

## CCBE comments in response to the Commission “Consultation of judges, other justice practitioners and training institutions on the new European Commission Strategy on the effective application of the Charter of Fundamental Rights in the EU”

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### Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE regularly responds on behalf of its members to consultations on policy issues which affect European citizens and lawyers.

The CCBE is happy to have the opportunity to respond to the “Consultation of judges, other justice practitioners and training institutions on the new European Commission Strategy on the effective application of the Charter of Fundamental Rights in the EU”.

Despite the Charter of Fundamental Rights (the “Charter”) being 20 years old, its content, and possibly its existence, will be new to many people. This is an unfortunate reality, as the Charter is a wonderful instrument with great added value and its provisions need to be availed of to a greater extent.

The CCBE strives to increase the general awareness of the Charter among lawyers. Increased awareness and understanding by lawyers would bring great benefit towards increasing the use of the Charter, and thus, greatly enhance the value of the Charter as an instrument to protect Fundamental Rights.

In addition, there have been so many developments of significance in those twenty years that it is now opportune to promote the significance of the Charter.

### CCBE observations

The Charter is of great value to practitioners, and could be even more so. However, there are a number of possible reasons to explain why, despite being legally binding since 2009, there are still suitable cases where lawyers have not regarded the Charter as an instrument of reference:

- (a) Frequently, lawyers can struggle to apply or refer to EU law, as it might appear to be too distant or irrelevant to a case. The basic reluctance to apply EU law, which has been in existence for many decades, may extend to any instrument based on EU law, including the Charter in this case. It is a fact of life that national governments do not necessarily highlight that national legislation in fact derives from EU measures thus immediately engaging the Charter
- (b) In cases where lawyers are aware of the Charter, there may be a misconception that the Charter can only be invoked when all domestic remedies have been exhausted, as is the case with the European Convention on Human Rights.

- (c) The relevance and ease of implementation of the Charter in a national setting needs to be demonstrated and communicated. However, when looking at judgements in some areas of law it also has to be noted, that arguments based on the constitution of member states or the ECHR often seem to prevail over those based on the Charter – probably because of a stronger legal tradition, including jurisprudence/ settled case-law. Also, sometimes judges seem to rely strongly on commonly acknowledged legal arguments. It seems difficult to convince with “out of the box”-arguments which refer, for example, to Charter rights. This puts lawyers in a difficult position as they need to act in the interest of their clients and provide *effective* legal representation.
- (d) By not being aware of its provisions, lawyers are not aware of how the Charter is a modern instrument which applies in a number of areas, including Justice. The Charter also includes 'third generation' fundamental rights, such as data protection.
- (e) Practitioners who believed at the point of its introduction that the Charter was far removed from their areas of practice must be encouraged to re-evaluate based on the current prevailing legal landscape.

### **Fundamental Rights Agency**

The CCBE believes the Fundamental Rights Agency (FRA) does tremendous work developing material regarding the Charter. The CCBE believes efforts should be made to promote the high-quality material produced by the FRA which, when used, is of great practical assistance to practitioners. The CCBE agree's with the FRA assessment “*The EU Agency of Fundamental Rights points to a lack of national policies that promote awareness and implementation of the Charter.*”<sup>1</sup>

### **What could help?**

The CCBE shares the view of the Commission that “*The Charter can only be effective in people's lives if they know about their rights, if they know where to turn to when their rights are violated and if national courts, legislators and administrations implement their rights.*”<sup>2</sup>

The CCBE also shares the view in the Commission's Report that “*The Charter is nevertheless still not used to its full potential and too few people are aware of it.*”<sup>3</sup> Regarding awareness, the CCBE believes the following measures may assist regarding legal practitioners:

- More needs to be done at a national level to promote the Charter and to encourage its use by legal practitioners. National Bars and Law Societies should be supported to do this work
- The connecting factor needs to be explained. In this respect the Charter can be applied when there is a connecting factor with EU law. For example, a connecting factor exists where national legislation transposes an EU directive, a public authority applies EU law or a national court applies or interprets EU law. A public awareness campaign is needed to heighten awareness of the many fields driven by EU initiatives
- Practitioners need to be aware that the EU courts have increasingly referred to the Charter in their decisions (the number of decisions quoting the Charter in their reasoning rose from 27 in 2010 to 195 in 2017 and 356 in 2018). The Charter articles referred to

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<sup>1</sup> See FRA Fundamental Rights Report 2019 on lack of national policies aimed at the promotion of the Charter's application.

<sup>2</sup> 2018 Commission Report on the application of the EU Charter of Fundamental Rights

<sup>3</sup> 2018 Commission Report on the application of the EU Charter of Fundamental Rights

prominently in cases before the EU courts were those on the right an effective remedy and to a fair trial, the right to good administration, equality before the law and the right to property. These are all areas where lawyers play a key role.

- Lawyers also play a key role regarding requests for preliminary references. When addressing questions to the Court of Justice of the European Union (CJEU) (requests for preliminary rulings), national courts often refer to the Charter. Of those requests submitted by judges in 2018, 84 contained a reference to the Charter, as compared with 44 in 2017 and 19 in 2010. Lawyers need to be aware of this.
- The Charter is addressed to Member States only when they are implementing EU law, as set out in its Article 51. Infringement procedures based on the Charter can therefore only be triggered when a sufficient link to EU law is established. Better awareness and understanding of EU Law by practitioners will also allow for better understanding of the Charter. The Commission has indicated that “*The Commission receives many complaints every year on which it cannot act, as the situation does not fall within the scope of EU law. This can lead to some frustration when individuals seek to invoke their rights.*”<sup>4</sup>
- The Commission Report provide that “*National authorities, including the courts, are required to apply the Charter when implementing EU law*”. If lawyers are aware of the Charter they can also raise awareness within the Courts through invoking it.
- The FRA Charterpedia (an online information tool with Charter article-by-article access to relevant European and national case law as well as relevant norms of constitutional, EU and international law) is an excellent resource which requires greater visibility and awareness. Moreover the Commission’s annual report on the Charter could contain a case digest and could be translated into all official languages. It could then be integrated into national legal databases so that it pops up automatically in legal research, even at national level.
- The FRA handbook on the Charter for legal practitioners and policy makers from October 2018 is also of great value and should be promoted further.
- There needs to be greater visibility of the European e-Justice portal which is a very beneficial resource for the correct application of EU law and the rights enshrined in the Charter. For example, ‘CharterClick’ allows users to check if a specific case falls within the scope of the Charter. The portal also features a guide with in-depth information on the Charter and the scope of its application, interpretation and effects.

## **Training areas**

The CCBE believes that practitioners would benefit from training (training should be delivered on line or in person) which could address a number of issues, including:

- What is the Charter of Fundamental Rights?
- How can it be applied?
- By whom can it be applied?
- When can it be applied?
- When does it not apply?
- Why it should be invoked?

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<sup>4</sup> The 2018 report indicates that “45% of the letters from the public in 2018 were on matters for which the EU has no competence.”

- The difference between the Charter and the European Convention on Human Rights and the relationship between these two important legal documents.
- The added value of the Charter
- Sample cases when the Charter has been applied by the national courts
- Sample cases when the Charter has been applied by the European Courts
- Examples of cases or situations when the Charter was not applied - but could have been applied
- Further resources/reference material

## **Conclusion**

The Commission report provides that “...*the Charter has proven to be a key instrument to make fundamental rights a reality in people’s lives. It is still a relatively young instrument when compared, for example, to the European Convention of Human Rights, which has existed for over 65 years. It will take time and sustained work for it to be used to its full potential, especially at local and national level.*”<sup>5</sup>

The Charter is an excellent instrument with substantial added value. The CCBE is fully supportive of any measure which promote the practical use of the Charter. The CCBE is happy to work with the Commission and other bodies to ensure the use of the Charter of Fundamental Rights becomes “Fundamental” for practitioners.

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<sup>5</sup> 2018 Commission Report on the application of the EU Charter of Fundamental Rights