



Ministry
of Justice

*Review of the
Balance of Competences*

Call for Evidence on the Review of the Balance of Competences between the United Kingdom and the European Union

Fundamental Rights

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How to respond to this Call for Evidence

1. This public call for evidence provides information on the EU's competence and action in the field of fundamental rights. We are seeking evidence on these issues and welcome input from anyone with relevant knowledge, expertise or experience. Your evidence should be objective, factual information about the impact or effect of the competence in your area of expertise.
2. As part of this review we encourage contributions from interested parties across the UK and beyond.
3. We intend to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it, for example, in response to a request under the Freedom of Information Act). We will not publish your name unless you wish it to be included. Please base your response on answers to the questions set out in this call for evidence.
4. Please send your evidence by midday on 13 January 2014 to fundamentalrightsBoC@justice.gsi.gov.uk. This email address should also be used for any related enquiries. Further information on this call for evidence can be found at: <https://consult.justice.gov.uk/digital-communications/boc-fundamental-rights-review> or follow us on Twitter at: **@MoJGovUK**.
5. Evidence is sought on the following questions:
 1. What evidence is there that the impact of:
 - the Charter of Fundamental Rights of the European Union ("the Charter");
 - the EU's broader framework of fundamental rightshas been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
 2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?

- 3.** What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 4.** What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 5.** What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?
- 6.** What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?
- 7.** What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?
- 8.** Do the projects funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?
- 9.** What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 10.** What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 11.** What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?
- 12.** How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?

13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

14. Is there any other evidence in the field of EU fundamental rights which is relevant to this review?

Chapter 1: Introduction to the Balance of Competences

Review

6. The Foreign Secretary launched the Balance of Competences 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. The review 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 will not be tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

7. The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by Government but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners, and the EU institutions are also being invited to contribute. The process will be comprehensive, evidence-based and analytical. The progress of the review will be transparent, including in respect of the contributions submitted to it.

What do we mean by competence?

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. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

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 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.

An example of why EU fundamental rights are relevant in the UK

The fundamental rights of “non-discrimination” and “equality between women and men” have been found by the courts to mean that insurers cannot use gender to determine premiums and benefits under insurance policies. As a result, insurance companies cannot charge a man in the UK higher insurance premiums than a woman for the same car insurance solely on the basis of gender.¹

The broader international human rights context

10. EU fundamental rights sit alongside the UK’s other international human rights obligations. In particular, the UK is a member state of the United Nations and a signatory to a number of United Nations human rights treaties and International Labour Organisation conventions. The UK is also a member state of the Council of Europe – a completely separate organisation to the European Union – and a party to the European Convention on Human Rights (ECHR).

Incorporation of international obligations into UK law

The UK is a “dualist” state, which means that a treaty ratified by the Government does not alter UK law unless and until it is incorporated into domestic law by legislation. This can be contrasted to several other European “monist” states, where obligations in an international treaty become directly applicable in domestic law when the state ratifies the treaty.

11. The human rights obligations contained in United Nations and International Labour Organisation instruments do not apply directly in UK law. That means that individuals can only enforce rights conferred by those instruments in the UK’s courts where they have been recognised and given effect in UK law.

¹ Case C-236/09 Test Achats, judgment of 1 March 2011.

What is the United Nations?

The United Nations is an international organisation founded in 1945 after the Second World War. The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10 December 1948. The UN has also adopted a number of other human rights treaties, such as the Convention against Torture and the Convention on the Rights of the Child. UN Member States that have ratified such treaties are examined periodically on their compliance with their treaty obligations, and may choose to be subject to a complaints mechanism. UN Member States are also subject to a wide-ranging peer review – the Universal Periodic Review – where Member States question each other on their human rights record.

The International Labour Organisation is an agency of the United Nations. It was founded in 1919 and became the first specialised agency of the UN in 1946. Its objectives are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.

12. The ECHR is given further effect in domestic law by the Human Rights Act 1998. The Human Rights Act is said to give “further effect” to the ECHR because some ECHR rights were already recognised in the UK by domestic legislation and the common law before Parliament passed the Human Rights Act. The Human Rights Act requires public authorities to act compatibly with a number of rights in the ECHR (the Convention rights) unless there is an Act of Parliament which obliges them to act otherwise. It also provides a specific mechanism for the enforcement of the Convention rights in our national courts. When considering a question concerning the Convention rights, national courts must have regard to the case law of the European Court of Human Rights (ECtHR). National courts are not however bound by decisions of the ECtHR.²

² R (Ullah) v Special Adjudicator [2004] UKHL 26, paragraph 20.

What is the Council of Europe?

The Council of Europe is an international organisation based in Strasbourg comprising 47 countries. It was set up in 1949, and its objectives are to protect human rights, democracy and the rule of law. The Council of Europe is an entirely separate organisation from the European Union.

The European Convention on Human Rights³ is an international treaty, drafted by the Council of Europe, containing principally civil and political rights. It was first agreed in 1950, and has been amended and added to on a number of occasions since. All members of the Council of Europe are parties to the ECHR. The European Court of Human Rights in Strasbourg considers complaints from individuals that States have failed to comply with their obligations under the ECHR. It can also receive inter-State complaints.

The Council of Europe has adopted other treaties aimed at the promotion and protection of human rights, such as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Development of fundamental rights in the European Union

13. Unlike most international human rights, which are established directly by treaties, EU fundamental rights have been recognised over time through the case law of the EU. 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.
14. Despite the Treaties' initial silence, the requirement to respect fundamental rights as a matter of EU law has been consistently recognised by the Court of Justice of the European Union (CJEU) since the late 1960s.⁴ In developing particular fundamental rights, the CJEU has often drawn on the constitutional traditions common to the

³ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome 1950; CETS 005), as amended, and its Protocols.

⁴ Case 29/69 Stauder, judgment of 12 November 1969; Case 11/70 Internationale Handelsgesellschaft, judgment of 17 December 1970; Case 4/73 Nold, judgment of 14 May 1974.

Member States and widely-accepted international instruments, such as the ECHR and the International Covenant on Civil and Political Rights (a key UN agreement).⁵

15. In 1977, the European Parliament, Council and Commission endorsed the CJEU's case law in a joint declaration stressing the importance of protecting fundamental rights.⁶ In 1993 the Treaty of Maastricht formally reflected the case law of the CJEU in the EU Treaties by 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". This is now reflected in Article 6(3) of the Treaty on European Union (TEU).
16. In 1999 the Member States of the EU decided that EU fundamental rights should be consolidated in a Charter to enhance their visibility.⁷ The result was the Charter of Fundamental Rights of the European Union, a collection of rights, freedoms and principles recognised in EU law, which was first proclaimed in 2000 by the European Parliament, the Council of the European Union and the European Commission. The Charter 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 (see Article 6(1) of the TEU). The rights, freedoms and principles in the Charter derive from a wide range of sources⁸: the EU Treaties, EU secondary legislation, the constitutional traditions and international obligations common to the Member States, the ECHR, the case law of the CJEU and the Social Charters. For more on the Charter, see *The Charter of Fundamental Rights of the European Union* below.

⁵ Case 44/79 Hauer, judgment of 13 December 1979, paragraph 15.

⁶ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977Y0427\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977Y0427(01):EN:HTML)

⁷ See Presidency Conclusions of the Cologne European Council, 3 and 4 June 2004, Annex IV: www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm.

⁸ ZZ v Home Secretary [2011] EWCA Civ 440, paragraph 16: "the Charter is not a free-standing, rights-creating legislative instrument. It is akin to a restatement of rights, freedoms and principles already established in law as a result of, inter alia, judgments of the Luxembourg Court"; see the preamble to the Charter: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>; see also page 3 (footnote 7) of the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union at http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf.

EU fundamental rights and the ECHR

17. The relationship between the obligation to respect fundamental rights, resulting from the UK's EU membership, and the rights contained in the ECHR is not straightforward. All EU Member States are party to the ECHR and the substance of a number of ECHR rights have been incorporated into EU law as fundamental rights. The ECHR has special significance in EU law⁹, however EU fundamental rights do not completely mirror the rights in the ECHR. There are, for example, EU fundamental rights that are not contained in the ECHR, such as the freedom to pursue a trade or profession¹⁰, and vice versa¹¹. Moreover, ECHR rights and their equivalents in EU law do not necessarily have the same scope. In particular, some EU fundamental rights have a broader scope than the equivalent ECHR right. For example, Article 6 of the ECHR (the right to a fair trial) is limited to disputes concerning a civil right or obligation or a criminal charge, but no such limitation applies to the right to a fair hearing under EU law.¹²
18. The ECHR itself has not been directly incorporated into EU law and the CJEU does not have the power to determine the compatibility of EU activity, EU law or Member States' national laws with the ECHR itself.¹³
19. The impact in the UK of EU fundamental rights and of ECHR rights are not the same. In particular, while both can be enforced in the UK courts by individuals who claim their rights have been breached, EU fundamental rights can be relied on against public authorities only when the authority is acting within the scope of EU law (see *The case law of the CJEU* below). Where an individual has successfully relied on an EU fundamental right, UK courts have wide powers to remedy the breach, including sometimes disapplying a provision of an Act of Parliament.¹⁴ By contrast, the Human Rights Act requires public authorities to comply with a number of ECHR rights at all

⁹ Article 6(3) of the Treaty on European Union: "*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*"; see also Case C-260/89 ERT, judgment of 18 June 1991, paragraph 41; and Case C-571/10 Kamberaj, judgment of 24 April 2012, paragraphs 60 and 61.

¹⁰ Case 234/85 Keller, judgment of 8 October 1986.

¹¹ For example, when considering the right to vote under EU law, the Supreme Court in *R (Chester) v Secretary of State for Justice*; *R (McGeoch) v The Lord President of the Council & Anor* [2-13] UKSC 63 rejected the argument that the ECHR jurisprudence on the right to vote has been incorporated into EU law.

¹² See explanation to Article 47 of the Charter. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>.

¹³ Case C-260/89 ERT, paragraphs 41 and 42; Case C-571/10 Kamberaj, paragraphs 58-63; and *Akerberg Fransson* judgment of 7 May 2013, paragraph 44.

¹⁴ *Benkharbouche v Embassy of the Republic of Sudan* (UKEAT/0401/12/GE) and *Janah v Libya* (UKEAT/0020/13/GE), Employment Appeals Tribunal, judgment of 4 October 2013 (the EAT has granted permission to appeal).

times. In the case of a successful challenge, however, the courts' powers do not extend to disapplying Acts of Parliament.

20. There is also a notable difference in how the UK can be held to account at an international level for its compliance with particular rights. In particular, whilst individuals can bring proceedings against the UK before the European Court of Human Rights in relation to rights under the ECHR, individuals cannot generally bring direct complaints against the UK in the CJEU.¹⁵

21. There is another important issue about the EU fundamental rights framework. The EU is not currently directly bound by the ECHR, but Article 6(2) of the Treaty on European Union does now require the EU to accede – that is, to become a party – to the ECHR. The purpose of this is to subject the EU to the same human rights controls as its Member States. Once the EU becomes bound by the ECHR, the EU will be required to act compatibly with the ECHR and individuals will be permitted to bring proceedings directly against the EU in the ECtHR (see *Fundamental rights: the future* below).

¹⁵ Article 34 of the ECHR sets out the right of individual application. A direct action against a Member State can be brought before the CJEU by the Commission (Articles 258 and 260 TFEU) or another Member State (Article 259 TFEU).

EU and ECHR rights compared

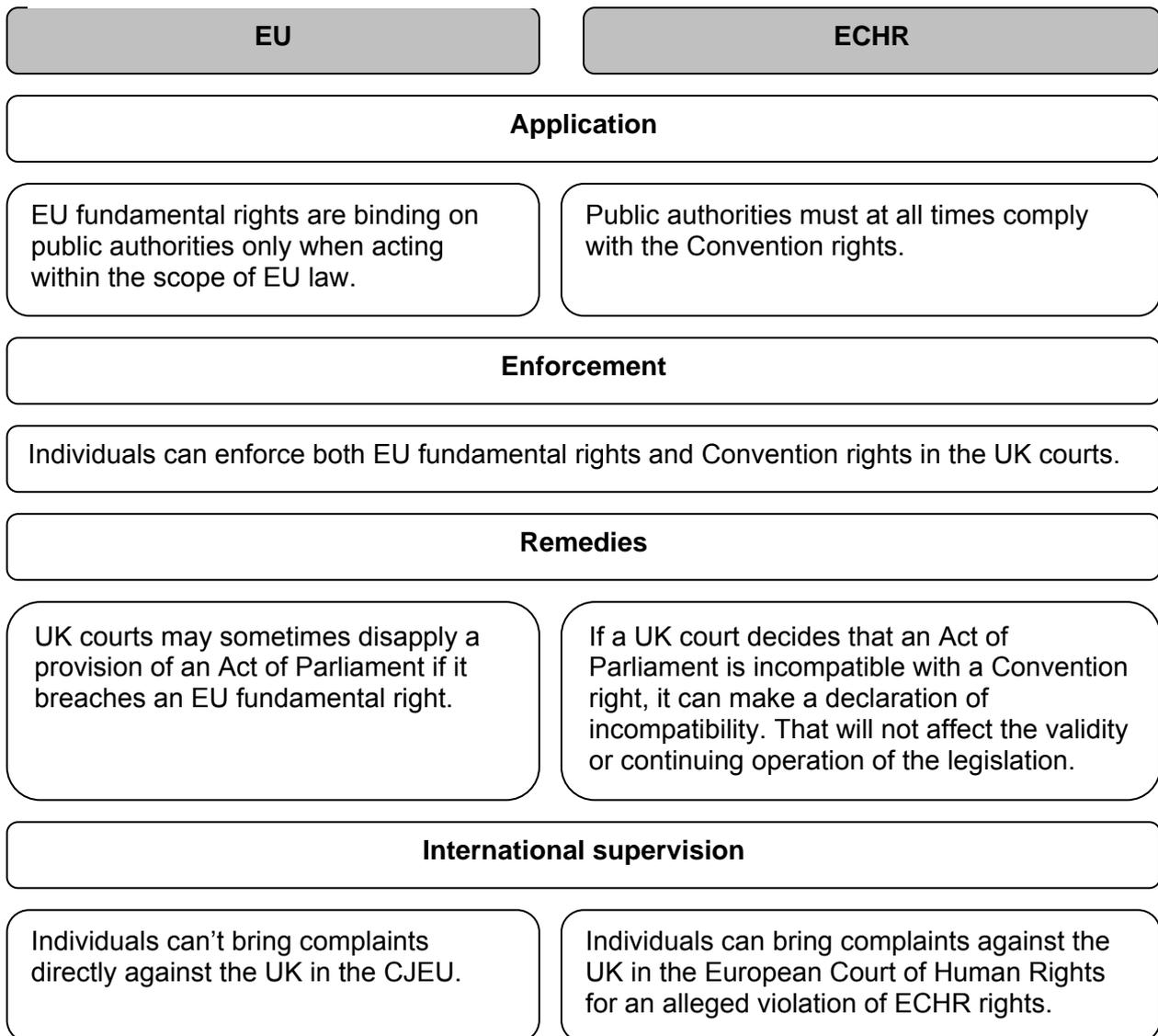


Diagram showing differences between EU and ECHR rights

Chapter 3: The scope of the Fundamental Rights Review

22. The **EU's competence on fundamental rights** can be split into three broad categories. First, the EU has competence to constrain the actions of its institutions and, in certain circumstances, its Member States to ensure respect for fundamental rights. This competence is most evident in the judgments of the CJEU. In exercising this competence the CJEU is increasingly referring to the Charter. In considering the competence to restrict the actions of the EU and its Member States, it is also worth having regard to the EU Treaties and in particular Article 6 of the TEU. We explain the main features of the relevant Treaty provisions below (see *The EU Treaties*).
23. Second, the EU has competence to take action in respect of particular rights, such as non-discrimination; Article 19 of the Treaty on the Functioning of the European Union (TFEU) confers on the EU the power to adopt legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. There is however no Treaty provision giving the EU a general competence to adopt legal instruments or to take other specific action aimed at promoting or protecting fundamental rights.
24. Finally, the EU undertakes a number of activities designed to support respect for fundamental rights. It has established a Fundamental Rights Agency, to collect and analyse fundamental rights data, and a programme to fund rights projects across the EU. It also takes non-legislative action to promote rights, such as campaigns and educational programmes.
25. **The scope of this review** covers the EU's overarching competence on fundamental rights. It is therefore focused on the first and third categories of competence outlined above, namely the EU's framework for ensuring that the EU and its Member States respect fundamental rights, and its work to promote fundamental rights.
26. This review is not about the EU's specific competence in relation to individual fundamental 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 reviews (see Annex B). For example, the right not to be discriminated against will be considered in the Social and Employment Review. However, we recognise that examples relating to

individual rights may be useful in demonstrating the impact on the UK of the EU's overarching competence on fundamental rights. For example, evidence on whether the CJEU is interpreting a particular fundamental right in line with its source may well be relevant to this review. In contrast, evidence of the impact on UK businesses of EU legislation aimed at promoting gender equality in the work place is beyond the scope of this review. Where possible we will ensure that evidence on EU competence relating to particular rights is provided to the appropriate review. Where this is not possible – for instance where the review has already concluded – we will note the evidence in the final report on this review.

27. This review is not about the UK's relationship with the ECHR. However, evidence on the ECHR or the Human Rights Act may be relevant to this review where it demonstrates the effect on the UK of the EU's competence in relation to fundamental rights. The same can be said of other international human rights instruments and their monitoring bodies. For example, evidence on a judgment of the ECtHR is outside the scope of this review if it does not demonstrate how EU competence affects the UK.

Devolution

28. Responsibility for international relations, including with the EU, has not been devolved to Scotland, Northern Ireland or Wales. Some devolved responsibilities however are within the scope of EU law and may therefore be affected by the EU's fundamental rights framework. For example, civil law is largely devolved in relation to Scotland, and there is EU legislation on the recognition and enforcement of judgments in civil matters between Member States.

Chapter 4: The EU's overarching competence on fundamental rights

The EU Treaties

29. The EU's competence on fundamental rights is mainly about protecting those rights by constraining the acts of the EU and its Member States. The requirement to respect fundamental rights is found in Article 6 of the TEU, which was inserted by the Treaty of Lisbon. Article 6(1) confirms that the rights, freedoms and principles set out in the Charter are recognised by the EU. It also gives the Charter the same legal value as the EU Treaties (which are primary EU law, settled and agreed between the Member States as the framework for and extent of EU competence) and provides that the Charter does not extend the EU's competences. Article 6(3) draws on the CJEU's case law, as we have described in paragraph 15 above, to provide that fundamental rights constitute general principles of EU law (see *The case law of the CJEU* below).
30. The Treaties also contain general provisions referring to fundamental rights. Article 2 of the TEU, for example, sets out the values on which the EU is founded, including respect for human rights. Article 3 of the TEU sets out that the EU aims to promote those values. These articles do not give the EU a specific power to take action to protect or promote fundamental rights.
31. Article 352 of the TFEU provides the EU with the power to take action if necessary to attain an objective in the Treaties, where the EU does not otherwise have the necessary power to do so.¹⁶ The EU has relied on Article 352 and its predecessor, Article 308 of the Treaty establishing the European Community, to facilitate action on fundamental rights. In particular, Article 352/308 was used to establish the EU's Fundamental Rights Agency and to agree its five-year work programme, as well as to establish the EU's fundamental rights funding programme (see *The Fundamental Rights Agency and Funding Programmes* below). This review will cover action under Article 352 as it relates to fundamental rights; the Subsidiarity and Proportionality Review will cover the use of Article 352 more generally (see Annex B).

¹⁶ Article 352 TFEU allows the EU to take action which is necessary "to attain one of the objectives set out in the Treaties" where "the Treaties have not provided the necessary powers". This power may not be used to extend the EU's competence.

The case law of the Court of Justice of the European Union

32. The CJEU has consistently held that fundamental rights are general principles of EU law.¹⁷ General principles are part of the EU's primary law, which is binding on the EU and its Member States.¹⁸ This means that the EU and, in certain circumstances, its Member States must comply with the general principles. Other examples of general principles of EU law are subsidiarity, proportionality and legal certainty.
33. The CJEU takes general principles of EU law, including fundamental rights, into account when interpreting and ruling on the validity of acts of the EU and its Member States.
34. Fundamental rights are always binding on the institutions of the EU. That means that the EU should not act in a way that breaches people's fundamental rights and, if it does, the measure (including legislation) can be set aside by the CJEU. It also means that courts (the CJEU and national courts) must try to interpret EU legislation in a way which ensures respect for fundamental rights.
35. The CJEU has held that fundamental rights are also binding on EU Member States in some circumstances. It has said the Member States must respect fundamental rights when they (i) implement EU law¹⁹, (ii) derogate from EU law²⁰, or (iii) act within the scope of EU law²¹. The UK's position is that the third category is the aggregate of the other two, however it has been suggested that it is wider. We would welcome evidence on the scope of application of fundamental rights through the case law of the CJEU and our national courts, and its effects on the UK (see question 1).

¹⁷ Case 29/69 Stauder; Case 11/70 Internationale Handelsgesellschaft; Case 4/73 Nold; and Case 44/79 Hauer.

¹⁸ Cases C-402/05 and C-415/05 P Kadi, judgment of 3 September 2008, paragraph 308.

¹⁹ Case 5/88 Wachauf, judgment of 13 July 1989.

²⁰ Case C-260/89 ERT.

²¹ Case C-617/10 Akerberg Fransson; and Cases C-411/10 and C-493/10 NS, judgment of 21 December 2011.

When is a Member State “acting within the scope of EU law”?

The case of *Zagorski*²² concerned the export of Sodium Thiopental to the United States, where it is used to anaesthetise prisoners before administration of the death penalty by lethal injection. The claimants, who had been sentenced to death in the United States, argued that the UK Government’s failure to prevent the export of the drug breached the prohibition of torture and inhuman or degrading treatment or punishment. Export restrictions are governed by EU law. As a result, the UK court found that the Government’s decision whether or not to prevent the export of the drug constituted ‘acting within the scope of EU law’.

In *G1 (Sudan)*²³ a naturalised British citizen complained that he had been discriminated against in the course of the Government’s decision to exclude him from the UK. He claimed that the decision deprived him of his national citizenship which meant he also lost his EU citizenship, and therefore the Government’s action fell within the scope of EU law. A UK court rejected this argument, finding that EU citizenship is entirely dependent on citizenship of a Member State; that decisions about national citizenship are for Member States themselves, and so the decision to exclude him fell outside the EU’s competence.

Charter of Fundamental Rights of the European Union

36. The Charter’s Preamble and Article 6(1) of the TEU state that the Charter reaffirms rights already recognised in EU law and does not extend the competence of the EU. There has been debate about the scope and application of the Charter since its introduction, in particular whether it has adhered to the principle in Article 6(1). For example, there have been three wide-ranging debates in Parliament on EU fundamental rights, including the Charter, since the last General Election.²⁴

²² R (*Zagorski*) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), paragraph 70.

²³ R (*G1 (Sudan)*) v Secretary of State for the Home Department [2012] EWCA Civ 867.

²⁴ www.publications.parliament.uk/pa/cm201011/cmgeneral/euro/110314/110314s01.htm;

www.publications.parliament.uk/pa/cm201012/cmgeneral/euro/120221/120221s01.htm;

www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120712/debtext/120712-0003.htm#12071258000004.

37. The rights, freedoms and principles in the Charter are grouped into six themes: dignity, freedoms, equality, solidarity, citizens' rights and justice. A list of the rights, freedoms and principles in the Charter are at Annex A. The final Title of the Charter, which is of particular relevance to this review, contains general provisions on how the Charter should be interpreted and applied. The Charter is also accompanied by explanations.²⁵ 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 EU Treaties themselves provide that "due regard" must be had to the explanations when interpreting the Charter.²⁶

How does the Charter apply?

38. The Charter is primarily directed at the EU institutions, but it also applies to the Member States when they are 'implementing Union law'.²⁷ The CJEU has held that the Charter applies to Member States in the same circumstances as EU fundamental rights, in other words when they are acting within the scope of EU law (see *The case law of the CJEU* above).²⁸
39. The Charter contains rights and principles, although there is no clear distinction in the Charter itself as to which of its provisions fall into each category.²⁹ That distinction is important, though. In particular, unlike rights, principles are not directly enforceable, although they do guide the actions of the EU and its Member States. Principles can be implemented by the EU or its Member States, and they can influence the CJEU or national courts when interpreting such implementing measures or ruling on their validity.³⁰ There is still uncertainty as to the effect of the Charter principles, and in particular whether they can be relied upon to challenge the validity of EU or national legislation.

²⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>.

²⁶ Article 6(1) of the TEU provides that "the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions"; Article 52(7) of the Charter provides that: "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

²⁷ See Article 51(1) of the Charter.

²⁸ Case C-612/10 Akerberg Fransson, paragraphs 17 and 18.

²⁹ While freedoms are expressed as a third, separate category in the preamble of the Charter, in practice they fall under either rights or principles.

³⁰ See Article 52(5) of the Charter; see also discussion in House of Lords Select Committee on the European Union, Tenth Report (2007-08), The Lisbon Treaty, paragraphs 5.15-5.23: <http://www.publications.parliament.uk/pa/ld200708/ldselect/lducom/62/6209.htm>.

Application of Charter principles

The case of *Kamberaj*³¹ concerned the compliance of Italian regional legislation with an EU Directive on the rights of third-country nationals. The Directive provides that third-country nationals who are long-term residents are to enjoy equal treatment with nationals as regards certain social benefits. Member States can however limit equal treatment to “core benefits”. The CJEU interpreted the Directive in the light of Article 34(3) of the Charter, which contains the principle that the EU “recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient means”. The CJEU drew on that principle to find that a core benefit would be one which ensures a decent existence for those who lack sufficient means.

40. The European Commission reviews all legislative proposals for their compatibility with the Charter. In addition, the Commission conducts an annual review of the Charter’s application, analysing the implementation of the Charter by EU institutions as well as its application in the courts of the Member States.³² The Commission’s 2012 report noted that in national proceedings the Charter is most commonly referred to in asylum and immigration cases. The provisions most frequently relied upon in national proceedings include respect for private and family life (Article 7), right to asylum (Article 18), rights of the child (Article 24), right to good administration (Article 41) and right to an effective remedy and to a fair trial (Article 47).

How is the Charter interpreted?

41. The interpretation of a Charter provision depends on where the right or principle concerned comes from. Article 52 of the Charter provides, in particular, that:³³
- rights derived from the EU Treaties must be “exercised under the conditions and within the limits defined by those Treaties”;

³¹ Case C-571/10 *Kamberaj*.

³² See the Commission’s Annual Report on the Application of the Charter:

http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm

³³ Article 52, paragraphs (2) to (4), of the Charter; “*The provisions of 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 derive*”, *R (Zagorski) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin), paragraph 64.

- rights corresponding to rights guaranteed by the ECHR will 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”.

Interpreting Charter rights in line with their source

The case of Melloni³⁴ concerned the extradition of M pursuant to a European arrest warrant from Spain to Italy, where he had been convicted of fraud and sentenced to ten years’ imprisonment. M complained that extradition would breach his right to a fair trial because he had not been represented in the Italian criminal proceedings. In considering a preliminary reference, the CJEU held that although the right of an accused to appear in person at his own trial is an essential element of the right to a fair trial, guaranteed by Articles 47 and 48(2) of the Charter, that right is not absolute. An accused may waive that right, provided it is done in an unequivocal manner, is attended by safeguards and is not contrary to any important public interest. The CJEU acknowledged that this interpretation of Articles 47 and 48(2) of the Charter was consistent with the equivalent right under the ECHR (Article 6) and cited ECtHR case law to that effect.

In Zagorski³⁵ (see summary of facts above) the claimants initially relied on Article 3 of the ECHR and Article 4 of the Charter, which both prohibit torture and inhuman or degrading treatment or punishment. At the hearing the claimants accepted that they were not covered by the UK’s obligations under the ECHR, so relied on the Charter. Referring to Article 52(3) of the Charter and its explanation, the UK court held that not only is the content of the rights in Article 4 of the Charter and Article 3 of the ECHR the same, but so is their scope of application. Therefore, as Article 3 of the ECHR was not applicable to the claimants, neither was Article 4 of the Charter.

³⁴ Case C-399/11 Melloni, judgment of 26 February 2013, paragraphs 49 and 50.

³⁵ R (Zagorski) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), paragraphs 73 and 74.

Protocol 30

42. Although Protocol No.30 to the Treaties is drafted in terms specific to the UK and Poland, the UK’s position is that the Protocol sets out general points on the application and status of the Charter that are not specific to particular Member States.³⁶ Article 1(1) provides that the Charter does not extend the ability of the CJEU or national courts to find UK laws, practices or acts inconsistent with its provisions.³⁷ Article 1(2) provides that nothing in Title IV of the Charter, which contains social and economic provisions, creates enforceable rights except in so far as national law has provided for such a right. Finally, Article 2 states that the Charter provisions that 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.³⁸
43. The Protocol has often been referred to as an “opt-out” from the Charter for the UK. In the case of NS the CJEU held that Article 1(1) of the Protocol explains Article 51 of the Charter with regard to its scope and does not call into question the application of the Charter to the UK (see *Case study on the application of the Charter* below). We would welcome evidence on the effect of the Protocol (see question 1).

Case study on the application of the Charter

The case of NS³⁹ 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 claim. Nevertheless NS asked the UK Home Secretary to exercise a discretionary power to examine his asylum 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 of the EU law issues to the CJEU.

³⁶ There is a proposal for a protocol which would have the effect of adding the Czech Republic to Protocol 30.

³⁷ Cases C-411/10 and C-493/10 NS, paragraphs 116-122.

³⁸ Article 2 of Protocol 30 reinforces Article 52(6) of the Charter which provides that “*Full account shall be taken of national laws and practices as specified in this Charter.*”

³⁹ Cases C-411/10 and C-493/10 NS.

The main issue in this case was whether Article 4 of the Charter, which prohibits torture and inhuman or degrading treatment, prevents the transfer of an asylum seeker to the responsible Member State in certain circumstances. The CJEU ultimately concluded that Article 4 of the Charter 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 CJEU's judgment raises the following issues concerning the interpretation and application of the Charter:

- When the Charter is applicable: The CJEU held that the discretionary power in the EU Regulation to examine a claim forms part of the system for determining the Member State responsible for an asylum claim, and is therefore an element of the Common European Asylum System. Consequently, the decision whether to exercise the discretionary power is one which implements EU law and must therefore respect fundamental rights.

- Interpreting the rights and principles in the Charter: The prohibition on torture and inhuman or degrading treatment set out in Article 4 of the Charter comes from the equivalent right in Article 3 of the ECHR. In reaching its answer the CJEU drew heavily on a judgment of the European Court of Human Rights which concerned a similar complaint under Article 3 of the ECHR (*MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011).

- The effect of Protocol 30: The CJEU held that Protocol 30 did not require it to qualify its answers and that it does not exempt the UK from its obligations under the Charter.

Questions 1 – 3

1. What evidence is there that the impact of:

- the Charter;
- the EU's broader framework of fundamental rights

has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?

3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

The Fundamental Rights Agency

44. The Fundamental Rights Agency is one of a number of the EU's specialised agencies set up to support the EU on a range of issues. It is a data collection and research agency which aims to promote respect for fundamental rights. It publishes thematic reports and organises events to provide guidance on, and raise awareness of, fundamental rights. The Fundamental Rights Agency is not a monitoring or standard-setting institution and does not examine individual complaints.
45. The Agency's scope of activity is set out in its establishing Regulation⁴⁰ and is limited to carrying out its tasks "within the competencies of the Community as laid down in the Treaty establishing the European Community". The Lisbon Treaty collapsed the former EU pillar structure, with the effect that the European Community was subsumed within a consolidated EU. There has been debate about whether pillar collapse has extended the Agency's mandate beyond matters formerly falling within the first pillar. The UK's position is that pillar collapse has not extended the Agency's mandate.

⁴⁰ Regulation 168/2007/EC establishing a European Union Agency for Fundamental Rights: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:053:0001:01:EN:HTML>.

Pillar collapse under the Lisbon Treaty

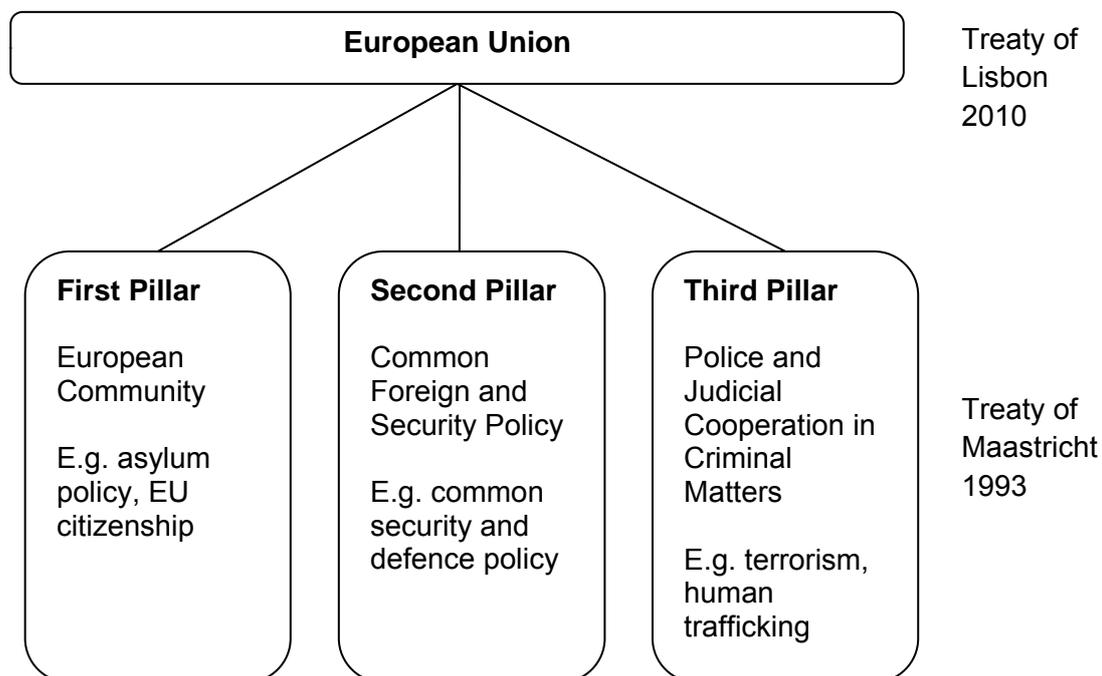


Diagram showing the EU's pre-Lisbon pillar structure

46. The Fundamental Rights Agency's work focuses on the thematic areas set out in its five-year programme (for example, Roma integration, racism, xenophobia and related intolerance).⁴¹ Its programme from 2013 to 2017 remains limited to the former first pillar. The Agency can only undertake work outside the thematic areas if requested to do so by the European Parliament, Council or Commission.⁴²
47. To minimise duplication between the work of the Fundamental Rights Agency and the Council of Europe and to ensure that they cooperate where appropriate, the two bodies have signed an agreement setting out a framework for cooperation.⁴³ The agreement includes practical steps such as regular liaison and information sharing meetings between the two bodies, and a Council of Europe representative sitting on the Fundamental Rights Agency's management board.

⁴¹ Five year work programme 2013-2017: http://fra.europa.eu/sites/default/files/council-decision-no-252-2013-eu-establishing-multiannual-framework-2013-2017_en.pdf.

⁴² Article 5(3) of the Agency's establishing Regulation.

⁴³ The Agreement between the Fundamental Rights Agency and the Council of Europe: http://fra.europa.eu/sites/default/files/cooperation-agreement-ec-coe-fra_en.pdf.

Question 4 - 5

4. What evidence is there that the impact of the Fundamental Rights Agency has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

5. What evidence is there of whether the Fundamental Rights Agency demonstrates value for money?

The Fundamental Rights and Citizenship Programme

48. The EU runs a number of funding programmes across a wide range of areas, including fundamental rights: the Fundamental Rights and Citizenship Programme.⁴⁴ This funding programme, which runs from 2007 to 2013, aims to promote a society based on respect for fundamental rights and rights derived from citizenship of the EU. The programme has so far funded a number of projects run by UK organisations.

UK organisations funded by the Fundamental Rights and Citizenship programme

Advice on Individual rights in Europe	Brunel University
Child rights international network	Fair Trials International LBG
International Organisation for Migration	Leeds City Council
LGBT Youth Scotland	Privacy International
University of Leicester	University of Liverpool

⁴⁴ The Fundamental Rights and Citizenship funding programme: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:110:0033:01:EN:HTML>.

Questions 6 – 8

6. What evidence is there to demonstrate the advantages or disadvantages of the Fundamental Rights and Citizenship Programme for the UK, and individuals within the UK?

7. What evidence is there that the Fundamental Rights and Citizenship programme provides value for money?

8. Do the projects funded under the Fundamental Rights and Citizenship programme help the programme meet its stated objectives?

Chapter 5: Fundamental rights: the future

49. The EU's work in respect of fundamental rights continues to develop. Discussion about the future direction of EU fundamental rights includes increasing the scope of the Charter's application in relation to Member States and extending the Fundamental Rights Agency's remit. We welcome views on the impact of future developments in the area of fundamental rights.

EU accession to the ECHR

50. Article 6(2) of the TEU requires the EU to accede (become a party) to the ECHR. Currently, the ECtHR has no power to hold the EU responsible for a failure to comply with the ECHR. That has two main consequences.
51. First, individuals and organisations could be without a legal remedy where EU action breaches the ECHR. For example, the ECtHR has refused an application against EU Member States which was in reality challenging a decision of the CJEU in a labour dispute that was entirely internal to the EU. There was no act or omission by any of the Member States for which they were responsible under the ECHR.⁴⁵ Following accession, individuals and organisations will be able to bring a case directly against the EU in the ECtHR, in the same way as they can now against the EU Member States.
52. Second, a Member State could be held responsible for breaching the ECHR when complying with EU law obligations. There is 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.⁴⁶ However, if the presumption is rebutted and the ECtHR finds a violation of the ECHR, the Member State concerned will be held responsible. Following accession, the ECtHR will be able to hold the EU directly responsible if EU law breaches the ECHR.
53. The precise terms of the EU's accession to the ECHR are currently under negotiation, with a draft accession agreement being scrutinised by the EU and the

⁴⁵ *Connolly v 15 Member States of the European Union* (dec.), no. 73274/01, 9 December 2008.

⁴⁶ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* [GC], no. 45036/98, 30 June 2005; the presumption is however rebuttable, see *Michaud v France*, no. 12323/11, 6 December 2012.

Council of Europe, as well as their respective Member States.⁴⁷ 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.⁴⁸ The EU's accession to the ECHR was discussed in evidence sessions as part of the Foreign Policy review.⁴⁹ We would welcome evidence on how the EU's accession to the ECHR is likely to affect the UK (see question 9).

What are the implications of accession?

The explanatory report to the draft accession agreement states that “[t]he objective of accession is to enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the Convention system”.⁵⁰

There are a variety of opinions on the likely impact of the EU's accession to the ECHR: some highlight the importance of individuals being able to hold the EU to account for ECHR breaches; some say accession will result in greater coherence between the CJEU and the ECtHR; others focus on the impact of accession on the UK's relationship with the ECHR.

The Fundamental Rights Agency

54. The Fundamental Rights Agency has recently been the subject of an independent external evaluation.⁵¹ The report made several recommendations, most notably the conduct of a review on the Agency's remit under its establishing Regulation and on its role in the EU's legislative process. The report also highlighted the need to continue efforts to increase the relevance and usefulness of the Agency to the Member States.

⁴⁷ 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: [www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH\(2013\)R78_addendum%20IV_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2013)R78_addendum%20IV_EN.pdf).

⁴⁸ Article 6(2) TEU and Protocol No.8.

⁴⁹ See Foreign Policy report: review of the balance of competences: www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences.

⁵⁰ [www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH\(2013\)R78_addendum%20IV_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2013)R78_addendum%20IV_EN.pdf).

⁵¹ http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf.

The Rights, Equality and Citizenship Programme

55. 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 would consolidate the objectives of a number of existing funding programmes – including the Fundamental Rights and Citizenship programme⁵² – in a single funding programme, with a lower net budget than the current funds. The programme remains under negotiation but is likely to fund projects on anti-discrimination, the rights of the child and combating violence against women. The projects may involve the collection and sharing of data, developing guides and educational material, and monitoring the implementation of EU legislation.

Questions 9 – 14

- 9.** What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 10.** What evidence is there that the impact of the Rights, Citizenship and Equality Programme will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 11.** What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?
- 12.** How could action in respect of fundamental rights be taken differently – including nationally, regionally, or by other international organisations – and how would this affect the United Kingdom?
- 13.** Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?
- 14.** Is there any other evidence in the field of EU fundamental rights which is relevant to this review?

⁵² The proposed Rights, Equality and Citizenship programme would also cover the objectives currently covered in the Daphne III programme on addressing violence against women and aspects of the Programme for Employment and Social Solidarity (PROGRESS).

Annex A: Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union sets out the rights, freedoms and principles which the European Union recognises.

Title I Dignity
Article 1 – Human Dignity
Article 2 – Right to Life
Article 3 – Right to integrity of the person
Article 4 – Torture and Inhuman or degrading treatment or punishment
Article 5 – Prohibition of slavery and forced labour
Title II Freedoms
Article 6 – Right to Liberty and security
Article 7 – Respect for private and family life
Article 8 – Protection of personal data
Article 9 – Right to marry and found a family
Article 10 – Freedom of thought, conscience and religion
Article 11 – Freedom of expression and information
Article 12 – Freedom of assembly and of association
Article 13 – Freedom of the arts and sciences
Article 14 – Right to Education
Article 15 – Freedom to choose an occupation and right to engage in work
Article 16 – Freedom to conduct a business
Article 17 – Right to property
Article 18 – Right to asylum
Article 19 – Protection in the event of removal, expulsion or extradition
Title III Equality
Article 20 – Equality before the law

Article 21 – Non-discrimination

Article 22 – Cultural, religious and linguistic diversity

Article 23 – Equality between women and men

Article 24 – The rights of the child

Article 25 – The rights of the elderly

Article 26 – Integration of persons with disabilities

Title VI Solidarity

Article 27 – Workers' rights to information and consultation within the undertaking

Article 28 – Right of collective bargaining and action

Article 29 – Right of access to placement services

Article 30 – Protection in the event of unjustified dismissal

Article 31 – Fair and just working conditions

Article 32 – Prohibition of child labour and protection of young people at work

Article 33 – Family and professional life

Article 34 – Social security and social assistance

Article 35 – Health Care

Article 36 – Access to services of general economic interest

Article 37 – Environmental protection

Article 38 – Consumer protection

Title V Citizens' Rights

Article 39 – Right to vote and to stand as a candidate at elections to the European Parliament

Article 40 – Right to vote and to stand as a candidate at municipal elections

Article 41 – Right to good administration

Article 42 – Right of access to documents

Article 43 – European Ombudsman

Article 44 – Right to petition

Article 45 – Freedom of movement and of residence

Article 46 – Diplomatic and consular protection

Title VI Justice

Article 47 – Right to an effective remedy and to a fair trial

Article 48 – Presumption of innocence and right of defence

Article 49 – Principles of legality and proportionality of criminal offences and penalties

Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Annex B: Interdependencies between the Fundamental Rights Review and other Balance of Competences Reviews

Specific Right/ Area of Interdependency	Balance of Competences review	Semester
EU Accession to the ECHR (an International Agreement)	Foreign policy review	1 st Semester
Right to asylum	Asylum and immigration review	2 nd Semester
Access to justice	Civil judicial cooperation review	2 nd Semester
Non-discrimination and equality rights	Social and employment review	3 rd Semester
Access to justice	Police and criminal justice review	4 th Semester
Voting rights	Cross cutting areas of EU competence	4 th Semester
Article 352 TFEU (the provision through which some Fundamental Rights action is taken)	Subsidiarity and proportionality review	4 th Semester
Data protection rights	Information rights review	4 th Semester

To find out more on other Balance of Competences Reviews see:

www.gov.uk/review-of-the-balance-of-competences

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