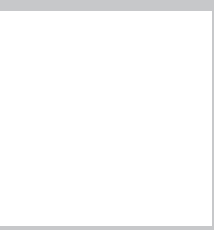
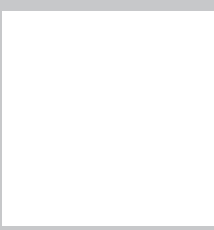
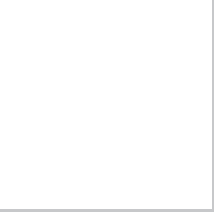
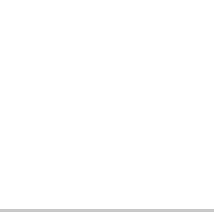




European University Institute

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

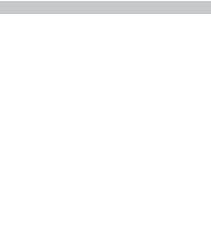
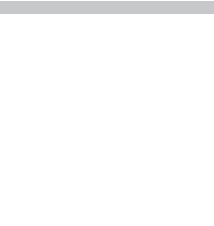
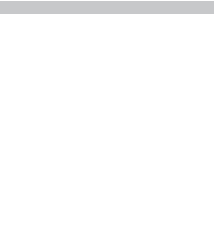
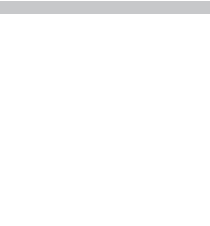
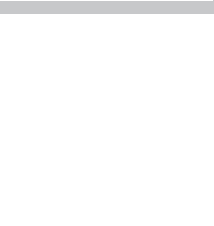
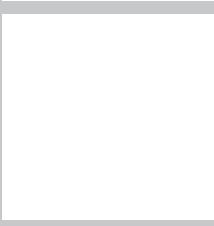
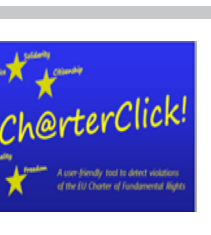
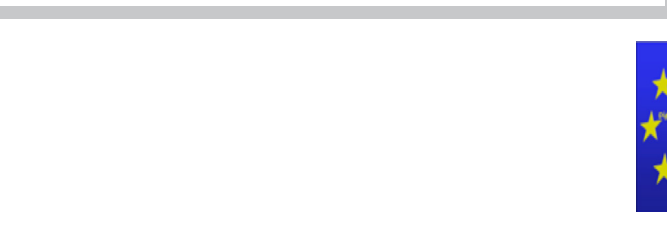


July 2017

RESEARCH PROJECT REPORT

# Report on the Use of the EU Charter on Fundamental Rights by National Human Rights Bodies and Practical Guidelines on the Strategic Use of the EU Charter by National Human Rights Bodies

AUTHOR: MADALINA BIANCA MORARU



CharterClick! (“Don’t knock on the wrong door: CharterClick! A user-friendly tool to detect violations falling within the scope of the EU Charter of Fundamental Rights”)

Report on the use of the EU Charter on Fundamental Rights by National Human Rights Bodies  
and Practical Guidelines on the strategic use of the EU Charter by National Human Rights Bodies

Author: Madalina Bianca Moraru | *Research Fellow, European University Institute, Robert Schuman Centre for Advanced Studies, Centre for Judicial Cooperation*

Under the scientific supervision of:

Prof. Deirdre Curtin | Director of CJC

Professor Adelina Adinolfi | CharterClick! Project Director (University of Florence)

With the support of:

Dr. Federica Casarosa | Member of the CJC/EUI Team

Dr. Nicole Lazzarini | CharterClick! Project Manager (University of Florence)

LL.M. Viorica Vita | Member of the CJC/EUI Team

The [Centre for Judicial Cooperation](#) was created in December 2011, within the European University Institute, for the purpose of establishing a space of collaboration and exchange of knowledge between legal practitioners and the academic community on a variety of EU law related topics. The CJC engages both professional groups to participate in differentiated activities ranging from workshops and conferences to pure research and policy endeavours. In order to disseminate the results of its work, the Centre publishes Working Papers and Distinguished Lectures, thus engaging in open discussions with the judicial and academic communities. The transnational and diverse blend of the CJC activities makes sure that dialogue between authors, judges and practitioners is constantly put into place, allowing for improvement of research and its outputs related to judicial dialogue.

Project co-financed by the European Commission, “Fundamental Rights and Citizenship Programme 2013”



©European University Institute, 2017

Content © Madalina Bianca Moraru, 2017

This text may be downloaded only for personal research purposes. Any additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), the title, the year and the publisher, and url of the originally published document, where available.

Views expressed in this publication reflect the opinion of individual authors and not those of the European University Institute.

Centre for Judicial Cooperation(CJC)

Robert Schuman Centre for Advanced Studies, European University Institute

July 2017

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

<http://cadmus.eui.eu/>



# TABLE OF CONTENTS

The CharterClick Project .....	1
Acknowledgements .....	1
Terms of use .....	1
Table of figures.....	2
List of abbreviations .....	2
Executive summary.....	3
I. Introduction .....	5
II. Comparative quantitative analysis of NHRBs’ use of the Charter of Fundamental Rights .....	6
1. General information on the participating National Human Rights Bodies .....	6
1.1.Respondents.....	6
1.2.Remit of respondents’ mandate.....	8
1.3 Activities of the respondent bodies.....	8
1.4 Type of decisions (binding or non-binding) by category of respondent bodies.....	9
1.5.Role of the respondent NHRBs in litigation.....	11
2. Role of the Charter in the activity of each body .....	11
2.1 Role of the Charter in the day-to-day activities of the NHRBs .....	11
2.2 The actor(s) that raise the Charter in the complaint procedure(s) .....	12
2.3 Specific use of the Charter by NHRBs – sample of good practices.....	13
2.4 The various tools/databases used by the respondent NHRBs in order to collect information on the interpretation and application of the Charter and its potential ..	14
3.Suggestions on how to improve the CharterClick! deliverables .....	14
3.1 The main difficulties the respondent NHRBs experience in applying the Charter .....	14
3.2 Most useful tool from the CharterClick! Toolkit.....	14
4.Training and awareness raising activities.....	15
III. Comparative Qualitative Analysis of the NHRBs’ use of the Charter – landmark cases .....	16
1.The Charter as (legal) tool to trigger domestic legislative change .....	16
2.The Charter as a parameter of validity for EU secondary legislation .....	17
3.The Charter as a parameter of legality of national legislation .....	17
4.The Charter <i>as tool for changing practices of public authorities and private parties contrary to HRs</i> .....	17

IV. Conclusions .....	20
V. Practical Guidelines on the use of the Charter – multiple functions and added compared to other human rights instruments .....	23
1. Introduction .....	23
2. The multiple legal functions the Charter of fundamental rights can play in the practice of the NHRBs .....	25
2.1. Mainstreaming the EU Charter into the EU and national legislative process.....	25
2.2. Charter as a parameter of validity of EU secondary legislation .....	26
2.3. Charter as parameter of interpretation of EU legislation and implementing national measures .....	27
2.4. The Charter as parameter of compatibility of national legislation and public authorities practice with fundamental rights .....	28
2.5. The Charter as an entrance door for Directives in private parties relations/litigation .....	29
2.6. The Charter as an instrument for strategic litigation .....	30
2.6.1 The Office of the Human Rights Commissioner of Poland – equal treatment.....	30
2.6.2 N.S.and others – conformity with absolute human rights in overlapping multilevel human rights system .....	30
2.6.3 Firma Feryn – collective remedies .....	31
2.6.4 Belov and CHEZ – systemic discriminatory practices.....	31
2.7. The Charter as gap filling and raising standards of protection of fundamental rights at national level .....	31
3. The Added value of the Charter compared to other human rights instruments (ECHR).....	32
Annex I – The CharterClick! Questionnaire .....	34
1. Introduction .....	35
2. The importance of shedding light on the use of the Charter by National Human Rights Bodies	35
3. Questionnaire .....	36
Part I – Your institution.....	36
Part II – The EU Charter in your day-to-day activity .....	38
Part III – Help us modelling the CharterClick! On-line platform on your needs.....	42
Part IV – Awareness raising and training activities.....	44



# I. THE CHARTERCLICK PROJECT

“Don’t knock on the wrong door: CharterClick!” (hereinafter [CharterClick!](#)) is a two year project (February 2015 - January 2017) co-financed by the European Commission under the “Fundamental Rights and Citizenship Programme 2013”. The primary outcome consists in setting up an on-line, freely accessible platform with a set of tools aimed to provide assistance in understanding whether and how reliance on the EU Charter of Fundamental Rights (hereinafter [EU Charter](#)) can be of help in a specific case. The toolkit will target victims of fundamental rights violations, their representatives, national judges and national human rights bodies (NHRBs), including data protection supervisory authorities.

## II. ACKNOWLEDGEMENTS

I wish to express the Project partners’ gratitude to the participating *National Human Rights Bodies* for sharing their practice and experience concerning the application of the Charter, as well as sending us their suggestions on how to make the CharterClick Tool! useful to them. Similarly, I wish to express the Project partners’ gratitude to *Zuzana Dorazilova*, Policy Officer at the European Commission, and *Gabriel Toggenburg* from the *Fundamental Rights Agency of the EU* for their kind introductions to the Workshop *The Charter in the Everyday Activity of the National Human Rights Bodies: Experiences, Problems, Perspectives*.

I also wish to personally thank *Equinet* and *ENNHRI* for their help in disseminating the questionnaire; *Dr. Federica Casarosa*, *Dr. Nicole Lazzarini* and *LL.M. Viorica Vita* for their very useful input and recommendations for improving this report; *Aristi Volou*, from the University of Leicester for her language corrections. All mistakes remain mine.

This document could have been written thanks to the kind co-funding of the European Union Programme “Fundamental Rights and Citizenship 2013”.

## III. TERMS OF USE

This document may be freely used and distributed, provided that the document itself is not modified or shortened, that full authorship credit is given, and that these terms of use are not removed but included with every copy. Please, address questions and comments to: [madalina.moraru@eui.eu](mailto:madalina.moraru@eui.eu)





# TABLE OF FIGURES

Figure No.1 – Respondent NHRBs .....	7
Figure No. 2 – Fundamental Rights within the remit of the NHRBs mandate .....	8
Figure No.3 – Activities of the NHRBs.....	8
Figure No. 4 – Type of activities for each of the respondent NHRBs.....	9
Figure No. 5 – Types of decisions (binding v non-binding decisions) adopted by the respondent NHRBs	10
Figure No. 6 – Total numbers for each type of decisions .....	10
Figure No. 7- Role of NHRBs in litigation .....	11
Figure No. 8 – Roles of the Charter in the day-to-day work of NHRBs .....	12
Figure No. 9 – Body who invokes the Charter .....	12
Figure No. 10 – Role of the EU Charter in the activities of the NHRBs .....	13
Figure No. 11 – Main difficulties experienced by the NHRBs in the application of the EU Charter .....	14

# LIST OF ABBREVIATIONS

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DPA	Data Protection Authorities
EDPS	European Data Protection Supervisor
GDPR	General Data Protection Regulation
NDPA	National Data Protection Authorities
NHRBs	National Human Rights Bodies



# EXECUTIVE SUMMARY

The Report maps out the use of the Charter by 28 National Human Rights Bodies (hereinafter NHRBs).<sup>1</sup> Secondly, it includes practical guidelines on the use of the Charter for the NHRBs.

Most studies on the domestic use of the Charter have so far concentrated on the judiciary's activity.<sup>2</sup> The Ch@rterClick! project aimed to look at the Charter's life also outside the courtroom. A wide range of national bodies with human rights competences exist in the Member States and could play a crucial role in ensuring protection of European fundamental rights. Therefore the Ch@rterClick! project assessed the use of the Charter by NHRBs with varied powers and mandates, such as: *awareness raising, advocacy, advisory role vis-à-vis national governments, protection of victims, equality bodies, ombudspersons, protecting certain categories of interests: migration, and data protection*. The Project chose a very broad definition of NHRBs, trying to include all those national bodies that have a role in fundamental rights application. The criteria for choosing the NHRBs was determined by the very practical objective of the Project, namely, ensuring sound protection of fundamental rights and knowledge on when the Charter is applicable in concrete cases. Therefore all national bodies which carry out activities related to the application of human rights were invited to participate in the **CharterClick!** Survey, and not only those that qualify as NHRIs according to the 1992 Paris Principles.

The NHRBs that replied to the the project's survey included: *NHRIs<sup>3</sup>, equality bodies, ombudsmen, commissions, and other independent bodies entrusted with the task of human rights supervision*. Some of these bodies

are quasi-judicial, meaning that they adjudicate cases but are not courts of law.<sup>4</sup>

The conclusions presented in this Report are based on data collected via the CharterClick! *Questionnaire* (Annex I) and a *one-day Workshop*,<sup>5</sup> which gathered NHRBs and other national and EU fundamental rights stakeholders. Responses to the Questionnaire and the Workshop discussions show that **the EU Charter has a progressively important role in the every-day work of NHRBs, especially in legislative mainstreaming and validity assessment of EU and national legislation**. Yet, there is considerable room for **improving the day-to day application of the Charter among NHRBs**.<sup>6</sup>

The data collected indicates that the added value of the Charter provisions compared to the provisions of specific EU secondary legislative acts is not clear for the NHRBs (especially in fields where there are detailed EU legal acts, such as non discrimination, data protection). It is often used together with other fundamental rights related instruments, often to support auxiliary arguments. Significantly, most of the NHRBs do not keep statistics concerning their use of the Charter.

According to the **CharterClick!** Survey, the possible reasons for the limited and auxiliary use of the EU Charter by the NHRBs in their daily activities can be, *inter alia*: 1) the fact that the scope of application of the Charter is difficult to understand; 2) an overcrowded human rights context; the added value of the Charter compared to the other human rights instruments, or the specific EU secondary legislative acts is not immediately clear; 3) limited visibility and lack of relevant public awareness; 4) linguistic and time constraints; 5) limited financial resources of the NHRBs; and limited training initiatives on the use of the Charter. These reasons were invoked also as possible obstacles to the future development of the application of the Charter across various fields.

1 The Report excludes the National Data Protection Authorities, which form the subject of a separate study, see the RSCAS Research Project Report on *The Use of the Charter by National Data Protection Authorities and the European Data Protection Supervisor*.

2 According to, for instance, FRA Annual Report 2013.

3 NHRIs according to the 1992 Paris Principles; not all the NHRBs have applied to be certified under the Paris principles.

4 E.g. equality bodies.

5 For more details on the Workshop discussion, see *Report of the CharterClick! Workshop The Charter in the Everyday Activity of the National Human Rights Bodies: Experiences, Problems, Perspectives*.

6 Especially beyond the fields of non-discrimination and data protection, which seem to have been the areas where the EU Charter is mostly referred to.





Solutions were suggested by the participating NHRBs, such as: more awareness raising among the public; new tools for the improvement of the practitioners' knowledge about the Charter, its possible legal functions and added value compared to other human rights instruments. A helpline desk with capacity to answer the more controversial and juridical questions has been suggested as a useful instrument in furthering the application of the EU Charter (*Portuguese High Commission for Migration*). Although the EU Charter is gradually included in training curricula for public administration officials (e.g. in Greece, Portugal), there is still limited discussion on the added value of the EU Charter in legal practice. In areas covered by EU legislation, the EU Charter should be used as a legal tool of reference jointly with the domestic legal instruments

It is recommended that a thorough institutional planning on the use and reference of the Charter is endorsed by NHRBs, for the purpose of ensuring its meaningful application in their day-to-day work. Best practice examples were submitted by NHRBs: a formal internal decision of the NHRB inviting to an increased use of the Charter (*Greek Ombudsman*); *ex officio* reference to the EU Charter in solving complaints (*Sweden Equality Ombudsman*); the inclusion of Charter in the internal institutional databases to facilitate access to prior cases that dealt with the Charter (*Belgian Federal Ombudsman*); monitoring of the CJEU case law on the Charter (*Belgian Federal Ombudsman*); planned systemic references to the Charter in annual activity reports (*Belgian Federal Ombudsman*, *Romanian National Council for Combating Discrimination*).

The jurisprudence of the CJEU on the Charter and the case law submitted by the participating NHRBs show the essential role played by NHRBs in the application of the Charter. Landmark cases where the CJEU stroke down provisions from an EU secondary legislative act on the basis of the Charter originated from NHRBs (Test Achats, pending RPO case). Cases of European importance, leading to the clarification of the scope of application of the Charter, and ultimately leading to enhancing the level of human rights protection at the national level also originated at the initiatives of NHRBs. A case which has gained constitutional importance is the *N.S. and others* case. Following the *N.S.* case, which case initiated by the *UK Equality and Human Rights Commission*, Poland and the UK can no longer resort to Protocol 30 as a justification for not complying with the Charter. The CJEU made clear that the Charter covers both cases where Member States 'implement' and 'derogate' from EU law.

Another case where the Charter was used by a NHRB as a standard of review of national legislation and enhancing domestic human rights protection is the *Benkharbouche* case.<sup>7</sup> The *UK Equality and Human Rights Commission*

<sup>7</sup> *Benkharbouche v Sudan and Janah v Libya*, UK Court of Appeal, [2015] EWCA Civ 33.

intervened in favour of the applicants, foreigners working in embassies of their third countries based in London, who complained of unfair dismissal, failure to be paid the minimum wage, harassment and racial discrimination in breach of the Working Time Regulations 1998 and, *inter alia*, Articles 6 and 13 ECHR, and Article 47 Charter. It was argued that the UK State Immunity Act violated the ECHR and Charter based fair trial and effective remedy rights of third country nationals working in the embassies of their countries based in London. This case also shows the added value of the Charter vis-à-vis the ECHR, which in certain jurisdictions has more limited effects than the Charter (e.g. statutory limitation applies to the ECHR, but not to the Charter within the specific UK legal context;<sup>8</sup> similarly Germany).

Although there is still a modest usage of the Charter by the NHRBs, there has been an increase in cases where the NHRBs invoke *ex officio* the Charter. It is interesting to note that the Charter has at times been used by the NHRB(s) in order to achieve a certain strategic outcome. For instance, to help solve conflicting interpretations between various state authorities; as a last resort to remedy incompatibility of EU/national legislation with fundamental rights; to change social or economic policies; or adjust systemic deficiencies in the treatment of certain communities which have long been discriminated against (see the *Belov* and *CHEZ* cases discussed below).

All these examples underline that the NHRBs' institutional commitment to use the Charter in their daily work is highly important for its effective use. A thorough institutional planning of the use of the Charter ensures that this instrument is used in a meaningful way in the day-to-day work of the NHRBs.

<sup>8</sup> UK courts cannot disapply national legislation on the basis of the ECHR, since according to section 3 of the Human Rights Act, the amendment of incompatible statutory provisions is the prerogative of the legislature.





# I. INTRODUCTION

For the purpose of collecting data on the use of the Charter by NHRBs, the Centre for Judicial Cooperation circulated the Ch@rterClick! Questionnaire in July 2015, among the associate partners, as well as other NHRBs outside the Consortium.<sup>9</sup> The replies were collected until January 2016.

The CharterClick! *Questionnaire* was drafted in a modular way, in order to ensure that NHRBs with different mandates would be able to respond to questions regarding the use of the EU Charter.<sup>10</sup> Accordingly, the questionnaire includes four parts. *Part I* requires providing some general information on the NHRBs. *Part II* refers to the role of the EU Charter in the activity of the NHRBs. *Part III* aims at collecting the suggestions the NHRBs may deem useful to improve the CharterClick! deliverables. Finally, *Part IV* focuses on the training and awareness raising activities concerning the use and comprehension of the EU Charter. Whilst Part I and III are common to all the addressees of the Questionnaire, Part II and Part IV contain different sets of questions to be replied depending on the activity/ies performed by the NHRB.<sup>11</sup>

The time frame of the research was between the entry into force of the Charter, in December 2009 until November 2015.

This report illustrates a selection of the results of the CharterClick! Project Questionnaire on the use of the Charter of Fundamental Rights by National Data Protection Authorities (hereafter NDPA) and the EDPS

in their day-to-day activities. The Ch@rterClick! Report unfolds as follows: Section II introduces the main results of the comparative quantitative analysis of the NHRBs use of the EU Charter. Section III highlights the main findings of the qualitative comparative analysis, offering an overview of the best practices of NHRBs' use of the EU Charter. The Report will conclude with Section IV, which summarises: the main roles of the EU Charter in the activities of the NHRBs; the good practices as well as shortcomings in EU Charter application. The Report will attempt to briefly put forward possible solutions for enhancing the application of the EU Charter by NHRBs.

---

<sup>9</sup> The full CharterClick! Questionnaire can be found in Annex I. The Questionnaire was primarily designed to contribute to the CharterClick! Online Platform by collecting the practices of NHRBs as regards the application of the Charter. At the same time, the Questionnaire took into account also the need to collect useful information for the elaboration of other tools, with a view to make them respondent to the actual needs of NHRBs.

<sup>10</sup> Not all the questions would be applicable to all bodies, given that not all bodies provide training, process complaints or litigate on behalf of complainants.

<sup>11</sup> The CharterClick! Questionnaire can be found in Annex I to this Report.



## II. COMPARATIVE QUANTITATIVE ANALYSIS OF NHRBS' USE OF THE CHARTER OF FUNDAMENTAL RIGHTS

### 1. General information on the participating National Human Rights Bodies

The first part of the Ch@rterClick! Questionnaire aimed to gather information on the participating NHRB(s), in particular: the legal instrument(s) authorising their activities; the scope of their mandates; the legal nature and effects of the decisions they are authorised to issue; the characteristics of the process followed when processing complaints raised by individuals; the role of the bodies before courts; clarification on whether they are accredited under the 1992 Paris Principles.

#### 1.1 Respondents

The Questionnaire was completed by 28 NHRBs, from 19 EU countries.<sup>12</sup> The following NHRBs replied to the Questionnaire:

1. Federal Ombudsman of Belgium
2. Commissioner for Administration and Human Rights of Cyprus
3. The Public Defender of Rights of the Czech Republic
4. The Board of Equal Treatment of Denmark
5. Chancellor of Justice of Estonia

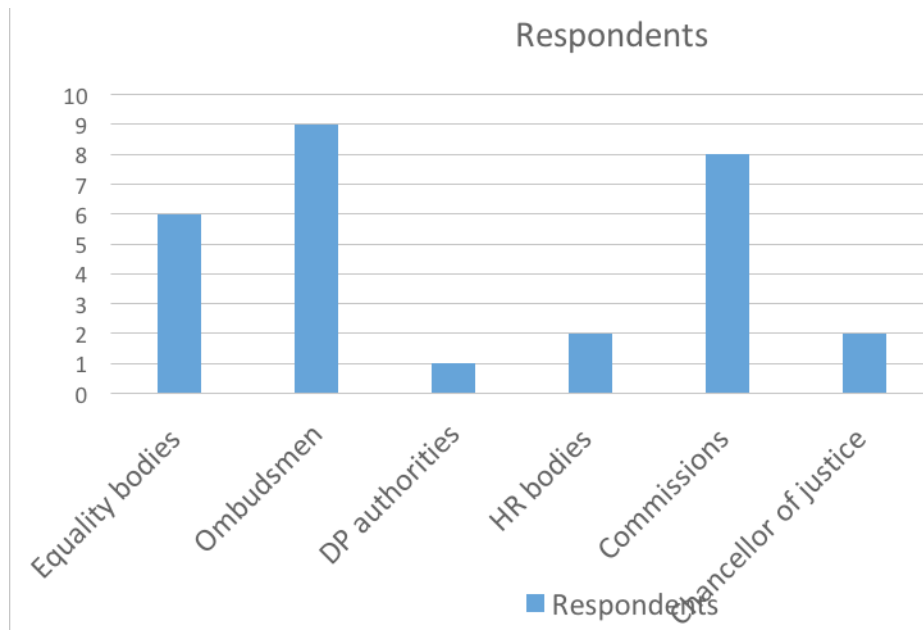
6. Human Rights Centre of Finland
7. Ombudsman for Equality of Finland
8. Parliamentary Ombudsman of Finland
9. Defender of Rights of France
10. Parliamentary Ombudsman of Greece
11. Office of the Commissioner for Fundamental Rights of Hungary
12. Coordination of Regional and Autonomous Provinces Ombudsman Institutions of Italy
13. Seimas Ombudsmen's Office of the Republic of Lithuania
14. Parliamentary Ombudsman of Malta
15. Commissioner for Human Rights of Poland
16. High Commission for Migration of Portugal
17. Comissão para a Igualdade no Trabalho e no Emprego of Portugal
18. National Council for Combating Discrimination of Romania
19. People's Advocate Institution of Romania
20. National Centre for Human Rights of Slovakia
21. Council for the Elimination of Racial or Ethnic Discrimination of Spain
22. Chancellor of Justice of Sweden
23. Data Protection Authority of Sweden
24. Equality Ombudsman of Sweden
25. The Parliamentary Ombudsman of Sweden
26. Equality and Diversity Forum of UK
27. Equality and Human Rights Commission of UK
28. Parliamentary & Health Service Ombudsman of UK

Figure No.1 – Respondent NHRBs

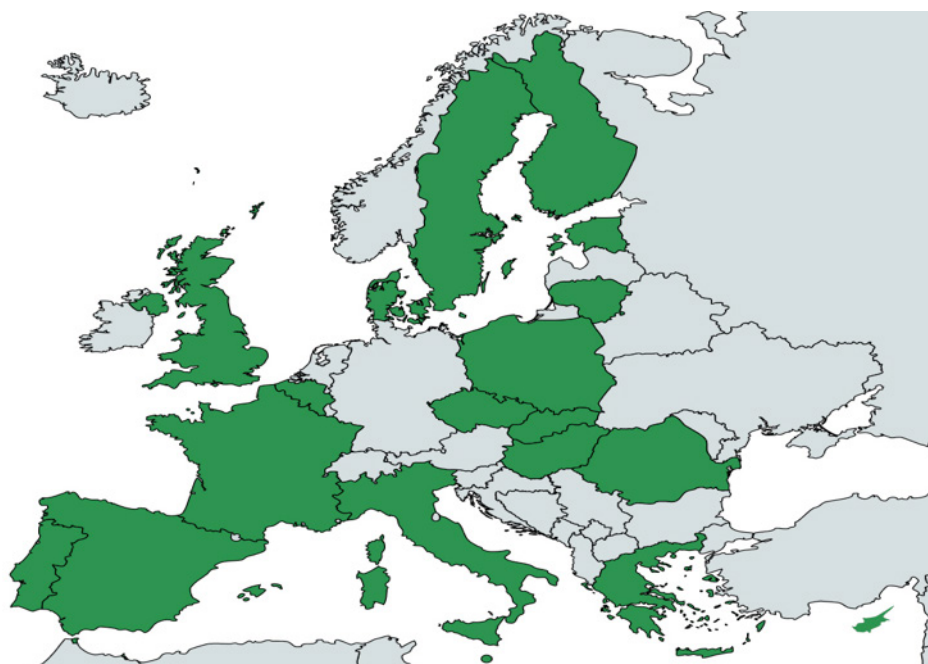
<sup>12</sup> Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and UK.



Figure No.1 – Respondent NHRBs



Member States of origin of the participating NHRBs



The field of data protection was not included in this round of survey. Given the increasing activity of data protection commissioners and agencies on the issue of the scope of application of the Charter, in particular breaches of the right to privacy and data protection (e.g. *Shrems*<sup>13</sup> and

*Digital Rights Ireland*<sup>14</sup> cases), these rights will be the focus of a separate **CharterClick!** Survey.<sup>15</sup>

<sup>13</sup> Case C-362/14, *Schrems v. Data Protection Commissioner [Ireland]*, ECLI:EU:C:2015:650.

<sup>14</sup> Joint cases C-293/12, C-594/12, *Digital Rights Ireland and Seitlinger v. Austrian Minister for Communications, Marine and Natural Resources*, ECLI:EU:C:2014:238.

<sup>15</sup> The results of this second round of survey will be discussed separately during a second transnational training that will be organised by the Centre for Judicial Cooperation, focusing on the fundamental right of data protection and interaction with the right to



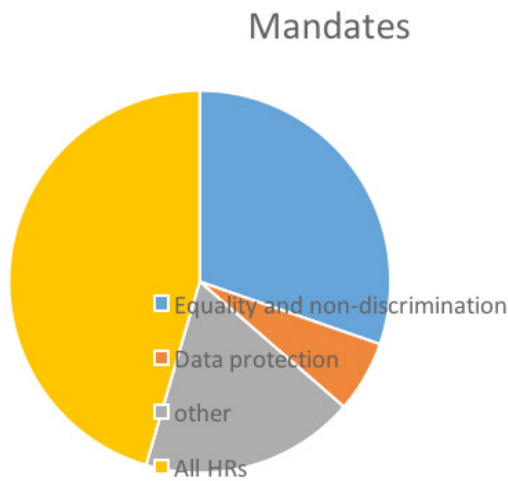
## 1.2 Remit of respondents' mandate

The responding NHRBs vary in composition, and the remit of their mandate. Among the respondents, nine are ombudspersons; six are equality bodies; eight are commissions; two are Chancellors of Justice;<sup>16</sup> while one was a national supervisory authority on data protection.<sup>17</sup>

Most of the replies came first from NHRBs with a mandate covering all human rights, followed then by bodies focusing on the principles of equality and non-discrimination, and then by those whose mandate cover all fundamental rights, but only within specific fields of law (e.g. migration).

Figure No. 2 – Fundamental Rights within the remit of the NHRBs mandate

Question 4.1: Please, specify if your competence extends to all human rights listed in the Charter or it is limited to some of them (multiple replies possible)

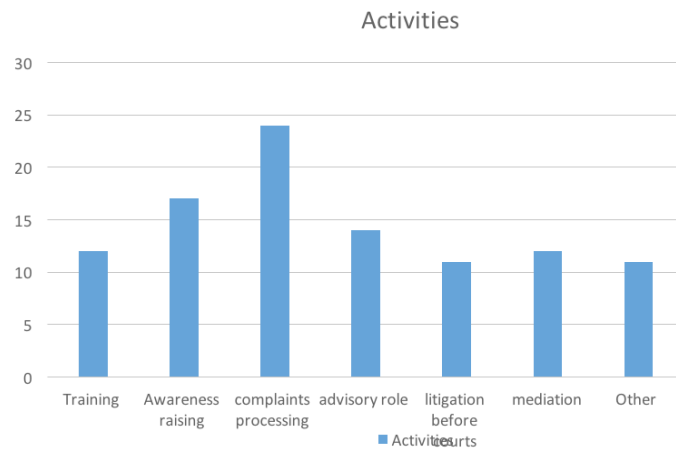


## 1.3 Activities of the respondent bodies

The respondent NHRBs perform multiple functions ranging from: awareness raising, advocacy, advisory role vis-à-vis national governments and legislators, complaints processing, training, advising on policy making and legislative drafting. The NHRBs' mandates cover the following fundamental rights: all fundamental rights which arise within the field of activities performed by public authorities; fundamental rights restricted to specific fields of law (migration and data protection); or only particular fundamental rights (as the case of equality bodies which concentrate on equality and non-discrimination). The most commonly performed activities of the respondent NHRBs are: complaints resolution; awareness raising; advisory role for public bodies and institutions; legislative mainstreaming especially for the legislative branches.

Figure No.3 – Activities of the NHRBs

Question 4.2: Please, select which of the following activities are included in your mandate (if more than one, please indicate the most relevant one/s):



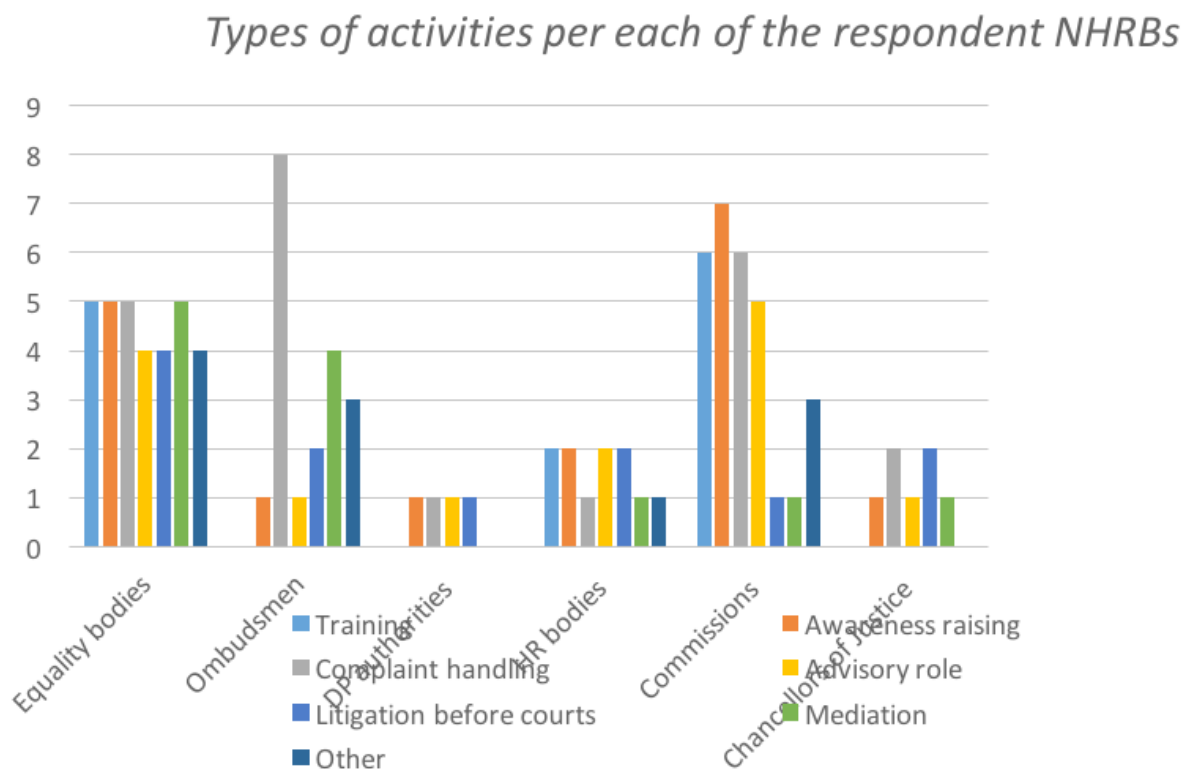
private life, as applied by national data protection authorities. See the RSCAS Research Report on the Use of the Charter by NDPAs and the EDPS.

<sup>16</sup> Chancellor of Justice usually perform constitutional duties, ensuring that laws and regulations would be constitutional and in compliance with other laws.

<sup>17</sup> Use of the EU Charter by national data protection authorities is the subject of a separate survey started after the end of the Survey on use of the EU Charter, in general, by NHRBs.



Figure No. 4 – Type of activities for each of the respondent NHRBs



#### 1.4 Type of decisions (binding or non-binding) by category of respondent bodies

Judging by the total number of decisions issued by the NHRBs, the majority of them do not have legally binding nature. Except the Ombudspersons, the other NHRBs issue both legally binding and soft law decision. The Ombudspersons usually issue consultative/advisory opinions or recommendations which are not legally binding for the public administration. The Ombudsmen do not hear/decide complaints raised by individuals in the sense of issuing decisions on the merits of the complaints (quasi-judicial role). This is usually the role of equality or migration related bodies. While human rights commissions or the chancellor of justice can issue both legally binding decisions and consultative acts, such as: recommendations, reports, opinions, which are not legally binding.

The decisions issued in individual complaints are usually not definitive and irrevocable, in the sense that courts or legislative bodies can reverse them.<sup>18</sup> It seems that certain trends can be identified, in the sense that equality bodies have quasi-judicial powers and if their decisions are not challenged before courts, then they remain final for the involved parties. On the other hand, ombudspersons

issue decisions which are generally advisory for public authorities or private bodies. Most of the individual decisions are subject to a form of appeal. In case no appeal is submitted against decisions, equality bodies can end the litigation without the need to follow court procedures.

18 Some exceptions exist, for instance, the Chancellor of Justice of Estonia's decisions are final and not subject to appeal.



Figure No. 5 – Types of decisions (binding v non-binding decisions) adopted by the respondent NHRBs

Question 4.3: If your mandate includes the processing of complaints raised by individuals (c) in question 5.2), could you specify the legal value of the decisions you may issue? (multiple replies are possible)

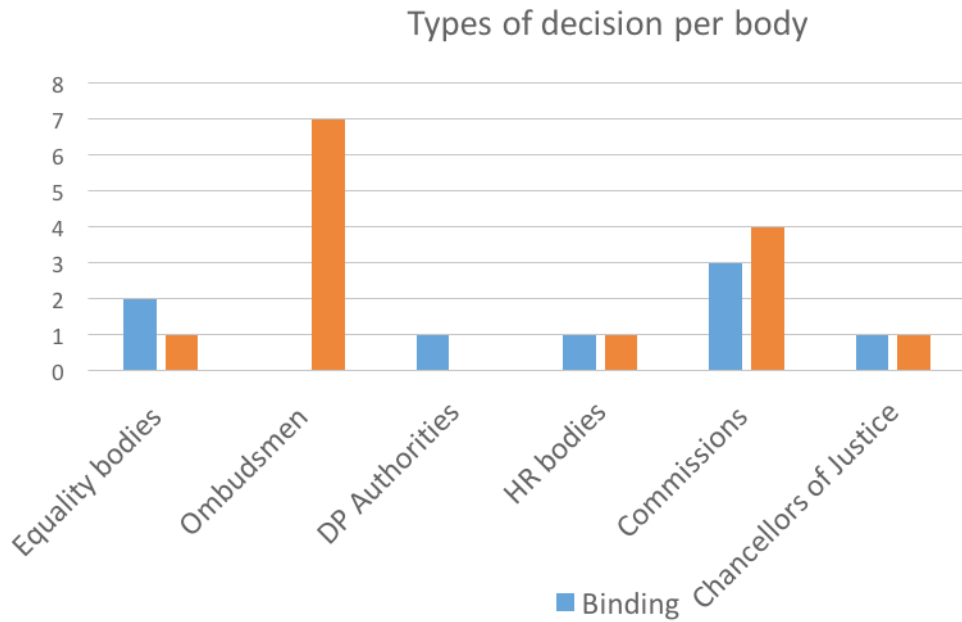
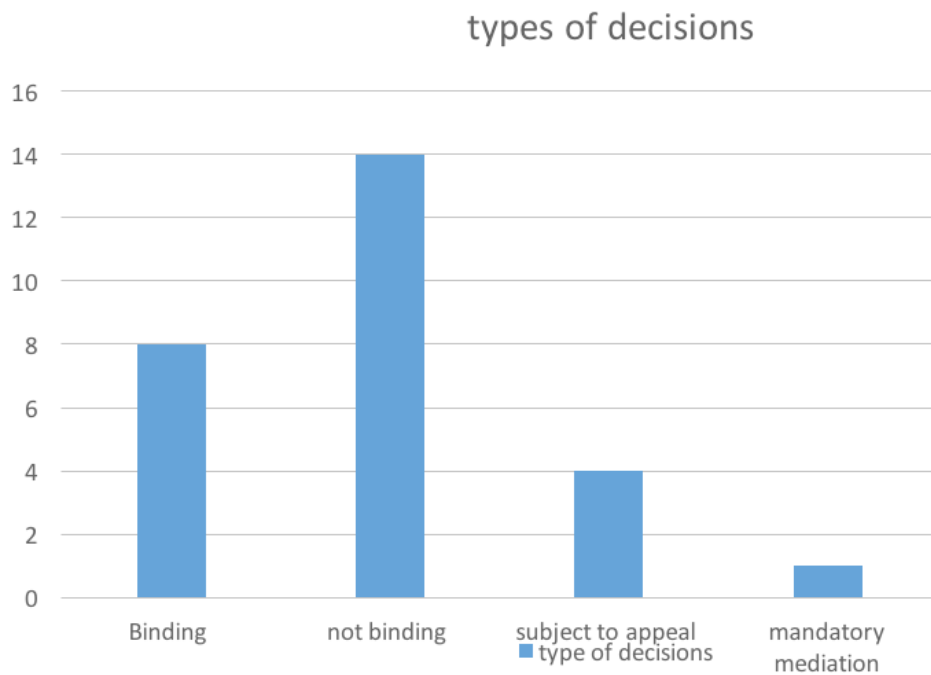


Figure No. 6 – Total numbers for each type of decisions



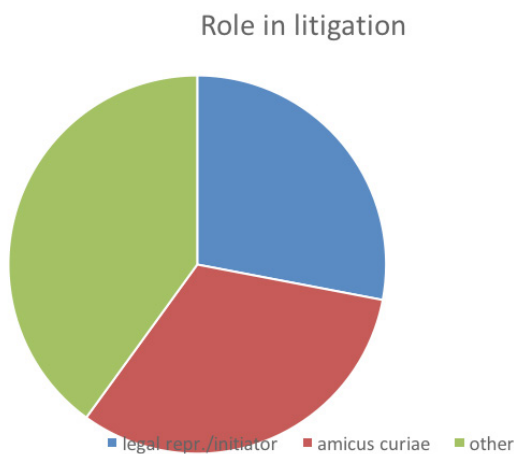


### 1.5 Role of the respondent NHRBs in litigation

There seems to be an equal distribution among the various roles that NHRBs can have in litigation on human rights. The distribution of NHRBs' roles in human rights litigation usually ranges from: case initiation, legal representation to other *amicus curiae* activities. Most of the NHRBs could act as legal representative or initiator of a case, and *amicus curiae* in judicial proceedings. The NHRBs that cannot act as legal representative of initiator are usually the Ombudspersons whose decisions are soft law.

Figure No. 7- Role of NHRBs in litigation

Question 4.4: If your mandate includes litigating cases before courts (e) in question 4.2), could you describe the role you may have in front of courts?



## 2. Role of the Charter in the activity of each body

Part II of the CharterClick! *Questionnaire* aimed to gather information on the EU Charter related activities such as:

number of cases;

the actor introducing/raising the Charter in the case;

consequences for the introduction of the Charter; most frequently mentioned fundamental right(s);

(...) most important case(s) dealing with the Charter; most relevant database(s) for Charter related cases; questions for litigating bodies; cases where the Court upheld arguments based on the Charter; cases where the Court did not follow arguments based on the Charter raised by NHRBs; questions for institutions with advisory role; legislation regarding the Charter; questions for mediators or out-of-court settlement bodies; most relevant case (or cases) of alleged violations of the Charter and results.

### 2.1 Role of the Charter in the day-to-day activities of the NHRBs

The Charter is most often used a legal source of fundamental rights when hearing and deciding cases, in litigating cases before courts, but also in mediation out of court dispute settlements. It is not relied as the primary instrument of reference for human rights, but referred together with other national or regional legal instruments. Indeed, one of the main challenges that seems to be raised most often is that of integrating the Charter into an already rather “crowded” space of international and domestic fundamental and human rights norms. In certain domestic jurisdictions, the NHRBs seem to prefer to refer to European Convention of Human Rights (ECHR) as an older and better known source of law (e.g. Sweden, Romania), while the Charter is mentioned together with the ECHR.

An increase in Charter reference was reported, especially in certain jurisdictions. For instance, an impressive number of cases referring to the Charter was provided by the *Portuguese CITE*: 7518 cases where the Charter was referred. A possible reason for this increase could be the increasing case-law of CJEU referring to the Charter (as noticed by certain of the respondent NHRBs). The NHRBs mentioned that the Charter relevant jurisprudence of the CJEU offers welcomed guidance and encouragement on the use of the Charter at the national level, as it brings additional concrete examples on the application of the Charter.

However, there are several NHRBs who are considering the Charter independently/separately of other norms. Independent reference to the Charter is recently increasing, especially in the field of social rights, since the Charter, unlike the ECHR, includes also economic and social rights.<sup>19</sup> It should be noted that the rights and principles provided in Title IV (Solidarity) of the Charter do not have correspondent rights in the ECHR.

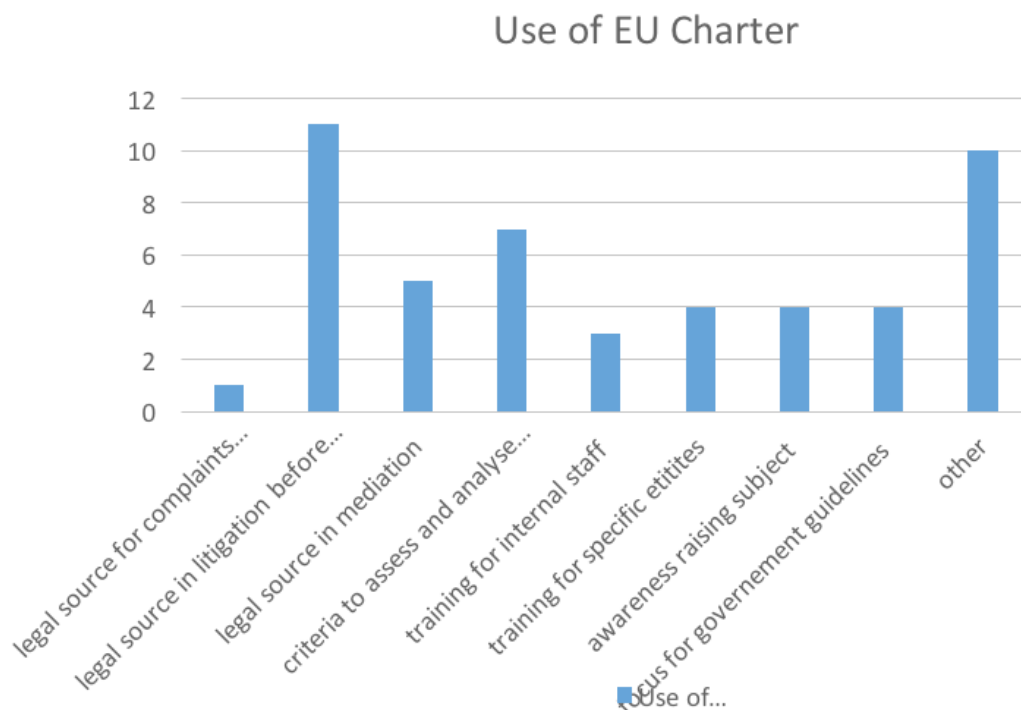
19 The European Social Charter (ESC), as counter-part to the ECHR (which refers to civil and political rights), is the most comprehensive treaty on social and economic rights in the pan-European area. Most of the social rights in the EU Charter of Fundamental Rights are based on the relevant articles of the ESC. However, given the clear lack of uniformity in the acceptance of the ESC's provisions by the EU member states, the EU Charter's corresponding social rights, whose implementation is scrutinised by the European Commission and the CJEU, present a clear added value compared to the ESC.





Figure No. 8 – Roles of the Charter in the day-to-day work of NHRBs

Question 6: Which role does the Charter play within your activities?



On the basis of the cases submitted by the respondent NHRBs, the Charter is used for the following purposes:

- *praeter legem*: as a source of law guiding the interpretation of national laws even if it is not strictly applicable according to EU law. For instance, Article 41-right to good administration is referred to, although the CJEU has clearly established that it applies only to the EU institutions, bodies, agencies;<sup>20</sup> or certain Charter based fundamental rights are applied as directly enforceable rights, although their direct effect is still unclear (e.g. best interest of the child);
- *contra legem*: against the law - leading to disapplication or annulment of national laws;
- *secundum legem*: in interpretation, to support the interpretation of other national and supra-national laws;
- instrument of training and awareness on human rights for practitioners and individuals.

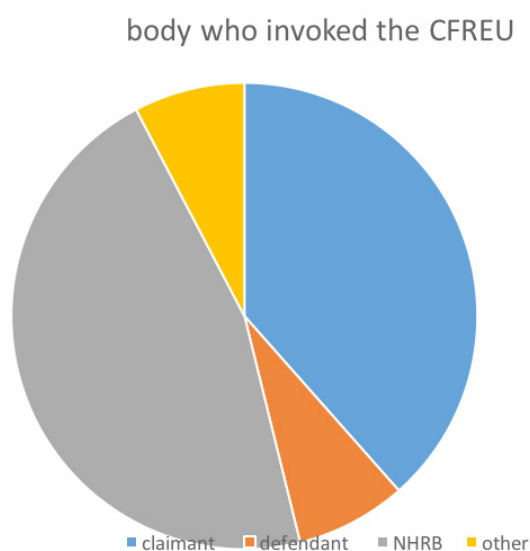
## 2.2 The actor(s) that raise the Charter in the complaint procedure(s)

The Charter is mostly invoked by the bodies themselves, within litigation or review of draft legislation. The other actors that invoke the Charter are the parties with the help of lawyers, legal assistants or other NGOs staff supporting the claim of the applicant/victim.

<sup>20</sup> See more on this in the Practical Guidelines section.

Figure No. 9 – Body who invokes the Charter

Question 8: Who has introduced the Charter in the complaint analysis?



### 2.3 Specific use of the Charter by NHRBs – sample of good practices

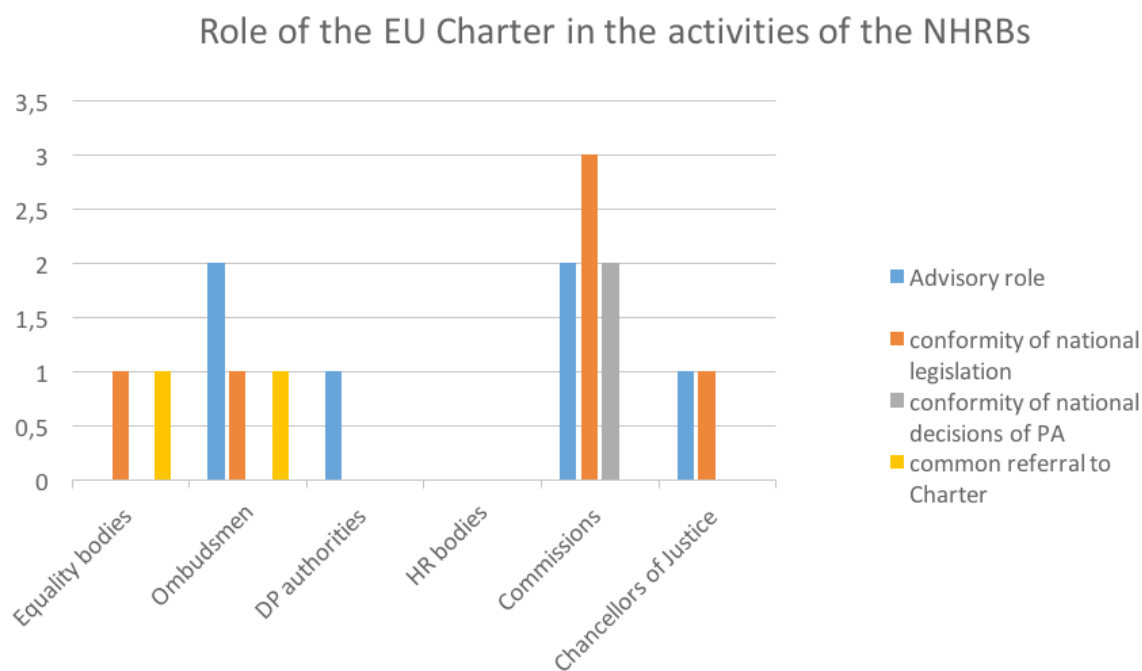
Equality bodies seem to be those who commonly refer to the Charter; commission(s) deal preponderantly with the Charter in addressing complaints against national authorities; ombudspersons refer to the Charter during their advisory role to the legislature; and the Chancellor of Justice use the Charter in their advisory role to the legislature and when addressing complaints against national authorities.

There is an increasing reference to the Charter by the NHRBs in their common practice. The results of the Questionnaire show that some of the NHRBs frequently refer to the Charter, including on their own motion. The role of the Charter is primarily an incidental one - being one of several human rights instruments, which is referred simply to corroborate a reasoning mainly centred on another legal provision. However, it has started to gain also central or predominant role in supporting the legal reasoning regarding fundamental rights. For instance, the *Danish Board of Equal Treatment* has commonly referred to the Charter particularly in cases based on discrimination related to pregnancy. The *Finish Parliamentary Ombudsman* frequently refers to the right to be heard, part of the right to good administration under Article 41, and to the principle of non-discrimination under Article 21.

The Charter is used not only in complaints assessment/ resolution, but also in their activity of awareness raising. For instance, *the Belgian Federal Ombudsman* makes references to the Charter in the annual activity reports.

The incorporation of the Charter into the internal practices of the NHRBs is essential to ensure an effective use of this instrument. In this sense, Part II of the CharterClick! *Questionnaire* helped identifying a number of good practices such as: a formal internal decision of the NHRB inviting to an increased use of the Charter (*Greek Ombudsman*); *ex officio* reference to the EU Charter in solving complaints (*Sweden Equality Ombudsman*); the inclusion of Charter in the internal institutional databases to facilitate access to prior cases that dealt with the Charter (*Belgian Federal Ombudsman*); monitoring of the CJEU case law on the Charter (*Belgian Federal Ombudsman*); planned systemic references to the Charter in annual activity reports (*Belgian Federal Ombudsman, Romanian National Council for Combating Discrimination*). All these examples underline that the NHRBs' institutional commitment to use the Charter in their daily work is highly important for its effective use. A thorough institutional planning of the use of the Charter ensures that this instrument is used in a meaningful way in the day-to-day work of the NHRBs.

Figure No. 10 – Role of the EU Charter in the activities of the NHRBs



## 2.4 The various tools/databases used by the respondent NHRBs in order to collect information on the interpretation and application of the Charter and its potential

The tools which were commonly referred to by the NHRBs as sources of gathering information on the interpretation and application of the Charter were the following: curia and eur-lex; few of them also mentioned the website of the EU Fundamental Rights Agency.

## 3. Suggestions on how to improve the CharterClick! deliverables

Part III of the Questionnaire aimed to collect suggestions on: how to improve the CharterClick! Toolbox; the main difficulties regarding the use of the Charter; the most useful tool among those provided by the CharterClick! toolbox; the most relevant features; the most relevant feature to fit for non-professional users; as well as suggestions on additional tools.

### 3.1 The main difficulties the respondent NHRBs experience in applying the Charter

The replies given by the NHRBs to this question might give indication on why they do not make a greater use of the Charter (irrespective of the legal obligation to give precedence to Union law). According to the respondents, it seems that the correct identification of the scope of application of EU law/Charter creates most difficulties in the practice of the NHRBs, followed by the issue of establishing the relation between diverse Charter rights and principles, or with other legal sources of fundamental rights, such as the ECHR and national constitutional provisions.

### 3.2 Most useful tool from the CharterClick! Toolkit

The replies to the CharterClick! *Questionnaire* revealed the following order of preference among the various CharterClick! tools: 1) the admissibility checklist; 2) the practical guidelines;<sup>21</sup> 3) the database and 4) the best practices document. The Admissibility Checklist was considered useful for both legal practitioners and individuals without legal education. In order to increase its accessibility for non-professionals, the replies pointed out that they should be followed by practical guidelines, ensure translation in as many native languages as possible; it should be an interactive tool with questions applying the admissibility criteria and it should include examples of concrete case law.

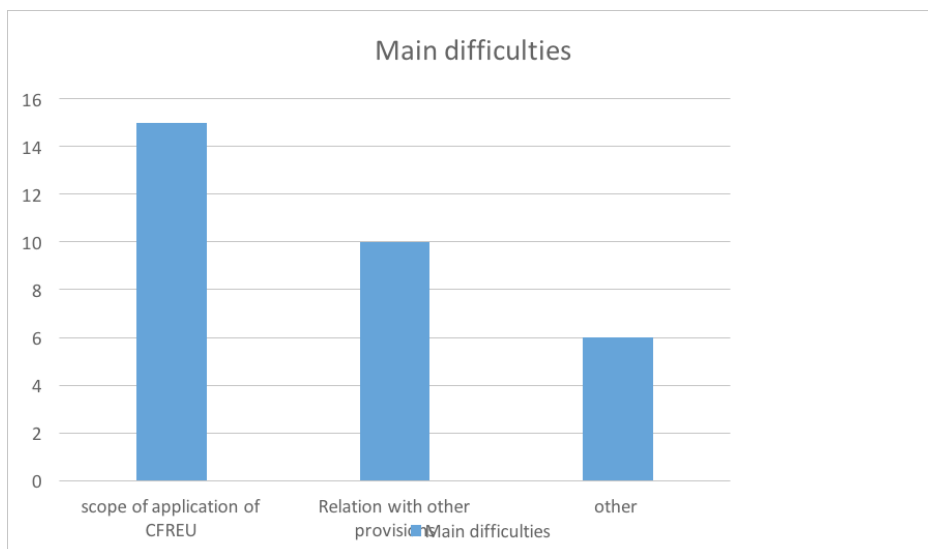
It was also mentioned that the Admissibility Checklist should include an explanation of the relationship between the Charter and the ECHR, the latter being more often used in certain domestic jurisdictions. The advantages of invoking the Charter instead of (or rather in addition to) the ECHR should be highlighted. This was reported to be instrumental for encouraging the use of the Charter.

The right to effective judicial protection, being one of the most often referred provisions of the Charter, was the focus of many recommendations. It was suggested the Tutorial should include information on the content of the right to an effective judicial protection, and remedies to violations of this right (referring also to the possibility of collective remedies). Guidelines and practical cases on the right to access to justice and legal aid enshrined in Article 47 Charter should also be included. Particularly since, in certain domestic jurisdictions, legal aid is often excluded for violations of human rights obligations, since such violations are granted damages in the form of low

21 Currently the document is entitled Tutorial.

Figure No. 11 – Main difficulties experienced by the NHRBs in the application of the EU Charter

Question 25: Which are the main difficulties you experience in the practical use of the EU Charter?



financial amounts, which do not legitimise the conferral of legal aid. For instance, it was reported that in Sweden, legal aid is recognised only for substantial material damages. The right to challenge a negative decision with regards to legal aid under Article 47 Charter was mentioned as another issue worth being detailed in the CharterClick! Tutorial.

The *Defender of Rights of France* (EDF) suggested that the CharterClick! admissibility tool should be available in different formats so as to be accessible to online users with visual disabilities. There are some standard processes that are considered good practice including having buttons at the top of the webpage that allow to change background and font colours and increase/decrease fonts (see icons below as an example). It is also helpful to provide word documents in addition to pdfs as the former can more easily be converted by screen readers and users.

- The *Parliamentary Ombudsman of Malta* (endorsed also by other participating NHRBs) recommended that:
- The publication of cases relevant to each EU Charter Article so that the reader may better understand what is the import of the Article;
- A brochure or booklet or web publication that explains the EU Charter and the mechanism of protection that is showing how the interested party can exercise his rights;
- Assistance or even legal aid at EU level for citizens or affected individuals to help them exercise their rights;
- Financial and material aid to institutions such as the national or Parliamentary Ombudsman to encourage study and training of personnel in these institutions on the EU Charter;
- An effective press and media campaign to help citizens and interested parties to understand and use the EU Charter.

These issues will be fully taken into consideration when drafting and amending the CharterClick! Tools. For instance, ITTIG will draft the final versions of the Admissibility checklist and of the Tutorial in line with an accessibility protocol for people with disabilities. The deliverables will be adapted, showing the importance of the readability and the usability of the tools not only to legal practitioners but also to general public. In order to achieve this result, the CharterClick! admissibility list will be supported by a two level tutorial.

#### 4. Training and awareness raising activities

Finally, *Part IV* of the CharterClick! *Questionnaire* aimed to gather data on the various awareness raising and training activities carried out by NHRBs: number; target groups; thematic of training activities.

The most preferred option on awareness raising are trainings and in person meetings followed by online forums. Most of the NHRBs participating in the survey do some form of training for public officials, however not all of them include the Charter in their training curricula. The *Portuguese High Commission for Migration* suggested that a helpline desk with capacity to answer the more controversial and juridical questions might be very useful.

The target groups that commonly benefit from the training activities organised by NHRBs are:

- public officials;
- law enforcement authorities;
- students.



### III. COMPARATIVE QUALITATIVE ANALYSIS OF THE NHRBS' USE OF THE CHARTER – LANDMARK CASES

This section outlines the most often performed legal functions of the Charter in the activities of the NHRBs.<sup>22</sup> In particular, cases that refer to the Charter as: parameter for ex-ante validity of national law; a parameter of validity of EU law; and parameter of legality of national law.<sup>23</sup>

Depending on the respective mandates and tasks of the NHRBs, they have invoked the Charter in a wide range of activities such as: training, awareness raising, processing complaints, advising the government, litigating cases before the courts or data collection.

#### 1. The Charter as (legal) tool to trigger domestic legislative change

The Survey showed that the NHRBs include the Charter in various types of opinions regarding legislative or policy drafting.

Interesting examples were provided from Romania and Spain. The *Spanish Council of Elimination of Racial and Ethnic Discrimination* succeeded to convince the legislator to include 'illness' into the discrimination factors which are now considered aggravating factors in the Spanish Criminal Code.<sup>24</sup>

22 Results presented on the basis of the data reported by the NHRBs following the CharterClick! Survey and during the CharterClick! Workshop on the Application of the EU Charter by NHRBs.

23 Information-notes were prepared for some of these cases and are available in the Project's Database.

24 As mentioned by *Pablo Lopez Pietsch*, Adjunct Director of the Council for the Elimination of Racial or Ethnic Discrimination of Spain during the CharterClick! Workshop held at the EUI on 18

The *French Defender of Rights* referred of its own motion to Article 45 Charter in relation to a legislative proposal on the legal regime of foreigners.<sup>25</sup> The High authority for the fight against discrimination and for equality (body preceding the French Defender of Rights) referred to Article 21 Charter when supporting the legality of a legislative proposal that would ensure access to employment for disabled persons in the private sector.<sup>26</sup>

The Charter is referred by NHRBs not only in relation to domestic legislative drafting, but also in relation to EU legislation drafting. The *German Federal Anti-Discrimination Agency* persuaded the German authorities to change their persistent position of blocking a proposal for a horizontal anti-discrimination Directive that was long time pending in the Council.<sup>27</sup>

The Charter is used by the NHRBs also with the view of preventing future violation of fundamental rights by the law that is under negotiation (cases where the NHRBs are involved in a consultative role during legislative or policy enactment). For instance, the *Polish Human Rights Defender* advised the government on the basis of the Charter in relation to age discrimination, gender equality, rights of persons with disabilities and data protection.

March 2016.

25 See Opinion n°15-17/23 June 2015 delivered on the Bill on the law on foreign nationals in France, adopted by the Council of Ministers on 30 July 2014 and amended by the National Assembly a year later. Case note available in the CharterClick! Database. The French Defender of Rights suggested improvements as regards: simplified/fast-track granting of French nationality, residency permits and family reunification to some foreign nationals.

26 The proposal mentioned that certain number of work places should be reserved to disabled persons. HALDE recalled that the principle of equal treatment in employment with regard to disabled persons thus supposed that facilities be put in place by employers in order to provide access to employment. The High Authority stated that said obligation was not intended to favour one person over another on the basis of their disability, but rather to compensate for the inequality induced by that disability by making available those facilities necessary to guarantee equal treatment. For more details, see Case note of the Opinion delivered by the High Authority on access to employment for disabled persons in the private sector in light of the principles of equal treatment and non-discrimination, 2010-126, 18/04/2011, available in the CharterClick! Database.

27 Case mentioned by *Zuzana Dorazilova*, from the *European Commission*, during the CharterClick! Workshop held at the EUI on 18 March 2016.





## 2. The Charter as a parameter of validity for EU secondary legislation

The use of the Charter as a parameter of validity for EU secondary legislation is not very common in the practice of the NHRBs. However, interesting practice was provided by the *Polish Human Rights Commissioner* and the *Finnish Ombudsman*.

- RPO case - *Polish Human Rights Commissioner*

On 7 July 2015, the *Polish Constitutional Tribunal* sent its first preliminary ruling to the CJEU based on questions submitted by the *Polish Human Rights Commissioner* (HRs Commissioner), challenging the constitutionality of a national legislation which determined that the electronic editions of books should be taxed according to the basic rate of 23% rather than 5 or 8% as in the case of printed books. The HRs Commissioner pointed to the fact that the matter concerned the incompatibility of EU Directive 2006/112/EC<sup>28</sup> with Article 20 Charter and the EU general principle of equality, and not just the incompatibility of the Polish transposing provisions with the Constitution and the Charter. The HRs Commissioner suggested to the Polish Constitutional Tribunal to request a preliminary ruling from the CJEU. As a result, the Constitutional Tribunal, for the first time in the history of the Polish membership in the EU, filed two preliminary questions to the CJEU, indicating in the second one that there might be an incompatibility between Article 20 Charter and the EU Directive 2006/112/EC.<sup>29</sup>

## 3. The Charter as a parameter of legality of national legislation

An interesting case of ensuring compliance of EU secondary law with the Charter comes from the practice of the *Finnish Ombudsman*.<sup>30</sup> The latter argued that numerous EU citizens lost their right to vote in the elections of the European Parliament due to the transposition of Council Directive 93/109/EC into the Finnish Electoral Act. In order to be able to vote, citizens had to inform their former country of residence that they wish to exercise their right to vote for the elections of the European Parliament in their current country of residence. The aim of the provision was to prevent people from voting or standing as candidates in more than one Member State during the same election. However, the complainant had not been aware of this practice. According to the decision of the Deputy of the Finnish Ombudsman, the existing practice which required citizens to inform their former country of residence

28 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1, 11.12.2006.

29 C-390/15, RPO, the case was still pending before the CJEU on 25th of October 2016 (the Opinion of the Advocate General is available, ECLI:EU:C:2016:664)

30 The case did not though lead to invalidation of the EU secondary provision at issue.

about their wish to vote in their current country of residence may result in EU citizens being deprived of their fundamental right to vote in EU elections, as citizens may not be aware of this obligation. In her decision, the Deputy-Ombudsperson referred to Articles 21 (Non-discrimination) and 39 (Right to vote and to stand as a candidate at elections to the European Parliament) of the Charter, together with the Treaty on European Union and the Treaty on the Functioning of the European Union, the First Protocol to the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Constitution of Finland.

The Deputy Ombudsperson stated that, in order to protect citizens' voting rights, Finland should aim to influence the prevailing legislation and practices at EU level. However, due to processes being slow at EU level, the Deputy-Ombudsperson affirmed that the Ministry of Justice and the Population Register Centre should ensure before the 2014 European Parliament elections that EU citizens receive appropriate and adequate information on the principles on which their right to vote is based and on exercising that right as well as the procedure followed in elections held in Finland. As of March 2016, the Ministry of Justice of Finland has made some progress in the information of the voting rights of EU citizens, but the legislation remains unchanged.<sup>31</sup>

## 4. The Charter as tool for changing practices of public authorities and private parties contrary to HRs

NHRBs play an essential role in delivering equality in Europe, as proven by several ground-breaking cases on combating discrimination pursued by NHRBs.

For instance, a successful case defended by the ASGI on the basis of the Charter relates to the Italian legislation which limited the maternity indemnity to women in possession of a long term residence permit. ASGI convinced the Italian judiciary that women with shorter stay permits should also benefit from the indemnity based on Article 21 of the Charter. Within the Italian legal order, Article 21 Charter permits the national court to directly disapply the national legislation, while the same is not possible based on Article 14 ECHR. Therefore the above mentioned case is significant also because it shows the added value of the EU Charter at domestic level vis-à-vis the ECHR.

Additionally, the Charter was used by ASGI as a validity tool for practices of private companies, achieving a change in practice without the cases reaching the courts. This was the case in the practice of certain insurance companies which had different prices for self-insurances based on citizenship.<sup>32</sup>

31 The case was mentioned *Hanna Rönty*, Human Rights Centre and Ombudsman, Finland during the CharterClick! Workshop held at the EUJ on 18 March 2016.

32 Case mentioned by *Simonetta Furlan*, Lawyer member of



A similar case which did not reach the courts (because it was settled based on negotiations between the ASGI representing the victims and private bodies), concerned the differentiations made by Italian bodies connected with banks in regard to the possibility of providing grants to students to go abroad for education purposes or following an internship. These grants were given only to Italian citizens. In that situation, ASGI wrote a recommendation to the banks, the Italian anti-discrimination body, and the European Commission complaining of the discriminatory practice. Following this initiative, the banks changed their practice.<sup>33</sup>

Important contributions have been made by the NHRBs in the field of promoting equality and prohibition of discrimination. In the field of prohibition of discrimination based on ethnic origin, the CJEU decided its first case on this ground of discrimination following the actions started by the Bulgarian equality body<sup>34</sup> in relation to the practice of a Bulgarian energy company, which was indirectly discriminatory to the Roma community. The Charter and the Race Equality Directive were central in the legal reasoning of the *Bulgarian Commission for Protection against Discrimination*. The requests of the Bulgarian equality body for preliminary questions to be sent to the CJEU were rejected on several occasions by the supreme administrative court of Bulgaria. In the face of this court's persistent refusal, the *Bulgarian equality body* sent itself a preliminary reference to the CJEU, which was, as expected, rejected as inadmissible by the CJEU.<sup>35</sup>

A similar case was later brought before an administrative court by the *Bulgarian Commission for Protection against Discrimination*, and this time a lower administrative court decided to request a preliminary ruling (C-83/14),<sup>36</sup> and gave the opportunity to the CJEU to clarify salient issues concerning the application of the principle of non-discrimination based on ethnic origin. The CJEU clarified that Roma community falls under the protected ground of 'ethnic origin' and that 'indirect discrimination' can occur by association, and does not need to target directly the protected community.<sup>37</sup>

the Associazione per gli studi giuridici sull'immigrazione (ASGI), Italy during the CharterClick! Workshop held at the EUJ on 18 March 2016, and available also in the CharterClick! Database.

33 Case mentioned by *Simonetta Furlan*, Lawyer member of the Associazione per gli studi giuridici sull'immigrazione (ASGI), Italy during the CharterClick! Workshop held at the EUJ on 18 March 2016.

34 Bulgarian Commission for Protection against Discrimination.

35 See Case C-394/11, *Belov*, order for lack of jurisdiction since the Bulgarian equality body, although a quasi-judicial body, is not a 'court' within the meaning of Article 267 TFEU.

36 Case C-83/14, *CHEZ*, ECLI:EU:C:2015:480.

37 The case is known as *CHEZ* and is commented in the *Practical Guidelines on the use of the EU Charter – functions, achievements, added value compared to other human rights instruments*, p.36.

Important contributions were made by NHRBs also in other fields of equality (e.g. sexual orientation – *ACCEPT*<sup>38</sup>), whereby national legislation were amended following litigation started or continued by NHRBs.<sup>39</sup>

In the field of migration, the *UK Equality and Human Rights Commission* achieved an important result as regards the scope of application of the Charter in the UK, with repercussions also in Poland,<sup>40</sup> and a clarification as regards the Member States' obligations under the Charter when acting under derogations provided by EU secondary legislation.

The Commission intervened in the *NS v SSHD* before the UK Court of Appeal, concerning the removal of an Afghan asylum seeker from the UK to Greece under Dublin II Regulation.<sup>41</sup> The purpose of the Commission's intervention was to ensure the correct interpretation of the EU Charter of Fundamental Rights and the related UK Protocol when EU law is being applied in the UK.

The intervention of the Commission had positive results in relation to the application of the EU Charter. Following the intervention of the Commission, the UK Court of Appeal decided to address preliminary questions to the CJEU with relevance for the application of the EU Charter.<sup>42</sup> The CJEU clarified that the Charter binding instrument for the UK. Secondly, the CJEU clarified its scope of application when Member States act within the limits of derogation permitted by EU secondary legislation. Prior to this case, the UK Secretary of State conceded that the fundamental rights set out in the Charter could not be relied on as against the United Kingdom and that the Charter did not create any new rights. The CJEU ruled that the Charter applies to the UK and confirmed that the purpose of the Protocol was not to exempt the UK from its obligations under the Charter. It also confirmed that Member States are obliged to

38 Case C-81/12, *ACCEPT*, ECLI:EU:C:2013:275.

39 Romania/Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (25.06.2013). The statutory limitation whereby the National Council for Combating Discrimination could issue a fine only if the complaint was introduced within 6 months was eliminated. It was replaced with a prescription time of 6 months for applying an administrative fine starting from the date when the NCCD issued its decision. (see Article 26(4) Governmental Ordinance 137/2000)

40 UK and Poland are parties to Protocol (No.30) of the application of the EU Charter of Fundamental Rights of the European Union to UK and Poland. Article 2 provides that to the extent the Charter refers to national law, it shall only apply to the extent that the rights or principles it provides are recognised in Polish or UK law. The Protocol was interpreted by domestic administration and certain national courts as constituting a general opt-out from the Charter for the UK or Poland, making its provisions inapplicable in those Member States.

41 The case is commented in *Practical Guidelines on the use of the EU Charter – functions, achievements, added value compared to other human rights instruments*, p.36.

42 C-411/10, *N.S. and others*, ECLI:EU:C:2011:865.





respect the provisions of the Charter even when acting within the limits of allowed derogatory action, as long as their decisions impact on the application of the relevant EU secondary legislation instrument.

Interesting practice in the field of migration was reported by the *Médiateur fédéral of Belgium*. The *Médiateur* held that the closed centre receptions of aliens were contrary to: 1) Articles 7, 24, 10 and 14 Charter given the limited activities permitted to the asylum seekers, the small places that they were placed, and lack of privacy for the family; and 2) Article 47 Charter, as regards access to social and legal aid for those in the Centre. The *Médiateur's* Report outlining these fundamental rights violations in the Centre led to the speeding up of the creation of a new Centre by the government.

Another salient string of cases where Belgian NHRBs aimed at changing the administrative practice based on the Charter concern the administrative practice of refusing access to social benefits and residence in open centres to irregular migrants. These cases reached the *Labour Tribunals in Belgium*, and ultimately the *Labour Tribunal of Brussels* referred a preliminary reference to the CJEU following the involvement of local NHRBs.<sup>43</sup> In the *Abdida* case, the *Brussels Labour court* asked the CJEU whether the appeal against a refusal of a permit to stay for medical reasons has a suspensive effect; and whether a seriously ill foreigner retains his/her right to medical and social assistance during the examination of his/her appeal against a refusal of a permit to stay. Following the positive answer of the CJEU, various cases emanating from Belgian Labour Tribunals held that seriously ill foreigners retained their right to social assistance pending the examination of their appeal as well as during the postponement or suspension of the return/removal of the TCN.

---

43 Case C-562/13, *Abdida*, ECLI:EU:C:2014:2453.



## IV. CONCLUSIONS

28 NHRBs from 19 Member States have participated in the CharterClick! Survey. Their mandate varies, ranging from: *equality body* (6); *ombudsman* (9); *data protection authority* (1); *human rights body* (2); *commission* (8); *chancellor of justice* (2). It resulted that the most commonly performed activities of the respondents are: complaints processing; awareness raising; and advisory role for the government. While decisions issued by equality bodies are mostly binding, those of the ombudspersons are generally advisory. All decisions are however subject to a form of appeal. In case no appeal is lodged against their decisions, equality bodies can end the litigation without the need to follow court procedures. According to the replies provided by the NHRBs, there seems to be an equal distribution among the various roles that they perform (legal representative/ initiator of judicial proceedings, *amicus curiae*, other), without one clearly being predominant.

The data gathered confirms previous findings that the Charter is not usually relied as the primary instrument of reference for human rights, but rather invoked together with other national, European or international legal instruments, and rarely alone. Noteworthy is the fact that among the various supranational legal instruments, the Charter is not invoked as the first instrument on human rights. It was mentioned that one of the challenges often faced by NHRBs in the application of the Charter is the difficulty of integrating it into an already “crowded” space of international and domestic legal norms establishing fundamental and human rights. The partial overlap of the Charter with other national and European human rights instruments, coupled with the unawareness of the added value of the Charter and limited human resources of the NHRBs contributed to the current specific use of the Charter as a supporting document, rather than the primary instrument of reference for fundamental rights. However, there are several NHRBs who are considering the Charter independently/separately of other human right instruments. Independent reference to the Charter is recently increasing, especially in the field of social

rights, since the Charter, unlike the ECHR, includes also economic and social rights.<sup>44</sup>

One of the main roles of the Charter in the activities of the NHRBs was that of ensuring that domestic legislation complies with the Charter both pre- and post-enactment. Equality bodies were mentioned as the ones who commonly refer to the Charter; Commissions deal preponderantly with the Charter when addressing complaints against national authorities; while Ombudsmen refer to the Charter when fulfilling their consultative role to the legislature and administrative branches.

During the pre-legislative enactment phase, the Charter is commonly used as a preventive, and mediatory tool for the promotion of human rights. Several good practice examples of referring to the Charter were mentioned by the NHRBs in the exercise of their advisory competences. The survey shows that the NHRBs include the Charter in opinions, comments on legislative proposals or human rights impact assessments of proposed legislation. Good examples come from the *Belgian Federal Ombudsman*, *French Defender of Rights*, *Portugal High Commission for Migration*, *Swedish Data Protection Authority*, and *the Slovak National Centre for Human Rights*. All these cases underline the importance of mainstreaming the Charter at the incipient stage of policy making, especially where the national legislation is to implement, transpose or overlap with an EU law. In this sense, a thorough mainstreaming of the Charter at the very early stages of the legislature’s decision-making was indicated as achieving the following goals: 1) facilitating a preventive approach to fundamental rights protection; 2) limiting occurrence of subsequent human rights violations; and

44 The European Social Charter (ESC), as counter-part to the ECHR (which refers to civil and political rights), is the most comprehensive treaty on social and economic rights in the pan-European area. Most of the social rights in the EU Charter of Fundamental Rights are based on the relevant articles of the ESC. However, given the clear lack of uniformity in the acceptance of the ESC’s provisions by the EU member states, the EU Charter’s corresponding social rights, whose implementation is scrutinised by the European Commission and the CJEU, present a clear added value compared to the ESC.



3) ultimately decreasing the instances of post-enactment intervention of NHRBs through complaint(s) resolution.

During the post-legislative enactment phase, it seems the Charter is mostly used for the purpose(s) of: 1) ensuring human rights compliance of national legislation; 2) bringing administrative practice in conformity with human rights; 3) interpreting national human rights standards in light of the European standards; and 4) occasionally ensuring legality of EU secondary legislation.

Several good practice cases where the Charter was used by the NHRBs to reinforce human rights at both national and EU level were reported by the participating NHRBs. In a first string of cases the Charter was used as a standard of review of EU secondary legislation: *Test-Achats*, *Digital Rights Ireland*, and the *RPO* case.<sup>45</sup> In the first two cases, the CJEU invalidated EU secondary legal provisions on the basis of the Charter. In the *RPO* case, the *Polish Constitutional Tribunal* addressed its first preliminary reference to the CJEU, following the request of the *Office of the Human Rights Commissioner of Poland*. All these cases ultimately reached the CJEU following the initiatives of NHRBs questioning the compatibility of national provisions, which transposed EU secondary legislation, with the provisions of the Charter.

The *Test Achats* case was initiated by the *Belgian Association of Consumer Protection*, which brought an action to declare unlawful a domestic law that allowed insurers to take a person's gender into account in the calculation of premiums and benefits in life insurance. The Belgian Law transposed *Directive 2004/113 on the implementation of the principle of equal treatment between men and women*. Therefore the Belgian NHRB was raising concerns as regards the compatibility of a provision from the Gender Directive with Articles 21 and 23 Charter. The CJEU agreed with the approach of the Belgian NHRB and invalidated that specific provision.

*Digital Rights Ireland* is another landmark case initiated by the civil society, which ultimately led to the CJEU finding the Data Retention Directive to be entirely invalid due its disproportionate interference with the rights to data protection and privacy.

A more recent case was reported by the *Polish Human Rights Commissioner* concerning the compatibility of the VAT Directive with Article 20 of the Charter. This case is furthermore important due to the fact of being the first preliminary reference addressed by the Polish Constitutional Tribunal to the CJEU (C-390/15).

The Charter has also been used as parameter of legality for the national legislation and practice, which ultimately led to enhancing the level of human rights protection at the national level. A case which has gained constitutional importance is the *N.S. and others* case. Following the *N.S.* case, which case initiated by the *UK Equality and Human*

*Rights Commission*, Poland and the UK can no longer resort to Protocol 30 as a justification for not complying with the Charter. The CJEU made clear that the Charter covers both cases where Member States 'implement' and 'derogate' from EU law.

Another case where the Charter was used by a NHRB as a standard of review of national legislation and enhancing domestic human rights protection is the *Benkharbouche* case.<sup>46</sup> The *UK Equality and Human Rights Commission* intervened in favour of the applicants, foreigners working in embassies of their third countries based in London, who complained of unfair dismissal, failure to be paid the minimum wage, harassment and racial discrimination in breach of the Working Time Regulations 1998 and, *inter alia*, Articles 6 and 13 ECHR, and Article 47 Charter. It was argued that the UK State Immunity Act violated the ECHR and Charter based fair trial and effective remedy rights of third country nationals working in the embassies of their countries based in London. This case also shows the added value of the Charter vis-à-vis the ECHR, which in certain jurisdictions has more limited effects than the Charter (e.g. statutory limitation applies to the ECHR, but not to the Charter within the specific UK legal context;<sup>47</sup> similarly Germany).

There is considerable potential for the Charter in relation to filling gaps in the protection of human rights at domestic level. Certain human rights, such as human dignity or effective judicial protection, might be better protected under the Charter than under the ECHR. That was one of the arguments of the *UK Equality Commission's* intervention in the *N.S. and others* case or the case in *Benkharbouche*. Furthermore, certain social and economic rights might not be expressly protected at national level, while the Charter includes social rights, which can be used to either fill the gap at domestic constitutional level, or used as standard for updating the interpretation of constitutional provisions on social protection (e.g. Romanian Constitutional Court case on collective redundancies<sup>48</sup>).

Although there is still a modest usage of the Charter by the NHRBs, there has been an increase in cases where the NHRBs invoke *ex officio* the Charter. It is interesting to note that the Charter has at times been used by the NHRB(s) in order to achieve a certain strategic outcome. For instance, to help solve conflicting interpretations between various state authorities; as a last resort to remedy incompatibility of EU/national legislation with fundamental rights; to change social or economic policies; or adjust systemic deficiencies in the treatment of

45 Case C-390/15.

46 *Benkharbouche v Sudan and Janah v Libya*, UK Court of Appeal, [2015] EWCA Civ 33.

47 UK courts cannot disapply national legislation on the basis of the ECHR, since according to section 3 of the Human Rights Act, the amendment of incompatible statutory provisions is the prerogative of the legislature.

48 Decision No. 64/2015 of 24 February 2015.



certain communities which have long been discriminated against. The *Belov* and *CHEZ* cases revealed the persistent discriminatory treatment of Roma communities in certain Bulgarian regions and the strategic role played by the *Bulgarian equality body*,<sup>49</sup> which sought the help of the CJEU to remedy this situation on the basis of EU instruments (the Race Equality Directive and EU Charter). The *Danish Board of Equal Treatment* has commonly referred to the Charter particularly in cases based on discrimination related to pregnancy. The *Finish Ombudsman* carried out wide spread awareness raising campaigns regarding the citizen's obligation to inform the former country of residence that they wish to exercise their right to vote for European Parliament elections in their current country of residence. The *Swedish Equality Body* is supporting litigation on discrimination based on harassment between co-workers due to sexual orientation, for the purpose of amending the Swedish legislation which prohibits this type of harassment only in vertical work relations. Noteworthy, the CJEU jurisprudence related to the interpretation of the Charter, and the preliminary reference procedure have been used/relied on by NHRBs in their strategic litigation plan.

It should be remarked that some of the NHRBs openly recognised that they are actively focusing on the identification of grave or systemic deficiencies of human rights protection and on highlighting human rights issues that have to be given more attention, especially in relation with vulnerable groups, such as refugees, women refugees, unaccompanied minors, irregular migrants, LGBT people, victims of hate crime or discrimination or gender violence etc. (e.g. *Office of the Commissioner for Administration and Human Rights of Cyprus*). It seems that the Charter is gradually making its way into the NHRBs' strategic litigation methodology.

Some of the landmark cases submitted by the NHRBs show the added value of the Charter compared to other human rights instruments, which is an essential aspect of the Charter within the context of multilevel human rights protection in Europe. The *Benkharbouche* case showed that the potentially more limited scope of Article 6 ECHR can be compensated by the broader scope of Article 47 Charter. Additionally, the reference to Article 47 of the Charter allowed to overcome the procedural limitations of remedies for violation of human rights within the UK human rights setting (existing also in other domestic jurisdictions). Notably, the Charter allows a direct disapplication of national statutes, which in certain domestic jurisdictions cannot be done on the basis of the ECHR (e.g. Germany, Italy, and UK).

According to the CharterClick! Survey, the possible reasons for the limited use of the EU Charter by the NHRBs in their daily activities can be, *inter alia*: 1) the fact that the scope of application of the Charter is difficult

to understand; 2) an overcrowded human rights context; 3) limited visibility and lack of relevant public awareness; 4) linguistic and time constraints; 5) limited financial resources of the NHRBs. These reasons were invoked also as possible obstacles to the future development of the application of the Charter across various fields.

Solutions were suggested by the participating NHRBs, such as: more awareness raising among the public; new tools for the improvement of the practitioners' knowledge about the Charter, its possible legal functions and added value compared to other human rights instruments.

It is recommended that a thorough institutional planning on the use and reference of the Charter is endorsed by NHRBs, for the purpose of ensuring its meaningful application in their day-to-day work. Best practice examples were submitted by NHRBs: adoption of a formal internal decision inviting to an increased use of the Charter (Greece); the inclusion of the Charter in the internal institutional databases to facilitate access to prior cases that dealt with the Charter and monitoring of the CJEU case law on the Charter (Belgian Federal Ombudsman); planning of systemic references to the Charter in annual activity reports (Belgian Federal Ombudsman, Romanian Council for Combating Discrimination). All these examples underline that the institutional commitment to use the Charter in the NHRBs' work is highly important for its effective use.

<sup>49</sup> It full name is *Bulgarian Commission for Protection against Discrimination*.





# V. PRACTICAL GUIDELINES ON THE USE OF THE CHARTER – MULTIPLE FUNCTIONS AND ADDED VALUE COMPARED TO OTHER HUMAN RIGHTS INSTRUMENTS

## 1. Introduction

The 2015 Eurobarometer revealed that 35% of the respondents did not hear of the Charter, while 53% have heard of it, but they did not know very much about its contents and role. Thus, there is a strong need of raising awareness of the Charter in the different Member States. The survey carried out by the CharterClick project among the NHRBs confirms to a certain extent the aforementioned conclusion of the necessity of investing more in raising awareness of the added value role of the Charter compared to the other partially overlapping regional and national human rights instruments.

It should be recalled that the Charter enjoys primacy in the hierarchy of Union law sources. Hence, NHRBs should interpret the national applicable law falling within the scope of EU law in the light of both the Charter, and the related case law of the Court of Justice of the European Union. The NHRBs can play a major role in ensuring the application of the Charter due to their mandate of detecting violations of fundamental rights, and thus

could act as the gateway for ensuring the application of the Charter. In order to enhance the application of the Charter, this section aims at highlighting the possible added value of the Charter, by outlining the multiple legal functions the Charter can play in practice, namely:

- mainstreaming the Charter in the EU and national legislative process;
- the Charter as parameter of validity of EU secondary legislation;
- the Charter as an interpretative tool of EU legislation and national measures implementing it;
- the Charter a parameter of compatibility of national measures implementing EU law;
- the Charter as entrance door for Directives in private parties relations/litigation.
- the Charter as an instrument for strategic litigation;
- the Charter as an instrument for filling gaps and raising standards of protection of fundamental rights at national level.

Before assessing the various possible roles the Charter can play, it is useful to clarify two more general issues regarding its application, namely: 1) whether there is a difference between “Charter rights” and “Charter principles”; and 2) the relation between Charter rights and general principles of EU law as sources of fundamental rights. The divergent practice of certain NHRBs but also of certain national judiciaries regarding the legal nature of certain Charter “right” and “principles” (e.g. right to asylum, right to good administration, best interests of children, workers’ right to information and consultation within the undertaking) calls for this initial clarification.

1. *Charter rights v Charter principles* – It should be noted that the Charter contains both rights” and “principles”. According to Article 51(1) Charter, the rights shall be “respected”, whereas “principles” shall be observed. Article 52(5) Charter provides that principles should inform the positive actions of the EU institutions and the Member States when implementing EU law. While a *right* can usually have direct effect in national proceedings and be the legal



basis for disapplication of national legal provisions or annulling practice(s) of public authorities, Charter *principles* cannot. In the case of Charter principles, it is generally held that further action is needed by the EU legislator to transform the principle into a defined legal right (Advocate General Villalón in *AMS*<sup>50</sup>); note that there is no exhaustive list provided by the Charter of the Explanations mentioning which Articles include “principles”, and which the “rights”. The Explanations to Article 52(2) EU Charter only give examples of Charter “principles”, such as: Articles 25 (Rights of the elderly), 26 (Integration of people with disabilities), and 37 (protection of the environment). The same explanation also adds that ‘in some cases, an Article of the Charter may contain both elements of a “right” and of a “principle”, as in the case of Articles 23, 33 and 34’. The label of “right” v “principle”, with the ensuing lack of direct effect, is not to be determined solely on the basis of the title or content of the Charter Article. Advocate General Cruz Villalón remarked in his Opinion in *AMS* that Article 27 (*Workers’ right to information and consultation within the undertaking*), as a social right, was a “right” by virtue of its subject matter, and a “principle” by virtue of its operation (para. 45). For instance, although Article 21 Charter is entitled the ‘principle of non-discrimination’, it can have, according to the settled case law of the CJEU jurisprudence, direct effect.<sup>51</sup>

The CJEU clarified in *Glatzel*<sup>52</sup> the distinctions between *individual rights* and *programmatic principles*. The CJEU was asked, via a preliminary reference, whether the physical conditions imposed by Directive 2006/126/EC on driving motor vehicles are contrary to the principle of equal treatment (Article 20 EU Charter), the principle of non-discrimination (Article 21 EU Charter) and the principle of integrating persons with disabilities (Article 26 EU Charter). While all three Charter Articles are entitled ‘principles’, only the first two are precise and concrete enough to have direct effect. The CJEU categorised

Article 26 as a programmatic principle, since ‘in order for that article to be fully effective, it must be given more specific expression in EU law or national law’ (para. 78).<sup>53</sup>

The yardstick used by the CJEU to establish whether a Charter provision established a directly effective or a programmatic principle is whether the provision depends upon further concretisation in laws, and whether it endows an individual with a subjective entitlement or claim or specifically stipulate clear-cut obligations towards an individual. It should be noted that, once programmatic principles are sufficiently detailed in EU legislation, they can perform the function of validity check with respect to national acts adopted in order to implement that EU legislation. For instance, Article 27 Charter, although it lacks direct effect (see *AMS* judgment), if invoked in combination with EU secondary provisions which are sufficiently precise, direct and unconditional can be the basis for disapplication of conflicting national legislation or practice in public-private litigation. The only salient limitations of Charter provisions, which lack direct effect, is that in combination with EU secondary legislative provisions which also lack preciseness and are conditioned by further legislation, such provisions cannot be the legal basis for disapplication of national legislation.

All Charter provisions enjoy indirect horizontal application in litigation between private parties, meaning that courts and NHRBs are obliged to interpret national legislation in conformity with Charter rights and principles, even if they lack direct effect.

In a 2015 Decision, the Romanian Constitutional Court<sup>54</sup> held that Article 86(6) of Law 85/2006 on insolvency procedure is unconstitutional since it violated Article 27 Charter in combination with Articles 2 and 3 of Directive 98/59 on collective redundancies. In this case, the challenged national provisions permitted employees to bypass the general collective redundancies procedure in the case of insolvencies. Based on Articles 2 and 3 of Directive 98/59 as interpreted by the CJEU in *David Claes* judgment<sup>55</sup>, and together with Article 27 Charter,

50 Case C-176/12, *AMS*, ECLI:EU:C:2014:2, paras. 50-51. The CJEU held that Article 27 Charter lacked direct effect and could not enjoy horizontal direct effect. Namely it could not be invoked in combination with Article 3(1) of Directive 2002/14 establishing a framework for informing and consulting employees in the EU, as legal basis for the invalidity of the challenged Belgian legal provisions which excluded from the calculation of staff number in the undertaking, a certain category of employees, leading thus to the exclusion of the undertaking from representation in the trade union.

51 In *Baumbast* (Case C-413/99), the CJEU confirmed the direct effect of the EU Treaty based principle of non-discrimination (current Article 21 TFEU), which has similar content to Article 21 EU Charter; in *Küçükdeveci* (Case C-555/07), the CJEU confirmed the direct effect of the general principle of EU law of non-discrimination, which has similar content to the Charter based principle of non-discrimination. In *Glatzel* ( ), the CJEU confirmed the direct effect of the principle of non-discrimination.

52 C-356/12, *Glatzel*, ECLI:EU:C:2014:350.

53 Paragraph 78 of CJEU judgment in *Glatzel*: ‘Therefore, although Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such (see, to that effect, as regards Article 27 of the Charter, Case C-176/12 Association de médiation sociale ECLI:EU:C:2014:2, paragraphs 45 and 47).’

54 Decision No. 64/2015 of 24 February 2015.

55 Case C-235/239/10, *David Claes*, ECLI:EU:C:2011:119.



the Romanian Constitutional Court held that the Article 41(2) of the Constitution (right to social protection) should be interpreted as requiring a higher standard of protection than that offered by the national legislation. The challenged domestic legal provisions was declared unconstitutional, since they were incompatible with Article 41(2) interpreted in line with Article 27 Charter and Articles 2 and 3 of Directive 98/59.<sup>56</sup>

2. *Charter rights and principles v general principles of EU law* - Note that Charter 'principles' should be distinguished from 'general principles of EU law'. Article 6 TEU recognises three sources of fundamental rights: Charter, ECHR and constitutional traditions of the Member States. The Charter has the same legal value as the EU Treaties, i.e. EU primary law, while the ECHR and constitutional traditions of the Member States are recognised as general principles of EU law. The EU Charter codified certain of the autonomous general principles of EU law, such as the *principle of rights of defence* (Article 41 Charter – *right to good administration*- codifies the rights of defence during administrative proceedings; Article 47 Charter – *right to effective judicial protection* – codifies the rights of defence during judicial proceedings; Article 48 Charter – *presumption of innocence*- codifies the rights of defence during criminal proceedings); the *general principle of non-discrimination* is codified in Article 21 Charter. So far, the CJEU has not generally clarified the various differences between these two legal categories in terms of scope of application. In light of the Charter preamble which provides that the Charter does not restrict or affect fundamental rights as recognised by the Union, it could be inferred that Charter rights have to be interpreted in light of the general principles of EU law. Furthermore, the general principles of EU law, in spite of being codified by Charter provisions, are still relevant as proved by recent jurisprudence of the CJEU in administrative matters. In *Boudjlida*<sup>57</sup>, the CJEU clarified that the right to be heard as part of the right to good administration (Article 41 Charter) is applicable only against EU institutions, bodies, agencies, and not also against Member States when acting within the scope of EU law. However the right to be heard is applicable against national public authorities, when acting within the scope of EU law, as part of the general

56 For more details on the horizontal application of the EU Charter, please read the CharterClick! Tutorial, available at <http://www.charterclick.eu/portfolio/practical-guidelines/>

57 Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, paras. 32-33: *it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union. Consequently, an applicant for a resident permit cannot derive from Article 41(2)(a) of the Charter a right to be heard in all proceedings relating to his application.*"

principle of EU law of rights of defence. Regardless of whether a certain human right is invoked as a general principle of EU law or on the basis of an EU Charter provision, it will be applicable only if another provision of EU law is applicable *in casu* (see *Chartry*<sup>58</sup>). In conclusion, the multiple legal sources of fundamental rights recognised by the Treaty of the EU are complementary and mutually enforcing.<sup>59</sup>

## 2. The multiple legal functions the Charter of fundamental rights can play in the practice of the NHRBs

The Charter can play various functions, namely as:

- a instrument securing that EU and national legislative proposals and policy-making are compliant with fundamental rights;
- a parameter of validity for EU secondary legislation;
- an interpretative tool of EU legislation and national measures implementing it;
- a parameter of compatibility of national measures implementing EU law with fundamental rights;
- an instrument for strategic litigation;
- as gap filling and raising standards of protection of fundamental rights at national level.

### 2.1 Mainstreaming the EU Charter into the EU and national legislative process

As primary source of EU law, all EU secondary legislation has to be in compliance with the Charter. A salient function of the Charter is to inform the EU and national legislative process. The CJEU's annulment of the entire Data Retention Directive in *Digital Rights Ireland*<sup>60</sup> and of the Commission Decision on Safe Harbour Privacy in *Schrems*<sup>61</sup>, due to being in conflict with Articles 7 (right to private life) and 8 (data protection) of the Charter, shows the necessity of securing an *ex-ante* fundamental rights control of EU secondary legislation.

It became evident that the Charter needs to be incorporated into the methodology of legislative drafting at EU level, and equally also at national level.

58 Case C-457/09, *Chartry*, EU:C:2011:101; see also, Case C-370/12, *Pringle*, EU:C:2012:756.

59 See also, T. Tridimas, *Fundamental Rights, General Principles of EU law and the Charter*, in Cambridge Yearbook of European Legal Studies, Vol. 16 2013-2014.

60 Joint cases C-293/12, C-594/12, *Digital Rights Ireland and Seitlinger v. Austrian Minister for Communications, Marine and Natural Resources*, ECLI:EU:C:2014:238.

61 Case C-362/14, *Schrems v. Data Protection Commissioner [Ireland]*, ECLI:EU:C:2015:650.





A successful example of mainstreaming the Charter into the national legislative process is the incorporation of “illness” into the discrimination factors which are now considered aggravating factors for criminal offences provided in the Spanish Criminal Code.<sup>62</sup> The incorporation was done following the initiative of a NHRB (*Spanish Council for the Elimination of Racial and Ethnic Discrimination*).

All these cases underline the importance of mainstreaming the Charter at the incipient stage of policy making, especially where the national legislation is to implement, transpose or overlap with an EU law area. In this sense, a thorough Charter-based mainstreaming into early legislative drafting facilitates: a preventive approach to fundamental rights protection; limiting the occurrence of subsequent violations; decreasing the instances of ex-post intervention of NHRBs through complaint resolution; and ultimately, ensuring procedural economy for all actors involved in the different stages of litigation.

## 2.2 Charter as a parameter of validity of EU secondary legislation

According to Article 51(1) Charter, one of the roles of the Charter is to ensure that fundamental rights are respected at the EU level by its institutions, bodies, offices and agencies. As part of EU primary law, the Charter serves as a parameter for examining the validity of EU secondary legislation and national measures implementing these measures. So far, the *principle of non-discrimination on grounds of sex*, and *the right to privacy and data protection* have been used by the CJEU as main grounds for annulling provisions of various EU secondary legislative instruments (Regulations and Directives), as well as an entire Directive.

In *Test-Achats*<sup>63</sup> the CJEU held that a provision of a directive was incompatible with the higher-ranking prohibition of discrimination on grounds of sex which is enshrined in Article 21 Charter. The case was referred to the CJEU by the Belgian Constitutional Court, following an action brought by the consumer organisation *Association Belge des Consommateurs Test-Achats* (“Test-Achats”) and two private individuals who claimed that the Belgian law which transposed Directive 2004/113 had to be declared unconstitutional.<sup>64</sup> Article 5(2) of this

62 Following the proposal of the Spanish Council for the Elimination of Racial and Ethnic Discrimination. Further examples of the Charter being used in policy-making include: reference to the Charter in the NHRBs’ opinions, comments on legislative proposals or human rights impact assessments of proposed legislation. Examples which came from *Belgian Federal Ombudsman, Portugal High Commission for Migration, Swedish Data protection Authority, Slovakia-SNCHR*.

63 Case C-236/09, *Test Achats*, ECLI:EU:C:2011:100.

64 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37), ‘Directive 2004/113’.

Directive allowed Member States to permit differential treatment based on sex in respect of insurance premiums and benefits ‘if sex was a determining risk factor and that could have been substantiated by relevant and accurate current and statistical data.’ Belgium, as well as other Member States, made use of that derogation in respect of several types of insurance. The CJEU found Article 5(2) of Directive 2004/113 to be invalid on the ground that it allowed the Member States to derogate from the principle of equality between men and women indefinitely. It held that such a provision works against the very objective of Directive 2004/113, which aimed to implement the principle of equal treatment between men and women. The CJEU invoked the principle of non-discrimination (Article 21 Charter) and the principle of equal treatment (Article 23 Charter) as grounds for the annulment of the challenged provision from an EU secondary legal act.

The respect of private life (Article 7 Charter) in combination with the protection of personal data (Article 8 Charter) have also been used by the CJEU as grounds for annulling provisions of a Regulation<sup>65</sup>, Directive(s) and of a Decision<sup>66</sup>, as well as striking down an entire Directive. In *Digital Rights Ireland*<sup>67</sup>, the Court annulled the Data Retention Directive<sup>68</sup> which required providers of electronic communication services to retain certain customer data in the interests of public security. The CJEU established that the retention of personal data directly affected the private life of individuals (Article 7) and the right to protection of personal data (Article 8) since it involved a wide ranging retention of data<sup>69</sup>, and for a long period<sup>70</sup>, without providing for substantive and procedural guarantees. Therefore the interferences with the private life and data protection failed to pass the proportionality test required by Article 52(1) Charter.<sup>71</sup> In *Digital Rights Ireland*, the role of the NHRBs proved to be decisive. The case was started by the lobbying and advocacy civil society- Digital Rights Ireland<sup>72</sup>,

65 In *Volker und Markus Schecke* (Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke*, ECLI:EU:C:2010:662), the CJEU found a provision requiring publication of personal data of natural persons who are beneficiaries of European agricultural finance to be contrary to Articles 7 and 8 EU Charter

66 US Adequacy Decision - Decision 2000/520/EC, “the Safe harbour”, in Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

67 Joint cases C-293/12, C-594/12, *Digital Rights Ireland and Seitlinger v. Austrian Minister for Communications, Marine and Natural Resources*, ECLI:EU:C:2014:238.

68 Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

69 All traffic data covering all subscribers and registered users.

70 A period of six months.

71 The limitation on the exercise of Charter rights must: 1) not affect the essence of the rights; 2) be provided for by law’ 3) be necessary and genuinely meet objectives of general interest.

72 Digital Rights Ireland brought the case on behalf of the privacy rights of all individuals and not just their own corporate rights.



which challenged the legality of the national measures implementing the Directive, raising also questions regarding the compatibility of the Data Retention Directive with the Charter, before the Irish High Court. This Court decided then to refer preliminary questions to the CJEU.

Freedom of expression<sup>73</sup>, the right to effective judicial protection<sup>74</sup>, the right to liberty<sup>75</sup> have also been invoked as grounds for invalidating EU secondary legislation in the fields of audio-visual media services, criminal law and asylum. In these cases, the CJEU upheld the validity of the EU secondary provisions confirming the fundamental rights compatibility of the policy/legislative choices made by the EU institutions. However, this case law shows the potential of the Charter when assessing the legality of EU secondary legislation and the salient role played by national actors in the EU legislative process.

### 2.3 Charter as parameter of interpretation of EU legislation and implementing national measures

The Charter is most often used as an instrument for interpreting EU legislative acts and national measures implementing them. When applying national law that falls within the scope of EU law, public authorities have a duty to interpret it as far as possible in light with the wording and purpose of the applicable EU law and the Charter.<sup>76</sup>

According to *Marleasing*<sup>77</sup>, the Member States' authorities have a duty to interpret national law in conformity with EU law, even if the respective EU secondary provision has not yet been transposed by the domestic legislator. In *Marleasing*, the CJEU traced the duty of conform interpretation which required, *in casu*, the Spanish referring court to not take into account a particular interpretation of the Civil Code insofar as it would produce a result not envisaged by the Directive.

A landmark case concerning the interpretative role of the Charter is the *A, B, C*,<sup>78</sup> case concerning the rights of the LGBT in asylum proceedings. Article 7 of the Charter was used in the preliminary stage of investigating a claim for international protection and in particular to limit the form of questioning that national authorities may engage in when seeking to establish the credibility of these claims. The case demonstrated the potential reach of Article 7 of the Charter across the domestic asylum process, and its

link to fundamental questions of human dignity. *A, B and C* made applications for asylum based on persecution as homosexuals in their countries of origin. All three applications were rejected on grounds of credibility as to the true sexual orientation of the applicants. One applicant had failed to indicate his sexual orientation on his initial application. Others gave statements that were vague and inconsistent. Upon rejection, one applicant provided videos of him engaging in sexual acts and another offered to undergo medical examination in order to 'prove' his sexual orientation. The referring national court had concerns regarding the compatibility with Articles 1 (human dignity) and 7 (privacy) of the Charter of the aforementioned type of proof in cases of assessing international protection claims. It therefore referred the matter to the Court of Justice having regard to Article 4 of the Qualification Directive and the Charter.

The Court of Justice held that the assessment of asylum applications, including credibility assessments, must be conducted in compliance with the Charter rights. It held that, while the details of asylum application procedures are generally a matter for national law, a number of conditions flow from Union law. The assessment of any application should be conducted in cooperation with the applicant and it is for the applicant to advance any particular claims including regarding sexual orientation. Furthermore, assessments must be conducted in compliance with the Charter, in particular Article 7, on the right to privacy, and authorities may be required to modify their procedures in order to ensure compliance.

In relation to the specific situation of individuals claiming a particular sexual orientation, the Court outlined the limitations that may exist on the type of questioning and the assessment of their credibility. Firstly, it held that questioning based on 'stereotypical' notions may constitute only a starting point for an assessment of asylum application. For instance, an asylum application cannot be rejected solely on the basis of the fact that an applicant is unaware of certain organisations where LGBT individuals gather, as this would be contrary to the need to conduct an individual assessment, having regard to the specific circumstances of the applicant. Secondly, it held that detailed questions regarding sex acts would violate Article 7 Charter. Thirdly, it found that authorities cannot accept videos of sex acts, the performance of sex acts and of medical 'tests' regarding sexual orientation. Accepting such evidence would violate the applicant's human dignity under Article 1 Charter. Moreover, it would encourage others to submit similar evidence leading to a *de facto* requirement of such evidence. Finally, it found the non-disclosure of sexual orientation earlier in the asylum application process as not being fatal to credibility, given the sensitivity of the subject matter. In conclusion, the judgment of the CJEU in *A, B and C* and the follow-up national judgments<sup>79</sup> show the

73 Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, ECLI:EU:C:2013:28.

74 See, *inter alia*, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107.

75 Case C-601/15 PPU, *JN*, ECLI:EU:C:2016:84.

76 C-106/89, *Marleasing*, ECLI:EU:C:1990:395.

77 *Ibid.*

78 Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406.

79 See [ACTIONES Database](#) managed by the Centre for Ju-



interpretative role of Article 7 Charter and its effects on the practice of administrative authorities. In particular the right to privacy limits the form of questions that could be asked and the types of proof that could be requested when assessing the credibility of a claim of sexual orientation.

#### 2.4 The Charter as parameter of compatibility of national legislation and public authorities practice with fundamental rights

According to Article 51(1), the Charter applies to the Member States only when acting within the scope of EU law. In *Fransson*, the CJEU clarified that ‘the scope of EU law’ is the same as the scope of the Charter.<sup>80</sup> Therefore, once a connecting EU law element has been identified in a case, the Charter is applicable. For a detailed list of situations where the Charter is applicable, please see the CharterClick! *Checklist* and the *Tutorial*.<sup>81</sup>

For national courts, NHRBs and other authorities dealing with claims from individuals regarding their fundamental rights, the Charter is most often used as a parameter to check compatibility of national legislation and public authorities’ practice with EU law.

Following the initiative of NHRBs, Constitutional Courts have started to include the Charter as parameter of constitutionality review of national legislation. Following the multiple complaints raised by a trade union of a regional company<sup>82</sup> against the provisions of the Law on insolvency, the Romanian ordinary courts raised an exception of constitutionality before the Romanian Constitutional Court. In 2015, the Romanian Constitutional Court<sup>83</sup> held that Article 86(6) of Law 85/2006 on insolvency procedure is unconstitutional since it violates Article 27 Charter in combination with Articles 2 and 3 of Directive 98/59 on collective redundancies. In this case, the challenged national provisions permitted employees to bypass the general collective redundancies procedure in the case of insolvencies. Based on Articles 2 and 3 of Directive 98/59 as interpreted by the CJEU in *David Claes* judgment<sup>84</sup>, and together with Articles 27 Charter, the *Romanian Constitutional Court* held that the Article 41(2) of the Constitution (right to social protection) should be interpreted as requiring a higher standard of protection than that offered by the national legislation. It then decided to declare unconstitutional

-----  
dicial Cooperation, EUI.

80 In its judgement of 26 February 2013 on Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, the CJEU interpreted Article 51(1) EU Charter as meaning that “the fundamental rights granted by the Charter must (...) be complied with where national legislation falls within the scope of European Union law” (para. 21)

81 Available online at <http://www.charterclick.eu/toolkit/>

82 Sindicatul Hidroelectrina Hidrosind.

83 Decision No. 64/2015 of 24 February 2015.

84 Case C-235/239/10, *David Claes*, ECLI:EU:C:2011:119.

the challenged legal provisions, since they limited the application of the general collective redundancies procedure in the case of insolvency.<sup>85</sup>

The principle of non-discrimination on grounds of sex, sexual orientation and disability, as laid down in the Charter and as a general principle of EU law, has been the legal basis for setting aside domestic legal provisions creating direct or indirect discrimination (e.g. against female part-time workers, same sex married couples exercising the freedom of movement). A ground-breaking case concerning sexual harassment and the added value of the Charter was reported by the *Swedish Equality Body*. The case concerned discrimination based on harassment on sexual orientation between co-workers. At issue was the Swedish legislation which prohibits this type of harassment only in vertical work relations. The *Swedish Equality Body* argued that this legislative limitation was contrary to EU law, Articles 31<sup>86</sup> and Article 47 of the Charter.

A string of ground-breaking cases concerning the principle of non-discrimination based on ethnic origin were brought by the *Bulgarian Commission for the Protection against Discrimination*. These cases were lodged against an electricity company with multinational branches regarding their discriminatory practice of placing meters out of reach of the consumers only in Roma districts. The Bulgarian NHRB argued that this practice constituted discrimination based on ethnic origin. Following a string of persistent rejection of these cases by the Bulgarian Supreme Court, the Bulgarian NHRB sent directly a preliminary reference to the CJEU (C- 394/11, *Belov*), which was found inadmissible by the CJEU on grounds that the Bulgarian human rights body was not a court within the meaning of Article 267 TFEU. The *Bulgarian Commission for the Protection against Discrimination* continued to bring new cases before national courts challenging the legality of the electricity company’s practice due to its indirect discriminatory effects against those of Roma ethnic origin. Finally a lower administrative court decided to suspend the proceeding and request a preliminary ruling from the CJEU,<sup>87</sup> similar to the ones asked by the Bulgarian body in the preceding *Belov* case. In particular, the referring court asked whether a ‘homogenous group of Bulgarians of Roma origin’ can constitute an ethnic group, given that Directive 2000/43 does not define the concept of ethnic origin. Secondly, the Bulgarian court asked whether discrimination by association is covered by Directive 2000/43. Lastly, the referring court asked what constituted indirect

-----  
85 Another case where the Charter was used as a parameter for the assessment of the constitutionality of national legislation following the complaint of a NHRBs is the *RPO* case before the Polish Constitutional Tribunal, discussed below.

86 Article 31 EU Charter establishes standards on fair and just working conditions.

87 C-83/14 *CHEZ*.





discrimination. In particular, the court asked whether a national measure, such as that at issue in the proceeding, which although formally neutral, is detrimental for ‘considerably more’ individuals having the protected characteristic than for individuals not possessing it, can be considered as indirectly discriminatory. The Charter had an important role in both the Bulgarian human right body and the court’s legal reasoning, being invoked in conjunction with the EU Racial Equality Directive.

The CJEU concluded that the term ‘ethnic origin’ as appeared in the Directive 2000/43/EC should be interpreted as covering a homogenous group of Bulgarians of Roma origin such as those living in a particular district of the Bulgarian town of Dupnitsa. Another important issue clarified by the CJEU concerns the requirements that have to be fulfilled by the complainant in a case of discrimination based on ethnic origin. Ms Nikolova was not of Roma origin, nor identifying as Roma. She brought the claim based on the fact of having a shop in an area where Roma population was majoritarian. The CJEU rejected the interpretation of the notion of ‘discrimination on grounds of racial or ethnic origin’ as limited to a person who possesses the racial or ethnic origin. Therefore Ms Nikolova was entitled to avail herself of the protection against discrimination based on ethnic origin because she was living in a predominantly Roma neighbourhood and, therefore, was also subjected to the challenged discriminatory practice. The CJEU also provided salient guidelines on how to distinguish between direct and indirect discrimination, on what can be a ‘comparator’ to establish discriminatory practices, and on the proof that the perpetrator of indirect discrimination has to bring to show that this practice is objectively justified by legitimate aims such as: preventing fraud and protecting people’s life and health.

The role played by Article 21 Charter in CHEZ was pivotal in providing an interpretation of the concept of “ethnic origin”. The CJEU legitimised a purposeful and wide interpretation of the personal scope of the Racial Equality Directive on the basis of interpreting the directive as “an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter, the scope of that directive cannot be defined restrictively (judgment in *Runevič-Vardyn and Wardyn*, C391/09, EU:C:2011:291, paragraph 43)” (para 42 of CJEU).<sup>88</sup> Article 21 Charter also frames the level of protection against the discriminatory practice in the case. The CJEU established that CHEZ RB’s practices are “offensive and stigmatising” (para 84, 87, 108) and constitute direct discrimination (76) but this is a matter which is for the referring court to determine (para 91).

88 For a detailed analysis of the CHEZ case, see the *ACTIONES Module on Non-discrimination*, available online in the webpage of the [ACTIONES Project](#).

## 2.5 The Charter as an entrance door for Directives in private parties relations/litigation

It is settled case law of the CJEU that EU Directives have only vertical effect<sup>89</sup>, therefore a Directive can be invoked or enforced *in lieu* of contrary domestic rules only in disputes against State entities or emanations of the State.<sup>90</sup> This is true regardless of whether the public authority acts as a commercial entity or exercising public powers.<sup>91</sup> The question is: can Charter rights and principles be invoked in a legal proceedings between two private parties?

In *Association de médiation sociale (AMS)*<sup>92</sup>, the CJEU confirmed that provisions of the Charter that fulfil the criteria of direct effect<sup>93</sup> can be relied on to disapply a conflicting national measure (that implements Union law within the meaning of Article 51(1) of the Charter), including in a dispute between private parties. The Charter can thus be used to overcome the restriction of applying EU Directives in proceedings between private parties. In *Kücükdeveci*, the CJEU held that the general principle of non-discrimination based on age, codified also in Article 21 Charter, is capable of having such a direct effect, and consequently also horizontal direct effect.<sup>94</sup> In *Kücükdeveci (C-555/07)*<sup>95</sup> the ordinary judge needed to assess the legality of a provision from the German Civil Code allowing employees to give a comparatively shorter notice of dismissal to employees who have started working before the age of 25. The plaintiff maintained that this domestic legal provision was discriminatory, because it arbitrarily affected early-workers. Discrimination in the workplace is regulated by the EU Directive 2000/78, which includes age among the prohibited grounds. However, since EU directives are deprived of direct horizontal effects, meaning that they cannot be invoked as a ground for disapplication of domestic law in litigation between private parties, the question was whether the Charter could be the legal basis

89 This doctrine has been reaffirmed time and again, for a summary of the most relevant judgments, see *Dominguez*.

90 In the area of non-discrimination the case law have given the horizontal direct effect to provisions of the directive. Compare: Case C-144/04, *Mangold*, op. cit. and Case C-555/07, *Kücükdeveci*, op. cit.

91 Joined Cases C-250/09 and C-268/09 *Georgiev*, judgment of 18 November 2010, para. 70.

92 Judgment of 15 January 2014, case C-176/12, *Association de médiation sociale (AMS)*.

93 According to a settled case law of the Court of Justice, the provisions of EU law (be they primary or secondary legal provisions) that are clear, precise and not subject to conditions can be relied on by legal and natural persons before domestic courts, in order to obtain the disapplication of conflicting national provisions. (*Van Gend en Loos*, ECLI:EU:C:1963)

94 CJEU: “the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.” (*Kücükdeveci*, para. 49)

95 Case C-555/07, *Kücükdeveci*, op. cit.



for disapplication of the challenged domestic provision.

The CJEU noted that non-discrimination on grounds of age, as recognized in the Charter of Fundamental Rights, and in the Employment Equality Directive 2000/78, is a general principle of EU law, and requires judges to set aside conflicting legislation even in horizontal disputes.

An interesting case concerning the direct horizontal application of Charter rights comes from the UK. In that case, the applicants' claims were supported by the *UK Equality and Human Rights Commission*. The UK Court of Appeal (Civil Division) concluded that the rights to an effective remedy and fair trial (Article 47 EU Charter) can have direct horizontal effect in the national system.<sup>96</sup>

The Article was invoked as a legal basis for the legality check of a provision from the UK State of Immunity Act 1978 in proceedings between two foreign employees and the embassies of Sudan and Libya in London. According to the State Immunity Act 1978, the employees were prohibited from accessing the UK courts in relation to their dismissal which they claimed was unlawful under the EU Working Time Regulations and the Racial Equality Directive.

If certain Charter provisions lack direct effect and cannot thus be invoked in combination with the provisions of a relevant Directive in order to give the latter application in relationships between private parties, the Charter provisions can still enjoy indirect horizontal effect. The CJEU has held that a national court, when hearing a case between individuals, is required, when applying domestic legal provisions transposing a Directive, to interpret these norms, as far as possible in the light of the wording and purpose of that Directive, so as to achieve an outcome consistent with the objective pursued by the Directive.<sup>97</sup> Nevertheless, the principle of interpreting national law in conformity with EU law has limits, as shown by the *AMS* case, in the sense that it cannot serve as the basis for an interpretation of national law *contra legem* (see *Dominguez*, para. 25).

## 2.6 The Charter as an instrument for strategic litigation

The NHRBs have an essential role in shaping the EU and national laws and policies on human rights, as well as in ensuring the enforcement of these laws. Especially for NHRBs the Charter could be very useful in creating political pressure, influencing law, policy making and practices and ensuring that human rights standards at national level are observed and promoted at the highest possible degree. For instance, NHRBs can identify domestic cases raising issues which are of European and transnational relevance. They can decide to bring cases

before the national courts, and suggest to national courts to address preliminary questions to the CJEU, which can contribute to a uniform interpretation of EU law not only in the referring Member States but also in other Member States. The action of one NHRB can thus lead to adoption of good practice by the judiciary and NHRBs of all EU Member States. In the following paragraphs the most salient cases of strategic litigation revealed by the CharterClick! Questionnaires will be outlined.

### 2.6.1 *The Office of the Human Rights Commissioner of Poland – equal treatment*<sup>98</sup>

Article 20 Charter was invoked by the HRs Commissioner in a case on equal treatment of e-books which were higher taxed compared to paper books. The case was referred to the CJEU by the Polish Constitutional Tribunal following the recommendation of the Polish Office. It was the first preliminary reference sent by the Polish Constitutional Tribunal. The HRs Commissioner pointed to the fact that the matter did not concern the incompatibility of Polish provisions transposing an EU Directive with the Constitution but it concerned the incompatibility of EU Directive 2006/112/EC<sup>99</sup> with Article 20 Charter and the EU general principle of equality. The HRs Commissioner suggested to the Polish Constitutional Tribunal to request a preliminary ruling from the CJEU on the issue of the validity of Directive 2006/112. The HRs Commissioner contributed to determine the Polish Constitutional Tribunal to address its first preliminary ruling, and to settle an issue of national, but also European interest.

### 2.6.2 *N.S. and others*<sup>100</sup> – conformity with absolute human rights in overlapping multilevel human rights system

One excellent example presented by one of the CharterClick! Partners, the UK Equality and Human Rights Commission, is the *NS v SSHD* case. The purpose of the Commission's intervention was to ensure the correct interpretation of the Charter of Fundamental Rights and of the related UK Protocol regarding the application of the Charter in the UK. The intervention of the Commission had positive results in relation to the application of the Charter. First the case had an important impact at national level as it clarified that the Charter is a binding instrument for the UK. Secondly, the case is of EU constitutional relevance as it clarified the relation between EU secondary legislation and the Charter/ECHR, and the level of fundamental rights protection at EU level. The CJEU confirmed that Member States are responsible for respecting the Charter provisions even when they derogate from EU law as long as their actions impact on EU law. Furthermore they are also obliged to respect the ECHR rights corresponding to the Charter

<sup>96</sup> *Benkharbouche v. Embassy of the Republic of Sudan and Janah v. Libya*

<sup>97</sup> See Case C-212/04, *Adeneler and Others*, para. 111; *Dominguez*, para. 27.

<sup>98</sup> The case is pending before the CJEU (last check done in July 2016).

<sup>99</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1, 11.12.2006.

<sup>100</sup> Case C-411/10, *N.S. and others*, ECLI:EU:C:2011:865



provisions (Article 52(3)). The CJEU required that EU secondary provision should be interpreted in line with Article 4 Charter which have priority in application: ‘when *substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants...resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter...the transfer would be incompatible with that provision*’ (para. 84 and 86)

### 2.6.3 *Firma Feryn*<sup>101</sup> – collective remedies

Another case which shows the role NHRBs can play in strategic litigation is *Firma Feryn*. The case was initiated by the Belgian equality body against a private company because of a public statement made by that company that it would not recruit any Moroccans. The main issue of the case was that there has been never an identifiable victim, since no actual application was made and had been rejected by the company. The CJEU held that the existence of direct discrimination is not dependent upon the identification of a complainant who alleged to be the victim, and that collective remedies can be established in case of direct discrimination. The Belgian equality body contributed thus to the clarification of important issues regarding remedies in cases of discriminatory discrimination based on race. The case is of relevance not only for the Belgian jurisdiction but also for all EU countries.

### 2.6.4 *Belov*<sup>102</sup> and *CHEZ*<sup>103</sup> – systemic discriminatory practices

In addition to the substantive clarification of the scope of application of the Race Equality Directive and its relation with the Charter, these cases are strategic because they reveal systemic discriminatory practices, which affect a whole group of people, i.e. all those who live in the so-called “Roma districts”. The Advocate General Kokott noted in her Opinion: “[t]he case does ultimately stem from a complaint lodged by one individual; however, the centre of interest is the wholesale and collective character of measures which affect an entire community and are liable to stigmatize all the members of that community and their social environment”.<sup>104</sup>

The contested practice of installing energy meters, affected an entire community, and it was challenged by several individuals, including Mr Belov and Ms Nikolova. The discriminatory practice had been in place for almost 25 years.<sup>105</sup> This highlights that NHRBs have the power to identify and effectively remedy discriminatory practice which, due to their length in

101 Case C-54/07, *Firma Feryn*, ECLI:EU:C:2008:397.

102 Case C-394/11, *Belov*, ECLI:EU:C:2013:48.

103 Case C-83/13, *CHEZ*, ECLI:EU:C:2015:480.

104 *CHEZ*, Opinion AG Kokott, para.1

105 R. Grozev, A Landmark Judgment of the Court of Justice of the EU – New Conceptual Contributions to the Legal Combat against Ethnic Discrimination, *The Equal Rights Review*, Vol. 15 (2015), 168-188.

time and the vast number of affected individuals, prove the existence of systemic deficiencies in the functioning of domestic anti-discriminatory regimes. The case adds to the line of European judicial decisions finding systemic discriminatory practices against the Roma communities in the public systems of the Member States. For instance, in *D.H. and others*<sup>106</sup>, the ECtHR found that Romani children were systematically placed in schools or classes for the mildly mentally disabled, in a manner which appeared far from ‘neutral’. The 18 applicants of Czech nationals were represented by European Roma Rights Centre based in Budapest. Similarly, NHRBs have challenged systemic discriminatory practices against Roma in Sweden, Italy and France, by way of supporting the claims lodged by specialised NGOs or by individual applicants, whose complaints revealed systematic discriminatory practices against the Roma community.<sup>107</sup>

As a concluding remark, it should be pointed out that some of the NHRBs openly recognised that they are actively focusing on the identification of grave or systemic deficiencies of human rights protection and on highlighting human rights issues that have to be given more attention, especially in relation with vulnerable groups, such as refugees, women refugees, unaccompanied minors, irregular migrants, LGBT people, victims of hate crime or discrimination or gender violence etc. (e.g. *Office of the Commissioner for Administration and Human Rights of Cyprus*)

## 2.7 The Charter as gap filling and raising standards of protection of fundamental rights at national level

It is undeniable that national authorities are bound by domestic fundamental rights provided by constitutional provisions, which in general afford a satisfactory level of protection. However, due to the fact that constitutional provisions were drafted decades ago, they might not include certain fundamental rights which are included in the Charter, which is an instrument of newer generation (e.g. social and economic rights). For instance, the Maltese Constitution does not have a corresponding right to Article 3 Charter (right to the integrity of the person). Under the Maltese legal system, it used to be impossible to claim remedies for moral damages. Lower courts have used Article 3 Charter to admit claims for moral damages.<sup>108</sup>

*Benkharbouche* case concerned claims brought by third

106 *D.H. and others against the Czech Republic*, Application no. 57325/00, Judgment of the Grand Chamber of 13 November 2007.

107 See, for instance, the Judgment of the Swedish Municipal Tribunal – registration of Roma; the interim relief order of the ECtHR against Italy in a case on forced eviction of Romas in Rome - The claim was brought to the ECtHR by two NGOs acting in support of the victims (ERRC and Associazione 21 Luglio) and two lawyers belonging to ASGI.

108 Malta, Civil Court, No. 33/2014, decision of 15 January 2015.





country nationals working in London based embassies of their third countries for: unfair dismissal; failure to be paid the minimum wage; harassment and racial discrimination which were argued to have breached the Working Time Regulations 1998 and, *inter alia*, Article 47 Charter. The UK State Immunity provides general immunity for States under UK jurisdiction, with an exception for contracts of employment made in UK. However this exception did not apply to non-UK nationals, or non-habitually residents third country nationals. Thus *Benkharbouche and the others* complainants could not bring claims before the UK courts. Ultimately, the UK Court of Appeal held that the UK State Immunity Act infringed the fair trial rights enshrined in Article 47 Charter of the third country nationals working in the London based embassies of third countries.<sup>109</sup>

Another interesting case showing a creative use of the Charter originated from the UK jurisdiction. The UK Court of Appeal held that the UK Data Protection Act which implements the EU Directive on data protection conflicted with Articles 7 and 8 of the Charter. The case concerned an entitlement to monetary compensation for damages. The Court disapplied part of the domestic legislation which prevented recovery of non-pecuniary loss on the basis that it contravened Articles 7 and 8 of the Charter.<sup>110</sup> As *Benkharbouche*, the *Google Inc v Vidal-Hall & Ors* judgment affirms the role of the Charter in raising domestic standards of human rights protection and shows the potential added value of the Charter.

### 3. The Added value of the Charter compared to other human rights instruments (ECHR)

One of the essential questions regarding the application of the Charter is: *why is it necessary or useful to rely on the EU Charter, when there are already long-established national and European human rights bills/instruments safeguarding similar fundamental rights as those enshrined in the Charter?* For instance, in Europe we have the ECHR, national constitutions, and the various thematic fields are covered by specialised EU secondary legislation providing for specific substantive and procedural safeguards of fundamental rights (e.g. Racial Equality Directive, Common European Asylum System instruments, etc.). In addition to the European level, there are international legal instruments, such as the Refugee Protection Convention, the two UN International Covenants on civil, political and social rights, various other conventions and treaties protecting specific fundamental rights, such as: prohibition of ill treatments, protection of disable persons, children, women, etc.

109 *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33, 5th February 2015, the case is now pending before the UK Supreme Court.

110 *Google Inc v Vidal-Hall & Ors*, [2015] EWCA Civ 311.

Chapter II and III of the Report revealed that NHRBs are mainly relying on the ECHR, specific EU secondary legislation (especially for equality and migration related bodies), and national constitutional provisions. However, the following aspects reflect the necessity of using the EU Charter, and also the added value of using the Charter:

*Mandatory, binding legal nature of the Charter* – The Charter is first of all a legally binding instrument. According to Article 6(1) TEU, the Charter has “the same status of the Treaties”. Therefore, it belongs to the primary law of the European Union. Accordingly, the provisions of EU secondary law must be interpreted in conformity with the Charter and, in case of a conflict that cannot be resolved through interpretation, EU secondary law can be set aside by the Court of Justice. In addition, national provisions that fall within the scope of the Charter must conform to the Charter provisions. If the conflict cannot be resolved by way of interpretation, national courts can disapply the conflicting national provision, if the applicable EU provision (either the Charter or applicable EU secondary provision) fulfils the criteria of direct effect.<sup>111</sup> Given the binding legal nature of the Charter, and its status as EU primary law, NHRBs are expected to ensure the full and effective application of the Charter in their everyday practice, just as they apply EU secondary legislation.

*Political, Civil, Economic, and Social rights and principles in one single instrument* – The Charter’s added value comes also from the fact that it is an up to date instrument, including new generation rights reflecting the spirit of modern society, which are not included in all national constitutions. It is a modern instrument providing for human rights which are not provided for by the ECHR or other international instruments, such as: express asylum related rights: right to asylum (Articles 18, 19 Charter)<sup>112</sup>; the right to conscientious objection (Article 10(1) Charter); detailed, extended and express grounds for non-discrimination (Article 21 Charter includes grounds which are not expressly provided for by Article 14 ECHR); Article 24 Charter codified the essence of the children rights as enshrined in the Convention on the Rights of the Child;

*Charter human rights which do not have correspondent in the ECHR* – such as, for instance: the right to conscientious objection (Article 10(1) Charter); right to good administration (Article 41 Charter); social rights (see Title V Charter);

111 For the different requirements the Charter has to fulfil in private v public legal relationships see section 1.5.

112 It is important to underline here that the application of the ECHR in the field of asylum and irregular migration is limited due to the fact that: 1) unlike the EU Charter it does not include a right to asylum; 2) the right to a fair trial and effective remedy do not apply to asylum and irregular migration cases; while Article 13 ECHR has been considered in asylum and migration case but, in conjunction with other provisions of the Convention, such as Articles 3, 5(1)(f), 8, and Article 4 Protocol 4.





*Higher protection of certain fundamental rights* – Prohibition of discrimination is provided in Article 21 Charter on account of 17 grounds, and with an independent application in contrast with Article 14 ECHR. Article 47 Charter guarantees effective judicial protection for all rights derived from Union law, while Article 13 ECHR guarantees effective judicial protection only for civil and criminal rights, excluding the entire category of administrative rights.

*CJEU ensuring an interpretation of the Charter within the specific context of the EU legal order* – The application of the Charter is supervised by the European Commission and the CJEU. The latter is increasingly resorting to the Charter for the purpose of assessing the validity of EU secondary legislation, striking down, when necessary incompatible provisions (e.g. *Digital Rights Ireland* case). Furthermore, the CJEU will adopt an interpretation of certain fundamental rights which is specific for the EU legal order, and might at times differ from the interpretation provided by the ECtHR. For instance, while the ECtHR will qualify a certain discriminatory legislation as indirect discrimination, the CJEU might have a different interpretation of the principle of non-discrimination. For instance, the CJEU considered a pension scheme as directly discriminatory and ultimately an unjustified measure, since it excluded male civil servants, who were able to prove that they assumed the task of bringing up their children, from obtaining the points which the national legislation introduced for the calculation of retirement pensions.<sup>113</sup> On the other hand, the ECtHR qualified the different pension scheme as being indirectly discriminatory.<sup>114</sup>

*Charter can overcome the procedural limitations in the application of the ECHR* – The *Benkharbouche* case showed that the Charter can provide a solution for situations where the application of the Convention is limited by statutory or constitutional provisions. In that case, Article 47 of the Charter allowed for the disapplication of the provisions of the UK State Immunity Act that limited access of individuals to domestic courts and effective remedies. In that case, the third country nationals working at the embassies of their countries in London, could access the courts for the purpose of claiming damages for the discriminatory practice applied by their States' embassies. Regarding the area of non-discrimination on grounds of age, Article 21 Charter goes beyond the national and ECHR standard of protection. The use of the Charter to enhance fundamental rights protection is especially visible also in the case-law of German courts, whereby the Charter was successfully used to advance the level of fundamental rights protection in the context where the ECHR did not provide for explicit and self-standing prohibition of age discrimination.

113 C-366/99, *Griesmar*, ECLI:EU:C:2001:648.

114 ECtHR, *Andrle v Czech Republic*, Judgment of 17 February 2011, Appl. No. 6268/08.



# ANNEX I – THE CHARTERCLICK! QUESTIONNAIRE

## **Don't knock on the wrong door: CharterClick!**

*A user friendly tool to detect violations falling within the scope of the EU Charter of Fundamental Rights*



Co-funded by the European Union Programme  
“Fundamental Rights and Citizenship 2013”



# Questionnaire on the Use of the Charter by and before National Human Rights Bodies

## Contents

1. Introduction	1
2. The importance of shedding light on the use of the Charter by National Human Rights Bodies	2
3. Questionnaire	3
Part I – Your institution	3
Part II – The EU Charter in your day-to-day activity	5
Part III – Help us modelling the CharterClick! On-line platform on your needs	9
Part IV – Awareness raising and training activities	10

Completed questionnaires must be sent to [charterclick@dsg.unifi.it](mailto:charterclick@dsg.unifi.it) and [madalina.moraru@eui.eu](mailto:madalina.moraru@eui.eu) by 1<sup>st</sup> of December 2015.

## 1. Introduction

*“Don’t knock at the wrong door: CharterClick!”* (hereinafter CharterClick!) is a two year project (February 2015 - January 2017) co-financed by the European Commission under the “Fundamental Rights and Citizenship Programme 2013”. The primary outcome consists in setting up an on-line, freely accessible platform with a set of tools aimed to provide assistance in understanding whether and how reliance on the EU Charter of Fundamental Rights (hereinafter [EU Charter](#)) can be of help in a specific case. The toolkit will target victims of fundamental rights violations, their representatives, national judges and national human rights bodies (NHRBs). Detailed information on the Project can be found in the Annex that complements this questionnaire.

This questionnaire, in particular, is primarily functional to the elaboration of one of the four main tools that will be uploaded to the Platform, notably of a document collecting the practices of NHRBs as regards the application of the Charter. At the same time, the information collected will be taken into consideration also in the elaboration of other tools, with a view to make them respondent to the actual needs of NHRBs.

## 2. The importance of shedding light on the use of the Charter by National Human Rights Bodies

NHRBs have a prominent role to play in the application of the EU Charter to the benefit of victims of fundamental rights violations. As reported by the [Fundamental Rights Agency](#), NHRBs from different Member States have started to rely on the Charter in their everyday activity. Nevertheless, a comprehensive knowledge about their activity is still lacking, as well as about instruments through which they can learn from each other. Linguistic and time constraints, but also limited financial resources, are serious obstacles to the spontaneous creation of a process of cross-fertilisation.

Against this background, the present questionnaire aims at collecting evidence on the current use of the Charter by NHRBs throughout the EU, but also at obtaining their suggestions on tools that may help them to improve the use of this instrument. Actually, the questionnaire pursues a twofold objective. First, by shedding light on the day-to-day use of the Charter by NHRBs, it will favour a process of mutual learning and cross-fertilisation between these bodies themselves. Second, drawing on the experience of NHRBs in the field, the team of the CharterClick! Project will better tailor the tools created within the Project to the actual needs of such Bodies. The achievement of this ultimate objective is of crucial importance in order to bolster the application of the EU Charter, to the benefit of victims of fundamental rights violations.

The gathered data will serve as a basis for statistical overview and qualitative analysis focused on the description of best practices. Please note that in this case the NHRB interested by the practice will be contacted in order to confirm its willingness to make it public.

The final document will be uploaded on the on-line platform.



The questionnaire below includes four parts. Part I requires providing some general information on your institution. Part II refers to the role of the EU Charter in the activity of your institution. Part III aims at collecting the suggestions you may deem useful to improve the CharterClick! deliverables. Finally, Part IV focus on the training and awareness raising activities concerning the use and comprehension of the EU Charter. Part I and Part III are common to all the addressees of the Questionnaire, whereas in Part II and Part IV there are different sets of questions to be replied depending on the activity/ies performed by your institution.

### 3. Questionnaire

**!!! Please, note that the questions below refer to the experience of your NHRB with the application of the Charter in the period from 1 December 2009 (the date on which the Charter became legally binding) to the date on which you fill in the questionnaire.**

#### Part I – Your institution

The purpose of this first part is to gather basic information about the NHRBs operating within the Member States. Previous research shows that the mandates of these bodies are quite heterogeneous, in terms of the legal areas covered (from non-discrimination, children protection, to data protection), or of the tasks and competences (from pure training to quasi-judicial mandate).

**1. Full name:**

---

**2. Member State:**

---

**3. Legal form:**

---

Please, indicate if the act establishing your body is available in English and, whenever possible, include a link to it or send us a pdf version.

---

**4. Mandate**

4.1 Please, specify if your competence extends to all human rights listed in the Charter or it is limited to some of them (e.g. children rights, equality and non-discrimination rights):

---

---

---

4.2 Please, select which of the following activities are included in your mandate (if more than one, please indicate the most relevant one/s):

- a. training
- b. awareness raising
- c. complaints processing
- d. advisory role for government



- e. litigating cases before courts
- f. mediation provider/out-of-court dispute settlement
- g. Other (please specify) \_\_\_\_\_

4.3 **If your mandate includes the processing of complaints raised by individuals (c) in question 5.2),** could you specify the legal value of the decisions you may issue? (more replies are possible)

- a. legally binding for parties
- b. not legally binding for parties
- c. subject to appeal or judicial review by courts/administrative bodies/other (please specify)
- d. not subject to appeal or judicial review
- e. compulsory for parties before any judicial action

Please add any additional aspect you may deem interesting.

---

---

---

4.3.1 What is the general examination process followed by your body when processing complaints raised by individuals and its timeline (if available, please add links to the relevant documents).

---

---

---

---

---

---

4.3.2 Does the examination process identify changes where the complaint falls within the scope of application of the Charter? If so, could you highlight the main differences in processing in such cases?

---

---

---

---

---

4.4 **If your mandate includes litigating cases before courts (e) in question 4.2),** could you describe the role you may have in front of courts?

- As a legal representative
- As an *amicus curiae*
- An an expert consultant
- Other (please specify below)

---





---

---

---

**5. ICC accreditation under Paris Principles<sup>115</sup> (please describe your position):**

---

---

**Part II – The EU Charter in your day-to-day activity**

The purpose of this part is to identify where, among the array of activities that your institution carries out, the EU Charter has a specific role. In particular, major attention will be drawn towards those institutions that are responsible for in-house mediation or adjudication vis-à-vis the violation of human rights, as well as those that are able to litigate the violations of human rights in front of courts.

The questions will allow us to improve our understanding on how the EU Charter impacts on such activities and which are – if any – the tools employed to make the best use of the EU Charter.

**6. Which role does the Charter play within your activities?**

- As the main legal source to decide complaints processed by the institution
- As a legal basis/source, among others (e.g. national constitutions, international conventions..), of inspiration for arguments in litigation in front of courts
- As legal source to decide in mediation and/or out of court settlement activity provided by your institution
- As a training subject for internal staff
- As a training subject for specific entities (individuals, NGOs, legal practitioners, etc.)
- As a focus of awareness raising campaigns
- As a focus of government guidelines
- Other (Please specify).

---

---

---

---

---

**IF YOU REPLIED a) PLEASE REPLY TO QUESTIONS 7-13**  
**IF YOU REPLIED b) PLEASE REPLY TO QUESTIONS 14-22**  
**IF YOU REPLIED c) or g) PLEASE REPLY TO QUESTIONS 23-24**

**Questions 7-13 are for those who replied a) in Question 6.**

**7. How many of the cases that you decided have concerned the violation of the Charter?**

If possible, specify the number of relevant cases *per year* since 2010 and the total number of cases dealt with in the same year.

If your body produce annual reports, please add a link to them when available on-line or, if possible, send us a scanned

115 Reference is made to the “Principles relating to the status of national institutions: Competences and Responsibilities”, defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by the Commission on Human Rights, Resolution 1992/54, in 1992 and by the [General Assembly Resolution 48/134](#), in 1993.

copy by e-mail together with this questionnaire.

2010 - Total cases _____	Cases involving the Charter _____
2011 - Total cases _____	Cases involving the Charter _____
2012 - Total cases _____	Cases involving the Charter _____
2013 - Total cases _____	Cases involving the Charter _____
2014 - Total cases _____	Cases involving the Charter _____
2015 - Total cases _____	Cases involving the Charter _____

**8. Who has introduced the EU Charter in the complaint analysis?**

The claimant

The defendant

The deciding body

Other (please, specify below)

---

---

**9. In these cases, which consequences did the use of the Charter entail?** Specify, in particular, whether the use of the Charter led to establishing a different interpretation of the fundamental right concerned as compared to the domestic sources applicable. If yes, please specify whether the Charter contributed to establishing a higher or lower standard of protection than the domestic sources. Otherwise, would you say that the Charter did not bring any substantive impact to the solution of the case?

---

---

**10. Which are the fundamental rights of the Charter that are most frequently at stake in your activity?** Please, specify the provisions of the Charter that you refer to most frequently, possibly providing also some information on the context of the case (e.g., art. 21, par. 1, on non-discrimination on ground of race in work-related case)

---

---

---

**11. Can you briefly (and anonymously if preferred) describe the most important case (or cases) where you applied the EU Charter?** Please select the one(s) where the Charter has a clear traceable impact on the reasoning of your organisation in the follow-up given to a complaint.

---

---

---

---

---

**12. Which of the following tools/databases do you use in order to collect information on the interpretation and application of the Charter and its potential?**



- a. CJEU database (Curia)
- b. Eur-lex
- c. FRA Charterpedia
- d. Other national or international databases (*Please, specify:* \_\_\_\_\_  
\_\_\_\_\_)

Academic works

Internal database

Best practices shared with other institutions

Other (*Please, specify:* \_\_\_\_\_  
\_\_\_\_\_)

**13.** *In case you answered f) or g) in the previous question (Q.12), could you please provide us some details on the tools/ best practices you are referring to?*

---



---



---



---



---



---

**Questions 14-22 are for those who replied b) in Question 6.**

**14.** *How many of the cases you were involved in concerned the violation of the EU Charter?*

---



---

**15.** *Could you provide an approximate indication of the number of cases in which the EU Charter was principally relied on? In how many cases did it serve as an auxiliary argument?*

---



---

**16.** *Who has introduced the EU Charter in the complaint analysis?*

- a. Victim of the violation
- b. Suspected author of the violation
- c. Deciding body

---



---

**17.** *In the cases where the Charter was principally relied on, which consequences did its use entail? Specify, in particular, whether the use of the Charter led to establishing a different interpretation of the fundamental right concerned as compared to the domestic sources applicable. If yes, please specify whether the Charter contributed to establishing a*



higher or lower standard of protection than the domestic sources. Otherwise, would you say that the Charter did not bring any substantive impact to the solution of the case?

---

---

**18. Which are the fundamental rights of the Charter that are most frequently at stake in your activity?** Please, specify the provisions of the Charter that you refer to most frequently, possibly providing also some information on the context of the case (e.g., art. 21, par. 1, on non-discrimination on ground of race in work-related case)

---

---

---

**19. Do you use any of the following tools/databases in order to collect information on the interpretation and application of the Charter and its potential?**

- a. CJEU database (Curia)
- b. Eur-lex
- c. FRA Charterpedia
- d. Other national or international databases (*Please, specify:* \_\_\_\_\_ )
- e. Academic works
- f. Internal database
- g. Best practices shared with other institutions
- h. Other (*Please, specify:* \_\_\_\_\_ )

**20. In case you answered f) or g) in the above question (Q.19), could you please provide us some details on the tools/best practices you are referring to?**

---

---

---

---

---

---

**21. Can you mention a case where the national court upheld your arguments based on the Charter?**

---

---

---

---

---



22. Can you mention a case where the national court did not follow your arguments based on the Charter?

---

---

---

---

---

Questions 23-24 are for those who replied c) or g) in Question 6.

23. If your mandate includes an advisory role for governments, could you indicate which legislation regarding the EU Charter you commented on? Were your comments implemented?

---

---

---

---

---

24. If your mandate includes mediation and/or out-of-court dispute settlement, could you briefly describe the most relevant case (or cases) of alleged violations of the Charter you were involved in? Please, highlight the rights invoked and the outcome of the case.

---

---

---

---

---

### Part III – Help us modelling the CharterClick! On-line platform on your needs

The purpose of this part is to involve your institution in identifying the challenges the NHRBs may face when using the EU Charter, selecting the most useful tools that would help to overcome such difficulties. This will also help the project members in fine-tuning the CharterClick! deliverables upon the real needs of NHRBs.

### THE FOLLOWING QUESTIONS ARE FOR ALL THE ADDRESSES

25. Which are the main difficulties you experience in the practical use of the EU Charter?

a. Determining whether the situation concerned falls within the scope of application of the Charter in light of its Article 51, par. 1, and the related case law of the EU Court of Justice

b. Coordinating the provisions of the Charter with the other applicable legal sources, both national and international

Other (Please explain: \_\_\_\_\_)

---





26. Which would be the most useful tool among the CharterClick deliverables (please see below in the document for a wider description)? For more information on the design of each of the deliverables, please refer to Annex 1.

Please indicate your preference between 1 (extremely useful) and 5 (not very useful).

- a. Admissibility Checklist
- b. Database
- c. Practical Guidelines on the application of the Charter
- d. Best Practices concerning the fundamental rights violations falling within the scope of the Charter.

Please, justify your answer(s): \_\_\_\_\_

---

---

---

---

27. Which are the features that CharterClick! deliverable(s) should have in order to better fit with your needs?

- a. Clarity
- b. Ready to use (from the shelf) tools
- c. Language accessibility
- d. Internet/mobile accessibility
- e. Rich legal comparative data

Please, explain: \_\_\_\_\_

---

---

28. Which are the main features that CharterClick! deliverables should have in order to make the Charter clearer to affected individuals who are non-professionals? Please list and explain the main features.

- a. \_\_\_\_\_
- b. \_\_\_\_\_
- c. \_\_\_\_\_
- d. \_\_\_\_\_
- e. \_\_\_\_\_

29. Based on your experience, which other type of tools (e.g. direct exchanges, meetings, networks, etc.) would be more useful to help you when defining the scope of application of the Charter?

---

---

---

---

---



30. Do you have any additional consideration and suggestion? Please share your views with us

---

---

---

---

---

**Part IV – Awareness raising and training activities**

This part addresses the initiatives aimed at raising awareness on the EU Charter organised by the addressees during the reference period.

31. Could you indicate the most relevant ones in the last three years?

- a. title:  
number of person exposed:  
timeframe:  
description:

---

---

---

---

- b. title:  
number of person exposed:  
timeframe:  
description:

---

---

---

---

- c. title:  
number of person exposed:  
timeframe:  
description:

---

---

---

---



d. title:  
number of person exposed:  
timeframe:  
description:

---

---

---

---

e. title:  
number of person exposed:  
timeframe:  
description:

---

---

---

---

**32. If your mandate includes training activities as regards the Charter, could you indicate the most relevant ones in the last three years?**

---

---

---

---

---

32. 1. Which were the target groups that benefited from these training activities? Please indicate the most numerous groups.

- a. own staff
- b. public officials
- c. law enforcement officers
- d. judges and prosecutors
- e. academics
- f. students
- g. social
- h. general population
- i. other

Please specify: \_\_\_\_\_

---

---

---

RESEARCH  
PROJECT  
REPORT



Publications Office

doi:10.2870/677859  
ISBN:978-92-9084-543-0