertise have to be created. EU and human rights advisers need to be brought together. But there is a pragmatic problem: there is a limit in time and capacity to organise training. E.g. in Croatia it took 10 years of awareness training among judges and others for the application of the Convention.

Some participants noted that gestures of the Court on the scope of application would be welcomed. Some found it interesting that the ECHR in its rulings is more and more referring to provisions of the Charter, even in occasions there is no EU element. In member states the practice of referring to the Charter by judges differs. In some member states judges make references only if lawyers referred to it, in other member states judges refer to the Charter proactively.

3/4. Toolbox: what to bring home and to Brussels

What should be in the toolbox for Charter application? The following suggestions were made:
Strengthening national scrutiny ex ante

- strengthen scrutiny in parliament (a Human Rights Committee)
- early-involvement of (national) external bodies (like data protection authorities, NHRI, Ombudsman, FRA related experts) in the drafting of legislation.
- interministerial involvement and/or specialized scrutiny by one ministry

Exchange of information

- peer-to-peer exchange between experts of Member States
- direct contact CIE/FRA –exchange of EU tools / mapping national tools
- interaction between special legislative lawyer/human rights expert/EU law expert (national level)
- database of national manuals/guidelines (CIE/FRA) – storytelling (member states, e.g. NL/FIN)
- the Charterclick database on national and European case law.

Guidelines/checklists

- more practical guidelines for judges, practitioners and policy makers
- handbook for non specialists: basic information is needed.
- handbook on ECJ-case law article 51 (making use of ECLI)

Awareness/training

- awareness training on the Charter in member states
- promotion of EU tools (CIE/FRA)
- human rights education at schools

Other

- more national considerations when legislating at EU level. And more interface with EU bodies when drafting national legislation.

A participant noted we first and foremost need to deliver to our colleagues basic information on the Charter. The Commission and FRA are best positioned to assist member states in the sharing and mapping of EU/national tools.

Participants underlined that we should be aware that checklists don't become an instrument of tick boxing. Storytelling and awareness are needed to avoid these checklists being used as not more than a technical step.

At the end of the session some analysis was done on the schematic summary of article 51 situations (conference paper of Mirjam de Mol). Ms De Mol underlined that it has been drafted as a guide for the national legislator ex ante, because judges will use a slightly different approach for applying the Charter in case law.

Summary of working group 4
Chair: Gabriel Toggenburg (FRA)
Report: Karsten Meijer (Dutch Ministry of the Interior and Kingdom Relations)

Holistic versus specific approach

The first topic of the group discussion was how to best address the Charter when drawing up national legislation. Two alternative approaches emerged: a more holistic approach that would address the Charter amongst many other human rights standards be they national or international and, secondly, a more specific approach that would address the Charter in a separate procedure when examining draft legislation.

Some representatives expressed concerns that new procedures could put unnecessary burden on the shoulders of the civil servants dealing with the legislative processes. One participant stated that "There is no need for all these different checks". In this light, some representatives argued that instead of creating new guidelines now, the national legislatures should wait for more case law to provide a more robust foundation for new charter proofing tools.

Some of the participants expressed concerns vis-à-vis Charter-specific tools as they could risk forgetting other sources and rights. To the contrary, other participants argued that only Charter-specific tools would guarantee that sufficient attention is given to the Charter standards. In a concluding round consensus emerged that the two approaches might be a false dichotomy as also a holistic approach to the question, whether draft legislation conforms with human rights standards could very well integrate Charter-specific questions and elements.

Training

Representatives from many member states in the working group pointed at the lack of knowledge of the Charter among civil servants. They stressed the importance of adequate training concerning the application of the Charter. The delegate of the European Commission pointed to the training provided for within the Commission as well as to the EU funding opportunities for training purposes at national level.

Guidelines and Awareness

In terms of the potential development of guidelines, participants underlined that such tools can be an important asset for enhancing charter-compatibility of upcoming legislation. But it was stressed that such tools are not enough. Also in this context, the discussion touched on the topic of awareness about the charter among civil servants and the lack of specialized training. Some discussants pointed to the fact that the mere existence of guidelines can in themselves create more charter awareness among civil servants of the member states. Other voices stressed that non-state actors have a prominent role to play when it comes to raising awareness. In various Member States also ombudspersons, human rights institutes or NGO's contribute to scrutinising national legislation and may hence 'bring in' the Charter. However, it was added that so far the ECHR is the more prominent instrument when compared to the Charter. However, there was a general perception that the relative prominence of the Charter will increase in the future.

In the context of awareness raising, reference was also made to the Charter Click project of the University of Florence: a user-friendly tool to detect Charter violations. This project was supported by the European Commission. Its goal is to create a toolkit that supports victims of fundamental rights violations, lawyers, national judges, ombudspersons, equality bodies and other national human rights institutions. It will complement the Charterpedia as developed by the FRA.

Concluding remarks

Checklists are a first step, but also guidelines are needed to guarantee that legislative processes remain within the boundaries drawn by human rights obligations. These guidelines need to be made known to policy advisors, legal advisors and legal practitioners. Whereas there was no consensus as to whether there is a need for the development of new Charter-specific tools, consensus emerged that instruments aiming at checking the human rights compatibility of legislation and/or assessing potential human rights impact of such legislation should take due account of the Charter. It remains however a challenges to increase the overall awareness about what the Charter adds in comparison to other legal instruments, including the ECHR. Some of the representatives from various member states emphasised that training needs need to be focused on a real-life-perspective and should therefore not be of theoretical character. This needs-oriented statement contrasted with data collected by FRA showing that a large part of Charter training events are targeting an academic-scientific audience.

5. Programme

February 18-19th 2016, Marine Etablissement Amsterdam, the Netherlands

Thursday February 18th 2016
18:30 - 20:00 Welcome reception in EYE Film Museum Amsterdam
20:00 - 22:00 Speakers' dinner in EYE Film Museum Amsterdam

Friday February 19th 2016

9:30 - 10:30 Opening: Setting the scene (plenary session)

9:30 - 9:40 Welcome – *Mr Ruben Maes, chairperson of the day*
9:40 - 9:55 The importance of a focus on application of the Charter at the stage of national level policy development
Mr Ronald Plasterk, Minister of the Interior and Kingdom Relations
9:55 - 10:10 Ensuring the respect of the EU Charter of Fundamental Rights in all EU actions
Ms Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality
10:10 - 10:30 The Charter in the Member States: a FRA perspective
Professor Michael O'Flaherty, Director of the Fundamental Rights Agency

10:30 - 11:00 Coffee/tea break

11:00 - 12:10 Session 1: Charter and national policy application: tools and procedures – state of play (plenary session)

11:00 - 12:00 Q&A session with a few Member States on their experiences with the application of the Charter in their respective policy/legislative cycles, followed by a discussion with the audience
12:00 - 12:10 Spoken column – *Ms Nuala Mole, founder of AIRE Centre*

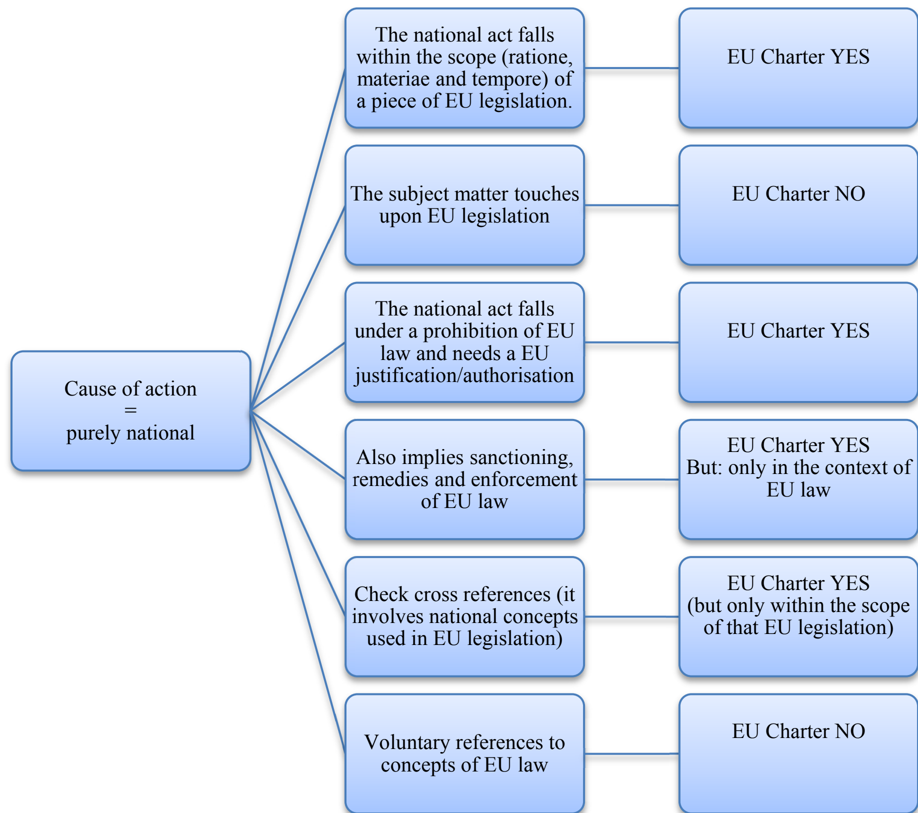
12:10 - 14:00 Lunch – canal cruise

14:00 - 15:30 Session 2: National policy application of the Charter: experiences and promising practices (four parallel working groups)
In parallel working groups, participants will have an in-depth discussion on strategies to ensure Charter compliance at the national level. These can include procedural safeguards and specific tools, but also awareness raising methods, the role of external actors, etc. The focus will be on Charter compliance by Member States, but experiences from the European level will also be a valuable source for lessons learned.

15:30 - 16:00 Coffee/tea break
16:00 - 16:45 Closing session: best practices and ways forward (plenary session)
16:00 - 16:25 Chairs from each working group will present the results from their respective sessions
16:25 - 16:40 Conclusions – *Professor Jean-Paul Jacqué, Honorary Director General of the Council of the European Union*
16:40 - 16:45 Closing - *Ms Marilyn Haimé, Director Constitutional Affairs and Legislation Department, Ministry of the Interior and Kingdom Relations, the Netherlands*

16:45 - 18:30 Drinks and homeward journeys

Schematic overview article 51 EU Charter situations (abstract conference paper)


Cause of action
=
purely national
The national act falls within the scope (ratione, materiae and tempore) of a piece of EU legislation.
EU Charter YES
The subject matter touches upon EU legislation
EU Charter NO
The national act falls under a prohibition of EU law and needs a EU justification/authorisation
EU Charter YES
Also implies sanctioning, remedies and enforcement of EU law
EU Charter YES
But: only in the context of EU law
Check cross references (it involves national concepts used in EU legislation)
EU Charter YES
(but only within the scope of that EU legislation)
Voluntary references to concepts of EU law
EU Charter NO

6. The Netherlands manual on national application of the EU Charter of Fundamental Rights

I. Scope of application

A. Scope of application of the EU Charter of Fundamental Rights on national action

Unlike international fundamental rights treaties, and in particular the ECHR, the EU Charter of Fundamental Rights (CFR) contains a general restriction in respect of the applicability on the actions of the Member States. Application on national legislative, policy-making and executive measures is, in accordance with the words of article 51 paragraph 1 of the CFR, restricted to situations in which Member States *'are implementing'* Union law (see I.B and I.C below). It follows from the jurisprudence of the EU Court that this is the case whenever a national rule or administrative act falls within the *scope of application of Union law*.[2] If a national rule or administrative act does not fall within this scope of application, it is neither necessary nor useful to assess whether it is in accordance with the provisions of the CFR.

B. When does a measure fall within the scope of Union law?

1. In the case of a (new) measure or administrative act adopted in implementation of a regulation, including the discretionary power permitted by the regulation.[3]
2. In the case of a (new) measure that transposes a directive.
3. In the case of a (new) measure that transposes a directive that contains general enforcement obligations, in combination with a general obligation arising from the Treaty on the Functioning of the European Union (TFEU).[4]
4. In the case of a national administrative act based on national legislation that itself implements a regulation or transposes a directive.
5. In the case of the amendment of a national measure that can be viewed as a (previous) implementation of Union law.
6. In the case of a national administrative act adopted in implementation of a decision of a European institution.
7. When in a national measure of which the subject matter has no connection to Union law, reference is made to Union law for interpretation purposes, without there being any obligation to make this reference.[5]
8. In the case of a national measure that restricts free movement rules, whereby the government in the context of derogations from free movement rules, appeals to the exceptions stipulated in the TFEU (the protection of public policy, public security or public health) or to a different justification for the limitation of a free movement rule (overriding reasons of general public interest).[6]

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[2] See C-617/10 Akerberg Fransson, paras. 20-21 and C-418/11 Texdata, paras. 72-73.
[3] See e.g. C-411/10 NS.
[4] See C-617/10 Akerberg Fransson.
[5] See C-28/95 Leur-bloem.
[6] See e.g. C-260/89 ERT and C-60/00 Carpenter.

C. When does a measure not fall within the scope of Union law?

1. When the EU does NOT have competences in the field of the national action in question.[7]
2. When the EU does have competences in the field of the national action, but in respect of the specific subject of the national action, EU harmonisation has not (yet) taken place.[8]
3. The EU does have competence to act, this competence has been used and in implementation thereof the Netherlands carries out actions that go beyond EU requirements (so-called gold-plating).[9] In that case, the Charter of Fundamental Rights does not apply to that part of the provision that can be seen as being gold-plated.

II. Scope and interpretation

A. Scope

1. The fifty CFR rights can be broken down into four categories (see appendix):
   1) CFR rights with the same level of protection as the ECHR equivalent;
   2) CFR rights that have a more extensive level of protection than the ECHR equivalent;
   3) CFR rights with no ECHR equivalent; and
   4) EU context-specific fundamental rights.

In legislative activities, it is recommended that this distinction is taken into account (see also sub B. Interpretation).

2. The system of limitations provided in article 52(1) of the CFR acts in the same way as the one in the ECHR and in the Constitution, i.e. limitation of rights is only permitted if provided for by law, serving a legitimate goal and if proportional.[10] An explicit requirement is that the essence of CFR rights is respected.

B. Interpretation

1**.** According to article 6 of the EU Treaty, the CFR is not the only source of fundamental rights in the EU context. Alongside the common constitutional traditions of the Member States and the general principles, specific reference is made to the ECHR. In this respect, it is important to note that on the one hand in terms of content, the CFR encompasses the ECHR, but on the other hand, in certain respects it goes further. In this light, it is **recommended to take <u>the CFR as the substantive point of reference</u>, wherever national action falls within the scope of application of Union law.** (on this issue see I.B).

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[7] E.g. national security which according to the EU Treaty is not covered by Union law. For an example of a non-national security related case: see C-206/13 Siragusa in relation to landscape protection.
[8] See C-483/09, Gueye and Salméron Sanchez. In this case, the issue was a framework decision in which the nature and level of criminal sanctions were not harmonised. Against this background, the Court judged that a national obligation to always impose an injunction in certain cases did not fall within the scope of the framework decision and could therefore also not be judged in the light of the CFR.
[9] See e.g. C-6/03, Eiterkopfe. Note: in practice, it is generally quite difficult to decide on the dividing line between the section relating to implementation of EU law, and the section that can be earmarked as gold-plated.

[10] For the indicators for carrying out an analysis of these aspects for proposed legislation and regulations, please see the checklist of (international) (civil and political) fundamental rights, steps 2-7, contained in the Integral Assessment Framework (IAK).

2. **For interpretation of the meaning of CFR provisions which correspond to rights guaranteed by the ECHR, it is necessary to seek the connection with the ECHR**. On the basis of article 52(3) of the CFR, the ECHR equivalent of a CFR right must serve as the starting point for the interpretation of the CFR right. This applies both to CFR rights that offer the same level of protection as their ECHR equivalents and for CFR rights that provide more extensive protection. **For interpretation of the meaning of CFR rights with no ECHR equivalents, it is recommended to seek tie-ins with corresponding rights in the UN human rights treaties and the (Revised) European Social Charter.** The article-by-article explanatory notes to the Charter are a good starting point.[11]

3. The text of article 53 of the CFR[12] requires that the level of protection offered by the CFR is at least equal to the level of protection offered by the ECHR, other international human rights treaties ratified by all Member States and national constitutions. In this connection, on the one hand the Court has indicated that although the national authorities remain at liberty to apply these other sources, the level of protection of the CFR and the primacy, unity and effectiveness of the law of the Union may not be adversely affected.[13] It is therefore **recommended that the level of protection offered by the CFR be taken as the starting point and if the Constitution demands more extensive protection, to argue that the primacy, unity and effectiveness of Union law may not as a consequence be adversely affected.** On the other hand, the Court appears to have effectively played down the wording of article 53 of the CFR which states that the international human rights treaties in question must have been ratified by *all* Member States.
This is of particular importance for the interpretation of CFR rights with no ECHR equivalent, in the light of such international human rights treaties.[14] It is therefore **recommended to also look at human rights treaties that have not been ratified by all Member States such as UN human rights treaties and the (Revised) European Social Charter, when interpreting corresponding CFR rights.**

4. The text of the Charter distinguishes between 'rights' and 'principles'. According to article 51(1) of the CFR, rights must be 'respected' while principles (only) need be 'observed'. According to article 52(5) of the CFR, jurisdiction in respect of principles remains limited to the interpretation of legislative and executive acts that implement principles, and rulings on their legality. However, the CFR text and the Explanatory Notes are not always clear in explaining which CFR provisions are 'rights' and which are 'principles'. Furthermore, given the case-law from the Court of Justice on both the application of social CFR rights[15] and the application of general constitutional principles of Union law[16], the distinction (as yet) appears to be of limited relevance for (national) ruling. It is therefore **necessary to fully assess national action against *all* CFR provisions, including those CFR provisions that apparently contain 'principles'.**

[11] Explanatory notes to the Charter of Fundamental Rights, Pub. EU C 303/17, 14 December 2007, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:NL:PDF.
[12] Article 53 reads as follows: "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."
[13] See C-399/11 Melloni, para. 60.
[14] See C-517/10 Kamberaj; Court assessment according to article 34 CFR, of a right that corresponds substantively to provisions from the Revised European Social Charter, that has not been ratified by all Member States.
[15] See C-517/10 Kamberaj
[16] See C-144/04Mangold and C-555/07 Kücücdeveci.

5. The preamble to the CFR clarifies the fact that the CFR rights have resulted from, among other things, the case-law of the EU Court of Justice and of the ECtHR. Semi-judicial bodies that are not able to issue legally-binding judgements, such as the European Committee for Social Rights or the UN treaty bodies are not referred to as a source of inspiration. Therefore, **when assessing whether national action is in accordance with the provisions of the CFR, it is under all circumstances essential to a) read all CFR rights in the light of the Court of Justice case-law; and b) to read CFR rights that tie in with ECHR rights in the light of ECtHR case-law, whereby it should be remembered that CFR rights can offer more extensive protection than the ECHR.** It is recommended to also discuss these aspects when reporting on the assessment.

III. Reporting about the compliance with EU fundamental rights

Wherever national measures 'implement' Union law, the CFR can be used as a starting point for fundamental rights assessment. This document describes in some detail how to include other sources from domestic law (Constitution) and international law (e.g. ECHR and ECtHR case-law) in this interpretation (see II.B.1-3). At the same time, these sources outside the CFR must be examined carefully on their own merits as well. **In reporting about the compliance with regard to EU fundamental rights in the Explanatory Memorandum, it therefore remains desirable to refer to *all* underlying sources, including in particular the Constitution and the ECHR, from the point of view of transparency, and the continuation of trusted practice.**

APPENDIX: categories of CFR rights[17]

1. CFR rights with the same level of protection as an ECHR equivalent

CFR article	Right/prohibition	Constitutional equivalent	ECHR equivalent
2	Life	-	2
4	Torture and inhuman or degrading treatment or punishment	-	3
5	Slavery, forced labour & human trafficking	11, 15 (1), 19(2)	4
6	Liberty and security	15	5
7	Respect for private and family life	10(1), 10(2)	8
10(1)	Thought, conscience and religion	6	9
11	Freedom of expression and information	7,13	10
13	Freedom of the arts and sciences	7	10
17	Property	14	Protocol 1-1
19(1)	Protection from collective expulsion	-	P4-4 (not ratified by all EU Member States)

[17] The distinction employed in sections 1 and 2 is largely based on the one hand on the list of CFR provisions with the same content and scope as ECHR rights, and on the other hand the list of CFR provisions that have the same content but a broader scope than corresponding ECHR rights, both referred to in the explanatory notes to article 52, paragraph 3 CFR.

19(2)	Protection from removal, expulsion or extradition to a state where there is a serious risk of subjection to inhuman or degrading treatment	2(2), 2(3)	3
20	Equality before the law	1	P12-1
21	Non-discrimination	21	14
23	Equality between men and women	1	14, P12
48	Presumption of innocence and right of defence		6(2) & 6(3)
49(1) (except the last) & 49(2)	Nulla poena sine lege	16	7

2. CFR rights with a more extensive level of protection than an ECHR equivalent (see also explanatory notes to article 52, paragraph 3)

CFR article	Right/prohibition	Constitutional equivalent	ECHR equivalent	Extended scope
8	Protection of personal data	10(3)	8; also Council of Europe data protection treaty	Independent supervision
9	Right to marry and found a family		12	Also other forms of marriage as appointed in national legislation
12(1)	Freedom of assembly and of association	8, 9	11	Also EU level
14(1)	Right to education and access to vocational and continuing training	23	P1-2	Also vocational and continuing training
14(3)	Education (right of parental choice)	23	P1-2	
47(par 1)	Right to effective remedy and fair trial	17	13	Article 47 provides expressly for effective remedy before a tribunal (in other words: before the courts)
47 (par 2&3)	Impartial tribunal and legal aid	18	6(1)	No restriction to disputes concerning civil rights/ obligations, criminal prosecution
50	Ne bis in idem		P7-4	Also EU level

3. CFR rights with no ECHR equivalent

CFR article	Right/ prohibition	Constitutional equivalent	Non-ECHR equivalent	Comments
1	Human dignity			
3	Integrity of the person	11	Convention on human rights and biomedicine Article 7 paragraph one, subjection g, Statute of Rome (in respect of eugenic practices)	
10(2)	Right to conscientious objection	99		
14(2)	The right to receive free compulsory education		IVESCR, 13(1-2), 14	
15	Freedom to choose an occupation and engage in work	19(1), 19(3)	Revised ESC96, 1, 18 and 19	
16	Freedom to conduct a business		(Case law Court of Justice)	
18	Asylum			
24	Rights of the child		UN child rights convention	
25	Rights of the elderly		ESC, Additional Protocol: 4 (not ratified by all EU Member States)	
26	Integration of persons with disabilities		Revised ESC96, 15 (not ratified by all EU Member States)	
27	Workers' rights to information and consultation within the undertaking		ESC, Additional Protocol: 2-3 (not ratified by all EU Member States)	
28	Collective bargaining and action		Revised ESC96, 6 (not ratified by all EU Member States)	
29	Access to placement services		ESC, 9 (not ratified by all EU Member States)	
30	Protection in the event of unjustified dismissal			
31	Fair and just working conditions	19(2)	Revised ESC96, 2-4 (not ratified by all EU Member States)	
32	Prohibition of child labour and protection of young people at work		Revised ESC96, 7 (not ratified by all EU Member States)	

33	Family and professional life		Revised ESC96, 8-16-17 (not ratified by all EU Member States)	
34	Social security and social assistance, social housing	20	Revised ESC96, 12-13-14-16-31 (not ratified by all EU Member States)	
35	Health care	22	Revised ESC96, 11 (not ratified by all EU Member States)	
36	Access to services of general economic interest			
37	Environmental protection	21	ICESCR, 12(b)	
38	Consumer protection			
49(0) last sentence) and 49(3)	Principle of proportionality			

4. EU context-specific fundamental rights

CFR article	Right/prohibition	Constitutional equivalent	ECHR or non-ECHR equivalent	Comments
12(0)	EU political parties			
39	European Parliament voting rights	3, 4		
40	Municipal election voting rights for Union citizens residing in another Member State	3, 4	P1:3	
41	Good administration by Union institutions and bodies			
42	Right of access to documents of Union institutions and bodies			
43	Access to European Ombudsman in cases of maladministration by Union institutions and bodies			
44	Right to petition the European Parliament			
45	Freedom of movement and residence Union citizens, legal nationals of third countries	2(4)	P4:2 (not ratified by all EU Member States	
46	Diplomatic and consular protection			