



HM Government

# Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights

Summer 2014

Review of the Balance of  
Competences between the  
United Kingdom and the  
European Union  
Fundamental Rights

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# Executive Summary

This report examines the balance of competences between the European Union and the United Kingdom in the area of fundamental rights, and is led by the Ministry of Justice (MOJ). Fundamental rights are EU protections that in other contexts are often referred to as human rights, although fundamental rights do not always afford the same guarantees as human rights in other contexts. The report has been prepared on the basis of the evidence received within the scope of the Call for Evidence on the Review of the Balance of Competences between the UK and the EU: Fundamental Rights. It sets out evidence submitted by experts, non-governmental organisations and other interested parties, either in writing or orally. It also draws on academic and other relevant literature. Where appropriate, the report sets out the current position of the Coalition Government. It does not prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

Fundamental rights are EU protections that in other contexts are often referred to as human rights; although fundamental rights do not always afford the same guarantees as human rights in other contexts.

The evidence shows there is a divergence of views on where the balance of competence should lie between the EU and the UK on the protection of human rights. There is little consensus on what constitutes the national interest in this context beyond the principle that the EU and Member States should act consistently with human rights. Views vary on whether the EU's competence on fundamental rights is being exercised consistently with interests in the UK, depending on perspectives on the role of supranational human rights mechanisms, national sovereignty and how fundamental rights are balanced against other interests in society, such as trade.

EU fundamental rights derive from various sources, including the courts and international human rights obligations common to the Member States. **Chapter One** sets out national and international human rights protections, outside EU law, that are relevant to the UK. An understanding of these various protections is important not only to appreciate what fundamental rights are, but also to assess their impact in the UK.

**Chapter Two** provides a brief history of how fundamental rights have come to be recognised in EU law, and how they have evolved over time. The competence has been developed in judgments of the European Court of Justice (ECJ) over the past 45 years and has periodically been formally endorsed by other EU institutions and Member States, most notably in the EU Charter of Fundamental Rights which re-affirms rights and principles recognised in EU law.

The EU's current competence on fundamental rights is considered in **Chapter Three**. It looks at the obligation on EU institutions and Member States to respect fundamental rights, as well as mechanisms in the Treaties to protect the EU's values (including respect for human rights), the Fundamental Rights Agency and EU funding programmes on fundamental rights. The evidence received and the literature considered exposes a debate over the precise boundaries of the EU's competence, which is reflected in this chapter.

**Chapter Four** considers the evidence received on the impact of the EU's competence on fundamental rights in the UK. Respondents to the Call for Evidence supported the principle that there should be human rights checks on the EU institutions and Member States when acting under EU law. There was mixed evidence on the case law of the ECJ; while some considered that the ECJ has simply upheld fundamental rights, others considered that some of its judgments have undermined national sovereignty and the EU's legislative institutions. To date, the impact of fundamental rights in domestic case law has been relatively limited. However, in comparison to other human rights protections in domestic law, fundamental rights can have a wider scope and can result in the disapplication of primary legislation. Therefore, with an increasing domestic awareness of EU fundamental rights, the evidence suggests that their impact will increase. While the Charter of Fundamental Rights has increased the visibility and accessibility of fundamental rights, the evidence demonstrates that uncertainties persist as to certain aspects of the obligation to respect fundamental rights.

**Chapter Five** considers the future of fundamental rights in the EU. Fundamental rights have been recognised in EU law through the case law of the ECJ and the evidence indicates that it will fall to the courts – and ultimately the ECJ – to resolve outstanding uncertainties on the obligation to respect fundamental rights. There are currently no concrete EU proposals on the table in relation to fundamental rights, other than the Treaty obligation for the EU to accede to the European Convention on Human Rights, in respect of which negotiations are underway.







# Introduction

This report is one of 32 reports being produced as part of the Balance of Competences Review. The Foreign Secretary launched the review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. It will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It has not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. More information on the review can be found at [www.gov.uk/review-of-the-balance-of-competences](http://www.gov.uk/review-of-the-balance-of-competences).

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts or to take any other sort of action. It also means examining areas where the Treaties apply directly to the Member States without requiring any further action by the EU institutions.

This report covers the EU's overarching competence on fundamental rights, namely how it seeks to ensure that the EU institutions and Member States, when acting within the scope of EU law, respect fundamental rights and its work to promote fundamental rights. This review is not about the EU's specific competence in relation to individual rights. Nor will it attempt to provide a comprehensive account of the meaning and scope of each right and its effect on the UK. The EU's competence in relation to certain individual rights is being considered in other reports within the Balance of Competences Review.<sup>1</sup>

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<sup>1</sup> For more information, please see: HMG, *Call for Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights* (2013), Annex B.

## Definition of EU Competence

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must act in accordance with fundamental rights and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU Treaties.

## Engagement and Evidence

The analysis in this report is based on 63 pieces of evidence received in response to a Call for Evidence by the Ministry of Justice from 21 October 2013 to 13 January 2014. It also draws on workshops held during the Call for Evidence period and existing material, such as parliamentary reports and academic literature. The report also takes account of relevant evidence submitted to other Calls for Evidence within the Balance of Competences Review where fundamental rights are raised.

The information received in response to the Call for Evidence represents the views and opinions of the contributor concerned. They are not necessarily the views of the Coalition Government.

A wide range of organisations and individuals in the UK and in other EU Member States with an interest in fundamental rights were encouraged to respond to the Call for Evidence, including business, civil society, think tanks, academics, legal practitioners and those who had received funding from the Fundamental Rights and Citizenship Programme. The governments of Scotland and Wales and the Northern Ireland Executive, government agencies, parliamentary committees and Members of the European Parliament (MEPs) were also invited to contribute, as were the European Commission and the Fundamental Rights Agency.

A programme of direct engagement was also undertaken. Over 450 stakeholders, representing a wide range of organisations, were contacted and social media was used to raise awareness of the review. Six workshops were held under the Chatham House rule; three in London and one in each of Scotland, Northern Ireland and Brussels, attended by 56 individuals, including representatives from 35 organisations.

A list of those who submitted evidence can be found in **Annex A**, including a description of the organisation they represent. Details of those who participated in the workshops can be found in **Annex B**. A list of other sources referred to in this report, such as academic literature, can be found in **Annex C**.

Those who submitted evidence to the review are referred to in this report as 'respondents'. The authors of other evidence are referred to as 'commentators'. The term 'evidence' is used to refer to evidence from respondents and commentators.

The written responses to the Call for Evidence can be found here:

<https://www.gov.uk/government/consultations/balance-of-competences-fundamental-rights-review>



# Chapter 1. Fundamental Rights in Context

## Introduction

- 1.1. Human rights are often described as basic rights inherent to every person. They can take the form of protections for individuals, organisations and business, such as freedom of expression. 'Fundamental rights' is the term used to describe human rights as they are recognised in EU law. However, EU fundamental rights do not necessarily afford the same guarantees as human rights in other contexts.
- 1.2. Although fundamental rights are most commonly discussed by the EU institutions, national governments, courts, lawyers and academics, their effects can be felt by us all. For example, fundamental rights have been found to mean that the sex of a driver cannot be a factor used to determine car insurance premiums.
- 1.3. EU fundamental rights are part of a larger framework of human rights protections in the UK. In order to understand the impact of fundamental rights in the UK, it is essential to consider them in the context of the UK's other international human rights obligations and domestic protections.
- 1.4. EU fundamental rights derive from various sources, including international instruments and constitutional traditions common to Member States. The international human rights landscape has therefore provided, and continues to provide, the context for the development of EU fundamental rights.
- 1.5. All EU Member States are members of the United Nations (UN) and the Council of Europe. Both these organisations promote, amongst other values, respect for human rights and have established systems to protect human rights that the UK has joined.
- 1.6. This chapter sets out the UK's key international human rights obligations outside EU law, namely those emanating from the UN and the Council of Europe. It also summarises domestic human rights protections, most notably the Human Rights Act 1998.

**Figure One: Membership of the United Nations, the Council of Europe and the European Union**

**UNITED NATIONS**

*193 states are members of the United Nations including all members of the Council of Europe and the European Union*

**COUNCIL OF EUROPE** (47 Member States)

- |                        |   |
|------------------------|---|
| Albania                | Montenegro                                |
| Andorra                | Norway                                    |
| Armenia                | Russian Federation                        |
| Azerbaijan             | San Marino                                |
| Bosnia and Herzegovina | Serbia                                    |
| Georgia                | Switzerland                               |
| Iceland                | The former Yugoslav Republic of Macedonia |
| Liechtenstein          | Turkey                                    |
| Republic of Moldova    | Ukraine                                   |
| Monaco                 |   |

**EUROPEAN UNION** (28 Member States)

- |                |                |
|----------------|----------------|
| Austria        | Italy          |
| Belgium        | Latvia         |
| Bulgaria       | Lithuania      |
| Croatia        | Luxembourg     |
| Cyprus         | Malta          |
| Czech Republic | Netherlands    |
| Denmark        | Poland         |
| Estonia        | Portugal       |
| Finland        | Romania        |
| France         | Slovakia       |
| Germany        | Slovenia       |
| Greece         | Spain          |
| Hungary        | Sweden         |
| Ireland        | United Kingdom |

## United Nations

- 1.7. The UK is a member of the UN and party to a number of UN human rights instruments and conventions of the International Labour Organisation (ILO).

### What is the United Nations?

The UN is an international organisation founded in 1945 after the Second World War through the adoption of the United Nations Charter. The aims of the UN are to maintain international peace and security, to develop friendly relations between nations and to achieve international cooperation in promoting and enhancing respect for human rights and fundamental freedoms. The UN currently has 193 members.

### What is the International Labour Organisation?

The ILO is a UN agency, but was originally founded in 1919 after the First World War. It has the objectives to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues. The ILO currently has 185 members.

- 1.8. One of the UN's purposes is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>2</sup>
- 1.9. On 10 December 1948 the UN adopted the Universal Declaration of Human Rights, which it describes as the foundation of international human rights law. The UN subsequently adopted the International Covenant on Civil and Political Rights (containing rights for individuals such as the right to life, the right to a fair trial and the right to freedom of thought and expression) and the International Covenant on Economic, Social and Cultural Rights (containing socio-economic rights such as the right to work, the right to an adequate standard of living and the right to education). It has also adopted human rights instruments focusing on specific areas, such as the Convention against Torture and the Convention on the Rights of the Child. The UK is party to most UN human rights instruments and is periodically reviewed for its compliance with several of them.<sup>3</sup>
- 1.10. In 2006, the UN introduced the Universal Periodic Review, a peer review process whereby the UN reviews the general human rights record of each UN Member State every four years. The UK is a strong supporter of the Universal Periodic Review process and, in 2008, was amongst the first UN members to be reviewed (with a subsequent review in 2012).

<sup>2</sup> Charter of the United Nations, 26 June 1945, Article 1(3).

<sup>3</sup> For details please see United Nations web site: [www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx), accessed on 25 June 2014



1.11. The UK has also ratified many of the ILO conventions including all eight fundamental ILO conventions.<sup>4</sup>

## Council of Europe

1.12. There are a number of regional organisations that promote human rights, primarily the African Union, the Organization of American States and the Council of Europe. The balance of competences between these regional organisations and their member states differs.

1.13. The UK is a member of the Council of Europe, which is a European organisation based in Strasbourg comprising 47 countries, including all EU Member States. The Council of Europe is a separate organisation from the European Union.

1.14. The Council of Europe was founded in 1949 and its objectives are to protect human rights, democracy and the rule of law. It has adopted a number of treaties aimed at the promotion and protection of human rights including, most notably, the European Convention on Human Rights (ECHR).<sup>5</sup> All members of the Council of Europe are parties to the ECHR. The EU is not itself a party to the ECHR but there is now an EU Treaty obligation to accede. EU accession to the ECHR is discussed in chapter Five.

1.15. Following the UN's Universal Declaration of Human Rights in 1948, in 1950 the Council of Europe adopted the ECHR, which came into force in respect of the United Kingdom in 1953. It principally contains civil and political rights, including the right to life, the right to a fair trial and the right to respect for private and family life. Additional rights have been added over the years; they are contained in Protocols which are optional to states already party to the ECHR.

1.16. In order to understand the scope and meaning of the rights in the ECHR – which are expressed in brief, general terms – it is necessary to consider the substantial body of case law of the European Court of Human Rights (ECtHR).

1.17. The ECtHR in Strasbourg is the ultimate judicial authority on the interpretation and application of the ECHR. It considers applications from individuals, groups of individuals and non-government organisations complaining that states have violated rights in the ECHR. However, applicants must first exhaust remedies available domestically. This means that the state in question generally has the chance to consider the complaint and remedy any violation before a case will be considered by the ECtHR. The ECtHR can also receive inter-state complaints.

1.18. The ECtHR can award costs and damages to a successful applicant but cannot set aside UK legislation or quash domestic judicial or administrative decisions. If the ECtHR finds a violation, the respondent state is obliged to implement the judgment. This

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<sup>4</sup> Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

<sup>5</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 1950; CETS005 (as amended by Protocols No 11 and No 14) (2010).

involves putting the applicant, so far as possible, in the position they would have been had the violation not occurred, including by paying damages for any loss. It can also require the state to take general measures to avoid or remedy other similar violations. The duty on the UK to implement adverse ECtHR judgments against it is binding as a matter of international law.

- 1.19. At the end of 2013, there were 2,517 applications to the ECtHR pending against the UK. More than 2,000 of those were repetitive cases, mostly relating to prisoner voting. The highest number of pending applications at that point was against Russia (16,757). During the UK's Chairmanship of the Council of Europe in 2012 a number of reforms to the ECtHR were agreed to better define the boundaries around when the ECtHR should become involved in cases and to make it more efficient.<sup>6</sup>

## Human Rights in the UK

- 1.20. Unlike the majority of EU Member States, the UK does not have a written constitution. Its legal framework has developed over centuries with both Parliament and the courts playing a part.
- 1.21. In March 2011 the Government established a Commission on a Bill of Rights 'to investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the ECHR, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties'.<sup>7</sup> In its report the Commission noted that the concept of rights in the UK goes back 'to Magna Carta in 1215, the Petition of Right of 1629, the Bill of Rights in 1689 in England and the Claim of Right of 1689 in Scotland. The language of those instruments is very different from today's but all had in common the premise that there needed to be some limits placed on the absolute power of those who ruled and some rights attaching to their subjects'.<sup>8</sup> In addition, over many years the UK courts have developed protections in the common law, such as the right of those brought before the courts to know the charges against them.<sup>9</sup> The Commission commented that, therefore, 'the foundation on which today's human rights edifice rests is neither the European Convention on Human Rights nor the Human Rights Act but an unbroken tradition going back at least some 800 years of both statute and common law providing protection against the arbitrary acts of those in power'.<sup>10</sup>
- 1.22. Into this existing human rights framework, the UK has incorporated into domestic law rights contained in EU law and the ECHR.
- 1.23. The UK is a 'dualist' state which means that a treaty ratified by the UK does not give rise to domestic rights unless and until it is incorporated into domestic law by legislation. This can be contrasted to many European 'monist' states, where obligations in an international treaty become directly applicable in domestic law when the state

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<sup>6</sup> Council of Europe, *High-Level Conference on the future of the European Court of Human Rights, Brighton Declaration* (2012).

<sup>7</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us - Volume 1* (2012), p 5.

<sup>8</sup> *Ibid*, p 9.

<sup>9</sup> *Ibid*, p 9.

<sup>10</sup> *Ibid*, p10.

ratifies the treaty. EU fundamental rights are incorporated into domestic law in the UK by the European Communities Act 1972.

## Human Rights Act 1998

- 1.24. The UK has been bound by the ECHR since 1953. Although many of its guarantees reflect rights long protected in the UK, for example the common law right of habeas corpus, they were not formally incorporated into domestic law until the Human Rights Act 1998 came into force in 2000. Until then, individuals had to go to Strasbourg in order to rely directly on their rights under the ECHR against UK public authorities. The Human Rights Act allows individuals to enforce in UK courts the rights set out in the ECHR.
- 1.25. The rights contained in the Human Rights Act are referred to as ‘Convention rights’ and are set out in Schedule 1 to the Act. They recognise in domestic law those ECHR guarantees that the UK has signed up to, but provide a framework of domestic rights that exist independently of the ECHR.
- 1.26. The Act places an obligation on public authorities not to act incompatibly with Convention rights unless an Act of Parliament requires them to do otherwise. When considering Convention rights, a domestic court or tribunal must ‘take into account’ the case law of the ECtHR.<sup>11</sup> Although not bound by decisions of the ECtHR, domestic courts and tribunals will generally follow a clear and constant line of Strasbourg case law that is not inconsistent with some fundamental substantive or procedural aspect of UK law.<sup>12</sup> There is however a lively debate, particularly in the legal community, on the extent to which domestic courts should follow the ECtHR.<sup>13</sup>
- 1.27. Section 3 of the Human Rights Act requires UK legislation to be read and given effect in a way that is compatible with Convention rights so far as it is possible to do so. While recognising that there is a ‘strong rebuttable presumption’ in favour of reading legislation consistently with Convention rights, the courts have recognised that section 3 is only a rule of interpretation and does not entitle judges to act as legislatures.<sup>14</sup> However, some commentators have questioned whether the courts have strayed over this line.
- 1.28. The Human Rights Act does not permit domestic courts to disapply or strike down an Act of Parliament.<sup>15</sup> Where it is not possible to read an Act compatibly with Convention rights, certain higher courts can make a declaration under section 4 of the Human Rights Act that a provision of the legislation is not compatible with a Convention right. This discretionary power does not affect the validity, continuing operation or enforcement of the incompatible provision. Instead, a declaration of incompatibility

<sup>11</sup> Human Rights Act 1998, Section 2.

<sup>12</sup> *R (Chester) v Secretary of State for Justice, McGeoch v Lord President of the Council* [2013] UKSC 63.

<sup>13</sup> See, for example, Lord Justice Laws, ‘The Common Law and Europe,’ *Hamlyn Lectures* (November 2013) 21-38, and The Rt Hon. Lord Judge, ‘Constitutional Change: Unfinished Business,’ *University College London* 40-42 (2013).

<sup>14</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

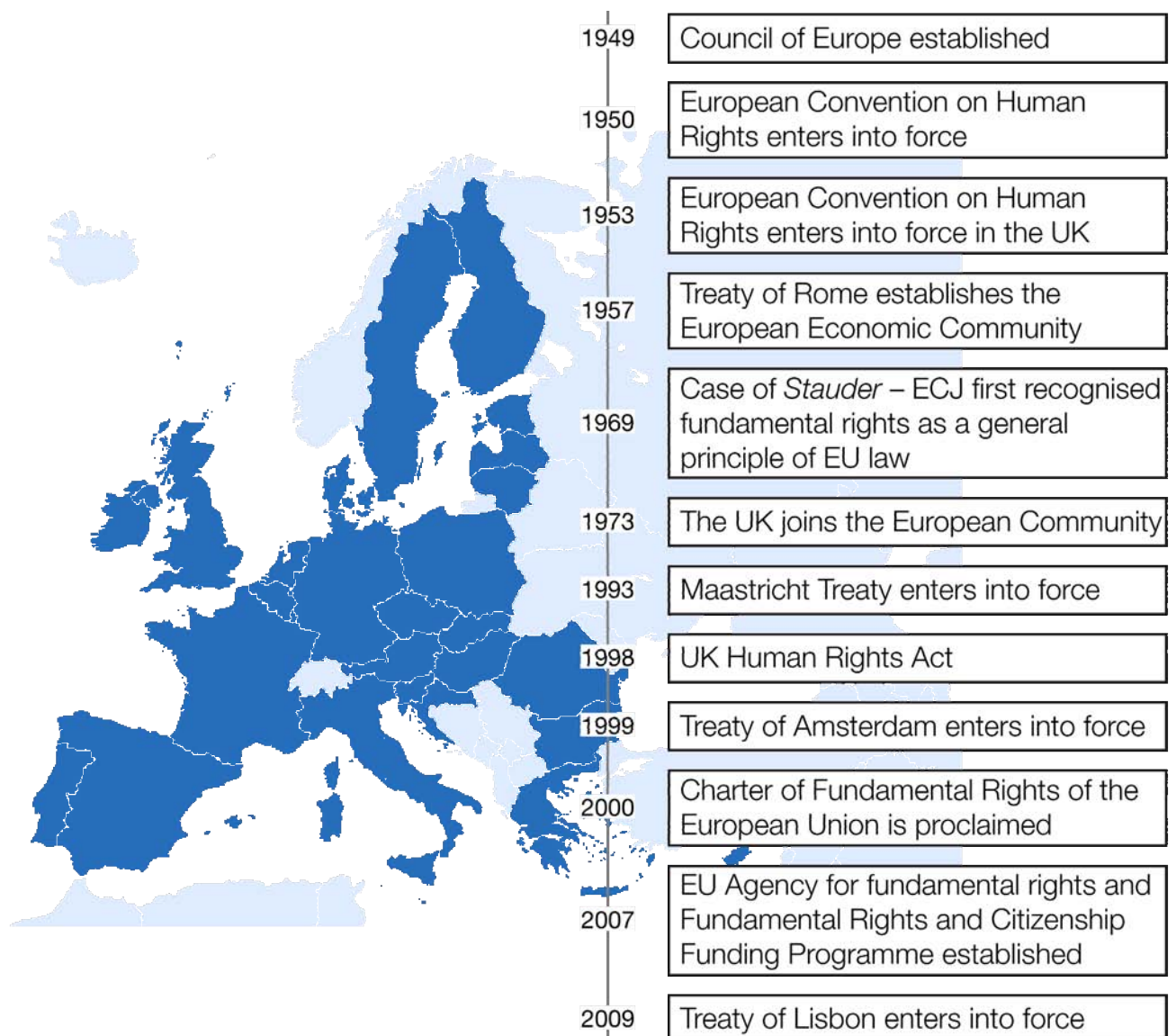
<sup>15</sup> Human Rights Act 1998, Section 4; the domestic courts can strike down secondary legislation that cannot be read compatibly with Convention rights, unless the relevant primary legislation does not allow for the secondary legislation to be made in a way that is compatible with Convention rights.

leaves it to Parliament to remedy any incompatibility, and is therefore said to preserve the sovereignty of Parliament.

## Convention Rights and Devolution

The devolution settlements provide that the devolved legislatures do not have competence to enact legislation which is incompatible with Convention rights. If found to be incompatible, the legislation is invalid and has no effect. Individuals may rely on the Human Rights Act or the relevant devolution settlement to challenge an act of a devolved administration as incompatible with Convention rights.

**Figure Two: A Timeline Relating to the Protection of Human Rights Relevant to the Report**





## Chapter 2. Development of Competence

- 2.1. International human rights are usually established expressly and directly by treaties or other international agreements. EU fundamental rights, by contrast, have been recognised over time through the case law of the European Court of Justice (ECJ). The founding Treaties of what is now the EU focused on economic cooperation between European nations in order to aid economic recovery after the Second World War. There was no mention of fundamental rights.
- 2.2. Despite the Treaties' initial silence, the requirement to respect fundamental rights in EU law has been recognised by the ECJ since the late 1960s. The rights recognised by the ECJ were endorsed by the other EU institutions in political declarations on two occasions, but it was not until the Maastricht Treaty that the first changes were agreed to the Treaties to reflect the legal effect given to them by the Court. The Lisbon Treaty then formally recognised the EU Charter of Fundamental Rights (containing rights and principles recognised in EU law) alongside the Treaties.
- 2.3. In 1969 the ECJ in the case of *Stauder* held that fundamental rights are general principles of EU law.<sup>16</sup>

### General principles of EU law

General principles are part of the EU's primary law, with which the EU institutions and Member States are bound to comply.<sup>17</sup> They derive from the traditions of national legal systems and have been recognised in EU law by the ECJ. General principles are applied by the ECJ and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and are also an aid to interpretation.

Other examples of general principles of EU law are subsidiarity and proportionality, which are the subject of a separate report in the fourth semester of the Balance of Competences Review.<sup>18</sup>

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<sup>16</sup> *Erich Stauder v City of Ulm, Sozialamt* Case C-29/69 [1969].

<sup>17</sup> *Yassin Abdullah Kadi, Al Barakaat International, Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland* Joined Cases C-402/05 and C-415/05 [2005], para 308.

<sup>18</sup> Please see: HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Subsidiarity and Proportionality*, published in Semester Four.

- 2.4. Several commentators have suggested that fundamental rights were recognised by the ECJ in response to calls from national courts to ensure that EU law adhered to human rights standards applicable in Member States; the recognition of fundamental rights placated national courts and protected the supremacy of EU law.<sup>19</sup> Others have added that the development of fundamental rights corresponded with the EU's growing ability to act in areas where fundamental rights are particularly relevant.<sup>20</sup> The recognition of fundamental rights as general principles of EU law also coincided with the ECJ developing other general principles such as legal certainty.
- 2.5. In developing fundamental rights the ECJ has drawn on the constitutional traditions common to the Member States and widely accepted international instruments, such as the ECHR. In the case of *Hauer* (1979), the ECJ confirmed that:

fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community and that similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>21</sup>

(*Hauer Case*)

- 2.6. In 1977 the European Parliament, the Council and the Commission endorsed the ECJ's case law in a joint declaration stressing the importance of protecting fundamental rights:

The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>22</sup>

(Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms)

- 2.7. In 1993 the Treaty of Maastricht formally reflected the case law of the ECJ in the EU Treaties, stating that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on the 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>23</sup>

(TEU)

<sup>19</sup> Vaughne Miller, 'Human Rights in the EU: the Charter of Fundamental Rights', *House of Commons Research Paper 00/32* (2000) p 11.

<sup>20</sup> *Idem*.

<sup>21</sup> *Liselotte Hauer v Land Rheinland-Pfalz* Case C-44/79 [1979], para 15.

<sup>22</sup> O.J. C 103, 27/04/1977 P.0001-0002.

<sup>23</sup> Treaty on European Union (Maastricht text) (1992), Article F, O.J. C 191/1. Hereinafter referred to as Maastricht TEU.

- 2.8. In 1999, the EU Member States at the Cologne European Council concluded that there was a need ‘to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens’.<sup>24</sup> The European Council believed that the Charter should contain fundamental rights and freedoms as well as basic procedural rights guaranteed in the ECHR and derived from the constitutional traditions common to Member States. It also considered that when drafting the Charter account should be taken of economic and social rights.
- 2.9. At the time, some commentators considered there to be no glaring gap in human rights protection in EU law.<sup>25</sup> On the other hand, the prospect of EU enlargement to include countries with a shorter experience of democracy and the transfer of human rights sensitive matters to the competence of the European Community were said to support the strengthening of human rights protection in the EU.<sup>26</sup>
- 2.10. The Cologne European Council conclusions resulted in the creation of a special body, which was known as the Convention, composed of representatives from all Member States, the Commission, the European Parliament and national parliaments. The body drafted the Charter of Fundamental Rights of the European Union (the Charter), which was first proclaimed in 2000 by the European Parliament, the Council of the European Union and the European Commission.
- 2.11. Although fundamental rights were already part of the EU legal order as general principles of EU law, the Charter itself did not initially have any binding legal effect. A revised version of the Charter became legally binding with the entry into force of the Lisbon Treaty in December 2009.<sup>27</sup> The preamble to the Charter acknowledges that its aim is to strengthen the protection of fundamental rights by making them more visible.
- 2.12. The rights, freedoms and principles in the Charter are grouped under six titles: dignity, freedoms, equality, solidarity, citizens’ rights and justice.<sup>28</sup> The final title of the Charter contains general provisions on how the Charter should be interpreted and applied. The Charter is also accompanied by Explanations.<sup>29</sup> The Explanations are essential to a proper understanding of the Charter as they set out the sources and limits of the rights it contains. The EU Treaties, and the Charter itself, provide that ‘due regard’ must be had to the Explanations when interpreting the Charter.<sup>30</sup>

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<sup>24</sup> Cologne European Council. Presidency Conclusions, Annex IV (1999).

<sup>25</sup> Vaughne Miller, ‘Human Rights in the EU: the Charter of Fundamental Rights’ (2000).

<sup>26</sup> *Idem*.

<sup>27</sup> Treaty on European Union, 2010, Article 6(1), O.J. C 83/01. Hereinafter referred to as TEU post Lisbon.

<sup>28</sup> Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02, hereinafter the Charter.

<sup>29</sup> Explanations Relating to the Charter of Fundamental Rights, O.J. 2007 C 303/02.

<sup>30</sup> TEU post Lisbon, Article 6(1) 2010 O.J. C 83 and the Charter, Article 52(7), 2000 O.J. C 364.



2.13. Article 6(1) of the Treaty on European Union (TEU) states that the Charter does not extend in any way the competences of the EU. Similarly, Article 51(2) of the Charter provides that:

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

(TEU)

2.14. Protocol No. 30 (the Protocol) was annexed to the EU Treaties to clarify the application of the Charter in terms that are specific to the UK and Poland.<sup>31</sup> The potential effect that the Protocol has on the EU's competence on fundamental rights is discussed in chapter Three.

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<sup>31</sup> Protocol (No. 30) to the EU Treaties, O.J. 2010 C 83.





# Chapter 3. The Current State of Competence

## Introduction

- 3.1. The EU has legislative competence in relation to specific fundamental rights such as combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>32</sup> The EU Treaties however do not confer an express competence on the EU to adopt legislation or take specific action in relation to fundamental rights generally.
- 3.2. As the Call for Evidence explained, this report does not concern the EU's specific competence on individual rights. It instead addresses the EU's overarching competence on fundamental rights. This chapter summarises that current competence. Its most important feature is the obligation to respect fundamental rights which are recognised as general principles of EU law and reaffirmed in the Charter. The chapter then briefly sets out the mechanisms available under Article 7 of the TEU to protect the EU's values, which include respect for human rights. It also looks at the EU's Fundamental Rights Agency and funding programmes on fundamental rights.
- 3.3. The EU also has competence to join the ECHR by virtue of Article 6(2) of the TEU, which was added by the Lisbon Treaty. As the EU has yet to accede to the ECHR, this issue is discussed in chapter Five.

## Obligation to Respect Fundamental Rights

- 3.4. As set out in the previous chapter, the EU legal order has protected the fundamental rights of individuals since long before the Charter was first proclaimed. The UK Government's position is that the Charter did not alter the legal effect of fundamental rights in EU law, and this is largely reflected in the evidence. Nevertheless there are features of the EU's competence on fundamental rights that remain contentious, and there are provisions in the Charter and the Protocol that have yet to be given detailed consideration by the courts. This chapter draws on evidence to summarise the discussion on aspects of the obligation to respect fundamental rights, the effects of which have yet to be fully settled.

### Is Protocol 30 an Opt Out from the Charter?

- 3.5. Protocol 30 is a legally binding part of EU law. The Protocol only refers to the United Kingdom and to Poland, but its purpose is to clarify how the Charter applies to the EU institutions and across all Member States.
- 3.6. It is helpful to clarify from the outset that the Protocol is not, and never has been, an opt out for the UK from the application of the Charter. The Charter applies to the UK; a fact acknowledged by respondents and commentators as well as by the House of Lords European Union Committee and the House of Commons European Scrutiny

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<sup>32</sup> TEU post Lisbon, Article 19(1) 2010 O.J. C 83.

Committee.<sup>33</sup> There has nevertheless been confusion as to the effect of the Protocol; for example, in 2013 a High Court judge expressed surprise that the Charter was applicable in domestic law.<sup>34</sup>

- 3.7. In the case of *NS v Secretary of State for the Home Department*, however, the ECJ clearly confirmed that the Protocol ‘does not call into question the applicability of the Charter in the United Kingdom’.<sup>35</sup>

### Case summary: NS

The case concerned the removal of an Afghan asylum seeker (NS) to Greece from the UK. Greece was considered to be the Member State responsible under the relevant EU Regulation for examining the asylum claim. Nevertheless NS asked the UK Home Secretary to exercise a discretionary power to examine his claim. NS alleged that there was a risk that his rights under EU law and the ECHR would be breached if he were returned to Greece. The Home Secretary maintained the decision to remove NS. In the course of a legal challenge against removal, the UK Court of Appeal referred some issues of EU law to the ECJ for a preliminary ruling.

The ECJ concluded that Article 4 of the Charter – prohibiting torture and inhuman or degrading treatment – means that a Member State cannot transfer an asylum seeker where systemic failures in the asylum procedure and reception conditions of the receiving Member State mean there are substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. The ruling reflected the ECtHR’s judgment in the case of *MSS v Belgium and Greece*.<sup>36</sup>

- 3.8. While the Protocol does not operate as an opt out there remains a lively discussion among academics and legal practitioners as to the potential effect of the Protocol and whether it can limit the impact of the Charter in the UK. Views range from those who consider the Protocol to have no effect, to those who think it provides strong substantive protections against the Charter being interpreted to impose new obligations on Member States. The Protocol’s individual provisions are addressed where relevant in this chapter.
- 3.9. The UK Government’s position, which also reflects the preamble to the Protocol, is that the Protocol clarifies certain aspects of the application of the Charter. Although it does so in terms that are specific to Poland and the UK, the Protocol explains how the Charter should apply to all Member States.<sup>37</sup> If, notwithstanding Article 6(1) of the TEU

<sup>33</sup> House of Lords European Union Committee, *The Treaty of Lisbon: an Impact Assessment* (HL 2007-08, 621), para 5.87; European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, para 141-143; House of Lords European Scrutiny Committee, *European Union Intergovernmental Conference: Follow-up Report* (HC 2007-08, 16-iii), para 38.

<sup>34</sup> *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3453, para 10.

<sup>35</sup> *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10 [2011], para 119.

<sup>36</sup> *MSS v Belgium and Greece*, App. No. 30696/09, (2011) 53 EHRR 2.

<sup>37</sup> See also: European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, para 144.

and Article 51(2) of the Charter, the Charter is interpreted as imposing new obligations on Member States, the Protocol affords an additional protection for the UK.

### When do Fundamental Rights Apply?

- 3.10. The institutions and bodies of the EU are bound by fundamental rights at all times. If they act in a way that breaches fundamental rights, the act or measure (including legislation) can be set aside by the ECJ.<sup>38</sup>
- 3.11. The ECJ has held that fundamental rights are also binding on EU Member States when they act within the scope of EU law. Article 51(1) of the Charter states that its provisions are addressed to Member States ‘only when they are implementing Union law’. The explanation to that provision says that:

It follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of the law of the Union.

(ECHR)

- 3.12. Implementing EU law may seem on one view to be a narrower concept than acting within the scope of EU law. However, in the case of *Akerberg Fransson* the ECJ clarified that, despite the difference in wording, the meaning is the same; the Charter applies to Member States when they are acting within the scope of EU law.<sup>39</sup> This decision is consistent with the UK Government’s position that the Charter and the general principles of EU law apply to Member States in the same situations. It also reflects the earlier conclusions of the UK Supreme Court.<sup>40</sup>
- 3.13. But what does acting within the scope of EU law mean? This is perhaps currently the most contentious aspect of the EU’s competence on fundamental rights. Two categories of Member State action are well established as being within the scope of EU law, namely when a Member State implements EU law or derogates from EU law. In *NS* the ECJ held that this can include instances where a Member State is deciding whether to exercise a discretionary power in a EU Regulation.<sup>41</sup>
- 3.14. More controversial is whether Member States can otherwise act within the scope of EU law. In their evidence, the Liverpool University European Law Unit considered that evidence supporting any such third category is both limited in nature and contested in character, noting that it is:

difficult to define with any precision when a Member State is otherwise acting within the scope of EU law, or justify why such situations should be subjected to scrutiny under EU fundamental rights law.

(Liverpool University European Law Institute)

<sup>38</sup> For example, see *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres* Case C-236/09 [2011].

<sup>39</sup> *Åklagaren v Hans Åkerberg Fransson* Case C-617/10 [2013], paras 17-21.

<sup>40</sup> *Rugby Football Union v CIS Ltd (formerly Viagogo Ltd)* [2012] UKSC 55, para 28: ‘the rubric, “implementing Union law” is to be interpreted broadly and, in effect, means whenever a Member State is acting “within the material scope of EU law”’.

<sup>41</sup> *N. S.* Joined Cases C-411/10 and C-493/10 [2011], paras 64-69.

- 3.15. Evidence from respondents was divided on the ECJ's case law on when fundamental rights apply to Member States. Non-governmental organisations, academics and some legal practitioners commented that the ECJ has consistently refused preliminary references where there is no connection with EU law. Some pointed to cases such as *Dereci* where they considered the ECJ to have adopted a cautious approach to when fundamental rights apply.<sup>42</sup>

### Case Summary: *Dereci*

Non-EU nationals wanted to live with family members who were Austrian citizens. They sought to rely on Article 7 of the Charter – respect for private and family life – to challenge refusals by Austrian authorities to grant applications for residence. On a preliminary reference the ECJ held that the situation was not covered by EU Directives and the refusal would not fall within the scope of EU law unless it deprived the family members in Austria of the enjoyment of their rights as EU citizens.

- 3.16. In contrast, other legal practitioners and Policy Exchange commented that the ECJ has given fundamental rights a broad scope of application. The case most frequently cited in the evidence to support this position is *Akerberg Fransson*.<sup>43</sup>

### Case Summary: *Akerberg Fransson*

The ECJ held that Swedish civil penalties and criminal proceedings for tax evasion constituted the implementation of EU law even though the relevant domestic legislation had not been adopted in order to transpose EU legislation. VAT is an EU tax, and an EU VAT Directive requires every Member State to take measures to guarantee collection of VAT, including preventing evasion. Also, the EU Treaties oblige Member States to counter fraud affecting the financial interests of the EU. The ECJ found that the Charter applied to the civil penalties and criminal proceedings in question as they were intended to implement an obligation on Member States to impose effective penalties for conduct prejudicial to the financial interests of the EU.

- 3.17. The *Akerberg Fransson* judgment provoked a reaction from the German Constitutional Court, which stated that just because domestic legislation has some connection with the abstract scope of EU law, or incidentally interacts with EU law, is not sufficient to trigger the application of the Charter.<sup>44</sup> Martin Howe QC, in his written evidence to the European Scrutiny Committee, said that the judgment demonstrates that 'the presence of even a peripheral or tangential element of EU law' is enough to engage the Charter. The European Scrutiny Committee concluded that *Akerberg Fransson* set a 'low threshold' for determining whether a Member State is acting within the scope of EU law.<sup>45</sup>

<sup>42</sup> *Murat Dereci and Others v Bundesministerium für Inneres* Case C-256/11 [2011].

<sup>43</sup> *Åkerberg Fransson* Case C-617/10 [2013].

<sup>44</sup> BVerfG *Antiterrordatei* 1 BvR 1215/07, 24 April 2013; see also: European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, paras 153-154.

<sup>45</sup> *Ibid*, para 148.

- 3.18. However, Professor Paul Craig, in his written evidence to the European Scrutiny Committee, thought that the Swedish law was clearly used to implement obligations flowing from the EU VAT Directive. Whether the domestic law was used solely for that purpose was not determinative. Moreover, he did not agree that the interaction between national law and EU law was merely incidental.
- 3.19. The Call for Evidence and the European Scrutiny Committee evidence sessions predated the ECJ's recent judgment in the case of *Siragusa*.<sup>46</sup> Referring to its previous case law, the ECJ confirmed that the concept of implementing EU law requires a greater connection than Member State action and EU law being closely related or one having an indirect impact on the other.<sup>47</sup> The ECJ then set out a non-exhaustive list of points that it considered to be relevant in that case to whether national legislation implements EU law, such as whether the legislation pursues objectives other than those covered by EU law.<sup>48</sup> In particular, the ECJ reiterated that fundamental rights do not apply to national legislation where EU law does not impose any obligation on Member States with regard to the situation at issue.<sup>49</sup> Academic commentary has welcomed the ECJ's approach as providing greater clarity on when the Charter applies.<sup>50</sup>
- 3.20. Again however, the question of when EU fundamental rights apply to Member States is not something that has become contentious with the advent of the Charter. Both David Anderson QC and Professor Sionaidh Douglas-Scott, in written evidence to the European Scrutiny Committee, referred to the ECJ's pre-Lisbon judgment in *Carpenter* as an example of a case where the ECJ gave fundamental rights, as general principles of EU law, a wide scope of application.<sup>51</sup>

### Does the Charter Create New Rights?

- 3.21. Article 6(1) of the TEU states that:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights

(TEU)

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<sup>46</sup> *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* Case C-206/13 [2014].

<sup>47</sup> *Ibid*, para 24.

<sup>48</sup> *Ibid*, para 25.

<sup>49</sup> *Ibid*, para 26.

<sup>50</sup> Please see: Dr. Benedikt Pirker, 'Case C-206/13 Siragusa: A Further Piece for the Åkerberg Fransson Jigsaw puzzle', *European Law Blog*, 12 March 2014; Editorial, "'The 'Constitutional Weight' of Adjectives'", *European Law Review*, 39(2) (2014), 153-154.

<sup>51</sup> *Mary Carpenter v Secretary of State for the Home Department* Case C-60/00 [2002].



3.22. The UK Government's position, which also reflects the preamble to the Protocol, is that the Charter reaffirms the rights, freedoms and principles recognised in EU law, but does not create new rights or principles. This view is almost unanimously supported in the evidence and is consistent with the preamble to the Charter itself.<sup>52</sup>

The Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to Member States.<sup>53</sup>

(The Charter of Fundamental Rights)

3.23. Article 1(1) of the Protocol provides that the Charter does not extend the ability of the ECJ or national courts to find UK laws, practices or acts inconsistent with its provisions. In *NS* the ECJ said that 'Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof...'.<sup>54</sup> The evidence indicates that Article 1(1) is generally considered to mirror Article 51(2) of the Charter and Article 6(1) of the TEU. The Government's position is that Article 1(1) is a straightforward consequence of the fact that the Charter does not extend either the circumstances in which rights and principles apply to Member States or the substance of those rights and principles.

3.24. In the case of *AB v Secretary of State for the Home Department* the judge commented that 'the Charter enunciates a host of new right' which are 'now part of our domestic law'.<sup>55</sup> The judge had not received detailed submissions on the Charter arguments, which were in any event not determinative of the case. It was widely recognised in the evidence that the judge's comments on the effect of the Charter derived from comparing the rights it contains to those in the ECHR, instead of the pre-existing EU law which the Charter reaffirmed.

3.25. Some legal practitioners expressed doubts as to whether all the rights and principles in the Charter had, prior to its declaration, been recognised in EU law by the ECJ. The Open Society European Policy Institute commented that even if not all the guarantees in the Charter had been expressly recognised by the ECJ, the conditions applied by the Convention that drafted the Charter when deciding on its content were the same as those used by the ECJ for recognising general principles.

3.26. In the case of *Chester and McGeoch* the Supreme Court held that the ECJ had not imported a right to vote in European Parliamentary elections from the case law of the ECHR.<sup>56</sup> The Supreme Court went on to find that provisions of the Treaty on the Functioning of the European Union (TFEU), read with Articles 39 and 40 of the Charter, do not confer a free-standing right to vote at European elections.<sup>57</sup>

<sup>52</sup> House of Lords European Union Committee, *The Treaty of Lisbon: an Impact Assessment*, paras 55.56; European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, para 150.

<sup>53</sup> The Charter of Fundamental Rights of the European Union ("the Charter").

<sup>54</sup> *N. S.* Joined Cases C-411/10 [2011] and C-493/10 [2011], para 120.

<sup>55</sup> *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3453, para 14.

<sup>56</sup> *R (Chester) v Secretary of State for Justice, McGeoch v Lord President of the Council* [2013] UKSC 63, para 58.

<sup>57</sup> *Ibid*, para 59.

### Case Summary: *Chester and McGeoch*

The appellants, prisoners serving sentences of life imprisonment, argued that the general ban in UK law on prisoners voting in European Parliament elections is contrary to EU law. Dismissing the appeals, the Supreme Court found that EU law does not incorporate any right to vote parallel to that recognised in the ECHR. Article 39(1) of the Charter, and Article 22 of the TFEU which it reaffirms, provide that every EU citizen has the right to vote at European Parliament elections ‘under the same conditions as nationals of the [Member] State’ where he or she resides. The Supreme Court found that the right in EU law is limited to EU citizens resident in another Member State being treated equally with the nationals of that Member State, and that eligibility to vote is a matter for national parliaments.

### The Charter and the Sources of Fundamental Rights

3.27. The rights and principles in the Charter derive from a wide range of sources, including the EU Treaties and the constitutional traditions and international obligations common to Member States, most notably the ECHR. The ECJ does not strictly apply the ECHR, but instead applies rights in EU law which replicate the guarantees in the ECHR (however in *Chester and McGeoch* the Supreme Court found that not all the ECHR rights have been recognised in EU law).<sup>58</sup> To identify the sources, and therefore the limits, of the Charter provisions regard must be had to the horizontal provisions in Title VII of the Charter (Articles 51-54) and the Explanations.

### The Explanations of the Charter

The Explanations provide guidance on the interpretation of the Charter. Both Article 6(1) of the TEU and Article 52(7) of the Charter provide that ‘due regard’ should be had to the Explanations when interpreting the Charter. The Government considers that the Explanations are essential to a proper understanding of the Charter, since they set out the sources and limits of the rights and principles it contains. The importance that the Government attributes to the Explanations is reflected in the preamble to Protocol No. 30 which states that the Charter is to be applied by the domestic courts ‘strictly in accordance with the Explanations.’

3.28. Article 52, paragraphs (2) to (4) of the Charter, sets out how the rights within it correspond with the law from which they derive:

- Rights for which provision is made in the EU Treaties must be ‘exercised under the conditions and within the limits defined by those Treaties’;
- Rights corresponding to guarantees in the ECHR have the same meaning and scope as the ECHR right, but this does not prevent EU law providing more extensive protection; and
- Rights resulting from the constitutional traditions common to the Member States ‘shall be interpreted in harmony with those traditions’.

<sup>58</sup> Åkerberg Fransson Case C-617/10 [2013], para 44.

3.29. The UK Court of Appeal has commented that:

Article 52(2), (3) and (4) [...] are intended to ensure that those rights recognised by the Charter which are derived from the Treaties, from the European Convention on Human Rights or from the constitutional traditions common to Member States respectively are and should remain consistent with the bodies of law from which they are derived.<sup>59</sup>

(UK Court of Appeals)

3.30. Notwithstanding Article 52(3) (described in the second bullet above), the explanation to that provision shows that certain rights in the Charter have the same meaning as corresponding guarantees in the ECHR, but a wider scope. An example is Article 47(2) and (3) which guarantees the right to a fair hearing. In contrast to the corresponding right in Article 6(1) of the ECHR, the EU fundamental right is not limited to cases which determine civil rights and obligations or criminal charges. The explanation to Article 47 confirms that this is also true of the right to a fair hearing as a general principle of EU law.

3.31. There is little suggestion in the evidence that the ECJ has departed from the meaning of ECHR rights when considering corresponding fundamental rights.<sup>60</sup> In the case of *DEB* the ECJ acknowledged that the meaning and scope of Charter rights corresponding to guarantees in the ECHR are to be determined by reference not only to the text of the ECHR, but also Strasbourg case law.<sup>61</sup> This is consistent with the ECJ's pre-Charter approach to the interpretation of general principles derived from ECHR rights. There is also evidence that the ECtHR has taken the Charter into account when interpreting ECHR rights.<sup>62</sup>

3.32. The explanation to Article 52(3) says that the level of protection afforded by the Charter can never be lower than that guaranteed by the ECHR. The second sentence of Article 52(3) says that the provision does not prevent 'Union law providing more extensive protection'. Respondents did not comment on the effect of this sentence in any detail. According to a report of the Convention that drafted the Charter, the second sentence of Article 52(3) clarifies that the provision does not prevent more extensive protection 'already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in some articles of the Charter which [...] go beyond the ECHR because Union law *acquis* had already reached a higher level of protection'.<sup>63</sup>

<sup>59</sup> *R (Zagorski) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin), para 64. Please also see: paras 73-73 where the UK court held that not only did the Charter right and the corresponding ECHR right have the same content, but also that the UK's jurisdiction was the same in respect of the provisions.

<sup>60</sup> *R (Chester) v Secretary of State for Justice, McGeoch v Lord President of the Council* [2013] UKSC 63, para 70: 'Court of Justice jurisprudence pays close attention to and, with very few exceptions, follows Strasbourg jurisprudence'.

<sup>61</sup> *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* Case C-279/09 [2010], para 35; see also *Stefano Melloni v Ministerio Fiscal* Case C-399/11 [2013], paras 49-50.

<sup>62</sup> For example, see *Goodwin v United Kingdom*, App. No. 28957/95, (2002) 35 EHRR 18 and *Scoppola v Italy (No.2)*, App. No. 10249/03, (2010) 51 EHRR 12.

<sup>63</sup> The European Convention, Final Report of Working Group II, CONV 354/02 (2002), p 7. Please also see: Peers, Hervey, Kenner and Ward (eds), *The EU Charter of Fundamental Rights: a Commentary* (2014), para 52.

## Limits of Charter Rights

The qualified guarantees in the ECHR, such as Article 10 (freedom of expression), generally have a common format; the right is contained in the first paragraph of the provision, and the grounds for justifying an infringement of the right are set out in the second paragraph. To be justified an infringement must (i) be lawful, (ii) pursue a legitimate aim, and (iii) be necessary in a democratic society in the interests of that aim (commonly referred to as the proportionality principle). The Charter takes a different approach, having a single provision on limiting rights (Article 52(1)), which reflects the three requirements set out above.

- 3.33. Article 53 of the Charter says that nothing contained in it restricts human rights as recognised by, amongst other sources, the ECHR and Member States' constitutions. The explanation states that the provision is intended to maintain the level of human rights protection afforded by EU law, national law and international law.
- 3.34. In *Akerberg Fransson and Melloni* the ECJ held that Article 53 confirms that national authorities and courts remain free to apply national human rights standards, in situations not entirely determined by EU law, provided that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.<sup>64</sup> In the case of *Melloni* the ECJ held that Spain could not rely on national constitutional principles to avoid surrendering someone to another Member State under a European Arrest Warrant. The EU Directive exhaustively sets out, in a manner consistent with fundamental rights, the circumstances in which a Member State can refuse to execute a European Arrest Warrant.

## The Charter and General Principles of EU law

- 3.35. Although the Treaties and the Charter do not explain the relationship between the Charter and the general principles of EU law, it is clear that the Charter has not replaced fundamental rights as general principles of EU law.<sup>65</sup> Article 6(3) of the TEU provides that:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

(TEU)

<sup>64</sup> *Akerberg Fransson* Case C-617/10 [2013], para 29; *Melloni* Case C-399/11 [2013], para 60.

<sup>65</sup> On the relationship between the Charter and general principles of EU law see Herwig Hofmann and Bucura Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', *European Constitutional Law Review*, 9(1), 73-101 (2013).

3.36. The Charter does not purport to be an exhaustive list of the fundamental rights recognised in EU law. In an evidence session of the European Scrutiny Committee on 20 January 2014, David Anderson QC commented that:

one could conceive of a case... in which, frustrated by limitations on the Charter, the Court of Justice were nonetheless to derive a particular right or a particular application of a right from its continuing jurisdiction to apply the general principle of fundamental rights.<sup>66</sup>

(David Anderson QC)

3.37. In its 2007 judgment in the case of *Festersen*, the ECJ appeared to find that the right to choose one's residence is a fundamental freedom in EU law.<sup>67</sup> This freedom is not contained in the Charter and is not entirely covered by the right in Article 45 to move and reside freely within the territory of Member States.

3.38. Professor Sionaidh Douglas-Scott, in her written evidence to the European Scrutiny Committee, commented that the Protocol does not apply to general principles of EU law. Therefore any limits the Protocol has on the interpretation of the Charter do not extend to the ECJ's development of general principles. This reflects the findings of the House of Lords European Union Committee and the House of Commons European Scrutiny Committee.<sup>68</sup>

3.39. The Government's position is that the horizontal provisions on the interpretation and application of the Charter reflect how the ECJ has developed general principles of EU law. The rights in the Charter therefore have the same meaning and scope as the general principles they reaffirm; they are not two distinct groups of rights in EU law that are potentially subject to disparate interpretations. Both the Charter and the general principles of EU law are part of the EU's primary law. The courts can therefore refer to the Charter and the general principles interchangeably when applying fundamental rights to EU institutions and Member States.

## Rights and Principles

3.40. Some of the provisions in the Charter contain principles rather than rights, and others contain both. Article 52(5) states that principles 'may be implemented by legislative and executive acts' taken by the EU institutions and Member States when implementing EU law, and are 'judicially cognisable only in the interpretation of such acts and in ruling on their legality'. So the Charter makes clear that principles are not capable of having the same effects as rights.

<sup>66</sup> Please also see: European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, para 159; David Anderson QC and Cian C Murphy, 'The Charter of Fundamental Rights: History and Prospects in post-Lisbon Europe', *European University Institute Working Paper Law* (2011), p 7-8.

<sup>67</sup> *Uwe Kay Festersen Case C-370/05* [2007].

<sup>68</sup> House of Lords European Union Committee, *The Treaty of Lisbon: an Impact Assessment*, para 5.104; House of Commons European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, para 159.

- 3.41. Koen Lenaerts, Vice-President of the ECJ, has suggested that principles can be relied upon with a view to setting aside conflicting legislation, but cannot impose positive obligations on the EU or Member States.<sup>69</sup> Professor Chris Hilson concluded that it is not possible – as the Charter tries to do – to make generalisations as to the effect of principles.<sup>70</sup> The ECJ has relied on principles in the Charter to interpret EU legislation.<sup>71</sup>
- 3.42. The explanation to Article 52(5) lists some of the provisions in the Charter that contain principles, but the list is not exhaustive. Indeed much of the evidence points towards a lack of clarity as to which provisions of the Charter guarantee rights and those that contain principles. In its report on the Treaty of Lisbon the House of Lords Select Committee on the European Union concluded that:

It is now clear that under the adapted Charter a distinction exists between rights (which are directly enforceable) and principles (which are only justiciable in the circumstances identified in article 52(5)) ... But there is obscurity about how and where the distinction is to be drawn ... The distinction will in practice have to be worked out in future cases before the ECJ.<sup>72</sup>

(Select Committee on European Union)

### Legal Effect of Fundamental Rights

- 3.43. The provisions of the Charter can be used by the ECJ and domestic courts to interpret EU law and domestic measures (within the scope of EU law) consistently with the guarantees it contains.<sup>73</sup>
- 3.44. Some provisions of the Charter give rise to directly enforceable rights, such as the prohibition on discrimination on grounds of age. The ECJ will declare invalid an EU measure that is contrary to a directly enforceable fundamental right.<sup>74</sup>
- 3.45. At a domestic level, where it is not possible to interpret primary legislation consistently with an enforceable right, domestic courts or tribunals can disapply the offending provision. In the cases of *Benkharbouche* the Employment Appeal Tribunal (EAT) disapplied the UK's State Immunity Act 1978 in so far as it prevented the claimants enforcing employment rights that fell within the scope of EU law.<sup>75</sup> The EAT's decision is the subject of an appeal. However, in the case of *Chester and McGeoch* the Supreme Court commented that had the general ban on prisoners voting been contrary to EU law, it would not have been possible to either read the domestic legislation compatibly

<sup>69</sup> Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, 8(3), (2012), pp 399-403, 400-401, 403.

<sup>70</sup> Professor Chris Hilson, 'Rights and Principles in EU Law: a Distinction without foundation', *Maastricht Journal of European and Comparative Law*, 15(2), 193-215, p 215 (2008).

<sup>71</sup> *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* Case C-571/10 [2012].

<sup>72</sup> House of Lords European Union Committee, *The Treaty of Lisbon: an Impact Assessment* para 5.22; House of Commons European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, paras 157-158.

<sup>73</sup> *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 [1990]; *Pickstone v Freemans PLC* [1989] AC 66.

<sup>74</sup> For example, see *Test-Achats* Case C-236/09 [2011].

<sup>75</sup> *Benkharbouche v Embassy Of The Republic Of Sudan* (Jurisdictional Points: State immunity) [2013] UKEAT 0401\_12\_0410 (4 October 2013).

with EU law or disapply the offending provision.<sup>76</sup> Noting that a ban on a very significant number of prisoners voting would be justified, the Supreme Court said that it could not itself devise an alternative scheme of voting eligibility, which was a matter for the UK Parliament.

- 3.46. The disapplication of domestic legislation that is contrary to EU law was recognised by domestic courts before the Charter was first pronounced, and is not unique to the EU's competence on fundamental rights.

### Case Summary: *Benkharbouche*

The claimants, who were employed at the embassies of Sudan and Libya respectively, complained that the State Immunity Act 1978 denied them access to a court to enforce employment rights. The EAT found that the 1978 Act constituted a disproportionate interference with the claimant's right of access to a court. The EAT disapplied the 1978 Act as it affected claims falling within the scope of EU law (race discrimination, working time), but in respect of those claims which fell outside EU law (unfair dismissal, National Minimum Wage) the legislation remained in force.

- 3.47. The Liverpool University European Law Unit observed that 'just because either the Court's case law or the Charter identifies the existence of a given "fundamental right", this does not mean that that right will actually produce autonomous, enforceable obligations for Member States'. There is therefore an initial question as to whether any given right is itself sufficiently clear, precise and unconditional to be directly enforceable.
- 3.48. Several provisions in the Charter make reference to national laws and practices, of which full account is to be taken according to Article 52(6) of the Charter. The evidence generally agreed that Article 52(6) is reinforced by Article 2 of the Protocol which states that the Charter provisions which refer to national laws and practices apply to the UK only so far as the rights and principles concerned are already recognised in UK law or practice. Professor Sionaidh Douglas-Scott, in written evidence to the European Scrutiny Committee, commented that Article 2 'does not appear to offer very much new'. However, Professor Paul Craig, in his written evidence to the same inquiry, considered the provision to be an 'important limitation' on the application of those Charter rights that make reference to national laws and practices.
- 3.49. One such right is Article 27 of the Charter which provides that workers must be guaranteed information and consultation 'in the cases and under the conditions provided for by Union law and national laws and practices'. In the case of *Association de Médiation Sociale* the ECJ noted that it is clear from the wording of Article 27 that it must be given more specific effect in EU or domestic law.<sup>77</sup> The ECJ therefore held that the 'article by itself is not sufficient to confer on individuals a right which they may invoke as such', and this finding wasn't altered if the provision was considered in conjunction with the relevant EU directive in that case.<sup>78</sup>

<sup>76</sup> *R (Chester) v Secretary of State for Justice, McGeoch v Lord President of the Council* [2013] UKSC 63, paras 73-74.

<sup>77</sup> *Association de médiation sociale v Union locale des syndicats CGT and Others* Case C-176/12 [2014], para 45.

<sup>78</sup> *Ibid*, para 49.

## Title IV of the Charter and Article 1(2) of the Protocol

Title IV of the Charter, entitled Solidarity, contains provisions on matters such as employment rights, social security, environmental protection and consumer protection. Article 1(2) of the Protocol states that nothing in Title IV creates justiciable rights applicable to the UK, except in so far as such rights are provided for in domestic law. Evidence from academics and legal practitioners suggests that Article 1(2) – which has not yet been considered by the ECJ – is the provision of the Protocol most likely to offer substantive protection for the UK should Title IV be interpreted to confer directly enforceable rights.<sup>79</sup>

The UK Government's position is that Article 1(2) reflects that nothing in Title IV by itself is a directly enforceable right going beyond national laws and practices. This position was shared by the European Scrutiny Committee.<sup>80</sup>

- 3.50. Where fundamental rights have direct effect they may in some circumstances apply horizontally (between private parties) as well as vertically (between a private party and a public authority).<sup>81</sup>
- 3.51. The Charter applies to the EU institutions and Member States, and there is mixed opinion among academics and legal practitioners on whether it is capable of imposing obligations on private parties. General principles of EU law have however been successfully relied upon in proceedings between private parties.
- 3.52. In the case of *Kucukdeveci* the ECJ held that the general principle of non-discrimination on grounds of age, as given expression in an EU Directive, can be raised in proceedings between private parties concerning the compatibility of national legislation with that principle.<sup>82</sup> In the case of *HK Danmark* the ECJ found that the principle of non-discrimination on grounds of age, as set out in Article 21 of the Charter and given specific expression in an EU Directive, precludes a private pension scheme under which employer's contributions increase with the age of the employee if the difference in treatment is not justified.<sup>83</sup> The case of *Association de Mediation Sociale* clearly demonstrates that not everything in the Charter can have horizontal effect.

<sup>79</sup> House of Commons European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, paras 85-86 and 95.

<sup>80</sup> *Ibid*, para 152.

<sup>81</sup> For a discussion about the horizontal application of fundamental rights see Dorota Leczykiewicz, 'Horizontal application of the Charter of Fundamental Rights', *European Law Review*, 38(4) (2013), paras 479-497.

<sup>82</sup> *Seda Küçükdeveci v Swedex GmbH & Co. KG* Case C-555/07 [2010].

<sup>83</sup> *HK Danmark (acting on behalf of Glennie Kristensen) v Experian A/S* Case C-476/11 [2013].



## Respect for Human Rights as a Value of the EU

- 3.53. Respect for human rights is one of the values on which the EU is founded, and the promotion of those values is an aim of the EU.<sup>84</sup> This is underlined by the requirement for all prospective Member States to demonstrate that they respect human rights before they are permitted to join the EU.<sup>85</sup>
- 3.54. Under Article 7 of the TEU, on a reasoned proposal by one third of the Member States, the European Parliament or the Commission, the Council may, by a majority of four fifths of its members, determine that there is a 'clear risk of a serious breach' of the founding values of the EU by a Member State. The Council may make recommendations to the Member State concerned.
- 3.55. Under the same provision, on a reasoned proposal of one third of the Member States or the Commission, and with the consent of the European Parliament, the European Council may unanimously find a 'serious and persistent breach' of the EU's values by a Member State. Such a determination can result in the Council, acting by qualified majority, suspending certain rights of the Member State concerned (for example, voting rights in the Council). However, to date there have been no determinations under Article 7 of the TEU.

## The Fundamental Rights Agency

- 3.56. The Fundamental Rights Agency (the Agency) is one of a number of the EU's specialised agencies. It primarily produces reports on the basis of the data it collects and was set up to improve knowledge and awareness of fundamental rights issues in the EU, with a view to ensuring respect for fundamental rights.<sup>86</sup> The European Commission welcomed the Agency 'as a key resource to advise Community institutions and Member States, raise public awareness, and provide information and data to support Fundamental Rights work'.<sup>87</sup> There was some criticism in the UK Parliament that the Agency 'was suddenly sprung on us with so little thought and so little preparatory work. The proposal was the result of a deal between Austria [...] and Italy at the European Council meeting in Brussels'.<sup>88</sup> But on balance the UK Government of the day concluded that there was a gap which the Agency would fill:

The current position demonstrates that there is not any body that enables the European institutions to get the benefit of advice or assistance when it comes to fundamental rights.<sup>89</sup>

(Baroness Ashton)

<sup>84</sup> TEU post Lisbon, Articles 2 and 3, 2010 O.J. C 83.

<sup>85</sup> Europe, 'Glossary: Accession Criteria (Copenhagen criteria)', *Summaries of Legislation*. Available at: [www.europa.eu/legislation\\_summaries/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://www.europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm), accessed on 25 June 2014.

<sup>86</sup> Council Regulation 168/2007/EC on establishing a European Union Agency for Fundamental Rights, 2007, O.J. L 245, preamble.

<sup>87</sup> European Commission, *Press Release: European Commission welcomes the opening of the EU Fundamental Rights Agency* (1 March 2007).

<sup>88</sup> HC Deb 2 February 2005 Column C-252WH.

<sup>89</sup> House of Lords European Union Committee, *Human Rights Protection in Europe: The Fundamental Rights Agency* (HL 2005-06 155).

- 3.57. One commentator thought it would put ‘abstract values’ into ‘concrete legal content,’<sup>90</sup> while another saw its creation as recognition of an EU-specific fundamental rights policy.<sup>91</sup>
- 3.58. The Agency was established in 2007 under Article 308 of the Treaty establishing the European Community (TEC). This is now Article 352 of the TFEU.
- 3.59. The Agency employs 90 staff and has a budget of €21.3m for 2014.<sup>92</sup> It is funded directly from the EU’s annual budget which is made up of contributions from all Member States and requires the unanimous agreement of the European Council.

### Article 352 of the TFEU

Article 352 of the TFEU enables the EU to take measures necessary to attain an objective within the policies defined in the Treaties, where the EU does not otherwise have the necessary power to do so. The EU has relied on Article 352 and its predecessor to adopt measures on fundamental rights, including those establishing the Fundamental Rights Agency and funding programmes. Article 352 cannot be relied upon however to adopt measures of constitutional significance that can be brought about only by Treaty amendment. It was for this reason that the ECJ held in 1994 that Article 308 (TEC) could not be the basis for the EU joining to the ECHR.

- 3.60. The Agency’s work is guided by a management board which is comprised of an independent expert from each Member State, two European Commission representatives and one independent expert appointed by the Council of Europe. The Board is responsible for approving the Agency’s work priorities and its budget.
- 3.61. The Agency’s objective is to:

Provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.<sup>93</sup>

(European Union Agency for Fundamental Rights)

- 3.62. The Agency pursues its objective through the collection and analysis of data, publishing thematic reports and opinions and raising awareness of fundamental rights. It is not a monitoring or standard-setting institution and does not examine individual complaints.

<sup>90</sup> Gabriel N Toggenburg, ‘The role of the new EU Fundamental Rights Agency: debating the “sex of Angels” or improving Europe’s human rights performance?’, *European Law Review*, 33(3), 385-398 (2008).

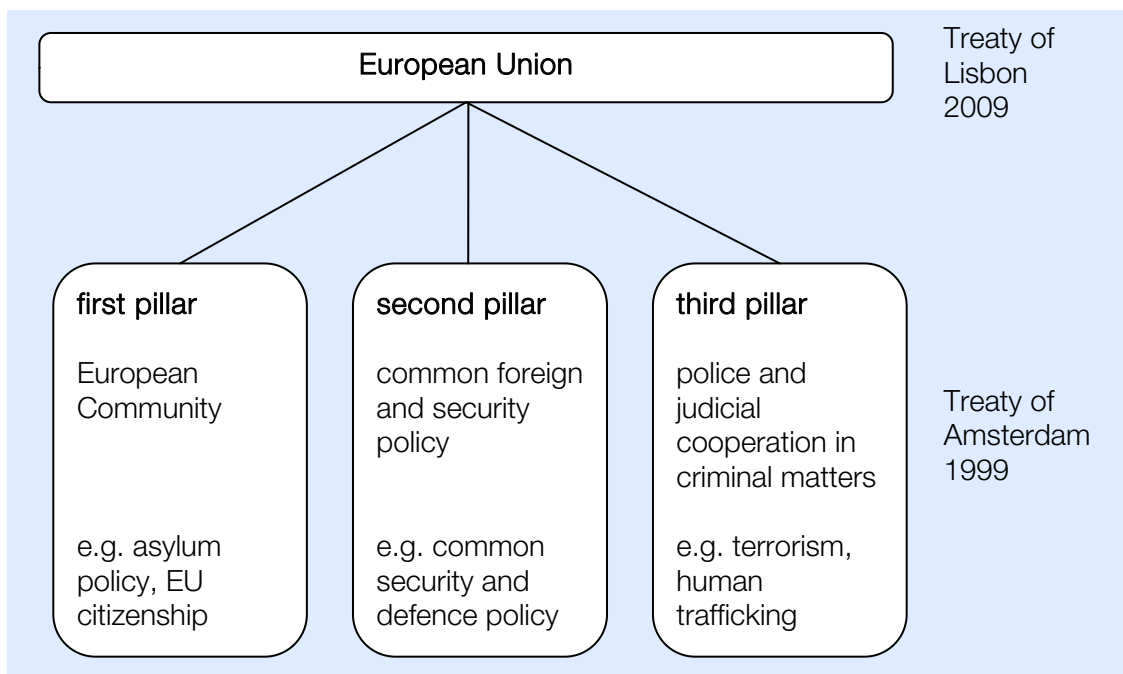
<sup>91</sup> A Von Bogdandy and J Von Bernstorff, ‘The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and some Unsettled Issues in a New Field of Administrative Law’, *Common Market Law Review*, 46(4) 1035-1068 (2009).

<sup>92</sup> In 2013, this was €21.6m, and in 2012 it was €20.6m. European Union Agency for Fundamental Rights, *Statement of Revenue and Expenditure of the European Union Agency for Fundamental Rights for the Financial Year 2014*.

<sup>93</sup> The Fundamental Rights Agency Establishing Regulation, *supra* note 85, article 2.

- 3.63. The Regulation which established the Agency limits it to carrying out tasks ‘within the competencies of the Community as laid down in the Treaty establishing the European Community’.<sup>94</sup> Subject to this limitation, the Agency undertakes work within thematic areas set out in a five year work programme (multiannual framework).
- 3.64. There has been debate about whether the Agency’s mandate can extend beyond matters formerly falling within the first pillar. This question arises because, while the Agency was established under Article 308 of TEC which was limited to the former first pillar, the Treaty of Lisbon has since collapsed the EU pillar structure (see below).
- 3.65. The UK Government’s position is that pillar collapse did not extend the Agency’s mandate and that its establishing Regulation would need to be amended to broaden the scope of the Agency’s activities. This was reflected in a Council decision adopting the current multiannual framework, which is limited to former first pillar matters.<sup>95</sup>

**Figure Three: The Effect of Pillar Collapse under the Lisbon Treaty**



<sup>94</sup> Ibid, Article 3.

<sup>95</sup> Council Decision 252/2013/EU establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, 2013.

3.66. There has also been debate on whether, despite the limit imposed by its establishing Regulation, the Agency can work on matters outside what was Community law when responding to a request from an EU institution.<sup>96</sup> The Agency's establishing Regulation allows the Agency to act outside of its thematic areas when responding to requests of the EU institutions.<sup>97</sup> On adopting the Agency's establishing Regulation, the Council made the following Declaration:

The Union institutions may, within the framework of the legislative process and with due regard to each others' powers, each benefit, as appropriate and on a voluntary basis, from such expertise also within the areas of police and judicial cooperation in criminal matters.<sup>98</sup>

(Council of the European Union)

3.67. Evidence from the Open Society European Policy Institute noted that 'currently, the FRA may not work on criminal justice matters without a specific request from one of the EU's institutions'. Indeed, there have been instances where the Agency has produced opinions in areas outside the former first pillar.<sup>99</sup>

3.68. The Government's position is that it is clear from the establishing Regulation that the Agency's remit is limited to the former first pillar, whether undertaking work on its own initiative or at the request of one of the EU institutions. A request from an EU institution only dispenses with the requirement that the Agency acts within its thematic area; it cannot change the scope of the legal base on which the Agency is founded.

## Funding Programmes

3.69. The EU runs a number of programmes which fund projects across the EU. The Fundamental Rights and Citizenship Programme, which ran from 2007 to 2013, aimed at promoting a society based on respect for fundamental rights and rights derived from citizenship of the EU.<sup>100</sup> This programme had a budget of €97.25m over a seven year period. It funded projects run by a range of organisations from across Member States, including charities, non-governmental organisations and government bodies and included projects run by UK organisations.

<sup>96</sup> Council Regulation 168/2007 EC on establishing a European Union Agency for Fundamental Rights, 2007, Article 4(d).

<sup>97</sup> Ibid Article 5(3).

<sup>98</sup> Council of the European Union 6396/07 *Addendum to draft minutes*, 128 1st meeting of the Council of the European Union, held in Brussels on 15 February 2007, 2007.

<sup>99</sup> For example, please see: European Union Agency for Fundamental Rights, *Fundamental Rights Agency Opinion on the draft Directive regarding the European Investigation Order (EIO)*, 2011.

<sup>100</sup> Council Decision 2007/252/JHA establishing for the period 2007-2013 the Specific Programme Fundamental Rights and Citizenship as part of the general programme Fundamental Rights and Justice, 2007.

3.70. In November 2011, as part of its strategy to simplify and streamline its funding programmes, the European Commission proposed a Rights, Equality and Citizenship Programme (2014-2020). This consolidated the objectives of a number of existing funding programmes – including the Fundamental Rights and Citizenship programme – in a single funding programme, with a budget of €439.47m over the seven year period.<sup>101</sup> This represented a slight reduction in the net budget from the previous funding programmes.<sup>102</sup> The programme has a general objective to further develop an area where equality and the rights recognised in EU law are promoted, protected and effectively implemented. The specific objectives of the programme include promoting the effective implementation of the principle of non-discrimination as well as preventing and combating all forms of violence against children, young people and women. Projects can involve the collection and sharing of data, developing guides and educational material and support for Member States in the implementation of EU legislation and policies. This proposal was adopted in December 2013.<sup>103</sup>

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<sup>101</sup> Funding for the programme comes from the overall EU budget unanimously agreed by the European Council and the European Parliament.

<sup>102</sup> The Rights, Equality and Citizenship programme also covers the objectives previously covered in the Daphne III programme on addressing violence against women (€121,43m) and aspects of the Programme for Employment and Social Solidarity (PROGRESS) (€241,52m).

<sup>103</sup> Regulation 1381/2013/EU of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014-2020, 2013.





# Chapter 4. Impact on the National Interest

- 4.1. This chapter summarises evidence on the impact on the UK of the EU's competence on fundamental rights. It considers the obligation to respect fundamental rights that are recognised as general principles of EU law and reaffirmed in the Charter. The chapter then considers the impact of the Fundamental Rights Agency and the Fundamental Rights and Citizenship funding programme.
- 4.2. Respect for human rights is acknowledged in the evidence as being in the national interest. However, beyond recognition that when the EU and (within the scope of EU law) Member States act they should do so consistently with some form of human rights protection, there is little consensus in the evidence on what constitutes the national interest in this context. Views on whether the EU's competence on fundamental rights is being exercised consistently with the interests of the UK vary depending on perspectives on the role of supranational human rights mechanisms and national sovereignty. Moreover, fundamental rights can conflict with other interests in society (such as trade), and opinions will differ in a particular case on which interest outweighs the other.
- 4.3. It is not straightforward to quantify or measure the impact of fundamental rights. The EU protects rights, principally through limiting the actions of both the EU institutions and Member States. This can affect the competence of Member States to act. However, it will not always be evident, for example, whether (or the extent to which) a particular policy at EU or UK level has been pursued, altered or abandoned by reason of fundamental rights considerations, as opposed to other legal or policy reasons (including, at a UK level, other human rights protections).

## Obligation to Respect Fundamental Rights

- 4.4. This section begins with some general observations from the evidence on the recognition of fundamental rights in EU law. It then considers evidence on the impact of fundamental rights in the case law of the ECJ and the domestic courts, as litigation provides the most tangible effect of the EU's competence on fundamental rights. Finally, the section summarises evidence on the Charter, not in terms of its substantive guarantees, but as a single document that seeks to increase the visibility of the rights and principles it contains.
- 4.5. Respondents generally recognised that when the EU and (within the scope of EU law) Member States act, they should do so in a manner that is compatible with existing national and international human rights protections applicable to Member States. David Anderson commented, in his response to the Call for Evidence, that:

If EU law is to remain a fact of life, fundamental rights must surely be an essential part of it [...] The desirability of such a safeguard against public authorities – particularly European public authorities – should be evident to Europhobes and Europhiles alike.

(David Anderson QC)



- 4.6. Several academics and NGOs commented that guaranteeing minimum standards of human rights protection across the EU is beneficial to the UK. The Discrimination Law Association commented that UK businesses can operate in other Member States, and UK citizens can exercise their right to free movement, with confidence that minimum standards of human rights will be respected. The Equality and Diversity Forum noted that if there were no minimum standards across Member States then those with the lowest levels of protection might have a competitive advantage.
- 4.7. Respondents to the Balance of Competences Foreign Policy review commented that the fundamental rights protections within the EU are important in ensuring the EU's credibility in relations with third parties.<sup>104</sup>
- 4.8. The EU institutions have sought to protect and promote fundamental rights outside the formal mechanisms set out in the Treaties. The European Parliament for example has adopted resolutions on human rights issues in Member States,<sup>105</sup> The Commission also publishes an annual report on the application of the Charter, which includes a summary of measures taken at EU level to promote fundamental rights.<sup>106</sup> However responses on this work did not address its impact on the UK.

## Impact of Fundamental Rights in ECJ Case Law

- 4.9. Fundamental rights primarily apply to the institutions and bodies of the EU.<sup>107</sup> The Open Society European Policy Institute considered that the EU fundamental rights system is 'inherently beneficial' to all sectors in the UK because it keeps the EU in check:

The primary function of fundamental rights at EU level is to prevent the EU from acting, or mandating states to act, in a manner that is inconsistent with human rights protection in place at national and international level.

(Open Society European Policy Institute)

- 4.10. Fundamental rights arguments before the ECJ have increased since the Lisbon Treaty came into force. Grainne de Burca considered that this is a consequence of not only the Charter having legal force, but also the separate expansion under the Lisbon Treaty of the jurisdiction of the ECJ.<sup>108</sup> The Open Society European Policy Institute considered however that the limited ability for individuals to bring proceedings before the ECJ constrains the remedies available.<sup>109</sup>

<sup>104</sup> HMG, *The Balance of Competences between the UK and the EU: Foreign Policy* (2013).

<sup>105</sup> For example, please see: European Parliament, Resolution on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), 2013.

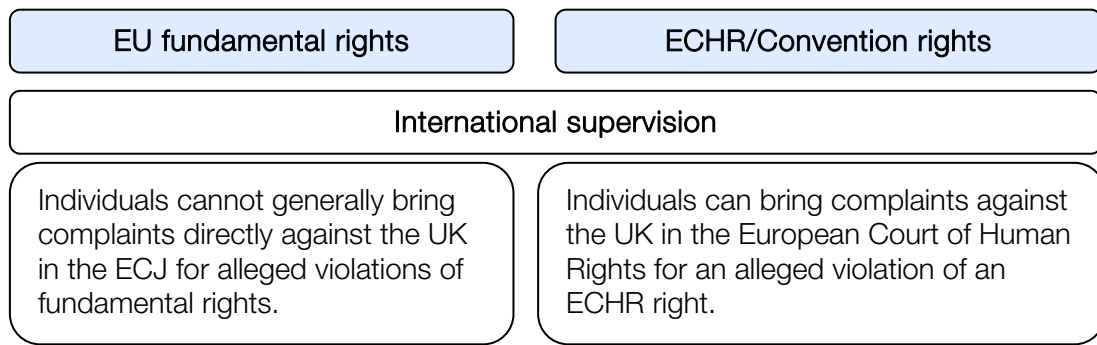
<sup>106</sup> For the most recent of these, please see: European Commission, 2013 *Report on the application of the EU Charter of Fundamental Rights*, COM(2014) 224 final.

<sup>107</sup> Explanation to Article 51 of the Charter. Please also see: European Commission, 2013 *Report on the application of the EU Charter*.

<sup>108</sup> Grainne de Burca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?', *Maastricht Journal of European and Comparative Law*, 20(2), 168-184, p.170 (2013).

<sup>109</sup> For more information, please see: House of Lords European Union Committee, *EU Charter on Fundamental Rights* (HL 1999-2000, 67), paras 132-133; Tim Eicke, 'European Charter of Fundamental Rights – unique opportunity or unwelcome distraction', *European Human Rights Law Review*, 2000, 3, 280-296.

Figure Four: EU and ECHR/Convention Rights Compared



- 4.11. The Open Society European Policy Institute identified cases where it considered the ECJ to have used fundamental rights to protect the rights of UK citizens and businesses from the action of EU institutions. For example, in the case of *Commission v Pilkington Group*, a company established in the UK contested the Commission's decision to publish information which the company considered to be commercially sensitive.<sup>110</sup> The ECJ granted a request for interim measures preventing publication based, in part, on the need to protect the right to professional secrecy and the right to effective judicial protection guaranteed by Articles 8 and 47 of the Charter respectively.
- 4.12. Professor Eleanor Spaventa and the AIRE Centre commented that the ECJ rarely declares EU legislation invalid for breaching fundamental rights. Although Professor Eleanor Spaventa considered that the ECJ recognises when legislation engages fundamental rights, she said that it confers a wide margin of discretion on the EU institutions regarding the proportionality of any interference.
- 4.13. In contrast, Anthony Speaight QC identified the case of *Test-Achats* to exemplify 'the activist tendency' of the ECJ in the context of fundamental rights.<sup>111</sup>

### Case Summary: *Test-Achats*

An EU Directive imposed a general rule that there should be no direct or indirect discrimination between men and women in pricing goods and services. However, there was an exception that Member States could permit insurance companies to charge different premiums to customers based on gender if the assessment of risk was based on relevant and accurate data. The ECJ ruled that the exception was incompatible with Articles 21 (non discrimination) and 23 (equality between women and men) of the Charter, and declared the provision void.

- 4.14. Noting that the EU Directive at issue in the *Test-Achats* case required the unanimous consent of all Member States and there was no obligation to legislate on insurance premiums, Anthony Speaight QC argued that the ECJ brought into force a law which the democratic organs of the EU manifestly did not want to enact. He commented that, irrespective of whether one agrees with the policy in question, the judgment of the ECJ:

<sup>110</sup> *European Commission v Pilkington Group Ltd Case C-278/13* [2013].

<sup>111</sup> *Test-Achats Case C-236/09* [2011].

Represents a remarkable inroad on the principle of the democratic competence of the legislative institutions of the EU. It is little exaggeration to say that it amounts to legislation by the Court.

(Anthony Speight QC)

- 4.15. Policy Exchange commented that the case of *Test-Achats* demonstrates the ‘potential for mission creep under the Charter’.<sup>112</sup> Similarly, in written evidence to the European Scrutiny Committee, Martin Howe QC described the *Akerberg Fransson* judgment as ‘a naked grab of territory by the ECJ’.<sup>113</sup> Jan-Herman Reestman and Leonard Besselink have commented that the rulings in *Akerberg Fransson* and *Melloni* ‘have the potential to marginalise national fundamental rights protection and perhaps even national constitutions’.<sup>114</sup> The Freedom Association and Policy Exchange commented that there is no effective check on whether the ECJ acts within its competence.
- 4.16. In contrast, the majority of respondents that commented on how the ECJ exercises its jurisdiction, particularly NGOs and academics, considered that the ECJ has adhered to the horizontal provisions on the interpretation and application of the Charter and that there is little or no evidence of competence creep. Dr Tobias Lock and the Discrimination Law Association considered the *Test-Achats* judgment to be simply an instance of the ECJ ensuring the enjoyment of fundamental rights.
- 4.17. The Open Society European Policy Institute provided examples of cases which it said demonstrate that fundamental rights are not being used by the ECJ to override British public interest. The case of *UEFA v Commission* concerned the UK’s decision to designate certain matches in the European football championship as an event that should be broadcast over free television channels.<sup>115</sup> UEFA challenged the Commission’s endorsement of the decision. The ECJ found that although the decision interfered with UEFA’s property rights, the interference was justified in the public interest.
- 4.18. Unite referred to the cases of *Viking* and *Laval* to argue that the protection afforded to citizens’ fundamental rights by the ECJ is insufficient when balanced against the rights enjoyed by business under EU law.<sup>116</sup> However, in relation to the same cases, Professor Eleanor Spaventa commented that ‘Much has been said, especially in the UK, about the fact that by recognising a EU derived right to take industrial action, the [ECJ] has made an (intolerable) incursion in national sovereignty’.<sup>117</sup>

<sup>112</sup> Please see: European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights in the UK: a State of Confusion* (HC 2013-14, 979) paras 81-82.

<sup>113</sup> See also Bas van Bockel and Peter Wattel, ‘New Wine into Old Wineskins: the Scope of the Charter of Fundamental Rights of the EU after *Akerberg Fransson*’, *European Law Review*, 38(6), 866-883 (2013).

<sup>114</sup> Jan-Herman Reestman and Leonard F.M. Besselink, ‘Editorial: After *Akerberg Fransson* and *Melloni*’ *European Comparative Law Review*, 9(2), 169-175, p 169 (2013).

<sup>115</sup> *Union des associations européennes de football (UEFA) v European Commission, Kingdom of Belgium, and United Kingdom of Great Britain and Northern Ireland* Case C-201/11 P [2013].

<sup>116</sup> *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* Case C-438/05 [2007] and *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* Case C-341/05 [2007].

<sup>117</sup> Please also see: House of Lords European Union Committee, *The Treaty of Lisbon: an Impact Assessment Report* (HL 2007-2008N 62-I), paras 5.30-5.36.

### Case summary: *Viking*

The case concerned the reflagging of a passenger ferry in order to enter into a collective agreement in Estonia which would permit lower wages for the crew compared to the equivalent agreement in Finland. In response, the International Transport Workers' Federation (ITWF) issued a circular to its members, including the relevant Estonian union, requesting them not to enter into agreement with the ferry operator.

As the ITWF was based in London, the ferry operator sought an injunction from the English courts preventing action that interfered with its right to freedom of establishment and its right to provide services under the EU Treaties. On a preliminary request from the Court of Appeal, the ECJ found that the right to take collective action is a fundamental right. It proceeded to hold that the collective action is a restriction on the right to freedom of establishment, but could be justified if it pursued a legitimate aim and was proportionate. The ECJ recognised that the right to take collective action for the protection of workers is a legitimate interest. As to proportionality, the ECJ held that the national courts should assess whether the union had 'other means at its disposal which were less restrictive of freedom of establishment'.

- 4.19. The Liverpool University European Law Unit suggested that the foundations of the Union in facilitating cross-border trade creates the risk that the protection of fundamental rights depends on whether they run congruent to, or conflict with, the free movement guarantees in EU law. By contrast, Vassilios Skouris, President of the ECJ, said in 2006 that the case law of the ECJ reflects that there is no hierarchy in EU law between fundamental freedoms and fundamental rights.<sup>118</sup>

### Impact of Fundamental Rights in Domestic Case Law

- 4.20. The evidence suggests that domestic courts are referring to the Charter with increasing frequency. However, this does not necessarily mean that fundamental rights are having a greater impact. There are existing human rights protections in the UK. When assessing the impact of the obligation on UK public authorities to comply with fundamental rights, it is important to consider their effect beyond other human rights protections, most notably Convention rights.
- 4.21. Evidence indicates that EU fundamental rights have to date had a limited impact in domestic case law. The domestic courts engage in a rigorous assessment of whether fundamental rights are applicable to case before them. Some NGOs that attended workshops commented that the Human Rights Act remains the primary reference point for human rights in domestic litigation.
- 4.22. The Faculty of Advocates noted that reliance on the Charter in Scotland is rare, and knew of no reported cases in which the Charter made any difference to the outcome:

<sup>118</sup> Vassilios Skouris, 'Fundamental rights and fundamental freedoms: the challenge of striking a delicate balance', *European Business Law Review*, 17(2), 225-239, (2006) p 238. Please also see: also Verica Trstenjak and Erwin Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU', *European Law Review*, 38(3), 293-315 (2013).

The effect so far of the Charter and fundamental rights on litigants has accordingly been neutral, other than perhaps in terms of the legal expense incurred arguing the point.

(Faculty of Advocates)

- 4.23. The limited impact of EU fundamental rights in the UK to date may in part be attributed to a lack of awareness. JUSTICE referred to a survey in 2012 which revealed that 10% of respondents in the UK had known what the Charter is.<sup>119</sup> The lack of familiarity with EU fundamental rights is not limited to the general public, with several respondents noting that it extends to the legal profession, including judges. Among those respondents who noted a lack of awareness of fundamental rights, it was generally suggested that there was a need to raise awareness among the legal profession.
- 4.24. The Discrimination Law Association however considered that the protection afforded by EU fundamental rights is gradually being recognised domestically following judgments that have generated discussion of the Charter, such as *Test-Achats* and *Benkharbouche*. What follows is a discussion of the main themes that emerged from the evidence on the impact of fundamental rights in domestic case law.

### Fundamental Rights and Convention Rights: Additional Guarantees Recognised in EU Law

- 4.25. EU law contains a wider array of rights than those protected under the Human Rights Act or the ECHR. The willingness of the ECJ to recognise international human rights principles enables reliance on those standards in some situations through EU law. This is obviously a benefit to those who want to rely on such additional rights, which may not otherwise have the same domestic legal effect. However, JUSTICE acknowledged that:

The corollary is that the Member States may argue that they find national law overruled by the indirect application of principles obtained from agreements made outside of the EU, not intended to have that effect when they became contracting parties, or in respect of some measures, such as protocols to the ECHR, that they have not even signed.<sup>120</sup>

(European Scrutiny Committee)

- 4.26. Professor Rory O’Connell considered that EU law, to a greater extent than the ECHR, encompasses rights that are ‘distinctly business friendly’.<sup>121</sup> That is not to say however that domestic law does not have equivalent protections outside the Human Rights Act, such as in the law of contract.
- 4.27. The inclusion in the Charter of economic and social guarantees was welcomed by the British Association of Social Workers. In contrast, Michael Pinto-Duschinsky, in his written evidence to the European Scrutiny Committee, said that the implementation of social and economic rights would be costly and unduly constrain the budgetary options and policies of the UK Government. As mentioned in chapter Three above, the Government’s position is that nothing in Title IV by itself is a directly enforceable right going beyond national laws and practices.

<sup>119</sup> European Commission, *Flash Eurobarometer 340: The Charter of Fundamental Rights of the European Union Report* (2012).

<sup>120</sup> European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, para 39.

<sup>121</sup> For example see *Mark Aleemo-Herron and Others v Parkwood Leisure Ltd* Case C-426/11 [2013].

## Fundamental Rights and Convention Rights: Meaning and Scope

4.28. As set out in chapter Three, some fundamental rights provide a wider scope of protection than corresponding guarantees in the ECHR. Respondents from civil society, academia and the legal profession suggested that the most important examples are the right to a fair hearing and the prohibition on discrimination. JUSTICE noted that the EU fundamental right to a fair hearing is particularly relevant in the sphere of immigration and asylum, where the corresponding ECHR right has provided limited assistance. An example of this is the case of *ZZ*.<sup>122</sup>

### Case Summary: *ZZ*

The appellant, a dual French and Algerian national, who had resided lawfully in the UK from 1990 to 2005, was refused admission to the UK in 2006 on grounds of public security. For reasons given in open and closed judgments, the Special Immigration Appeals Commission dismissed his appeal against that decision. The Court of Appeal acknowledged that Article 6 of the ECHR provided the appellant with no procedural rights in the case as decisions on the entry of aliens do not constitute a determination of civil rights or obligations or a criminal charge under that provision. On whether any procedural protections could be derived from EU law, the Court of Appeal made a request for a preliminary ruling to the ECJ.

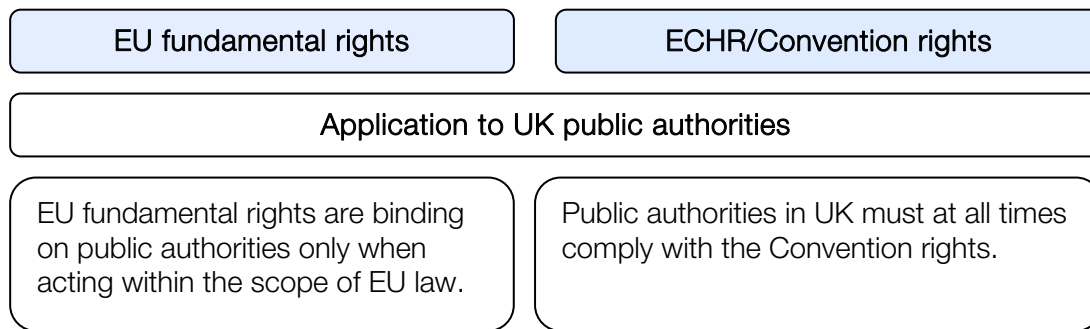
The ECJ held that EU law did confer procedural rights on the appellant. An EU Directive, read in conjunction with the right to an effective remedy in Article 47 of the Charter, required the national court to ensure that non-disclosure of grounds for restricting an EU citizen's freedom of movement and residence should be limited to that which is strictly necessary, and that he is 'informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence.'

4.29. Article 14 of the ECHR only allows individuals to claim that they have suffered discrimination in their enjoyment of another ECHR right, but under EU law, an individual can claim discrimination in respect of any aspect of their life. JUSTICE considered this to be the most significant instance of fundamental rights affording wider protection than the ECHR. It is clear from the explanation to Article 21 of the Charter, however, that the right to non-discrimination in EU law is not based exclusively on the ECHR.<sup>123</sup>

4.30. However, it is important to bear in mind that in contrast to Convention rights which apply to all actions of UK public authorities, EU fundamental rights only apply when the authority is acting within the scope of EU law.

<sup>122</sup> *ZZ v Secretary of State for the Home Department* Case C-300/11 [2013].

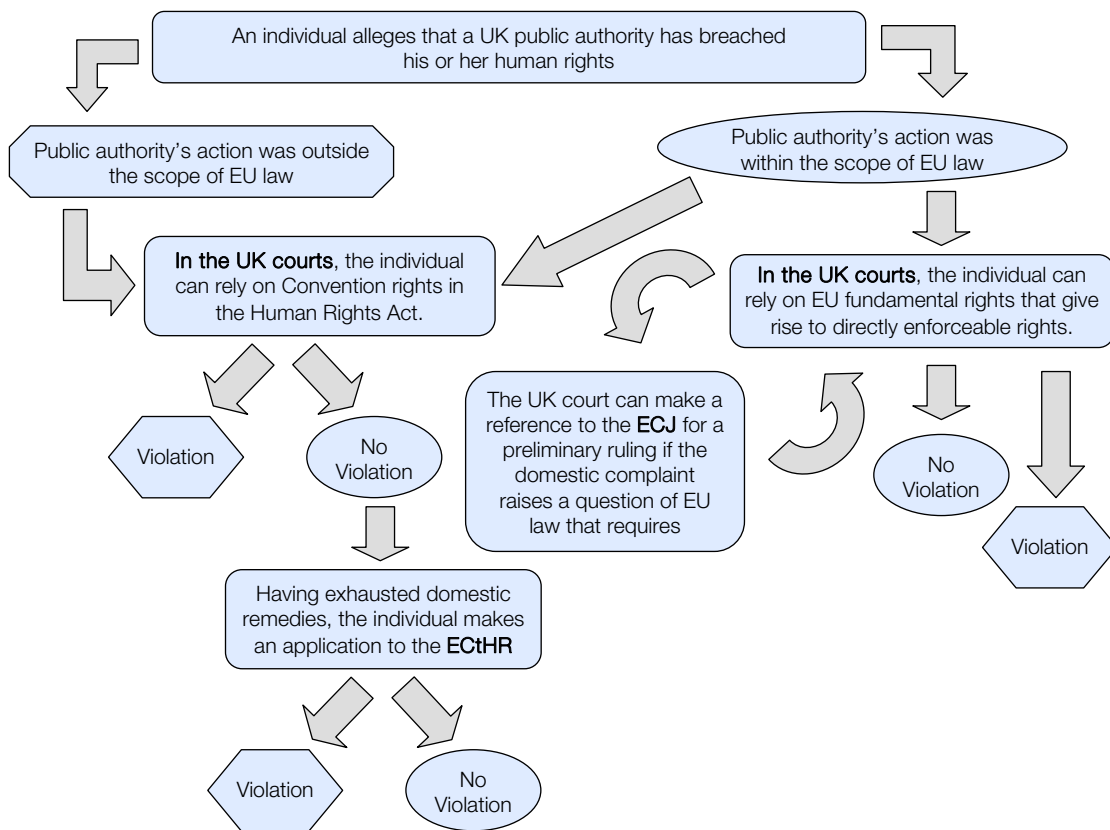
<sup>123</sup> The principal source of Article 21 of the Charter is the general principle of equal treatment.

**Figure Five: EU and ECHR/Convention Rights Compared**

- 4.31. The evidence indicated a high degree of consistency between the level of protection afforded by EU fundamental rights and that afforded by the ECHR. The Liverpool University European Law Unit and the Open Society European Policy Institute considered consistency between fundamental rights and the ECHR to be advantageous as it provides broad coherence in the UK's human rights framework.
- 4.32. While there was general support for consistency between the level of protection afforded by fundamental rights and ECHR rights, respondents said little on whether the EU or the Council of Europe should take the lead in setting human rights standards at a European level. Mr Andrew Duff MEP, in written evidence to the European Scrutiny Committee, said he was confident that the ECJ 'will soon act as a reference point for the ECtHR, setting high standards of case law in areas where the Charter goes further than the Convention'. In contrast, Protocol 15 to the ECHR, which is not yet in force but the vast majority of EU Member States have signed, refers to the need to ensure that the ECtHR 'can continue to play its pre-eminent role in protecting human rights in Europe'.<sup>124</sup>
- 4.33. Professor Eleanor Spaventa suggested that inconsistency between the levels of protection afforded by corresponding rights in EU law, the ECHR and the Human Rights Act is an inherent problem with a multi-layered system of fundamental rights protection. The Faculty of Advocates and the Freedom Association noted that although the layers overlap they can differ, thereby compromising legal certainty.
- 4.34. Policy Exchange commented that the current system of rights protection in the UK is complex and lacks clarity, making it fertile ground for litigators. The Faculty of Advocates said that the complexity of the system means that enforcing fundamental rights is frequently expensive for litigants and the public purse.

<sup>124</sup> Council of Europe, Protocol Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS No. 213, 2013.

Figure Six: Routes of Redress for Human Rights Violations



### Fundamental Rights and Convention Rights: Legal Effect in Domestic Law

4.35. As previously noted, when considering those fundamental rights that correspond to ECHR rights, the ECJ has generally followed the case law of the ECtHR. The effect is that ECtHR case law, which the UK courts only have to take into account under the Human Rights Act, can become binding in domestic law through its incorporation by the ECJ. Policy Exchange considered that the binding nature of ECJ case law means that its ‘impact on Parliamentary sovereignty is even more severe’ than the jurisprudence of the ECtHR.

4.36. Where an Act of Parliament breaches a directly effective fundamental right, national courts can disapply the offending provisions. In contrast, the Human Rights Act does not enable courts to strike down or disapply Acts of Parliament that are incompatible with Convention rights. The Equality and Human Rights Commission and the Bar Council considered this remedy to be the main advantage of fundamental rights over Convention rights from the perspective of victims.<sup>125</sup>

4.37. The relationship between the principle of supremacy of EU law and the sovereignty of Parliament is not unique to the EU’s competence on fundamental rights. Lord Phillips commented that: ‘Insofar as [the European Communities Act 1972] has had the effect that European law trumps statutes, the 1972 Act has also diminished the supremacy of

<sup>125</sup> Kieron Beal QC and Dr Tom Hickman, ‘Beano no More: The EU Charter of Rights after Lisbon’, *Judicial Review* 16(2) 113, paragraph 57 (2011); the authors identify six ‘principal, tactical advantages’ to relying on EU law to protect human rights.

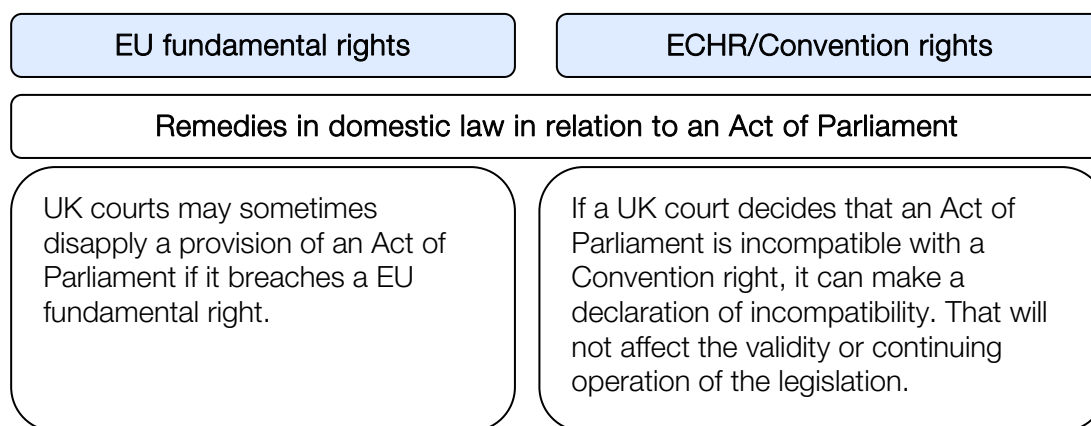


Parliament'.<sup>126</sup> However, several respondents commented on the different effect of fundamental rights and Convention rights regarding primary legislation, and referred to the case of *Benkharbouche*. While recognising that disapplying provisions of statute asserts 'no wider competence for the Union' than it already has under domestic law, Mr Justice Langstaff in *Benkharbouche* did note:

the uncomfortable recognition that the domestic legislature took care in the Human Rights Act not to allow the courts to dis-apply any domestic statute which was in conflict with the ECHR.<sup>127</sup>

(Mr Justice Langstaff)

### Figure Seven: EU and ECHR/Convention Rights Compared



4.38. The impact of Convention rights in the Human Rights Act is not the same across the whole of the UK. An Act of the Scottish Parliament 'is not law' if any of its provisions are incompatible with Convention rights.<sup>128</sup> So, if a court finds a provision of an Act of the Scottish Parliament to be incompatible with a Convention right, it will strike it down. The same principle applies to the devolution settlements in respect of Northern Ireland and Wales.<sup>129</sup> The remedies available under EU law may therefore have a more limited impact in respect of devolved legislation than an Act of Parliament – primarily because Convention rights have greater impact in respect of the devolved administrations than in relation to the UK.

## The Charter of Fundamental Rights

4.39. As explained in the previous chapter, the evidence indicated that the Charter has not altered the legal effect of fundamental rights in EU law. That is not to say however that the Charter, which aims to strengthen fundamental rights by making them more visible, has had no impact.

<sup>126</sup> Lord Phillips, 'The Art of the Possible: Statutory Interpretation and Human Rights', *The First Lord Alexander of Weedon Lecture* (2010).

<sup>127</sup> *Benkharbouche v Embassy Of The Republic Of Sudan* (Jurisdictional Points: State immunity) [2013] UKEAT 0401\_12\_0410 (4 October 2013), para 66.

<sup>128</sup> The Scotland Act 1998, Section 29(1).

<sup>129</sup> The Government of Wales Act 2006, Section 94 and the Northern Ireland Act 1998, Section 6.

## Making Fundamental Rights More Visible

- 4.40. Respondents agreed that the Charter has made the rights and principles it contains more visible. The Open Society European Policy Institute said this was the biggest change brought about by the Charter. The Scottish Government welcomed the Charter for making fundamental rights explicit in the fabric of the EU. The AIRE Centre and the Bar Council of England and Wales considered that the rights in the Charter are far easier to locate and understand than the general principles of EU law they reaffirm.
- 4.41. The House of Lords European Union Committee considered that while it was somewhat anomalous to give legal effect to the Charter as it codifies existing rights, doing so ‘will send a clear message to all institutions and citizens within the Union about the EU’s commitment to uphold the rights set out in the Charter’.<sup>130</sup>
- 4.42. Dr Tobias Lock commented that the Charter may encourage lawyers to rely on fundamental rights by making more tangible what had ‘previously been only recognised as an unwritten, and thus somewhat contourless, general principle’. Similarly, the Bar Council of England and Wales thought that the courts might be more confident in applying fundamental rights now that they appear in a single document.
- 4.43. The preamble to the Charter acknowledges that by increasing the visibility of rights, it seeks to strengthen their protection in the light of changes in society, social progress and scientific and technological developments. David Anderson QC, in his response to the Call for Evidence, said that some of the more obscure rights might have greater prominence because of their inclusion in the Charter. The Liberal Democrat Home Affairs, Justice and Equalities Parliamentary Party Committee (PPC) welcomed the inclusion of ‘modern’ rights, such as guarantees on bio-ethics. The British Association of Social Workers welcomed the inclusion of principles in the Charter, as it considered that the promotion of human rights should extend beyond those which are legally enforceable.

## Legal Certainty of the Charter

- 4.44. While respondents widely agreed that the rights in the Charter are clear in the sense of being accessible, there was contrasting evidence on whether they provide legal certainty. Professor Eleanor Spaventa and the joint evidence of the Law Society of England and Wales and the Law Society of Scotland indicated that the Charter has enhanced the legal certainty of fundamental rights in EU law.<sup>131</sup>
- 4.45. JUSTICE however commented that the Charter is not simple to use. Several respondents, particularly academics and legal practitioners but also some NGO’s, commented on the lack of clarity as to which Charter provisions reaffirm rights and which contain principles.<sup>132</sup> Martin Howe QC, at an evidence session of the European Scrutiny Committee, commented that the rewording of Charter provisions corresponding to rights in the ECHR is undesirable. Professor Rory O’Connell however considered that the updated drafting – such as expressing the right to marry in gender

<sup>130</sup> House of Lords European Union Committee, *The Treaty of Lisbon*, para 5.68.

<sup>131</sup> See also Francis G Jacobs, ‘Human Rights in the European Union; the Role of the Court of Justice’, *European Law Review*, 26(4), 331-341 (2001), p 339.

<sup>132</sup> European Scrutiny Committee, *The Application of the EU Charter*, para 156.

neutral language – was beneficial. The UK Government’s position is that, in accordance with Article 52(3) of the Charter and the Explanations, the Charter rights that correspond to guarantees in the ECHR have the same meaning as those ECHR rights.

4.46. Policy Exchange considered that ‘the wording of parts of the Charter is so vague that it provides exceptionally broad scope for judicial interpretation’. Michael Pinto-Duschinsky and Martin Howe QC echoed this in their written evidence to the European Scrutiny Committee, with the latter commenting that the result was effectively political decision-making by judges.

4.47. However, not all of the uncertainty around aspects of the obligation to respect fundamental rights derives from the Charter. In the case of *Bartsch* the Advocate General noted that ECJ’s case law on the application in proceedings between private parties of the general principle of non-discrimination on grounds of age ‘is criticised for having produced a situation of considerable legal uncertainty’.<sup>133</sup>

4.48. In written evidence to the European Scrutiny Committee, Andrew Duff MEP said that the Protocol has given rise to legal uncertainty. Similar concerns were expressed by witnesses when the House of Lords European Union Committee considered the possible effects of the Protocol.<sup>134</sup> However, some legal practitioners and academics considered that the Protocol was a helpful clarification on the application of the Charter.<sup>135</sup>

### The Charter’s Impact on the Decision Making of EU Institutions

4.49. By giving greater visibility to rights recognised in EU law, the Charter has prompted the EU institutions to adopt internal procedures to make sure that policy proposals, including legislation, comply with the Charter.

4.50. JUSTICE and the Discrimination Law Association commented that such procedures provide greater certainty that fundamental rights are respected within the EU institutions. While acknowledging that there are deficiencies in the existing internal checks, the Open Society European Policy Institute considered such procedures to be ‘clearly beneficial’ to the UK as a whole.

4.51. While it is clear from Article 6(1) of the TEU that the Charter does not give the EU any new legislative competence, Policy Exchange considered that it encourages the EU institutions, from a policy perspective, to bring forward legislative proposals that are focused on promoting and protecting fundamental rights. However, in evidence to the House of Lords European Union Committee, Dr Clemens Ladenburger of the Commission Legal Service said that he did not think the Charter would prompt EU legislation in areas where it would not otherwise legislate.<sup>136</sup>

<sup>133</sup> *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* Case C- 427/06 [2008], please see *Bartsch* Case C- 427/06 [2008], Opinion of Advocate General Sharpston delivered on 22 May 2008, para 31.

<sup>134</sup> House of Lords European Union Committee, *The Treaty of Lisbon*, paras 5.91-5.111.

<sup>135</sup> *Ibid*, para 5.103(d).

<sup>136</sup> *Ibid*, para 5.61.

## Fundamental Rights Agency

- 4.52. Of the 65 respondents, 28 provided evidence on the Fundamental Rights Agency. Evidence came from 10 non-governmental organisations, five legal organisations, three parliamentary and political groups, three individuals, two human rights institutions, the Scottish and Welsh Governments, a think tank, a trade union and an academic. The Fundamental Rights Agency was also discussed in all the workshops. There is little literature on the Fundamental Rights Agency.
- 4.53. This section also draws on published literature and the findings of an external evaluation of the Agency published in 2012.
- 4.54. The evidence received related to the need for the Agency and its work, as well as whether it duplicates the work of others. Evidence also commented on the projects the Agency undertakes, the quality of its work and whether it represents value for money. Although respondents broadly supported the existence of a data collection body, a key theme was a general lack of awareness of the Agency and its reports.

### The Role of the Fundamental Rights Agency

- 4.55. The 28 respondents who provided evidence on the Agency raised a wide range of issues around its role. A workshop participant commented that the Agency provides a useful strategic overview of fundamental rights across the EU, with an ability to step back and view the situation as a whole. This was supported by JUSTICE in its written evidence. Morten Kjaerum, Director of the Fundamental Rights Agency, stated that '[its] mere existence reflects the ever increasing importance of fundamental rights to the EU'.<sup>137</sup>
- 4.56. The AIRE Centre and the Liberal Democrats Home Affairs, Justice and Equalities PPC considered that the Agency's data has resulted in greater transparency of human rights issues within EU Member States. The Liberal Democrats Home Affairs, Justice and Equalities PPC stated that the use of a variety of actions by the Agency has:
- [enabled it to pinpoint where fundamental rights violations occur, through its establishment of a reliable, systematic and sizeable pool of data, as well as co-ordinating with civil society to raise awareness about fundamental rights so as to promote monitoring of compliance by ordinary citizens in a proactive manner.](#)
- (The Liberal Democrats, Home Affairs, Justice and Equality PPC)
- 4.57. The AIRE Centre also stated that the Agency's work in ensuring that EU legislation is drafted compatibly with fundamental rights results in fewer cases being taken to the ECJ on fundamental rights grounds.
- 4.58. The Scottish Government stated that the Agency had 'enhanced the understanding of fundamental rights across Europe'. The Equality and Diversity Forum and MIND noted its role in providing a pool of data that is used by NGOs. Of those NGOs that provided evidence on this topic, a small number noted a general lack of data on fundamental rights and supported the work of the Agency on the basis that no other organisation was undertaking the task. The Open Society European Policy Institute stated that the

<sup>137</sup> M. Kjaerum, 'Right Thinking', *European Lawyer*, 88, 4-5 (2009).

establishment of an EU agency was an efficient way to collect and analyse comparative data on fundamental rights.

- 4.59. The external evaluation of the Agency concluded that it fulfils its mandate to a ‘high extent’.<sup>138</sup> The evaluation made a ‘clearly favourable assessment in terms of the Agency’s ability to effectively help institutions, bodies, offices and agencies of the Union to ensure full respect of fundamental rights in the framework of the Union law, where survey, interviews and cases strongly supported that the Agency has been successful in meeting the needs of EU level stakeholders. The findings are less positive concerning the results at the national level’.
- 4.60. Evidence was also received on the Agency’s priorities; what the Agency chooses to do within its thematic areas. Respondents representing gypsy, traveller and Roma communities supported the Agency’s work in relation to these groups.<sup>139</sup> More broadly, the Scottish Government was content that the Agency’s current focus links ‘to the Scottish Government’s commitment to the principles of equality, fairness and social justice’. However, the Scottish Government did suggest more dialogue to maximise its effectiveness and to make sure the Agency’s work properly reflects the priorities of the EU and the Member States. One workshop participant suggested that there is a gap in terms of data relating to Scotland.
- 4.61. At one of the workshops, attendees queried how the Agency defines its priorities and determines the projects to undertake. One attendee considered that the process was unclear, unstructured, lacked transparency and provided the management board with little flexibility. Another noted that it was difficult to predict what research would be needed since projects can take a year or two to run and reach conclusions.
- 4.62. The Equalities and Human Rights Commission noted that once a list of projects has been agreed, the Agency should establish ‘some form of research steering group [...] [to] allow countries to discuss the design and implementation of research at an early stage’.
- 4.63. Other commentators in the literature identified the Agency as having a monitoring role.<sup>140</sup>

### The Outputs of the Fundamental Rights Agency

- 4.64. A few respondents gave examples of how they had used the Agency’s data. A small number of NGOs attending the workshops had used the data in litigation or, for example, to support submissions to UN bodies concerning the UK’s compliance with UN human rights instruments. A workshop attendee indicated that the information in the Agency’s reports had influenced its practices on issues such as Roma integration and violence against people with disabilities.

<sup>138</sup> Ramboll, *External Evaluation of the European Union Agency for Fundamental Rights* (2012).

<sup>139</sup> Community Law Partnership, Garden Court Chambers, Romani, Gypsy and Traveller Team, Traveller Movement, *submission of evidence*.

<sup>140</sup> Bal Sokhi-Bullye, ‘The Fundamental Rights Agency of the European Union: A New Panopticism’, *Human Rights Law Review*, 11(4), 683-706 (2011).

4.65. Of those organisations which provided evidence concerning the Fundamental Rights Agency, there was general consensus that the Agency's outputs were accurate, of a high quality and the product of rigorous processes. However, concern was expressed over accessibility. One attendee noted that larger reports were not as accessible for smaller organisations, while another stated that there was room for greater openness by making the data in the reports available in appropriate formats.

### Value for Money

4.66. Only a small number of NGOs provided evidence as to whether the Fundamental Rights Agency represented value for money. One NGO considered that the Agency's budget was justified since the type of work being undertaken – large research surveys – was inherently expensive, while another thought that a large part of the budget was actually spent on translation costs. Another NGO pointed to the competitive tendering process for all the Agency's research project contracts as evidence of the Agency's clear accounting processes.

4.67. However, a workshop attendee questioned whether the Agency represents value for money since it requires each Member State to provide the Agency with what that attendee considered to be a disproportionate amount of data compared to the impact of the output. Concern about the Agency's value for money was echoed by Christopher Chope MP in the House of Commons who stated that 'a lot of [the Agency's] budget is being wasted'.<sup>141</sup>

4.68. The external evaluation of the agency asked a number of questions concerning the efficiency of the Agency in terms of the extent to which it has conducted its activities and achieved its objectives at a reasonable cost in terms of financial and human resources and administrative arrangements. The review findings indicated a positive development in the Agency's internal operations, organisation and working practices. However, it also exposed that: 'Overall, mechanisms for monitoring, reporting and evaluating the Agency's work have been lacking since the establishment of the Agency'.

### Working with the Fundamental Rights Agency

4.69. A mixed picture emerged from the small number of NGOs that commented on how the Agency works with their sector. For larger organisations that have worked with the Agency on specific projects, the process was considered to be consultative and collaborative. However, the requirements in order to secure contracts with the Agency were considered to be too onerous for small organisations. Some of those who attended the workshops felt that the Agency was not accessible for smaller grass roots organisations and did not reflect the concerns of these bodies.

4.70. This mixed experience is reflected in the conclusions of the external evaluation of the Agency. It indicates positive results in the Agency's engagement with non-governmental organisations and institutions of civil society but 'that local level organisations are less aware and benefit to a lesser extent from the FRA's cooperation and coordination activities than organisations at the EU and national levels'.<sup>142</sup>

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<sup>141</sup> HC Deb, 4 February 2013, Column C-71.

<sup>142</sup> Ramboll, *External Evaluation of the European Union Agency for Fundamental Rights*.

4.71. The Agency has set up the Fundamental Rights Platform as a mechanism for communicating and working with civil sector organisations. Two NGOs put forward opposing views on the worth of the platform. JUSTICE stated that the platform was useful in disseminating information about the Agency's projects, but another NGO said in a workshop that the events run for members of the Platform did not represent value for money and were not useful. The Northern Ireland Human Rights Commission called for greater cooperation between the Agency and National Human Rights Institutions.

### The Fundamental Rights Platform

The Fundamental Rights Platform (FRP) is a network of civil society organisations.

Members of the FRP:

- Obtain information about Agency's work
- Provide feedback and suggestions for the Agency's annual work programme and annual report
- Participate as stakeholders at different stages of the Agency's thematic projects
- Take part in the annual FRP meetings, which discuss issues of mutual concern and are also opportunities to share knowledge and become acquainted
- Regularly exchange information in the e-FRP, an online communication platform
- Elect an advisory panel that assists the Agency's director in coordinating FRP activities

### Duplication with the Council of Europe

4.72. One of the concerns raised when the Agency was established was the potential for duplication with the work of the Council of Europe. This concern was shared by the UK which considered that the Council of Europe should remain the primary reference point for human rights in Europe. It was in light of these concerns that the Cooperation Agreement between the Agency and the Council of Europe was agreed.<sup>143</sup> The agreement includes practical steps such as regular liaison and information sharing meetings between the two organisations, and a Council of Europe representative sitting on the Agency's management board.

4.73. While the issue of potential duplication was not discussed to any great degree in the written evidence or at the workshops, it has been considered by both the House of Lords and the Council of Europe.

4.74. In October 2013, the House of Lords European Union Committee (Sub-committee E) conducted an evidence session on the subject of duplication between the Fundamental Rights Agency and the Council of Europe.

<sup>143</sup> European Community and Council of Europe, Agreement between the *European Community* and the *Council of Europe on Co-operation Between the European Union Agency for Fundamental Rights and the Council of Europe* (2008).

- 4.75. In evidence to the Committee, the Director of the Fundamental Rights Agency stated that there was a very high level of cooperation between the Agency and the Council of Europe, as noted by the external evaluation. He provided details of where the Agency's work had been used by the Council of Europe.<sup>144</sup> The Director also noted 'the distinct mandates' of the two organisations and that 'there is plenty for us all to do'.<sup>145</sup>
- 4.76. The Committee of Ministers of the Council of Europe – which consists of Ministers from the members of the Council of Europe expressed the view that cooperation between the Agency and the Council of Europe was working well. In contrast, Christopher Chope MP stated that the Agency has 'usurp[ed] the Council of Europe and duplicate[s] its work'.<sup>146</sup>

### Awareness of the Fundamental Rights Agency

- 4.77. One of the key themes that emerged from the evidence on the Fundamental Rights Agency was a lack of awareness of its work. Regardless of their views on its work and the quality of its research, the majority of those who contributed evidence on the Agency raised concerns over its visibility and the lack of awareness of its work. For example, a legal organisation noted at a workshop that the impact of the Agency's work was low, and that this was particularly acute at Member State level. An NGO considered that there was a lack of dissemination of the Agency's work.
- 4.78. In addition, the external evaluation of the Agency identified a lack of systems to monitor the impact of its work and less positive results in respect of the Agency's assistance and expertise to Member States, both in relation to the content of the research and its accessibility. There are very few examples of the UK Government using the data from the Agency to support policy development.

### Funding Programmes

- 4.79. Evidence on funding programmes was received from 12 respondents, composed of five non-governmental organisations, two legal organisations, two political or parliamentary groups, the Scottish Government, a trade union and an academic. There was very little literature available on the funding programmes but it was an issue discussed in all the workshops.
- 4.80. Of those respondents which provided evidence on this aspect a few made reference to particular projects which had been funded under the Fundamental Rights and Citizenship funding programme. A prominent theme concerned the onerous nature of the application process and the administrative demands of the programme.
- 4.81. The Fundamental Rights and Citizenship funding programme was considered beneficial by the London Criminal Courts Solicitors Association (LCCSA). The LCCSA referred to funding awarded to Fair Trials International as an important resource for UK citizens

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<sup>144</sup> The Fundamental Rights Agency's 2008-09 survey on Lesbian, Gay, Bisexual and Transsexual legislation was provided to the Council of Europe which subsequently replicated the research in non-EU Member States of the Council of Europe.

<sup>145</sup> House of Lords, Unrevised transcript of evidence taken before the Select Committee on the European Union Justice, Institutions and Consumer Protection (Sub-committee E), 30 October 2013 (2013).

<sup>146</sup> HC Deb, 4 February 2013, Column C-71.



arrested abroad. The Scottish Government stated that a project by the organisation LGBT Youth Scotland had received funding for an information exchange with other Member States which would not otherwise have been undertaken. Commenting on the programme as a whole, the Law Society for England and Wales and the Law Society for Scotland stated that ‘the promotion of awareness of these rights opens up opportunities as people are more confident in considering cross border trade, moving from one country to another and in investing in other countries’. The Open Society European Policy Institute considered there to be benefit in a programme assisting NGOs to network across the EU to share the concerns of the groups they represented. The Liberal Democrat Home Affairs, Justice and Equalities PPC stated that the programme offered ‘distinct advantages for the UK and its citizens’ as it provided ‘UK-based organisations the financial resources necessary to tackle pressing fundamental rights issues within the UK and better protects the fundamental rights of individuals throughout all levels of UK society’. Unite expressed support for the programme’s contribution to the promotion of education about rights.

- 4.82. The European Commission conducted a review of the programme in 2011 and noted a growing interest in funding opportunities, an increasing visibility of projects funded by the programme and the addition of well-known and respected international organisations as its direct beneficiaries.<sup>147</sup> The Commission concluded that these were strong indicators of the relevance and added value of the programme. However, it also stated that the use of the outputs of implemented activities to support policy development could be improved. It noted that no formal mechanisms were in place to make sure that the outputs of the projects were directly communicated to policy makers in the EU institutions or to other stakeholders involved in policymaking. It also noted that the dissemination of information from the projects takes place in a rather ad hoc and informal way.
- 4.83. Some NGOs at workshops and the Scottish Government raised concerns about the administration of the programme. This mainly concerned the need for match funding and the administrative requirements to apply for funding. One NGO stated that the requirement for 30% match funding made accessing funds difficult, particularly for smaller organisations. This weighting towards larger organisations led some NGOs at workshops to argue that the funding programme can have a negative effect by focusing on larger projects at the expense of grass roots action. Three NGOs and the Scottish Government also expressed concerns about the overly complicated application process.
- 4.84. One NGO at a workshop expressed the view that there was little monitoring of how the funding was spent and there was a danger that it could be used in an overly political way, providing funding in the run up to elections to bodies with particular views, thereby influencing elections.

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<sup>147</sup> European Commission, *Report from the Commission to the European Parliament and the Council Report on the interim evaluation of the Fundamental Rights and Citizenship Programme 2007 – 2013* (2011).

## Summary

- 4.85. It was generally recognised by respondents that when the EU acts, or mandates the Member States to act, it should do so in a manner that is compatible with existing national and international human rights protections applicable to Member States.
- 4.86. Some expressed concern however that the ECJ's approach to balancing competing interests when considering fundamental rights has undermined national sovereignty and the democratic competence of the EU's legislative institutions. Not all agreed. NGOs and academics, as well as some legal practitioners, considered that the ECJ has simply ensured the protection of fundamental rights, and indeed some considered that it has done so in a relatively restrained way.
- 4.87. Fundamental rights have had a relatively limited impact in the UK beyond existing human rights protections. The domestic courts engage in a rigorous assessment of whether fundamental rights are applicable to a given situation, and principally apply the law from which fundamental rights derive. In particular, the evidence revealed no instances where the domestic courts have interpreted fundamental rights to provide a greater standard of protection than corresponding guarantees in the ECHR. However, the evidence acknowledged that, in comparison to Convention rights, fundamental rights can have a wider scope of application and can result in the disapplication of primary legislation. Some legal practitioners and think tanks considered that the resulting impact of fundamental rights on parliamentary sovereignty is even more significant than the ECHR.
- 4.88. It was generally recognised in the evidence that the Charter has made fundamental rights more visible and some welcomed this as the rights are now more accessible in the EU legal order. However, there was contrasting evidence as to the clarity of the Charter.
- 4.89. The majority of the evidence received on the Fundamental Rights Agency supported its existence on the basis that there is a need for the work it does. However, there was also a general view that there was a lack of awareness of the Agency and of the data it produces. While only a few respondents referred to the funding programme, their comments showed support for a funding stream for projects in this area, but identified problems with the process for accessing funding.



# Chapter 5. Future Options and Challenges

5.1. This chapter considers the future of EU fundamental rights. It looks first at the implications of the EU's commitment to become a party to the EHCR, then at suggestions for possible future fundamental rights developments in relation to the Charter and the Fundamental Rights Agency.

## Accession of the EU to the European Convention on Human Rights

5.2. Article 6(2) of the TEU requires the EU to accede (become a party) to the ECHR. Protocol 8 to the EU Treaties specifies that the accession of the EU to the ECHR will not affect the competences of the EU, the powers of its institutions, or the situation of the EU Member States in relation to the ECHR.

5.3. In June 2013 the Council of the European Union agreed conclusions underlining the commitment of Member States to take the accession process forward on the basis that it will 'further enhance coherence in human rights protection in Europe, increase judicial dialogue and improve the consistency of case law'.<sup>148</sup> However, the conclusions acknowledged that politically and procedurally there is still some way to go.

5.4. The precise terms of the EU's accession to the ECHR are currently under negotiation. The EU and the Council of Europe agreed a draft accession agreement text in April 2013.<sup>149</sup> The ECJ is currently considering the compatibility of the draft accession agreement with the EU Treaties, following which it will be subject to further scrutiny within the EU, the Council of Europe and their respective member states. The European Commission has yet to present a legislative proposal setting out how the post-accession arrangements between Member States and the EU institutions will work at an EU level. The internal EU rules are likely to be complex to make certain that both the Treaty limits on accession are respected and the arrangements work in practice.

5.5. The EU's accession to the ECHR will ultimately require the agreement of all EU Member States. The UK Government's position is that before such an agreement can be reached, it is essential to be clear on the consequences of accession, including the domestic implications.

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<sup>148</sup> Council of European Union, *Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union* (2013). The Council reiterated this and underlined that the EU's accession to the ECHR will 'further contribute to consistency in human rights' protection in Europe as a whole' in: Council conclusions on 'the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union' (2014).

<sup>149</sup> Council of Europe Steering Committee for Human Rights (CDDH), *Interim report to the Committee of Ministers on the negotiations on the accession of the European Union to the European Convention on Human Rights* (2013). The draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms modifies the ECHR to reflect that the EU will be a non-state party to the ECHR with a separate legal order.

- 5.6. Currently, the ECtHR has no power to review the actions of the EU institutions. As a result, individuals and organisations are without a direct legal remedy against the actions of EU institutions in the ECtHR. For example, the ECtHR has refused an application against EU Member States which was in reality challenging a decision of the ECJ in a labour dispute that was entirely internal to the EU institutions. There was no act or omission by any of the Member States for which they were responsible under the ECHR ('the Connolly gap').<sup>150</sup> Following accession, individuals and non-governmental organisations will be able to bring a case directly against the EU in the ECtHR, as they can now against individual EU Member States.
- 5.7. In addition, there is currently a presumption that a Member State has acted compatibly with the ECHR where it takes action to comply with an EU obligation, and has no discretion in doing so, on the basis that the protection afforded by EU fundamental rights is in principle equivalent to that of the ECHR ('the Bosphorus presumption').<sup>151</sup> However, if the presumption is rebutted and the ECtHR finds a violation of the ECHR, the Member State concerned may be held responsible.<sup>152</sup> Following the EU's accession to the ECHR, the ECtHR will be able to hold the EU directly responsible if EU law breaches the ECHR.
- 5.8. There has been some speculation about the impact of accession on the Bosphorus presumption. The consensus amongst commentators is that it is unlikely to be needed once the ECtHR can directly adjudicate on the EU's compliance with the ECHR. The Liberal Democrat Home Affairs, Justice and Equalities PPC stated that its removal would be 'advantageous to Government, citizens and businesses alike as it makes the EU structures more accountable and transparent'.
- 5.9. As noted by JUSTICE, the detailed implications of accession are not yet clear. However, most of the evidence received surmised that it is likely to be of general benefit to individuals and businesses by plugging the Connolly gap (in other words, giving individuals a legal remedy against the EU for breaching the ECHR where there is no act or omission that can be imputed to a Member State).<sup>153</sup> Open Society European Policy Institute, Dr Tobias Lock and the Liberal Democrat Home Affairs, Justice and Equalities PPC suggested that the main impact of accession is therefore likely to be on the EU itself since it will become susceptible to challenge in the ECtHR, closing what is perceived to be a gap in legal protection. The effect of that remains to be seen, but one commentator suggested that the EU's accession to the ECHR could result in the EU

<sup>150</sup> *Connolly v 15 Member States*, App. No. 73274/01, decision of 9 December 2008.

<sup>151</sup> *Bosphorus v Ireland*, App. No. 45036/98, (2006) 42 EHRR 1; the presumption is however rebuttable, see *Michaud v France*, App. No. 12323/11. Please See also Cedric Ryngaert, 'Oscillating between embracing and avoiding *Bosphorus*: The European Court of Human Rights on Member State responsibility for acts of international organisations and the case of the European Union', *European Law Review* 39 176-192 (2014); and Alicia Hinarejos Parga, '*Bosphorus v Ireland* and the protection of fundamental rights in Europe', *European Law Review* 31 (2) 251-259 (2006).

<sup>152</sup> By way of contrast, a Member State can be held responsible by the ECtHR for a violation of the ECHR resulting from a decision to sign up to an EU Treaty obligation contrary to a pre-existing ECHR obligation, see *Matthews v UK* App. No. 24833/94, (1999) 28 EHRR 361.

<sup>153</sup> The British Association of Social Workers; the Discrimination Law Association; Dr Tobias Lock; the Law Society and Law Society of Scotland; Liberal Democrat Home Affairs, Justice and Equalities PPC; Open Society European Policy Institute; UNITE; and the AIRE Centre *submission of evidence*.

taking a more 'proactive approach to fundamental rights'.<sup>154</sup> This is echoed by Dr Tobias Lock who suggested that – mindful of the potential for review by the ECtHR – the ECJ could become 'more vigilant in the enforcement of [fundamental] rights', although Nuala Mole notes that '[a] small but growing jurisprudence is [already] starting to emerge where the same issue is coming before both European Courts'.<sup>155</sup>

- 5.10. Considering the likely impact of accession in the UK, Dr Lock described it as 'limited and indirect' in respect of individuals and business because it will not provide new remedies that are enforceable within the UK.
- 5.11. The Equality and Diversity Forum, Liverpool University European Law Unit and one individual respondent suggested that the EU's accession to the ECHR will improve coherence between the ECJ and the ECtHR, whilst Kieron Beal and Tom Hickman have commented that the ECtHR's competence 'to review acts of the EU institutions [...] will undoubtedly give rise to the difficult question of judicial supremacy'.<sup>156</sup> The Law Society of England and Wales and the Law Society of Scotland added that it will assist in ensuring 'that human rights are treated in a consistent manner not only by Member States but also at a supranational level'.<sup>157</sup> However, Policy Exchange and the Freedom Association did not support accession; their reasons were that it is complex, is likely to add delays to litigation and further entangles the UK within the ECHR system. Policy Exchange urged the Government not to agree to accession 'until the outstanding issues relating to the supremacy of the UK Supreme Court over matters relating to the EU Charter and the equally important matter of a UK democratic override of decisions by the Strasbourg Court have been resolved'. The Freedom Association added that accession will 'commensurately harm the interests of individuals in the UK'.
- 5.12. The literature also presented a mixed picture of the likely impact of accession. For example Jorg Polakiewicz, Head of the Human Rights Policy and Development Department at the Council of Europe, commented that accession represents significant progress towards a stronger, more legally certain and more coherent system of human rights protections across Europe.<sup>158</sup> Christina Eckes commented that accession will make little difference in practice given the provisions in the Charter that assimilate ECHR case law and the mutual deference demonstrated by the ECJ and ECtHR to date.<sup>159</sup> Adam Weiss wrote that although we can predict the

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<sup>154</sup> Please also see: Toggenburg, 'The Role of the New EU Fundamental Rights Agency'.

<sup>155</sup> Nuala Mole, 'The Complex and Evolving Relationship between the European Union and the European Convention on Human Rights', *European Human Rights Law Review*, 4 363-268 (2014).

<sup>156</sup> Kieron Beal QC and Dr Tom Hickman, 'Beano no More: The EU Charter of Rights after Lisbon', *Judicial Review* 2011 16(2) 113-141.

<sup>157</sup> Please also see: Koen Lenaerts and Eddy De Smijter, 'The Charter and the role of the European courts,' *Maastricht Journal of European and Comparative Law*, 8 (1), 90-101 (2001), which states that the main reason for the EU to accede to the ECHR is 'to enhance the uniform protection of fundamental rights in the EU'.

<sup>158</sup> Jorg Polakiewicz, 'EU Law and the ECHR: will the European Union's Accession Square the Circle?', *European Human Rights Law Review*, 6 592-605 (2013).

<sup>159</sup> Christina Eckes, 'EU Accession to the ECHR: between Autonomy and Adaptation', *Modern Law Review*, 76(2) 254-285 (2013). Please also see: Johan Callewaert, 'The European Convention on Human Rights and European Union Law: a Long Way to Harmony', *European Human Rights Law Review*, 6 768-783 (2009).

types of cases that are likely to be affected by accession, only time will tell what real benefit it will bring to the people of Europe.<sup>160</sup>

- 5.13. Professor Paul Craig foresaw practical and legal challenges.<sup>161</sup> He anticipated that the prior consideration of cases by the ECJ and the backlog of cases before the ECtHR are likely to result in delays. He also anticipated challenges in resolving the relationship between Charter rights and ECHR rights in a number of respects, including in respect of the future role of the ECJ in evolving jurisprudence on the ECHR.
- 5.14. The AIRE Centre and the Taxpayers Alliance considered the implications of accession should the UK in the future withdraw from the ECHR. The AIRE Centre said that accession would strengthen the protection of ECHR rights in the UK. They added that ‘the interconnected nature of fundamental rights protection in Europe makes it difficult to imagine the UK genuinely having the option to go against the tide of expanding the applicability of the ECHR and to reverse its domestic protection of fundamental rights’. The Taxpayers Alliance commented that given that the Treaties provide that the EU will accede to the ECHR ‘[i]t is hard to see how any Member State or member of the Commission could argue that the United Kingdom would, merely by the act of withdrawing from the ECHR, be in breach of its obligations regarding civic and personal rights, whichever option it took to allow them to flourish in the future’.
- 5.15. The question of whether accession would limit any future review of the UK’s relationship with the ECHR has been echoed by Joshua Rozenberg: ‘But where does it leave the UK? The whole agreement is drafted on the basis that some members of the Council of Europe will be EU states and some will not. It does not provide for the possibility of a state that is a member of the EU but not the Council of Europe’.<sup>162</sup>
- 5.16. There are a range of political views on the EU’s accession to the ECHR. For example, speaking in 2010, Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, spoke about the impact of accession as follows:

From the perspective of the citizens, accession will guarantee that any person claiming to be a victim of a violation of the Convention by an institution or a body of the Union can bring a complaint against the Union before the Strasbourg Court under the same conditions as those applying to complaints brought against Member States. In political terms, accession means that the European Union reaffirms the pivotal role played by the Convention system for the protection of human rights in Europe beyond the borders of the 27 Member States [...]. In legal terms, accession will be important in three respects. First, it complements the introduction of a legally binding Charter of Fundamental Rights. Accession to the Convention will ensure that the case law of both Courts – the Court in Strasbourg and our own ‘Constitutional Court’ in Luxembourg –

<sup>160</sup> Adam Weiss, ‘EU Accession to the European Convention on Human Rights: the State of Play and the Added Value for Victims of Human Rights Violations in Europe’ *European Human Rights Law Review*, 4 391-396 (2012).

<sup>161</sup> Paul Craig, ‘EU Accession to the ECHR: Competence, Procedure and Substance’, *Fordham International Law Journal*, Volume 36, No. 1115, (2013).

<sup>162</sup> Rozenberg, Joshua, ‘EU Accession to the ECHR will Change Euro Legal Framework’, *The Law Society Gazette* (2013).

evolves in step. It is therefore an opportunity to develop a coherent system of fundamental rights protection throughout the continent, with a strong promise for a Europe truly united by law and values. Second, accession opens the way for the Strasbourg Court to attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them – albeit implicitly – to 27 Member States collectively [...] Third, the Union will have at its disposal all rights that the Convention gives to the Contracting Parties to defend the human rights conformity of its acts before the Strasbourg Court.<sup>163</sup>

(Vivian Reding Vice-President of the European Commission)

- 5.17. In contrast, John Bufton of the UK Independence Party has expressed the view that: ‘EU accession to the ECHR would result in a tighter net forming around UK membership to the Convention creating a Gordian knot from which Britain would struggle to be freed. It is also likely to allow Brussels to intrude upon ongoing disagreements between the UK and the ECHR’.<sup>164</sup>
- 5.18. Giving evidence on accession to Parliament on behalf of the Government, the then Lord Chancellor and Secretary of State for Justice, the Rt Hon Kenneth Clarke QC MP, stated that: ‘The point of all this is to make the EU and its institutions subject directly to the European Convention on Human Rights, and have complaints against the EU and its institutions subject to that jurisdiction in the same way as Member States [...] why should a Member State have one of its citizens take it to the Court when actually the argument is about what has been done by some European Union institution – the Commission or one of the other agencies of the European Union?’<sup>165</sup>

## The Charter of Fundamental Rights

- 5.19. Whilst reliance on the Charter in the UK courts is increasing, it is less frequently cited than the ECHR and many commentators noted a lack of familiarity with the Charter amongst legal practitioners. JUSTICE stated that ‘ensuring that individuals and practitioners in the UK are familiar with EU fundamental rights law is the key challenge and opportunity that we see for the immediate future’. As the evidence has shown, the effect of a number of provisions in the Charter and the Protocol has yet to be settled by the courts. The Government will continue to monitor both ECJ and domestic proceedings in this field, and will intervene in cases where appropriate.
- 5.20. The European Commission has suggested broadening the application of the Charter so that it is directly applicable to Member States in all circumstances.<sup>166</sup> This suggestion was welcomed by the European Parliament and echoed by Viviane Reding on the publication of the Commission’s 2013 report on the application of the Charter.<sup>167</sup> As

<sup>163</sup> European Parliament - Committee on Constitutional Affairs, Hearing on the institutional aspects of the EU’s accession to the *ECHR* (2010).

<sup>164</sup> John Bufton MEP, website of John Bufton *MEP (Wales), UK Independence Party* (n.d.). Available at: [www.johnbufton.info/issues1/statement-on-eu-accession-to-echr/](http://www.johnbufton.info/issues1/statement-on-eu-accession-to-echr/), accessed on 4 October 2013.

<sup>165</sup> European Scrutiny Committee, *EU Accession to the EU Charter of Fundamental Rights*, Oral and Written evidence (HC 2010-12 1492-i).

<sup>166</sup> European Commission, *Assises de la Justice Discussion Paper 5: Fundamental Rights* (2013). This proposal was not supported by respondents to the discussion paper.

<sup>167</sup> Committee on Civil Liberties, Justice and Home Affairs, *Report on the Situation of Fundamental Rights in the European Parliament* (2012); European Commission, *2013 Report on the Application of the EU Charter of Fundamental Rights*.



noted by Tobias Lock, this would require Treaty change with the agreement of all Member States, including the UK. In addition, to extend the Charter beyond the scope of EU law would constitute a significant extension of the scope of application of fundamental rights and, as the Scottish Government noted, ‘would significantly expand the competence of the EU in relation to domestic law. Although it remains to be seen how far a new EU Justice and Home Affairs Commissioner might want to take this forward following appointment in late 2014, the Government does not support Treaty change to expand the EU’s competence on fundamental rights beyond the scope of EU law. The Government therefore agrees with Lord Mance’s prediction that there is no prospect of this happening in the near future.’<sup>168</sup>

5.21. Some contributors to the Commission’s Assises de la Justice consultation suggested that future initiatives could include an internal EU human rights strategy, although the direction of any such initiative remains to be seen.<sup>169</sup>

5.22. Whilst the majority of respondents to this review recognised that fundamental rights provide a check on EU action, some suggested that the UK has a complex human rights landscape that could benefit from being rationalised. Some respondents put forward ideas on how the application of EU fundamental rights, and specifically the Charter, could be restricted in the UK. Anthony Speaight QC suggested ‘some form of new Charter of Democratic Values, by which the [ECJ’s] role would be circumscribed in the application of the Charter’. Martin Howe QC, in his evidence to the House of Commons European Scrutiny Committee, stated that:

The UK could request that the Charter cease to apply in respect of the UK at all. However, and even making the assumption that other Member States would agree to this course, it would probably be necessary also to adopt flanking measures to prevent its indirect application via judicial doctrines such as that of general principles which are common to the Member States.

(Martin Howe QC)

5.23. The Government notes that the Charter was simply intended to bring together pre-existing rights and principles in EU law. To disapply the Charter without also changing the way that fundamental rights apply as general principles of EU law would leave the EU’s fundamental rights competence unchanged.

5.24. The House of Commons European Scrutiny Committee has considered the possibility of introducing primary legislation to disapply ‘the Charter and the pre-existing fundamental rights altogether’ in UK law’.<sup>170</sup> The Government’s position is that as long as the UK is a member of the EU, it has a duty to implement all EU law that applies to it.

<sup>168</sup> Lord Mance, ‘Destruction or Metamorphosis of the Legal Order?’, *Speech to World Policy Conference Monaco* (2013)

<sup>169</sup> Calls for an internal EU human rights strategy came from the following respondents to the European Commission *Assises de la Justice Discussion Paper 5: Fundamental Rights* (2013): Human Rights and Democracy Network, Amnesty International European Institutions office (representing the views of 47 human rights NGOs) ILGA-Europe and Open Society European Policy Institute. The Council noted the potential future possibility of an internal EU fundamental rights strategy in the fundamental rights conclusions adopted on 6 June 2014.

<sup>170</sup> European Scrutiny Committee, House of Commons European Scrutiny Committee, *The Application of the EU Charter*, paras 107-108.

Setting aside fundamental rights would amount to a failure to give full effect to EU primary law and would therefore constitute a breach of the UK's treaty obligations.

5.25. In respect of the suggestion to rationalise the UK's human rights landscape, the Commission on a Bill of Rights cautioned in 2012 that the time was not right to proceed with a UK Bill of Rights or changes to the current legislative framework for human rights.<sup>171</sup> This was largely because of the way the UK's human rights framework is tied into the devolution settlements and the forthcoming referendum in Scotland. The UK Government agrees with this conclusion.

## Fundamental Rights Agency

5.26. Following the external review of the Fundamental Rights Agency, the Agency's management board recommended an extension to the Agency's remit to include police and judicial cooperation in criminal matters.<sup>172</sup> The management board also recommended additional powers to allow the Agency to deliver opinions on proposals for EU legislation on its own initiative and set its own multiannual framework, as well as removing the requirement for unanimity when the Council of the European Union requests an opinion from the Agency.

5.27. The European Parliament has expressed support for an extension to the Agency's remit and this was mentioned by a small number of respondents and commentators. The AIRE Centre considered that the inability of the Agency to work in the area of police and judicial cooperation left 'a vacuum in its monitoring of a very important area which can be susceptible to human rights violations'. JUSTICE also expressed support for extending the Agency's remit to include police and judicial cooperation in criminal matters. The Open Society European Policy Institute stated that 'given increasing EU legislation in this area, such as the European Arrest Warrant and the legislative package on the rights of suspects in criminal proceedings, data from [the Agency] on this policy area would be particularly valuable to inform policy makers'.<sup>173</sup>

5.28. In its Assises de la Justice discussion paper on fundamental rights, the European Commission supported extending the Agency's remit to work in the area of police and criminal judicial cooperation.<sup>174</sup> Noting that this would require the agreement of all Member States, the Commission suggested that the process for amending the Agency's establishing Regulation to extend its remit could be changed from requiring unanimous agreement to a qualified majority of the Council. The European Parliament

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<sup>171</sup> Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (December 2012).

<sup>172</sup> Fundamental Rights Management Board, Letter to the European Commission Vice-President (2013). Available at: [www.fra.europa.eu/sites/default/files/fra-management-board-recommendations-external-evaluation\\_0.pdf](http://www.fra.europa.eu/sites/default/files/fra-management-board-recommendations-external-evaluation_0.pdf), accessed on 20 June 2014

<sup>173</sup> Please also see: European Parliament, *Recommendation on the Draft Council Decision Establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights* (2012); European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Minutes: Meeting of 9 July 2012, from 15.00 to 18.30, and 10 July 2012, from 09.00 to 12.30 and from 15.00 to 18.30*. In addition see, Gauthier de Beco, 'Networks of European National Human Rights Institutions,' *CRIDHO Working Paper 2008/01* (2008).

<sup>174</sup> Please see European Commission, *Assises de la Justice Discussion Paper 5: Fundamental Rights* (2013).

has suggested it would support Treaty change to provide a legal base for the Agency that does not require unanimity.<sup>175</sup>

5.29. The Government does not support an extension to the Agency's current remit nor Treaty change to provide a new fundamental rights legal base.

## Summary

5.30. Although the evidence contained a limited number of ideas for future EU action on fundamental rights, respondents and commentators, as well as the EU itself, have suggested some ways in which the EU's fundamental rights framework could be changed. Currently, the only clear future proposal is the Treaty obligation for the EU to accede to the ECHR.

5.31. In respect of the EU's accession to the ECHR, there was general agreement that any future impact is not yet clear since the package of instruments required for accession to take place remains under negotiation. Commentators presented a mixed picture on the potential implications, ranging from benefits for individuals currently unable to hold the EU to account in the ECtHR and legal benefits in creating greater coherence between European human rights systems, to perceived risks that the EU will become more active in the human rights field.

5.32. Although several respondents recognised that the Charter has made EU fundamental rights more accessible, the evidence also highlighted concerns regarding the clarity of the Charter as a reference point for legally enforceable rights. The evidence suggested that the courts will clarify the scope and application of the Charter over time. The courts have started this process and the Government is monitoring this.

5.33. There was broad support for the recognition of fundamental rights in EU law although some suggested that the UK's complex human rights landscape could be rationalised and the EU's role limited. A couple of commentators raised the possibility of moving away from a supranational fundamental rights framework towards a more, or exclusive, domestic one.

5.34. The evidence did not present a single picture on the future of fundamental rights. The evidence suggests that the focus in the foreseeable future is likely to be on clarifying and explaining the existing fundamental rights competence rather than radical change or the creation of new structures.

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<sup>175</sup> European Parliament, *Report on the Situation of Fundamental Rights in the European Union (2011-2012)* (2012).





# Annex A: Submissions Received to the Call for Evidence

Any references to MEPs reflect their status at the time of the Call for Evidence period.

Submissions were received through an online response form or by email; some respondents requested that their evidence remains anonymous. Some submissions considered a broad range of topics within the scope of the review, while some individuals and organisations focused on issues about which they held a particular interest. Some submissions contained viewpoints on topics not within the scope of the review.

**Responses to the Call for Evidence were received from the following individuals and organisations:**

## Academics

Professor Eleanor Spaventa, School of Law, Durham University.  
Dr Tobias Lock, University of Edinburgh.  
Liverpool European Law Unit, University of Liverpool.  
Professor Rory O'Connell, University of Ulster.

## Lawyers

Anthony Speaight QC, Pump Court Temple.  
David Anderson QC, Brick Court Chambers.  
Julian Hitchcock, Lawford Davies Denoon.

## Legal Organisations

The General Council of the Bar of England and Wales.  
The Community Law Partnership (supported by All Party Parliamentary Group Gypsies Travellers and Roma).  
Discrimination Law Association.  
Faculty of Advocates.  
Garden Court Chambers, Gypsy and Romani Traveller Team.  
The Law Society of England & Wales and the Law Society of Scotland.  
London Criminal Courts Solicitors Association.

## NGOs and Other Organisations

AIRE (Advice on Individual Rights in Europe) Centre (*a charity, remit includes working in the field of awareness of EU rights*).

The British Association of Social Workers (*professional association for social workers in the United Kingdom*).

Equality and Diversity Forum (*a national network of equality and human rights organisations*).

Equality and Human Rights Commission (*a statutory body, remit includes challenging discrimination, and protecting and promoting human rights*).

The Freedom Association (*an organisation, with the mission to challenge all erosion of civil liberties and campaign in support of individual liberty and freedom of expression. Describes itself as non-partisan, centre-right, libertarian pressure group.*)

GIRES – Gender Identity Research and Education Society (*a charity, work includes supporting research and education on gender identity*).

Human Rights Consortium Scotland (*a network of civil society organisations, remit includes awareness of human rights and building capacity on applying human rights to the delivery of publicly funded services*).

International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) Europe (*an international non-governmental umbrella organisation remit is working for equality and human rights for lesbian, gay, bisexual, trans and intersex people at the European level*).

JUSTICE (*campaign organisation, remit includes promoting access to justice, human rights and the rule of law; through research, education and interventions in the courts*).

Migration Yorkshire (*local authority-led regional migration partnership*).

Mind (*National Association for Mental Health in the United Kingdom campaigns on behalf of those with mental illness*).

Northern Ireland Human Rights Commission (*executive non-departmental public body of the Northern Ireland Office, remit includes ensuring government and other public bodies protect the human rights of everyone in Northern Ireland*).

Open Society European Policy Institute (*an organisation with the mission to work to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people*).

Policy Exchange (*an educational charity/think tank with the mission is to develop and promote new policy ideas which deliver better public services, a stronger society and a more dynamic economy*).

Traveller Movement (*a charity with the mission to support gypsies and travellers*).

UK Race and Europe Network (UKREN) (*network of local and national organisations in Great Britain and Northern Ireland that work to combat race discrimination within a European context*).

Unite (*a trade union*).

## Parliamentary and Governmental

All-Party Parliamentary Group on Modern Languages.  
 All Party Parliamentary Group Gypsies Travellers and Roma (in support of evidence submitted by Community Law Partnership).  
 Brussels and Europe Liberal Democrats.  
 Liberal Democrat Home Affairs Justice and Equalities Parliamentary Party Committee (PPC).  
 Scottish Government.  
 The Crown Dependencies (the Isle of Man and the Bailiwicks of Guernsey and Jersey).  
 Welsh Government.

## Individuals

25 other individuals completed online response forms to the Call for Evidence or sent an email. The following individuals have provided consent to publish their names:  
 Brian Cave, Rosemary Cantwell, Brian Edwards, Anthony Lea, Adrian Milne, David Sneath, Mira Makar.

## The following interested parties also submitted existing material for consideration:

European Commission submitted:  
 a list of previously published documents and reports.

House of Lord's European Union Committee submitted to the whole Balance of Competences Review:  
 a list of EU Committee reports and scrutiny correspondence.

European Scrutiny Committee submitted to the whole Balance of Competences Review:  
 three tables of European Scrutiny Committee reports from 2007 onwards.

Andrew Duff MEP submitted:  
 European Parliament Resolution of 22 May 2013 on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE));  
 Case C-411/10 N.S. v Secretary of State for the Home Department, judgment of the Court (Grand Chamber) on 21 December 2011;  
 Case C-411/10 N.S. v Secretary of State for the Home Department, opinion of Advocate General Trstenjak, delivered on 22 September 2011.

Open Society European Policy Institute submitted:  
 United Nations, Human Rights Office of the High Commissioner 'The European Union and International Human Rights Law', *Europe Regional Office*;  
 Dr Israel Butler, 'Ensuring compliance with the Charter of Fundamental Rights in legislative drafting: The practice of the European Commission', *reprinted from the European Law Review*, Issue 4, 2012;  
 Dr Israel Butler, 'Background Paper: The EU Charter of Fundamental Rights: What can it do?', *Open Society Foundations, Background Paper*, Open Society European Policy Institute, February 2013;  
 Dr Israel Butler, 'Policy Brief: How to Monitor the Rule of Law, Democracy and Fundamental Rights in the EU', *Open Society European Policy Institute*.



**In addition to the formal submissions to the Fundamental Rights Call for Evidence, the following responses to other reviews have been considered, as they provided evidence in scope of the Fundamental Rights Call for Evidence:**

- Three submissions from Heather Grabbe and Jacqueline Hales to the Foreign Policy Balance of Competences Review;
- International Lesbian and Gay Association submission to the Foreign Policy Balance of Competences Review;
- Senior European Experts Group submission to the Foreign Policy Balance of Competences Review;
- Stonewall submission to the Foreign Policy Balance of Competences Review;
- Taxpayers Alliance submission to Civil Judicial Cooperation Balance of Competences Review;
- Parliamentary delegates to the Council of Europe (Brian Binley, MP, Davit Harutyunyan, MP, David TC Davies, MP) submission to the whole Balance of Competences Review.

# Annex B: Engagement Events

To help inform the Fundamental Rights Report a number of meetings were held with interested parties to explore the issues raised in the Call for Evidence document.

These meetings, held under Chatham House rule, included:

## **4 November 2013 – Balance of Competences Fundamental Rights Review workshop, London**

Attendees: Aire Centre, European Commission - London office, Rights Watch UK, UK Race and Europe Network and an individual attending in a personal capacity.

## **11 November 2013 – Balance of Competences Fundamental Rights Review workshop, London**

Attendees: Discrimination Law Association, Equality and Human Rights Commission, Gender Identity Research and Education Society, Human Rights Collegium - University of London, Information Commissioner's Office, Just Lincolnshire Equality and Human Rights Council, JUSTICE, Odysseus Trust, Law Society of England and Wales, Law Society - Brussels office, Rights Watch UK, University of Liverpool and five individuals attending in a personal capacity (including three law students).

## **13 November 2013 – Balance of Competences Fundamental Rights Review workshop, Brussels, Belgium.**

Attendees: Bar Council - Brussels office, Channel Islands Brussels office, Council General Secretariat, International Lesbian and Gay Association-Europe, International Center for Transitional Justice, Isle of Man Brussels office, Law Society - Brussels office and Open Society European Policy Institute.

## **20 November 2013 – Balance of Competences Fundamental Rights Review workshop, Edinburgh, Scotland.**

Attendees: Equality Network, LGBT Youth, Scottish Government Legal Directorate, Scottish Human Rights Commission and three academics from University of Edinburgh.

## **25 November 2013 – Balance of Competences Fundamental Rights Review workshop, London**

Attendees: British Association of Social Workers, Big Brother Watch, Christian Legal Centre, Equality Diversity Forum, The European Foundation, Freedom Association, an academic from King's College London, South West Alliance of Nomads and two QCs.

## **16 December 2013 – Balance of Competences Fundamental Rights Review workshop, Belfast, Northern Ireland**

Attendees: Disability Action, Human Rights Consortium, Northern Ireland Council for Ethnic Minorities, Northern Ireland Human Rights Commission, Save the Children Northern Ireland and an academic from University of Ulster.

### **Other events:**

During the course of the Call for Evidence period the Balance of Competences Review was also discussed at events arranged by the Equality and Diversity Forum on 11 December 2013, and jointly by the Law Society for England and Wales, JUSTICE and Human Rights Lawyers Association on 7 January 2014.

# Annex C: Other Sources Used for the Review

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*including the following written evidence submitted to the European Scrutiny Committee inquiry into the application of Charter, December - January 2014:*

- *Dr Tobias Lock, Edinburgh Law School;*
- *Sionaidh Douglas-Scott, Professor of European and Human Rights Law, University of Oxford;*
- *David Anderson Q.C.;*
- *Professor Paul Craig;*
- *Supplementary Written Evidence from Professor Paul Craig;*
- *Michael Pinto-Duschinsky, Senior consultant on constitutional affairs to Policy Exchange;*
- *Andrew Duff MEP;*
- *Martin Howe QC.*

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# Annex D: Glossary of Abbreviations and Acronyms

<b>CJEU</b>	Court of Justice of the European Union
<b>ECHR</b>	The European Convention on Human Rights
<b>ECtHR</b>	The European Court of Human Rights
<b>ECJ</b>	The European Court of Justice
<b>FRA</b>	Fundamental Rights Agency
<b>FRCP</b>	Fundamental Rights and Citizenship Programme
<b>ILO</b>	International Labour Organisation
<b>the Luxembourg court</b>	A term used to refer to the Court of Justice of the European Union
<b>NGO</b>	A non-governmental organisation
<b>PACE</b>	the Parliamentary Assembly of the Council of Europe
<b>the Strasbourg court</b>	A term used to refer to the European Court of Human Rights
<b>TEC</b>	Treaty establishing the European Community
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>RECP</b>	Rights, Equality and Citizenship Programme
<b>UN</b>	United Nations