



HM Government

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

Evidence: Academics

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

Submission by Dr Tobias Lock, Edinburgh Law School¹

This submission is limited to the legal framework for the protection of fundamental rights in the EU. It thus provides answers to questions 1, 2, 3, 9, 11, 13, 14 only.

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 rights

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

The legal framework for the operation of the Charter

The impact of the Charter is limited to acts and omissions, which come within its scope. Article 51 (1) CFR has two prongs: (1) the Charter is always binding on the European Union; (2) it is binding on the Member States only when they are implementing Union law. As regards the first prong, the Charter can be considered advantageous for individuals and businesses in the UK, in particular because there is evidence in case law that the Court of Justice of the European Union (CJEU) has used its power to strike down EU legislation, which is incompatible with the fundamental rights guaranteed by the Charter.² Moreover, in a very recent decision the Court considered the length of proceedings in a case before the EU’s General Court excessive and in contravention to the right to have a case dealt with in a reasonable time guaranteed in Article 47 (2) CFR. The Court mentioned that such a violation could form the basis for a damages action based on Article 340 TFEU.³ Here the Charter opened up a route for the company concerned to claim damages.⁴

The scope of application of the Charter is more complicated where Member State action is concerned. This is because the Charter can only be invoked before UK courts where a Member State is ‘implementing Union law’.⁵ The existence of this trigger test reveals much about the nature of the

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² E.g. in Joined Cases C-92/09 and 93/09 *Volker and Markus Schecke GbR v Bundesanstalt für Landwirtschaft und Ernährung* [2010] ECR I-11063 and in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773; see also the Opinion by AG Cruz Villalón in Case C-293/12 *Digital Rights Ireland*, 12 December 2013, in which he recommended that Directive 2006/24/EC be declared incompatible (and void) with the Charter.

³ Joined Cases C-40/12 P, C-50/12 P and 58/12 P [2013] ECR I-0000.

⁴ It should be noted that the damages claim will only succeed if the company can show a ‘sufficiently serious breach’, cf. Case C-352/98 P *Bergaderm* [2000] ECR I-5291.

⁵ Note the different language versions: ‘lorqu’ils mettent en œuvre’ (French; literally, ‘when they are putting into work’) and ‘bei der Durchführung des Rechts der Union’ (German; literally, ‘during the execution of the law of the Union’).

Charter for the UK's legal order in that it cannot be considered a replacement for generally applicable human rights guarantees such as those contained in the HRA 1998. It would thus be wrong to consider the Charter as a new bill of rights for the United Kingdom as its effects are limited. This limited applicability of the Charter was well captured by Elias LJ in the Court of Appeal:

If the *Zambrano*⁶ principle [i.e. EU law] is applicable, then Article 7 of the European Charter on Fundamental Rights is engaged. If not, EU law is not engaged and the proportionality assessment has to be made, as it was in each of these cases, solely by reference to Article 8 of the European Convention on Human Rights.⁷

Thus the judge made it clear that the court would first have to establish whether the case was concerned with EU law, in which case the applicant could rely on Charter rights. The Court then found that this was not so given the purely internal character of the situation. Hence the applicant could 'only' rely on Article 8 of the European Convention on Human Rights, which is cognisable in the UK courts by virtue of the HRA 1998.

The exact meaning of 'implementing Union law' is still not entirely clear.⁸ The explanations to the Charter, which must be given due regard when interpreting its provisions⁹, suggest that Member States are 'implementing Union law' when they act within the scope of EU law. This has been confirmed by the Court in the judgment in *Åkerberg Fransson*.¹⁰ In that case the Court adopted a relatively wide approach when it considered that provisions of Swedish law criminalising tax evasion could be considered such an implementation despite the fact that the provisions pre-dated Sweden's EU membership.¹¹ The reason for this was that Article 325 TFEU and VAT Directive 2006/112/EC place the Member States under an obligation to ensure collection of VAT and to prevent evasion.¹² The crucial question for whether the Charter grants rights to individuals, which they can enforce in the UK courts, is therefore whether the legal dispute at issue arises within the scope of EU law.

Effect of Protocol No 30: Opt-out or not?

It is appropriate at this point to clarify the legal effect of Protocol No 30 to the Lisbon Treaty, which some¹³ have considered to constitute an opt-out from the Charter for the UK and Poland. The Czech Republic was promised to be included in the Protocol at the next accession treaty.¹⁴ In this respect it is worthwhile pointing out the differing motivations that prompted the three countries to request the Protocol. The Polish motivation is reflected in Declaration No. 61 to the Lisbon Treaty, which states that:

⁶ Reference is made to Case C-34/09 *Zambrano* [2011] ECR I-1177 (on the rights of family members of EU citizens).

⁷ Elias LJ, *Damian Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736, para 2.

⁸ Cf. answer to Question 11.

⁹ Article 52 (7) CFR.

¹⁰ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* 2013 ECR I-0000.

¹¹ *Ibid.*

¹² *Ibid.*, para 25.

¹³ *Cranston, J., High Court, R (on the application of Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin), para 155; *Mostyn J., AB, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin), para 10.

¹⁴ This inclusion did not occur despite the fact that the accession treaty with Croatia was signed after the entry into force of the Treaty of Lisbon.

‘The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.’

The United Kingdom was mainly concerned with ensuring that Title IV of the Charter (the social chapter) would not interfere with Britain’s labour law.¹⁵ However, the Polish did not pursue this aim at all. This is clear from Declaration No. 62 to the Lisbon Treaty, which states:

‘Poland declares that, having regard to the tradition of social movement of ‘Solidarity’ and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.’

By contrast, the key concern for the Czech Republic is the preservation of the so-called Beneš decrees, which concerned the confiscation of property of people expelled from Czechoslovakia after the Second World War.¹⁶

Having presented the different, and partly diametrically opposed, motivations behind Protocol No. 30, the remaining paragraphs of this sub-section will discuss its effect. It is suggested that if the Protocol resulted in a complete opt-out from the Charter, this would have to be considered negative for the fundamental rights protection of individuals and businesses. However, the Protocol’s wording does not suggest that a complete opt-out was intended. It contains no amendment to the Charter in relation to Poland and the UK. Article 1 (1) of the Protocol states that:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

The Charter is thus considered to reaffirm the fundamental rights already in existence in European Union law at the time the Charter entered into force. Fundamental rights have been recognised to exist as general principles, i.e. EU primary law, since the late 1960s.¹⁷ Thus Article 1 (1) of Protocol No 30 makes it clear that the Charter cannot be used to introduce new fundamental rights into the Union’s legal order. This is also reflected in the preamble to the Charter, where it says that:

This Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

Hence, Article 1 (1) of the Protocol mirrors what is already the position set out in Article 51(2) CFR and Article 6 (1) TEU, namely 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

¹⁵ Cf. Andrew Duff, MEP, Memorandum submitted to the House of Lords Select Committee on European Union, available at: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62wef11.htm>.

¹⁶ Cf. the Czech Republic’s own website: <http://www.czech.cz/en/Business/How-it-works-here/Justice,-legal-environment/The-Treaty-of-Lisbon-and-the-Czech-Republic>.

¹⁷ Case 29/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

and tasks as defined in the Treaties.’ This view has been confirmed by the CJEU in *NS*.¹⁸ It is perhaps interesting to note that in the academic discussion, which had taken place before *NS* was handed down, no one maintained that the Protocol constituted a complete opt-out from the Charter.¹⁹ Hence it was did not come as a surprise that the Home Secretary in *NS* conceded that the Charter was applicable.²⁰

The meaning of Article 1 (2) of the Protocol, which refers to Title IV of the Charter, is less clear:

In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

The CJEU in *NS* did not address the question concerning its interpretation. On one view, it merely confirms what is already stated in Article 52 (5) CFR. This provision introduces a distinction between provisions that embody rights and provisions that contain principles. It states that principles first need to ‘be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.’ Where such implementation has happened they ‘shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’. This means that principles, in contrast to rights, cannot be relied on without their having been implemented first. Some would argue that Title IV of the Charter, with which Article 1 (2) of Protocol 30 is concerned, only contains principles and not rights. If this is so, then Article 1 (2) merely confirms that Title IV does not contain any rights.²¹

If this view is not shared, i.e. if one thought that Title IV contains some rights at least, one could conclude that the UK has achieved an opt-out from Title IV.²² Those rights would only apply as principles to the UK, i.e. they could only be invoked in judicial proceedings if first implemented at national level.

However, on a third possible view one could construe Article 1 (2) in a similar manner to Article 1 (1), i.e. based on the notion that the Charter merely affirms rights already extant as general principles. If this is so, then the wording of Article 1 (2) is an affirmation of the general position: the Charter does not *create* any new rights, which could be justiciable. If justiciable rights mirroring those in Title IV of the Charter are deemed to exist as general principles anyway, then Article 1 (2) would not constitute an opt-out.

Comparison between the HRA and the Charter: better protection?

An important question is in how far the Charter provides better fundamental rights protection to individuals and businesses in the UK than the domestic human rights regime. Under the HRA 1998

¹⁸ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] ECR I-0000.

¹⁹ Cf. for instance C. Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in: Griller/Ziller (eds.), *The Lisbon Treaty*, Springer, 2008, 257-283; P. Craig, *The Lisbon Treaty*, OUP, 2010, 237-240; cf. also the views reflected in the House of Lords, EU Committee, *The Treaty of Lisbon: an impact Assessment*, HL Paper 62-I, paras. 5.84-5.111; as can be seen from the European Scrutiny Committee’s Third Report of 14 November 2007, that Committee, too, did not believe there to be an opt-out of the Charter.

²⁰ *N.S. v Secretary of State for the Home Department*, n. 18, para 46.

²¹ This seems to be the view of the House of Lords European Union Committee, summarised at para. 5.104 of HL Paper 62-I.

²² Barnard, n 19, 269.

the most a UK court can do in cases where it considers an Act of Parliament to be incompatible with the rights guaranteed in the ECHR is to issue a declaration of incompatibility, which leaves the validity of an Act of Parliament unaffected and does not change the outcome of the case. An exception to this applies under s. 29 of the Scotland Act 1998 as far as Acts of the Scottish Parliament are concerned. These are considered to be adopted *ultra vires* (and not law) if they contravene Convention rights or EU law. Moreover, only the higher courts have the competence to make declarations of incompatibility.²³

By contrast, if the Charter is applicable, Charter rights profit from the primacy of EU law.²⁴ This means that every court and tribunal, no matter how low in the judicial hierarchy, is under an obligation to disapply Acts of Parliament contravening Charter rights.²⁵ Given that many EU law related matters are first dealt with by tribunals, e.g. in employment law or in immigration law, the Charter results in an empowerment of these bodies.²⁶ It is important to note in this respect the difference between disapplying and declaring invalid. Disapplication does not render an Act of Parliament null and void. It remains in force and is applicable in cases where the Charter does not apply, i.e. situations not within the scope of EU law.

The relative power of the Charter became obvious in a recent decision by the EAT, in which the Tribunal considered that the State Immunity Act 1978 was incompatible with the applicants' right to an effective remedy guaranteed in Article 47 CFR.²⁷ The applicants were in an employment dispute with, their former employers, two embassies, which would normally profit from immunity in the UK courts. The judge considered that parts of the dispute came within the scope of EU law so that the Charter was applicable; so far as this was the case the State Immunity Act had to be dis-applied.

Moreover, it can be argued that the Charter, if applicable, provides much quicker relief for the victim of a human rights violation. In view of the requirement to exhaust domestic remedies before an individual can turn to Strasbourg and in view of the very lengthy duration of proceedings before the ECtHR, the road to Luxembourg can be travelled much more quickly if necessary. This is particularly so where a novel situation arises which deserves clarification since every court and tribunal in the United Kingdom has the right to request a preliminary ruling from the CJEU under Article 267 TFEU.

In addition, it should be briefly mentioned that the Charter contains a far wider array of rights than the ECHR/HRA. This is particularly true in the context of equality rights. Given that the UK has not signed up to Protocol No 12 to the ECHR, and given that Article 14 ECHR as a 'parasitic' right does not provide very far-reaching protection, in particular not in private law disputes, EU equality rights play a very important role in domestic law. In this sense the Charter can be regarded as an important addition to the protection of the rights of individuals in the UK. Moreover, some of the ECHR rights, which are duplicated by the Charter, have been modified and extended.²⁸

²³ S. 4 (5) HRA 1998.

²⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585; accepted by the House of Lords in *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1990] 3 WLR 818, [1991] 1 AC 603 HL.

²⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

²⁶ Cf. answer to Question 14 for statistics on preliminary references by tribunals.

²⁷ *Benkharbouche v Embassy of the Republic of Sudan* (UKEAT/0401/12/GE) and *Janah v Libya* (UKEAT/0020/13/GE); an appeal against the decision in *Benkharbouche* is currently pending before the Court of Appeal (case no. 20133062).

²⁸ On this see the following discussion on the 'indirect' effects of the Charter.

The above discussion has shown that the Charter, *in so far as it is applicable*, in some situations provides better protection for individuals than the UK's domestic regime based on the HRA and the common law. In wholly internal situations, the Charter cannot be invoked and thus does not provide any protection.

Indirect effects of the Charter

Apart from its direct application, it is important to note that the Charter also has indirect effects on the interpretation of the ECHR. As already mentioned, many of the provisions in Chapters I and II of the Charter are based on equivalent provisions in the ECHR. Where the ECHR provisions were deemed outdated by the drafters of the Charter, they were updated. An illustrative example is the right to marry guaranteed in Article 9 CFR and Article 12 ECHR respectively. Whereas Article 12 ECHR restricts this right to 'men and women', which is traditionally interpreted to restrict the right to opposite sex couples, Article 9 CFR is worded more openly²⁹ and can potentially accommodate same-sex marriages. A further example is Article 6 (1) ECHR, which limits the right to a fair trial to civil and criminal cases, whereas Article 47 CFR does not contain such a limitation so that it could also apply in administrative law proceedings.

There is an increasing tendency on part of the European Court of Human Rights to refer to these 'updated' versions of certain ECHR rights in order to justify an evolutive interpretation of the ECHR. For instance in the case of *Goodwin v UK* the ECtHR *inter alia* noted that Article 9 CFR departed from the wording of Article 12 ECHR, and came to the conclusion that a post-operative transsexual had a right to marry under Article 12 ECHR.³⁰

Given that the UK courts generally follow the case law of the ECtHR,³¹ these indirect effects of the Charter can be felt in the United Kingdom's legal order even outside the Charter's scope of application. In this way the Charter further contributes to the protection of individuals and businesses from state interference.

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?

Given that the Charter only applies in the Member States where the conditions set out in Article 51 (1) CFR are fulfilled, there is an increasing amount of case law dealing with this question. In this regard, it is important to note that while the Court adopted a wide approach in *Åkerberg Fransson*, there is equally evidence in recent case law on EU citizenship that the Court uses Article 51 (1) to allay the fears of the Member States with regard to the Charter's scope. For instance, in the case of *Dereci* the Court held that third country nationals, who apply for a right of residence in order to join their European Union citizen family members, who had never exercised their right to free movement and had always resided in the Member State of which they are nationals, could not rely on Citizenship Directive 2004/38.³² The Court then went on to point out

²⁹ Article 9 CFR reads: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'

³⁰ *Goodwin v United Kingdom* app no 28957/95, ECHR 2002-VI, para 100; other examples include *Bayatyan v Armenia* [GC] app no 23459/03, ECHR 2011 with regard to the right to conscientious objection under Article 9 ECHR and 10 CFR; *Scoppola v Italy (no. 2)* [GC] app no 10249/03 (17 September 2009) with regard to whether a criminal court was obliged to apply a more lenient penalty retroactively under Article 7 ECHR and 49 CFR.

³¹ S. 2 HRA as interpreted in *Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] UKHL 26 (so-called mirror principle).

³² Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315.

[...] that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.³³

This shows that the Court is not only conscious of the limited scope of the Charter but that it is also adamant to point out these limits to the national courts.

The CJEU is also making an increasing number of references to the Charter explanations, which under Article 52 (7) CFR must be given due regard.³⁴ The distinction between rights and principles contained in Article 52 (5) CFR will be addressed in the answer to question 11.

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?

It is at present not possible to provide evidence on this point in the strict sense as there still is not enough case law to allow one to give a meaningful answer. The following points therefore serve to illustrate the legal framework.

As previously mentioned, many of the rights contained in the Charter are based on rights contained in the ECHR. Article 52 (3) CFR provides that the meaning and scope of those rights must be the same as under the ECHR. The Court regularly refers to the ECHR and the ECtHR's case law when determining the substantive content of such a right.³⁵ Article 52 (3) confirms the previously existing practice of the CJEU to generally follow the case law of the Strasbourg court when developing EU fundamental rights derived from the general principles of EU law and transforms it into a binding obligation. The jurisprudence of the Strasbourg court is the first point of reference for the CJEU and thus its most important source of inspiration.

It is, however, important to note that all courts and tribunals applying the Charter have the option of providing stronger protection to the victim of a violation. Thus while it cannot be said that this has been advantageous to individuals in the UK, one can safely say that entrenching the ECHR as a minimum standard for the interpretation of corresponding Charter rights is not disadvantageous to individuals or businesses.

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?

In order to answer this question it is worth distinguishing between two questions: (1) will accession have an impact on the protection of individuals or businesses against UK public authorities?; and (2) will accession have an impact on the protection of individuals or businesses against the EU and EU acts?

³³ Ibid, para 71.

³⁴ Case C-597/12 RX-II *European Commission v Strack* [2013] ECR-0000; Case C-334/12 RX-II *Jaramillo and Others v EIB* [2013] ECR I-0000; Case C-101/12 *Schaible* [2013] ECR I-0000; Case C-426/11 *Almero Herron and Others* [2013] ECR I-0000; Case C-283/11 *Sky Österreich* [2013] ECR I-0000; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000.

³⁵ E.g. in Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Eifert* [2010] ECR I-11063; Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849; *Åklagaren v Hans Åkerberg Fransson* n. 10; Case C-400/10 *PPU McB v E* [2010] ECR I-08965.

As to the first question, there probably will be limited and indirect additional benefits to individuals and businesses when it comes to the assertion of their human rights within the UK and before UK courts. It is suggested that accession will not provide individuals with new remedies so that it will not directly be felt in the UK. The reason for this is two-fold. First, the HRA 1998 already incorporates the ECHR into domestic law so that individuals can rely on it. Second, while it is true that once acceded to by the EU, the ECHR becomes an 'integral part' of EU law and is capable of having direct effect and take primacy over conflicting national law³⁶, it is suggested that this would only be so where the UK is acting within the scope of EU law. Given that the Charter is applicable in the very same case and given that the ECHR constitutes the minimum standard of fundamental rights protection under the Charter (Article 52 (3) CFR), there is no additional benefit in such cases.³⁷

However, there are situations conceivable in which accession may be indirectly beneficial even in cases initiated in UK courts and tribunals. This would be situations in which the CJEU has adopted a standard of fundamental rights protection which is below that demanded by the ECHR. Because of Article 52 (3) CFR, discussed above, this is only likely to happen where there is no ECtHR case law on a given point.³⁸ Where a claimant then loses their case in the national court, which had relied on the CJEU's interpretation either with or without having made a request for a preliminary ruling, that claimant can take their case to the ECtHR in Strasbourg. The ECtHR can then review this lower CJEU standard. If, as suggested below, the *Bosphorus* presumption is given up, this would mean a full review of these findings and potentially an improvement of human rights standards in the EU.

Turning to the second question, one can identify two areas in which accession is likely to yield improved fundamental rights protection: the closure of the *Connolly* gap and a possible end to the *Bosphorus* presumption. As a background it should briefly be noted that individuals can already bring cases to the ECtHR which are founded on an alleged violation of the Convention brought about by EU action. Such cases have to be brought against the EU Member State, the authorities of which have acted vis-à-vis the victim.³⁹ However, there is a gap in this (indirect) protection where no Member State action has occurred, i.e. where *only* EU bodies were involved. This was made clear in the case of *Connolly*, which concerned a staff dispute between the EU and one of its employees.⁴⁰ It is suggested that EU accession will close the *Connolly* gap as it will become possible to bring such a case directly against the EU as respondent. Apart from staff disputes the other cases falling into this category are competition law cases, in which alleged procedural shortcomings before the European Commission and the EU courts may be at issue. In this sense, accession will immediately improve the fundamental rights protection of individuals and businesses in the UK.

As regards the *Bosphorus* presumption, the situation is a little less certain. The ECtHR established a presumption that a Member State which has no discretion in the implementation of an obligation under EU law has not violated Convention rights because the protection of fundamental rights at EU law is equivalent to what the Convention requires. This presumption can only be rebutted if the applicant can show a manifest deficit in the protection at EU level in the given case.⁴¹

³⁶ To this effect cf. Case 181/73 *Haegeman v Belgium* [1974] ECR 449.

³⁷ For a more detailed analysis, cf. Tobias Lock, 'End of an epic? The draft accession agreement on the EU's accession to the ECHR' (2012) 31 Yearbook of European Law 162, 190-194.

³⁸ For instance, this was the case in Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859 where the CJEU found that a company was not protected by Article 8 ECHR; a few years later the ECtHR decided in *Niemietz v Germany* app no 13710/88, Series A 251-B that this could very well be the case.

³⁹ *Matthews v United Kingdom* app no 24833/94, ECHR 1999-I.

⁴⁰ *Connolly v 15 Member States of the EU* app no 73274/01, 9 December 2009.

⁴¹ *Bosphorus v Ireland* app no 45036/98, ECHR 2005-VI.

This presumption puts EU Member States in a privileged position and places applicants in such cases at a serious disadvantage. In practice, the presumption has never been rebutted with regard to the EU.⁴² An open question is thus whether this presumption will continue to be applied after accession. Under Article 1 (4) of the Draft Accession Agreement⁴³, all action by Member State authorities will continue to be attributed to the Member State concerned even if it acted under strict EU obligations. Hence the same type of situation as in the *Bosphorus* case can arise after accession. The fate of the *Bosphorus* presumption is not addressed in the Draft Accession Agreement. It is, however, suggested that it is likely to be abandoned. In the first place, there are good reasons to assume that the presumption was introduced out of comity towards the EU system and in recognition of the fact that the EU was not formally bound by the ECHR.⁴⁴ In addition, the Draft Accession Agreement explicitly provides that the ‘current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary.’⁴⁵ Thus it is the aim of accession, as far as possible, to treat the EU like any other party to the Convention. Given that no other party enjoys the same or a similar privilege, it would only be logical for the Court to give up the presumption. Hence it is likely that the protection of individual rights in those types of cases will improve after accession.

Moreover, there may be indirect consequences, which may have an impact on the level of protection offered by the CJEU. Judges at the CJEU will be aware that their decisions will be susceptible to a challenge in Strasbourg. Thus it is possible that the CJEU will move to strengthen the human rights protection it offers and become more vigilant in the enforcement of such rights both vis-à-vis the EU and the Member States when implementing EU law.

11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?

There are five future challenges one can identify with regard to EU fundamental rights. First, the exact boundaries of the scope of the Charter; second, the distinction between rights and principles; third, the potential for horizontal effect of Charter rights; fourth, the role of the general principles of EU law; and fifth, the determination of the substantive content of the rights in the Charter.

The first challenge relates to the exact boundaries of the scope of the Charter when it comes to its application in the Member States under Article 51 (1) CFR. While the decision in *Åkerberg Fransson* suggests a relatively broad approach, it is not entirely clear whether this approach will be continued.⁴⁶ A recent decision, in which the CJEU made references to *Åkerberg Fransson* would suggest this.⁴⁷ Here the Court referred to *Åkerberg Fransson* as the relevant precedent for the interpretation of Article 51 (1) CFR. At the same time, the German Federal Constitutional Court made it clear that it did not agree with an expansive reading of the *Åkerberg Fransson* decision. It said:

“[*Åkerberg Fransson*] must not be interpreted in a way which would lead to the conclusion that it constituted an *ultra vires* act or in a way which would endanger the protection by or

⁴² The ECtHR considered the presumption not applicable in a case concerning the United Nations sanctions regime, cf. *Al-Dulimi and Montana Management Inc. v Switzerland* app no 5809/08 (26 November 2013).

⁴³ 47+1(2013)008rev2.

⁴⁴ In *Michaud v France* app no 12323/11, ECHR 2012, para 104 the Court stated that the presumption is tailored to situations in which the ‘international organisation [...] is not party to the Convention’.

⁴⁵ At para 7.

⁴⁶ *Åklagaren v Hans Åkerberg Fransson*, n. 10; the reasoning is briefly explained in the answer to Question 1.

⁴⁷ Case C-418/11 *Texdata* [2013] ECR I-0000.

enforcement of the Member State's fundamental rights, which would call into question the identity of the constitutional order erected by the Basic Law. In this sense the decision may not be understood and applied in a way that any reference of a provision to the abstract scope of Union law or purely factual effects on Union law would be sufficient for the Member States to be bound by the fundamental rights contained in the Charter of Fundamental Rights."⁴⁸

This stance is also relevant to the UK as it may well have an impact on the future development of the CJEU's case law. Implicit in this quote is the threat that the Federal Constitutional Court may consider a decision by the CJEU *ultra vires* and thus not applicable in Germany. Given that the Federal Constitutional Court considers itself to have jurisdiction to make such a finding, it is considered one of the most powerful antagonists of the CJEU. Its decisions carry particular weight in the discourse between the CJEU and national courts about the limits of European Union law. Its case law has in the past influenced the case law of highest courts in many other EU Member States. It is therefore likely that this *dictum* by the Federal Constitutional Court will trigger a response from the CJEU.

A further open question is the exact distinction between rights and principles established by Article 52 (5) CFR. The Court has not yet pronounced on this question. However, the opinions of the Court's Advocates General diverge on this point so that it is fair to conclude that there is a lack of clarity on this question.⁴⁹ This discussion will mainly concern the provisions contained in Chapter IV of the Charter. It has been suggested that in particular the provisions in Chapter IV contain principles.⁵⁰ This view, however, was dismissed by AG Trstenjak, who considered Articles 28 and 29 as well as 31 to contain rights rather than principles.⁵¹ It is recalled that the distinction between rights and principles is of great importance when assessing the effect of Article 1 (2) of Protocol No. 30.⁵²

Another future challenge concerns the question whether the rights contained in the Charter are capable of having horizontal effect. Moreover, the future role of the EU's fundamental rights as found in the (unwritten) general principles of EU law is not clear. Finally, the substantive content of many of the Charter rights has not yet been defined.

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?

It is suggested that the Charter (and EU accession to the ECHR) should primarily be regarded as ways in which the power of the EU is limited.⁵³ This is overall advantageous to individuals, businesses and the public sector in the UK. As regards an extension of EU competence in the area of fundamental rights, the EU's Justice Commissioner Reding recently proposed to extend the scope of the Charter

⁴⁸ BVerfG *Antiterrordatei* 1 BvR 1215/07, para 91 (translation Tobias Lock).

⁴⁹ Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [2012] ECR I-0000 (Opinion by AG Trstenjak); Case C-176/12 *AMS* (Opinion by AG Cruz Villalón)

⁵⁰ Lord Goldsmith, 'The Charter of Rights – a brake not an accelerator' [2004] *European Human Rights Law Review* 473, 476.

⁵¹ Opinion by AG Trstenjak, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, n. 49, para 75-79.

⁵² For this discussion, see the answer to Question 1.

⁵³ Cf. the cases quoted in n 2.

to all Member State action.⁵⁴ This would, however, necessitate treaty change, which would require the agreement of all Member States (incl. the UK).

There is no evidence of the Charter being used to expand the legislative competence of the Union. As regards more subtle ways of competence expansion, e.g. through case law, it is important to note that there still is not a great amount of case law available which could provide a firm basis for conclusions in this respect. In addition, there is the more general issue of drawing the line between the Court merely interpreting the Charter and the Court overstepping the boundaries and acting *ultra vires*. This is where the critique of the German Federal Constitutional Court cited above in the answer to Question 11 is to be situated. Apart from the above-mentioned decision in *Åkerberg Fransson*, the CJEU's decision in *Melloni* has attracted some criticism in this respect.⁵⁵

It may be appropriate in this context to briefly comment on whether the Charter created new rights or whether it merely affirmed rights which had already been in existence as 'general principles'. The Charter itself is quite clear in its preamble that it merely 'reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States [...]'. This seems to us to be broadly correct. Nonetheless, the codification of these rights in the Charter makes these rights more 'tangible' and accessible. This may well incentivise lawyers to rely on EU fundamental rights which had previously been only recognised as an unwritten, and thus somewhat contourless, general principle. There should thus in theory be an increase in cases in which EU fundamental rights are part of the parties' arguments. Consequently the Charter should be gaining greater prominence not only in the CJEU but also in the UK courts. In fact, a brief search on the legal research database 'Westlaw' revealed that between 1 January 2010 and 10 December 2013, i.e. roughly during the first four years of the Charter's existence as a binding source of law, the Charter was referred to in 139 cases before UK courts and tribunals. By comparison during the previous four year period from 1 January 2006 until 31 December 2009, the Charter was only mentioned in 18 UK cases.⁵⁶ This shows a surge in references to the Charter, which is unlikely to abate.

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

At this point it is appropriate to comment on two more general phenomena, which may provide some useful background for this review. The first relates to the legal culture in the UK and its attitude towards EU law in general and EU fundamental rights in particular. There appears to be a lack of familiarity with EU law in general and with the Charter in particular amongst practising lawyers, i.e. both counsel and judges. The comments by Judge Mostyn in the case of *AB* must be considered quite significant. They suggest that EU law is still considered as entirely distinct from domestic law and not, as would be appropriate, as part of the applicable law of the land. In addition, the case of *AB* suggests a lack of awareness both on part of the judge and on part of counsel that the crucial question with regard to the Charter is its applicability in the Member State legal orders according to Article 51 (1) CFR.⁵⁷ In *AB*, for instance, Article 51 (1) CFR is mentioned only once as part of a quotation. Apart from that, the provision was not considered by the judge. This suggests that there is perhaps a need for more legal training on part of the judiciary but also the legal professions on matters of EU law and in particular on the often very difficult task of delimiting the scope of EU law. In this context it should be pointed out that tribunals generally seem to be more

⁵⁴ Speech by Commissioner Reding, 4 September 2013, SPEECH/13/677.

⁵⁵ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR I-0000.

⁵⁶ Search for "Charter of Fundamental Rights" as free text in Westlaw (carried out 10 December 2013).

⁵⁷ See above.

accustomed to dealing with EU law sources and with EU fundamental rights than the higher courts. This is evidenced by the fact that the vast majority of all reference requests ever to come from the UK were made by tribunals.⁵⁸ This includes important reference requests in the field of fundamental rights which were made by tribunals.⁵⁹

In this context it is important to point out certain procedural restrictions, which may discourage counsel from invoking the Charter. These rules relate to the number of authorities to which counsel may refer in their notes of argument before the appeal courts in Scotland and England. Section 91 of the Court of Session's Practice notes and Section 29 of the Court of Appeal's Practice Direction 52C state that the bundle of authorities submitted to the court in preparation for the hearing should not 'contain (include) more than 10 authorities [...]'. The term 'authorities' is not defined, but is in practice construed to include legislative materials. Hence reference to the Charter of Fundamental Rights as such would count as one authority. Given that the Charter is relatively new and given that it can only be invoked where the case comes within the scope of EU law, an argument based on the Charter requires elaborate substantiation. Counsel cannot generally take it for granted that the court is fully familiar with the cases helpful in determining the scope of EU law or indeed with the CJEU's case law on the applicability and effect of EU law. Hence arguments based on the Charter are prone to be lengthy, complicated and in need of authoritative backup. In light of this, counsel may choose not to 'waste' a significant number of the 10 authorities to which they are allowed to refer on making a Charter-based point. Of course, it must be acknowledged that there is some flexibility built into the provision given its wording ('should'). Thus in a case which is exclusively based in EU law, the courts may be more lenient in practice and allow more authorities to be cited. However, regarding cases where the EU law angle is only secondary, which may often be the case with Charter-based arguments, the issue remains that counsel may choose not to raise that point for the reason referred to above. Hence these rules could significantly restrict the ability of counsel to invoke the Charter in practice.

The second comment concerns the general cultural climate surrounding the EU and human rights. The Leveson report has highlighted the issue of mis-reporting both on human rights and on EU issues:

9.53 Articles relating to the European Union, and Britain's role within it, accounted for a further category of story where parts of the press appeared to prioritise the title's agenda over factual accuracy. On Europe, Mr Campbell said:

"Several of our national daily titles – The Sun, The Express, The Star, The Mail, The Telegraph in particular- are broadly anti-European. At various times, readers of these and other newspapers may have read that 'Europe' or 'Brussels' or 'the EU superstate' has banned, or is intending to ban kilts, curries, mushy peas, paper rounds, Caerphilly cheese, charity shops, bulldogs, bent sausages and cucumbers, the British Army, lollipop ladies, British loaves, British made lavatories, the passport crest, lorry drivers who wear glasses, and many more. In addition, if the Eurosceptic press is to be believed, Britain is going to-be, forced to unite as a single country with France, Church schools are being forced to hire atheist teachers, Scotch

⁵⁸ As of 2012 courts and tribunals other than the Supreme Court/House of Lords and the Court of Appeal had made 434 out of a total of 547 UK references (since the UK's accession to the EU), cf. CJEU, Annual Report 2012, page 115.

⁵⁹ E.g. from the Immigration Appeal Tribunal in Case C-60/00 *Carpenter* [2002] ECR I-6279; from the Social Security Commissioner in Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; from the Employment Tribunal South London in Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603; from the from the Upper Tribunal (Immigration and Asylum Chamber) in Case C-83/11 *Secretary of State for the Home Department v Rahman* [2012] ECR I-0000.

whisky is being-classified as an inflammable liquid, British soldiers must take orders in French, the price of chips is being raised by Brussels, Europe is insisting on one size fits all condoms, new laws are being proposed on how to climb a ladder, it will be a criminal offence to criticise Europe, Number 10 must fly the European flag, and finally, Europe is brainwashing our children with pro-European propaganda! Of the UK press and the European institutions – I speak as something of a Eurosceptic by Blairite standards – it is clear who does more brainwashing. Some of the examples, may appear trivial, comic even. But there is a serious point: that once some of our newspapers decide to campaign on a certain issue, they do so with scant regard for fact. These stories are written by reporters, rewritten by subs, and edited by editors who frankly must know them to be untrue. This goes beyond the fusion of news and comment, to the area of invention.”

9.54 Although Mr Campbell’s evidence may have been exaggerated for effect, there is certainly clear evidence of misreporting on European issues. Mr Campbell drew attention to a Daily Mail story claiming that “the EU” was going to ban grocers from selling eggs by the dozen, followed by a story that there had been a U-turn and the ban would no longer take place. The reality is that there had never been a ban proposed and the original story was based on a deliberate or careless misinterpretation of EU proposals. Full Fact drew attention to a number of further ‘anti-EU’ stories which misrepresented facts, including a Daily Express report on EU plans to ‘ban’ plastic shopping bags, when the reality was that a consultation had been launched to explore a variety of options, including a potential ban, for reducing waste from plastic bags.

9.55 The factual errors in the examples above are, in certain respects, trivial. But the cumulative impact can have serious consequences. Mr Blair explained that the misinformation published about Europe by some parts of the press made it difficult for him to adopt particular policies or achieve certain political ends in Europe that he might otherwise have done. He said:

“My distinction is between that and how you actually report the story as a piece of journalism. So if you take the issue to do with Europe, what I would say is that those papers who are Eurosceptic are perfectly entitled to be Eurosceptic. They’re perfectly entitled to highlight things in Europe that are wrong. What they shouldn’t do is, frankly, make up a whole lot of nonsense about Europe and dish that up to the readers, because that’s – I mean, how does the reader know that’s not correct?”

9.56 That, ultimately, is the foundation of the criticism made in this section: there can be no objection to agenda journalism (which necessarily involves the fusion of fact and comment), but that cannot trump a requirement to report stories accurately. Clause 1 of the Editors’ Code explicitly, and in my view rightly, recognises the right of a free press to be partisan; strong, even very strong, opinions can legitimately influence the choice of story, placement of story and angle from which a story is reported. But that must not lead to fabrication, or deliberate or careless misrepresentation of facts. Particularly in the context of reporting on issues of political interest, the press have a responsibility to ensure that the public are accurately informed so that they can engage in the democratic process. The evidence of inaccurate and misleading reporting on political issues is therefore of concern. The previous approach of the PCC to entertaining complaints only where they came from an affected individual may have allowed a degree of impunity in this area: in the context of misleading reporting on political issues, representative bodies are likely to be far better placed to monitor, and complain about, inaccuracies.

Articles relating to the European Union, and Britain's role within it, accounted for a further category of story where parts of the press appeared to prioritise the title's agenda over factual accuracy.⁶⁰

There is a danger that such mis-reporting leads to a (further) deterioration of the public's regard for the European Union and in particular the fundamental rights protection available under European Union law.⁶¹ This is worrying given that, as elaborated above, the rights contained in the Charter are overall beneficial for individuals, businesses and the public sector in the United Kingdom.

Edinburgh, January 2014

⁶⁰ Leveson LJ, An inquiry into the culture, practices and ethics of the press, Volume 2, paras 9.53-9.56.

⁶¹ Further evidence of mis-reporting can be found on the "Euro-myths" page hosted by the European Commission's representation in the UK: <http://ec.europa.eu/unitedkingdom/blog/>.

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Review of UK and EU balance of competences: response to the call for evidence on fundamental rights

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Some general notes on the impact of the EU fundamental rights framework on UK action

By way of background to our evidence, and in order to provide full and comprehensive answers to the questions, we begin by setting out **some general points on the impact of the EU fundamental rights framework on UK action**. We have attached an editorial, written by Liverpool European Law Unit staff and published in the *Common Market Law Review* in 2010, which highlights key themes in the legal scholarship concerning the need to define precisely when Member State action must satisfy the standards laid down by EU fundamental rights law.¹ In this section of our evidence, we summarise the editorial's main points, supplemented by some more recent developments in the caselaw of the European Court of Justice.

1. The debate on the difference between the phrases 'within the scope of EU law' and 'implementing EU law'

First, the editorial highlights a basic confusion in the state of EU law at the time it was written (2010). After the Lisbon Treaty, the EU legal order contained two distinct sources of fundamental rights protection, each of which appeared to have a different scope of application for the Member States. On the one hand, the unwritten, judge-made general principles of EU law – which include respect for fundamental rights – will apply to Member State conduct that falls *within the scope of EU law*. On the other hand, the Charter of Fundamental Rights, as incorporated into EU primary law by the Lisbon Treaty, applies to the Member States only when they are *implementing EU law*. The latter concept appeared to be narrower in its potential scope of application than the former one – thus raising the rather confusing possibility that the EU's two distinct fundamental rights regimes would each catch a different range of national measures. However, the European Court of Justice in the important *Fransson* ruling held that, despite appearances, the concept of "implementing" as used in the Charter is in fact to be treated as identical to the idea of acting "within the scope of EU law" as developed in the context of the general principles of EU law.² That is a very useful clarification: although EU law still contains two distinct sources of fundamental rights – the general principles and the Charter – they will at least apply to the same categories of Member State action.

2. What does 'within the scope of EU law' mean?

Secondly, *Fransson* therefore focuses our attention on the key question posed by the CMLRev editorial: what does it mean, precisely, to say that the Member State is acting "within the scope of EU law" and must thus respect the EU's system of fundamental rights protection? In that regard, the editorial notes that two categories of situation can be considered clear and well settled:

¹ The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?" (2010) 47 *Common Market Law Review* 1589-1596. See Annex attached to this evidence.

² Case C-617/10 *Fransson* (Judgment of 26 February 2013).

- when the Member State is implementing EU law, e.g. by transposing, applying or enforcing a directive within the national legal system;³ and
- when the Member State is derogating from EU law, e.g. by seeking to deny an individual rights to which they are prima facie entitled under the Treaties.⁴

More controversial is a third category of situation, when it is also argued that Member States should be bound by EU fundamental rights law, i.e. if they are *otherwise* acting within a field governed by EU law. There is a longstanding academic opinion which favours expanding the range of situations in which EU fundamental rights law should apply to the Member States. However, the CMLRev editorial points out that the evidence in favour of that third category of situation has traditionally been both limited in nature, since there were few if any cases that clearly endorsed such a position; and contested in character, since it seemed difficult to define with any precision when a Member State was “otherwise” acting within the scope of EU law, or to justify why such situations should be subjected to scrutiny under EU fundamental rights law. The main development here is the European Court of Justice ruling in *Küçükdeveci*.⁵ That case does indeed suggest that certain types of Member State conduct – in particular, acts which are not clearly implementing or derogating from EU law, and whose only connection to the EU legal order seems to be that they happen to fall within a field regulated also by EU law – can indeed be scrutinised for their compliance with EU fundamental rights law. As the editorial point out, we await clarification from the European Court of Justice about the correct interpretation and implications of the ruling in *Küçükdeveci*. If there is to be such a potentially dramatic expansion in the scope of application of EU fundamental rights law, then we would argue it requires a more explicit and rather compelling constitutional justification.

In addition to the basic constitutional question of defining when Member State conduct falls within the scope of EU law and is therefore governed by EU fundamental rights law, we identify a series of **additional questions** which play an important role in **determining the balance of competences between the EU and the Member States in the field of fundamental rights protection**.

1. Can EU fundamental rights provisions produce their own legal effects in the Member States?

First, there is the question of whether any given EU fundamental right is sufficiently clear, precise and unconditional as to be capable of producing its own legal effects

³ E.g. Case 5/88 *Wachauf* [1989] ECR 2609; Cases C-31/91 to C-44/91 *Lageder* [1993] ECR I-1761; Case C-2/92 *Bostock* [1994] ECR I-955; Case C-292/97 *Karlsson* [2000] ECR I-2737; Cases C-20/00 and 64/00 *Booker Aquaculture* [2003] ECR I-7411; Case C-101/01 *Lindqvist* [2003] ECR I-12971.

⁴ E.g. Case C-260/89 *ERT* [1991] ECR I-2925; Case C-368/95 *Familiapress* [1997] ECR I-3689; Case C-60/00 *Carpenter* [2002] ECR I-6279; Cases C-482 and 493/01 *Orfanopoulos* [2004] ECR I-5257.

⁵ Case C-555/07 *Küçükdeveci* [2010] ECR I-365.

without further implementation by the EU or by the Member States. In other words, just because either the Court's caselaw or the Charter identifies the existence of a given "fundamental right", does not mean that that right will actually produce autonomous, enforceable obligations for the Member State, e.g. if the content or nature of the relevant right is not capable of being ascertained and enforced by the courts without additional guidance from the legislature. Consider, e.g. the case of *Dominguez*.⁶ French rules limiting a worker's entitlement to paid annual leave were incompatible with the Working Time Directive,⁷ but the latter (like all EU directives) could not be enforced in and of itself within the context of a private relationship. Although the Court was asked to consider whether the claimant could instead derive an enforceable right to paid annual leave directly from the provisions of the Charter, the Court refused to endorse this possibility, presumably on the grounds that it was not possible to identify the full nature and content of the right to paid annual leave autonomously and without reference to its EU and national legislative implementing measures. The ECJ reached a similar outcome, based explicitly on such reasoning, in the more recent dispute in *Association de médiation sociale*, which concerned the right of workers to information and consultation as set out in Article 27 of the Charter.⁸

2. Can EU fundamental rights provisions produce legal effects between two private individuals?

Every fundamental rights regime in every legal system struggles with the question: how far should those rights extend beyond the conduct of public bodies so as also to impose obligations upon private actors? In the EU context, it has traditionally been assumed that EU fundamental rights apply only to the conduct of Member States: after all, both the general principles of EU law and the Charter of Fundamental Rights are addressed to and should only be binding upon the Member States when acting within the scope of EU law. That is not to say that EU fundamental rights law has no relevance to private parties other than the claimants / beneficiaries of those rights. After all, it is widely accepted in many legal systems that claims of illegality against public acts can be raised collaterally in litigation between two private parties – so that the setting aside of the unlawful public act can affect the legal relationship between the two individuals without directly imposing any obligations as such upon a purely private party. As the famous ruling in *Mangold* shows, such a collateral application of EU fundamental rights law is also possible within the EU legal system.⁹ Otherwise, there is no evidence in the ECJ caselaw to suggest that EU fundamental rights have expanded beyond their traditional role of controlling Member State conduct (albeit that those rights can sometimes be raised also as collateral issues in private disputes between two individuals); so as to become truly "horizontal" in their application (in the

⁶ Case C-282/10 *Dominguez* (Judgment of 24 January 2012).

⁷ Directive 2003/88 [2003] OJ L299/9.

⁸ Case C-176/12 (Judgment of 15 January 2014).

⁹ Case C-144/04 *Mangold* [2005] ECR I-9981.

sense of being capable of determining the conduct of private parties in the exercise of their own autonomy).¹⁰

3. Protocol 30 and the opt-out question

Finally, and of particular importance in the UK context, there is the legal relevance of Protocol 30 as introduced by the Lisbon Treaty. The main case here is *NS v Home Secretary*.¹¹ This dispute raised the question of whether the UK is entitled or indeed obliged to assume responsibility for the examination of claims for asylum, rather than transfer the relevant individuals to Greece, despite the fact that the latter Member State has primary responsibility (under the applicable Union legislation) for examining those claims, in circumstances where it cannot be guaranteed that Greece will act in accordance with the standards laid down by the Charter of Fundamental Rights. An important element of the case concerned the correct interpretation to be attributed by the English courts to Protocol 30 and, in particular, the question of how far the latter measure limits the legal extent of the UK's obligations under the Charter of Fundamental Rights. Both the Advocate General and the European Court of Justice indicated that Protocol 30 cannot be interpreted as any sort of general opt-out from the Charter for the UK. In particular, Article 1(1) of Protocol 30¹² merely reaffirms what is already provided for under Article 51 of the Charter itself, i.e. that the Charter is not intended to extend the scope of Union competences or the field of application of Union law. Neither the Advocate General nor the Court expressed any firm view on the proper legal effects of Article 1(2) of Protocol 30 concerning the justiciability of the Charter's "Solidarity" provisions.¹³ After all, the dispute in *NS v Home Secretary* did not actually concern any of the Charter's "Solidarity" provisions. Similarly, neither the Advocate General nor the Court expressed any clear view about the proper legal effects to be attributed to Article 2 of Protocol 30 concerning those Charter provisions which make reference to national laws and practices.¹⁴ Again, none of the Charter provisions at stake in *NS v Home Secretary* made reference to national laws and practices. Having said that, developments in cases such as *Dominguez* and *Association de médiation sociale* suggest that the legal effects of Article 1(2) and 2 of Protocol 30 will cease to be a particularly controversial issue: if the Court has begun to limit the autonomous effects of Charter provisions concerning social and economic

¹⁰ See further for a full analysis: M. Dougan, "The Impact of the General Principles of Union Law Upon Private Relationships" in D. Leczykiewicz and S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing, Oxford) pp 71-87.

¹¹ Case C-411/10 (Judgment of 21 December 2011).

¹² "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".

¹³ "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law".

¹⁴ "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom".

rights that require further implementation and / or make explicit reference to national law, then the question of a “UK opt-out” loses much of its legal or political importance.

In light of these general observations, we now turn to the questions outlined in the call for evidence.

Q1.

In response to the question, we first focus upon the instances in which fundamental rights issues arise in respect of **Union free movement principles**.

In relation to **cross-border trade**, we have observed instances in which the EU fundamental rights framework is interpreted in a way as to promote cross-border trade (1), as well as times when it acts as a brake (2).

1. In *Familiapress*, for example, the Court prioritised free movement over fundamental rights considerations.¹⁵ Here, an Austrian rule related to the freedom of the press had to be re-assessed in light of the free movement rights of a German publisher, to sell its magazines in Austria, and the German publisher’s own right to freedom of expression.
2. On the other hand, the Court of Justice has offered a margin of appreciation to Member States in some cases where the exercise of free movement would clash with a Member States own values and definitions of fundamental rights. In some cases, this could inhibit UK trade.¹⁶ In other instances, it can allow the UK to maintain its own cultural and moral values.¹⁷

In relation to **free movement of services**, the *Laval* case carries advantages and disadvantages both for individuals and for business.¹⁸ In that case, the Court of Justice favoured the freedom to provide services in other Member States over the fundamental right to strike. On the one hand, this preference for free movement can be useful to UK businesses wishing to post workers in other Member States. On the other, it restricts the ability of individuals to protect their own interests in the course of industrial disputes. Following *Laval*, there was also concern that the case would encourage social dumping. Although this would be a cause for concern for businesses operating in the UK, commentators have to date found little evidence of it occurring in practice.¹⁹

In relation to **free movement of persons**, the recognition of the fundamental right to family life under Union law has been beneficial to UK citizens who wish to reside in another Member State. Directive 2004/38 allows UK citizens to take their family members with them when they work in another Member State.²⁰ EU law has, in some instances, provided access to the right

¹⁵ Note 4, above.

¹⁶ Case C-36/02 *Omega* ECR I-9981; Case C_244/06 *Dynamic Medien* [2008] I-00505

¹⁷ Case C-275/92 *HM Customs and Excise v Schindler* [1994] I-01039; Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan and Others* [1991] I-04685.

¹⁸ Case C0341/05 *Laval un Partneri* [2007] I-11767

¹⁹ C. Barnard, “Social Dumping or Dumping Socialism? (2008) 67 *Cambridge Law Journal* 262-264.

²⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30.4.04

to family life for UK and EU citizens, when this has been blocked at national level.²¹ However, this recognition of the fundamental right to family life is a corollary to the acknowledgement that free movement is facilitated by recognising the human being behind the economic actor, rather than by a straightforward expansive approach to fundamental rights.

Q2.

First, in relation to **Article 51 of the Charter**, we would recall the evidence outlined above (in the background section) on the clarifications provided by the Court regarding situations in which the Charter and the EU fundamental rights framework apply to Member State action, namely that:

1. Both the Charter and the EU's broader fundamental rights framework apply when Member States act within the scope of EU law (*Fransson*).
2. Protocol 30 is no more than a reiteration of the fact that the Charter only applies when the UK is acting in the scope of EU law (*MS*).

Furthermore, **Article 51(2) of the Charter** states that the Charter does not establish any new power or task for the Union. This means that the Court of Justice will only make a fundamental rights assessment where there is an existing link to EU law. The existence of a Charter of Fundamental Rights does not allow the Union institutions to become involved in new areas of Member State activity simply because they engage fundamental rights issues. This rule has been clearly enforced by the Court of Justice. In *Dereci*, the Court noted that a decision to separate a family for immigration reasons, impacting on the fundamental right to family life, was not sufficient to trigger EU law.²² The Court noted that, Article 7 of the Charter concerned the right to family life, also protected by Article 8 of the ECHR. However, due to Article 51(1), Article 7 was only relevant if the matter fell within the scope of Union law.²³ The Court could not decide whether a third country national had a right to reside in the Member State of a static Union citizen simply because it raised issues of the right to family life. This was not enough on its own to trigger Union law. The UK courts have also enforced this approach in their own interpretations of the *Dereci* ruling.²⁴

Following on from this, we have noted the following assessment of the **impact of the Charter at national level**:

'...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, the judgments of the Luxembourg Court...what the Charter does not and cannot do is to give birth to rights, freedoms and principles in areas in which the

²¹ *Carpenter* (note 4, above); C-127/08 *Metock and Others* [2008] I-06241

²² Case C-256/11 *Murat Dereci and Others* [2011] I-11315

²³ Paras.68-71

²⁴ See *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736

*Treaties claim no rule-making competence but acknowledge the exclusive competence of Member States. This is spelt out by Article 51.2 of the Charter.*²⁵

There have recently been two, unsuccessful attempts, to use the Charter, as well as the Union's framework of citizens' rights, in the national courts to create new substantive rights for UK citizens.

1. First, in October 2013, the Supreme Court ruled in the *McGeoch* case that British citizens detained in UK prisons do not enjoy the right to vote in municipal elections as a consequence of their status as Union citizens.²⁶ The appellant had relied on Article 20(2)(b) TFEU, which grants Union citizens 'the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence under the same conditions as nationals of that State'. It was argued that the omission of 'in a Member State of which he is *not* a national' in Article 20(2)(b), which features in Article 21 TFEU, meant that the right to vote also had to apply to British citizens detained in the UK. The appellant also relied on Articles 39 and 40 of the Charter to bolster his arguments. The Supreme Court unanimously rejected the claim, considering the appellant's reading of Article 20(2)(b) to be 'positively misleading'.²⁷ The right to vote in municipal elections was read, by the Supreme Court, as being limited to non-national EU citizens residing in the UK. Lord Mance considered that Articles 39 and 40 of the Charter supported the Supreme Court's interpretation of Union law on this point. The Supreme Court held that that matter was *acte clair* and there was, therefore, no reason to refer to the Court of Justice for a preliminary ruling. It should be noted that, at present, the right to vote in municipal and European Parliamentary elections boils down to a right to non-discrimination/equal treatment for non-national Union citizens. Accordingly, like national prisoners, non-national Union citizen prisoners do not currently enjoy a right to vote in municipal and European Parliamentary elections under Union law. However, if the right to vote in such elections were extended to national prisoners, Union law would require that non-national Union citizen prisoners were also given the right to vote in municipal and European Parliamentary elections.
2. Second, in *Sandiford*,²⁸ the Charter was invoked in an attempt to oblige the United Kingdom Government to provide legal aid to a UK national who had been convicted of drug trafficking offences and sentenced to death in Indonesia. The Charter-related arguments in this case were unsuccessful.

Q3.

²⁵ Maurice Kay LJ *ZZ v Secretary of State* [2011] EWCA Civ 440 at paras 16 and 17.

²⁶ *McGeoch v The Lord President of the Council and another* [2013] UKSC 63.

²⁷ Lord Mance in *McGeoch* (above note) at para. 59.

²⁸ *The Queen on the application of Lindsay Sandiford v The Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581.

Our evidence in respect of this question begins with an acknowledgement of the **ways in which the ECHR is given effect through the EU's fundamental rights framework**. These are:

1. The acknowledgement, found in Article 6(3) TEU that fundamental rights under the Union legal order are drawn from the ECHR (alongside the constitutional traditions of the Member States).
2. The statement, found in Article 52(3) of the Charter, that where a Charter right is also featured in the Convention, interpretations of that right should be drawn from the established understanding of that right pursuant to the ECHR (Article 52(3)).

Our first observation is that the strong correlation that exists between EU fundamental rights and the ECHR, through the mechanisms above, is advantageous to the UK as a whole because it provides **broad coherence within the UK's own fundamental rights framework**. The Court of Justice and the Court of Human Rights both recognise Member State commitments to the ECHR and the EU respectively. For instance, the UK will not be found to have breached the Convention through its implementation of Union law unless Union law is found to be 'manifestly inappropriate' in light of the Convention. This is because, although not yet a Contracting Party to the Convention, the Union is legally committed to respecting the ECHR through its own Treaty and the obligations of all of its Member States.²⁹ As a result, citizens and public services will not normally have to reconcile a wide range of competing and conflicting fundamental rights rules.

Following on from the previous point, our second observation is that there is now **very little difference in the interpretation of Convention rights by the ECtHR and their understanding as General Principle of Union Law**. This is because interpretation of rights under the ECHR has often developed in light of growing consensus on certain issues between the Contracting Parties to the Convention, which are themselves a source of General Principles (Article 6(3) TEU). This has often filtered into the Union's own interpretation of fundamental rights. For instance, there is clear evidence of mutual influence between the Strasbourg and Luxembourg Courts in relation to fundamental rights that concern sexuality and gender.³⁰

Finally, we would return to the point outlined above (Q1) on the **relationship between free movement and fundamental rights**. The need to respect fundamental rights, such as the freedom of expression, and the fundamental right to family life, as recognised by the ECHR, as part of Union law, has boosted the ability of goods and service providers to trade in other States.³¹ Union law requires that an ECHR minimum standard is met by its institutions and the Member States when acting in the scope of Union law. However, Union law might also require institutions and the Member States to offer fundamental rights protection over and above that

²⁹ There remains speculation as to the extent of the Union's margin of appreciation after its accession to the ECHR.

³⁰ See *Wyatt and Dashwood* (5th ed, p.272) citing Case C-117/01 *K.B.*[2004] ECR I-541 and *Goodwin v UK* (Appl. No.28957/95 (2002) 35 EHRTR 18)

³¹ *Familapress*, *ERT* and *Carpenter* (note 4, above).

minimum threshold where such an interpretation is necessary in order not to breach, for instance, Union free movement rules. Nevertheless, at times, free movement rules seem to demand an interpretation of fundamental rights which differ from, or are perhaps even in conflict with, ECHR interpretations.³² This can be both advantageous and disadvantageous for individuals and businesses depending on the facts of the specific case. Nevertheless, the margin of appreciation offered to Member States has also created room for the cultural and moral specificities of the Member States, which might also reflect the fundamental rights of certain groups therein.

Q9.

As outlined above (Q3), **the EU's accession to the ECHR should be advantageous for the UK as it would prevent inconsistency between the two fundamental rights regimes.** The EU is already committed, within its own Treaty on European Union and Charter of Fundamental Rights, to respect the ECHR. However, the Union cannot currently formally be held to account before the European Court of Human Rights itself. This can be problematic for the Member States. Clearly, Member States frequently have to implement rules, at national-level, derived from Union law. If these rules are in breach of the Convention, the Member State in question may be brought before the European Court of Human Rights, despite not being the original source of the contravention. For example, before the judgment in the case of *NS* was delivered by the Luxembourg Court, the Strasbourg Court had ruled in *MSS v Belgium and Greece* that a state which transferred an asylum-seeker to another state whose reception conditions had been held to breach Article 3 ECHR was itself committing a further breach of the same provision.³³ The transfer of the applicant in question, from Belgium to Greece, had been carried out under the provisions of the Dublin II Regulation concerning the allocation of responsibility between the Member States for hearing an asylum application. In other words, Belgium's breach of the ECHR occurred as a direct result of implementing an EU Regulation. *NS* resolved this potential conflict by providing an interpretation of the Regulation which precluded Member States from removing an asylum-seeker to a Member State in which the individual's fundamental rights may be breached. This case illustrates how the EU and ECHR frameworks often operate within the same space, underlining the importance of consistency between the two regimes.

If consistency is not assured, this can, of course, lead to **potential conflicts between the Convention and the supremacy of Union law.** This issue has been partially addressed by the line of decisions in *Matthews* and *Bosphorus* whereby a Member State will not be found to be in breach of the Convention for implementing Union law unless Union rules are 'manifestly inappropriate'. However, these decisions have, themselves, been criticised for offering greater manoeuvre to the European Union than to the Member States on fundamental rights issues. It remains to be seen how this line of case law will be treated after the Union accedes to the ECHR but it is possible that accession will address these disparities to a greater extent than the current situation.

³² Compare and contrast, *Viking and Laval* with *Demir and Baykara v Turkey*[2008] ECHR 1345

³³ *MSS v Belgium and Greece* (Appl no.30696/09, 21/01/11)

Finally, we would observe that, although accession should make European fundamental rights protection more coherent, **there will still be scope for inconsistency**. The Convention provides a floor, or a minimum level, of human rights protection. The Union legal order will still be able to require Member States to provide a fundamental rights protection where this falls within Union competences or, for instance, is conducive to free movement between the Member States. Thus, situations may arise where a Member State has not breached the Convention but has nevertheless failed to meet Union fundamental rights standards.

Q11

An ongoing challenge is **how the European Union reconciles its contemporary constitutional framework – involving economic *and* social integration – with its purely economic history**, lying in the creation of an internal market. Specifically, the particular constitutional architecture of the Union, having its foundations in facilitating cross-border trade, creates the risk that the protection of fundamental rights within the Union rests on whether they run congruent to, or clash with, the free movement provisions. In cases of congruence, fundamental rights will often receive extensive protection but sometimes at the expense of national autonomy. In cases of clash, the protection of fundamental rights will be greatly undermined by an adjudicative structure that favours free movement. These two situations can be both advantageous and disadvantageous for individuals, businesses and the public sector depending on the specific facts of the case.

Q12

Our first observation is that **it is not always necessary to rely on the ECHR or the Union fundamental rights framework in order to protect UK citizens**, as demonstrated by the Supreme Court case of *ZH*.³⁴ Lady Hale, in *ZH*, relied on the UN Convention on the Rights of the Child 1989 in order to protect the best interests of the child and keep the third country national family of a UK national child together with that child in the UK. *ZH* was factually very similar to the recent Court of Justice decision in *Ruiz Zambrano*.³⁵ This cause was seminal because it presented a challenge to many well-established Union constitutional principles, such as the wholly internal rule, and seemed to provide a means for the Union to become further involved in national-level fundamental rights questions. Lady Hale's judgment demonstrates that there are existing means of protecting the particular fundamental rights of specific individuals without it being necessary to extend the scope of Union law.

Nevertheless, we would also assert that **a fundamental rights framework within the Union is crucial**. It ensures that the Union institutions and the Member States are respectful of fundamental rights when they enact or act in the scope of Union law. It is mindful both of the need to interpret fundamental rights in a way that does not overly hinder other important endeavours, such as cross-border trade, but is also generally respectful of the cultural and social values of the Member States and acknowledges that fundamental rights protection is a legitimate reason for breach Union free movement rules. However, the extent of its ability to do

³⁴ *ZH v Tanzania v Secretary of State for the Home Department* [2011] UKSC 4

³⁵ Case C-34/08 *Ruiz Zambrano* [2011] I-01177

this remains debatable. In any case, the Union fundamental rights framework has, on countless occasions, proven itself to be advantageous to UK citizens and UK business.

With this in mind, as a final point in relation to this question, it is important to consider **whether a different fundamental rights framework, taken at national level, and separate from the Union general principles and Charter, would be feasible.** The UK would still need to respect Union fundamental rights in its trade with the European Union. After all, in the context of the internal market, it is this very cross-border trade which triggers considerations of fundamental rights at the Union level. Accordingly, adding another layer of fundamental rights legislation at the national level, for instance through a UK 'Bill of Rights', will not remove the need for Union-level fundamental rights protection to be taken into account. Instead, it will create a fourth stratum of fundamental rights that have to be understood, interpreted and reconciled with competing fundamental rights mechanisms, by judges, citizens and public actors. Other Member States that have national fundamental rights entrenched in their written constitutions have, nevertheless, had to tackle the constitutional challenge of reconciling these with not only their obligations under Union law, but their desire to be part of cross-border trade in Europe. Any process of creating a national 'Bill of Rights' will have to dedicate considerable time to these unavoidable and fundamental questions of reconciliation.

Q13

Within the internal market, we have not observed any instances in which fundamental rights have been used indirectly to expand EU competences. This is because there has to be a 'hook' to Union law before fundamental rights can be considered at the Union level at all. Consequently, rather than fundamental rights, it has been the free movement provisions and Union citizenship that have raised questions of 'competence creep'.³⁶ The most recent example of this is the *Ruiz Zambrano* judgment. In this case, the Court of Justice held that Union law would be triggered where a person would be denied the genuine enjoyment of the rights associated with Union citizenship. *Ruiz Zambrano* concerned a refusal by Belgium to grant a residence permit and work permit to the third country national father of Union citizen minor children. The Court held that this refusal was a matter of Union law because, without residence and work permits, the father would have to leave Union territory. Consequently, the Union citizen children would also have to leave Union territory. This amounted to a deprivation of the genuine enjoyment of the rights associated with Union citizenship for the children. Accordingly, the father had a right to work and reside in Belgium under Union law. This new 'hook' to EU law provided a means by which the children concerned could enjoy their right to family life. Crucially, it was not their right to family life that provided a gateway to further Union involvement, rather the expansive approach taken to the Union's citizenship provisions.³⁷

³⁶ The most well-known case on this is *Carpenter* where a father who occasionally provide services in other Member States was able to use his status as a Union service provider to transfer the question of his fundamental right to family life from a national immigration issue to a Union free movement issue (note 4, above).

³⁷ Indeed, in *Dereci*, the Court of Justice confirmed that the 'mere desire to keep one's family together on Union territory' would not be sufficient to trigger the genuine enjoyment test (note 22, above)

Response to the call for evidence on the Review of the Balance of Competences between the UK and the EU

Fundamental Rights

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Response to questions 1 and 2

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 that on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter.

Preliminary points and introduction

1. It is well known that fundamental rights in the EU were first developed through the case law of the Court of Justice of the EU; the Court found that fundamental rights formed part of the general principles of the EU that bound the EU institutions in whatever capacity they acted (e.g. legislative, executive, administrative or as employers). This case law was almost immediately welcomed by the EU institutions.¹ With time, the Court of Justice found that EU fundamental rights were also applicable to the acts of the Member States when they are implementing EU law (e.g. by implementing a directive or giving effect to a Regulation) or when they act within the scope of EU law (i.e. when they limit one of the free movement or citizenship rights).
2. The EU Charter of Fundamental Rights codified existing fundamental rights; it succeeded in rendering the rights protected in EU law more visible. However, at the same time, and perhaps inevitably, it also rendered more visible the problems inherent in having a multi layered system of fundamental rights protection. In this respect, it is impossible to determine whether the Charter has had any innovative effect beyond increasing the visibility of issues that were previously discussed mainly in academic circles. Possibly, the most palpable effect has been to force the Court of Justice of the EU to attempt to more clearly define the scope of application of EU Fundamental rights (see discussion about the *McB* case below, paras 29 and ff).
3. It is important to remember how the Charter, which merely 'codified' existing rights, is the final step in a long process of evolution of fundamental rights jurisprudence and legislation which mirrors the evolution of the European Economic Communities towards a more mature constitutional system: in many Member States it would be unthinkable to afford competence in human rights sensitive fields (such as criminal law or asylum) without at the same time reinforcing fundamental rights guarantees.

¹ European Parliament, Council and Commission Joint Declaration of 5th April 1977, (1977) OJ C 103/1.

4. In this contribution I will not distinguish between EU fundamental rights and the Charter of Fundamental rights unless it is necessary to do so since the Court has made it clear that Article 51(1) codifies the Court's case law,² so that the scope of the former and the latter should be the same. After having briefly recalled (A) the extent to which fundamental rights apply to the acts of the EU institutions; I will focus on B) the extent to which they apply to acts of the Member States; and C) the extent to which EU fundamental rights impose obligations on individuals.
5. Please note that for reasons of space I have decided to only respond to the first two questions of this Consultation as those are the questions most closely examined in my recent research. Please refer to the appendix for a list of my work most relevant to this review.

A) EU Fundamental rights to curtail the acts of the EU institutions

6. The Charter and EU fundamental rights apply first and foremost to the acts of the EU institutions; it is in relation to those acts that the case law on fundamental rights as general principles of (then) European Community law was first developed.³ This case law was solicited by national constitutional courts which were concerned that, through the operation of the principles of primacy and direct effect, the fundamental rights guarantees contained in domestic constitutions could be circumvented and private parties might see their rights curtailed through the medium of European law without any judicial scrutiny of the legitimacy of these limitations.⁴
7. In this respect the most important areas in which EU fundamental rights are relevant are:
 - a) Competition law cases, where the European Commission has extensive investigative and fine imposing powers;⁵
 - b) Staff cases, where the EU institutions act as employers and therefore the employment relationship is regulated by European law;⁶
 - c) More recently, fundamental rights have also become very relevant in relation to counter-terrorism action, to ensure that individuals are afforded minimum guarantees.⁷
8. Fundamental rights are also relevant in judicial review of legislation;⁸ however, with the exception of (c) above (counter-terrorism), instances in which EU legislation has been

² Case C-617/10 *Åkberger Fransson*, judgment of 26 February 2013, nyr, para 18.

³ E.g. Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491, para. 13.

⁴ *Internationale Handelsgesellschaft* ... [1974] 2 CMLR 540 (*Solange I*); see also *Steinike und Weinling* ... [1980] 2 CMLR 531; and cf also the Italian Constitutional Court rulings *Sentenza 7/3/64*, n.14 (in F. Sorrentino, *Profili Costituzionali dell'Integrazione Comunitaria*, 2nd ed, Giappichelli Editore 1996, p. 61 and ss) and *Società Acciaierie San Michele v. High Authority* (27/12/65, n. 98), [1967] CMLR 160.

⁵ Eg Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859.

⁶ E.g. C-404/92 *X v Commission* [1994] ECR I-4737.

⁷ Most notably see Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351.

declared invalid because of a breach of fundamental rights are very rare. Thus, the European courts are willing to recognise a wide margin of discretion to the Institutions' legislative function. In other words, EU courts seem very aware of the risk of substituting their assessment for that of the legislature.

9. Finally, fundamental rights are relevant horizontally, as an aid to the interpretation of EU law so that if two interpretations are possible that which is consistent with fundamental rights will be given preference.⁹
10. The role played by fundamental rights in relation to scrutiny of acts of the EU institutions has been crucial:
 - to ensure that individuals rights vis-à-vis European administrators could be properly safeguarded;
 - to ensure the constitutional consistency of the system (some national courts made clear that they would not allow the principle of supremacy to operate at the expenses of fundamental rights guarantees);
 - and to allow the European Union to develop its own jurisprudence without 'interference' from the European Court of Human Rights. The latter Court has in fact made clear that when and if the Court of Justice of the EU does not have, or cannot exercise, jurisdiction then it might step in to ensure that fundamental rights are protected (regardless of EU accession to the ECHR).¹⁰
11. The Charter entails greater and better protection for individuals and companies inasmuch it enhances transparency and legal certainty. Since Charter rights are (at least in theory) just a codification of existing rights, the Charter does not have the effect of extending or creating substantive rights. Furthermore, the Charter might help assuage fears in some of the Member States that the level of protection of fundamental rights in the EU is too low.¹¹

EU Fundamental rights in the Member States

12. The Charter applies to the Member States when they 'implement' EU law (Article 51(1)). I will start by examining the scope of application of the Charter to the public sector, to then turn to its application to private parties.

⁸ E.g. Case C-377/98 *Netherlands v European Parliament and Council* [2001] (Biotechnology Directive) ECR I-7079.

⁹ E.g. Case 29/69 *Stauder* [1969] ECR 419.

¹⁰ *Matthews v UK* (appl. No. 24833/94), ECHR 1999-I; *Michaud v France* (App. No 12323/11), judgment of 6 December 2012.

¹¹ In this respect the relationship between national supreme courts and the Court of Justice in relation to fundamental rights protection is a complex one; see e.g. Maastricht decision (*Brunner and others v EU Treaty* [1994] 1 CMLR 57); German Federal Constitutional Court, decision 7/6/00 [2000] Human Rights Law Journal 251; French *Conseil Constitutionnel*, Decision No 2004-496 (June 10, 2004); Decision No 2004-497 (July 1, 2004); the Polish Constitutional Court ruling in *Trybunał Konstytucyjny, arrêt du 27.04.05, P 1/05, Dziennik Ustaw 2005.77.680*, as reported by *Réflets-Informations rapides sur les développements juridiques présentant un intérêt communautaire*, no. 2/2005, p. 16, also available on http://curia.eu.int/en/coopju/aperçu_reflets/lang/index.htm

B) The application of Charter and EU fundamental rights to the public sector

13. As it has been pointed out above, the Charter applies to Member States when they implement EU law. The concept of Member State in EU law is very broad so as to include not only the central organs of the State, but also any local and / or public authority; authorities funded by the State; authorities with special powers.¹²
14. By virtue of its provisions (esp Articles 51(2) and ff, and the explanatory notes), the Charter does not extend the scope of application of EU law.
15. In this respect, it is interesting to note that following the Charter, the Court of Justice EU is attempting to define more precisely the scope of application of the Charter (and consequently of EU fundamental rights). In particular, the Court is attempting to determine two issues: what constitutes implementation of EU law for the purposes of Article 51 Charter; and the extent to which the Charter can apply to national rules, having also regard to the guarantees contained in Article 51(2).¹³
16. The definition of ‘**implementation**’ - Member States are said to be implementing EU law for the purposes of Article 51 Charter in the following situations:
 - a) **Direct transposition cases: Member States implementing or giving effect to a Regulation, Directive or Decision.**
17. The case law applying fundamental rights as general principles to acts of the Member States stems from the case of *Wachauf*.¹⁴ Here the Court of Justice held that a national court had a duty to interpret national law implementing a Regulation so as to comply (in so far as possible) with EU fundamental rights as general principles. The Court limited this duty to an interpretative duty (much as it is found in the HRA 1998) although given some mistranslation this has not generally been picked up in the academic debate in the English language (but it has in other Member States).¹⁵ It is still unclear how far this obligation stretches.¹⁶
18. The rationale behind this case law is that when the Member State is directly implementing a provision of EU law, it is acting as an ‘agent’ of the EU and for this reason it must respect the

¹² An outline of definition of State in EU law can be found in any EU law textbook; e.g. *Wyatt and Dashwood’s EU law* (Hart Publishing 6th ed 2011) chap. 8, section III C.

¹³ Article 51(2) provides ‘The Charter does not extend the field of application of EU 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’.

¹⁴ Case 5/88 *Wachauf* [1989] ECR 2609; in the context of a Directive see Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd at al v Scottish Ministers* [2003] ECR I-7411.

¹⁵ With the exception of T Hartley *The Foundations of European Community Law* (5th ed. OUP 2003), 146, n. 60.

¹⁶ I will be arguing in forthcoming work that the *Wachauf* case law has been misunderstood and the EU fundamental rights should not apply directly to national law.

EU constitutional system in its entirety, including its general principles and fundamental rights.¹⁷

b) Indirect transposition: situation falling within the ambit of application of a Directive, Regulation or Decision.

19. The *Wachauf* case law dealt with a simple issue – that of policing the way Member States gave effect to EU law also in relation to compatibility with EU fundamental rights (general principles first and Charter later). In *Åkberger Fransson*¹⁸ the Court went a step further and found that the obligation to respect EU fundamental rights applies also to cases where the national rules at issue do not directly implement EU law, but merely fall within the scope of EU secondary legislation. Here, the issue was whether penalties imposed for tax fraud could be reviewed also in relation to EU fundamental rights: the Court found that since the tax at issue was also VAT which is harmonised at Union level; given the fact that Member States are under an obligation to ensure collection of VAT; and that VAT fraud affected the Union financial interests, tax penalties and criminal proceedings for tax evasion (at least in the case at issue) constituted ‘**implementation**’ for the purposes of Article 51(1) Charter. As a result, the Charter and EU fundamental rights applied.

c) When the Member State is exercising a discretion pursuant to a Regulation (Directive or Decision);

20. In the *N.S.* case the Court of Justice made clear that when a Member State is exercising a discretion which is provided for in EU law, it must respect EU fundamental rights. In that case, the issue related to the application of Regulation 343/2003 (the so called Dublin II Regulation) which allocates jurisdiction in relation to asylum claims. The Regulation also contains a ‘sovereignty clause’ so that a Member State that has been seized can always decide to examine the claim even if it is not the responsible state pursuant to the Regulation. The issue in *N.S.* was whether EU fundamental rights constrained in any way the decision to exercise discretion, i.e. whether the UK was obliged by EU fundamental rights to consider the claim when deportation to the Member State responsible under the Regulation would infringe the claimants’ fundamental rights. The answer was positive and yet, in order to safeguard the effectiveness of the system provided by the Regulation, the Court limited the Member State’s obligation to exercise jurisdiction to those instances where there is the risk of an ‘egregious breach of fundamental rights’.

21. It is impossible to say whether the Court would have made the same finding had the European Court of Human Rights not decided, in a case mirroring the *NS* case, that the ECHR applies to Member States when they decide whether or not to exercise discretion and transfer asylum seekers pursuant to Regulation 343/2003.¹⁹

¹⁷ See AG Jacobs Opinion in case 5/88 *Wachauf* [1989] ECR 2609.

¹⁸ Case C-617/10 *Åkberger Fransson*, judgment of 26 February 2013, nyr.

¹⁹ *M.S.S. v Belgium and Greece* (appl No 30696/09), 21 January 2011.

d) Acting within the scope of EU law: Member State limiting a right granted by the Treaty free movement or citizenship provisions.

22. EU fundamental rights apply also when Member States are acting ‘within the field’ of EU law; the case law in this respect has considered so far only cases in which Member States were limiting or derogating a free movement or citizenship right. The rationale is the same as that considered previously – when Member States limit a right conferred by the Treaty they have to respect EU constitutional principles, including proportionality and fundamental rights. It should be stressed that this is entirely consistent with the EU constitutional premises, as well as with the aim of ensuring free movement in the internal market. Thus, if Member States could, by means of example, seize the assets of foreign (EU) businesses in their territory without having to comply with minimum fundamental rights standards (due process, judicial review, public interest justification etc), businesses would face additional risks in setting up a branch or subsidiary in those Member States with a less egregious fundamental rights record.
23. In this respect, protection through European law is more effective (through direct effect and supremacy) and quicker (an average of 18 months of a preliminary reference is requested with the possibility to have the dispute resolved in the lower grade of jurisdiction, vis-à-vis 5 years after having resolved all domestic remedies in ECHR), than the residual protection that would be afforded by the ECHR.
24. To illustrate this point take the rulings in *Viking* and *Laval*²⁰ where the Court found that companies could rely on the free movement provisions when faced with transnational or discriminatory industrial action; and that the right to strike was a general principle of EU law capable of justifying a limitation to free movement rights. Much has been said, especially in the UK, about the fact that by recognising a EU derived right to take industrial action, the Court has made an (intolerable) incursion in national sovereignty. But from the viewpoint of business, the rulings provide a guarantee that:
- a) Rules regulating industrial action (which are drafted having only local interests in mind) cannot be applied in a way that might discriminate against foreign companies; and
 - b) That industrial action which affects intra-European operators might have to respect further requirements in order to be compatible with Union law.

²⁰ Case C-438/05 *International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line et al* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

25. On the other hand, it should be noted that, by and large, the CJ EU has demonstrated to be respectful of local sensitivities; for instance in the case of *Omega* the Court accepted that the protection of human dignity was a legitimate public interest capable of justifying a limitation on the freedom to provide services.²¹
26. It is almost impossible to evaluate ‘advantage’ in this context, and in the context of fundamental rights protection more generally, since the benefit to one constituency will almost certainly entail a ‘loss’ to another constituency.
27. Take for instance the above mentioned cases of *Viking* and *Laval*: the benefit to the employers in ensuring that industrial action cannot result in discrimination against out-of-State enterprises, and that it must be (to a certain extent) balanced with the rights of free movement of business, constitutes a loss for trade unions, who see their right to engage in previously lawful industrial action curtailed. It also constitutes a loss for the regulators in the relevant Member States who see their power to strike the balance between competing interests curtailed by European law. In *Omega*,²² the recognition of the existence of the value of human dignity represents a victory for the national legislature and a loss for the business wishing to expand its trade in another Member State.
28. Whilst it is impossible to determine the extent to which the application of fundamental rights in these cases is advantageous to private parties, it should be noted that a minimum of fundamental rights scrutiny reduces the inevitable transaction costs which derive from the existence of different regulatory regimes.
- e) **The relevance of Article 51(2) – ensuring that EU competences are not broadened through fundamental rights case law (response to question 2)**
29. Article 51(2) provides that ‘The Charter does not extend the field of application of EU 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’. This provision thus restates that fundamental rights cannot be used as a vehicle to expand on the EU competences.
30. True to the spirit of this provision, the Court accepted that fundamental rights cannot be used to unduly impinge on Member States’ competences. This is especially important given the fact that in fields where the Member States have exclusive or shared competences, the EU might have legislated to co-ordinate the exercise of those competences, rather than to harmonise substantial provisions.

²¹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

²² Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

31. For instance, family law is by and large competence of the Member States. However, Regulation 2201/2003²³ provides rules on jurisdiction in relation to family matters. Amongst other things, it provides that when minors are abducted or wrongfully removed from their Member States of residence, jurisdiction over custody claims remains with the courts of the state where the children last resided before being removed.
32. In *McB*, Mr McB's partner had left Ireland for the United Kingdom, taking with her the couple's children. Pursuant to Irish law, since the couple was not married, custody rights could only be acquired by the father through agreement or following judicial pronouncement. When Mr McB seized the Irish courts to obtain custody (and challenge the children's removal from Ireland), the Irish court denied jurisdiction since he did not have custody rights and therefore there could not be abduction or wrongful removal for the purposes of the Regulation. It should be noted that, for the purposes of the Regulation, parental responsibility is attributed by (national) law or by agreement.
33. Mr McB argued, in synthesis, that since the matter fell within the scope of Regulation 2201/2003 then Member States are bound by fundamental rights as recognised in the Charter and/or general principles of Union law. And that, the fact that he would not gain automatic custody rights of his children constituted a violation of his right to family life as protected by Article 7 Charter (and 8 ECHR).
34. The Court found that the identification of the person(s) having rights of custody was entirely dependent on national law. Next it examined the fundamental rights issue – the key question being the extent to which Irish legislation could be said to be implementing EU law. The Court found that Article 51(1) clarifies that the Charter only applies to Member States when they 'implement' EU law, whilst Article 51(2) expressly states that the Charter does not extend the field of application of EU law. In this case, even though the Court does not say so explicitly, a direct application of the Charter to the Irish legislation in question would have had the effect of extending the field of application of EU law since the EU does not have harmonising competence in relation to family law.
35. The Court therefore found that 'there should be no interpretation of national law' as such and that it could only assess the compatibility of fundamental rights of its own interpretation of the Regulation. It then turned to assess whether its interpretation of the Regulation was compatible with Charter and ECHR given the national law at stake (hence performing an indirect scrutiny of national rules).

f) **Summary Conclusions: The scope of application of fundamental rights to the Member States**

²³ Regulation 2201/2003 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L 338/1.

36. The expansion of the field of application of EU law, to encompass also co-ordination in areas that are both very sensitive from a fundamental rights perspective and jealously guarded by Member States has introduced a conundrum for the interpreter of EU law. On the one hand, Member States should always comply with EU fundamental rights when they act within the EU constitutional system. On the other hand, when Member States have decided to only co-ordinate their legal systems rather than harmonise them, an intrusive fundamental rights scrutiny might jeopardise this very distinction.
37. The Court of Justice, in cases like *McB* and *N.S.* (as well as the European Arrest Warrant cases which have not been examined here for reason of space), is attempting to strike a balance between these two conflicting issues: preserving Member States' sovereignty and the need to ensure a system which protects fundamental rights in a coherent way.
38. In this respect, it should be noted that national courts, and national legal systems, should play an active (possibly more active) role in protecting fundamental rights in instances where 'action of the Member States is not entirely determined by European law',²⁴ since the Court has indicated that national courts 'remain free to apply national standard of protection of fundamental rights' provided that the Charter standards and the primacy of Union law are not compromised.²⁵
39. In my opinion, the more careful the scrutiny of fundamental rights at national level (pursuant to national standards) the less the need for interference from the Court of Justice of the EU.
40. Finally, I share the view that Protocol no 30 is only explanatory and does not constitute a derogation or an opt-out from the Charter (to that effect please see my submissions to the House of Lords Constitution Committee).

C) The application of Charter and EU fundamental rights to individuals and business

41. The Charter of Fundamental rights is formally addressed to the EU and the **Member States** when they implement EU law. For this reason, at least in theory, the Charter should only 'benefit' individuals and business, rather than imposing on them any active duty. After all, it is not for private parties to 'implement' EU law and, it follows, the Charter should not impose obligations on individuals. However, some of the rights enshrined in the Charter, and in particular the non-discrimination rights, might be of broader application.

²⁴ See *Fransson*, para 29.

²⁵ I have not discussed the case of *Melloni* (C-399/11 judgment of 26 February 2013, nyr) because it does not seem to me particularly relevant to the questions posed in this review, especially having regard to the UK constitutional system. It might be recalled that in that case the Court found that Article 53 Charter does not allow national courts to disapply EU law in order to enforce their own national constitutional fundamental rights, when the standard of protection provided by the latter are higher than that provided by the Charter. The Court held that Article 53 is therefore limited by the need to ensure that the primacy, unity and effectiveness of EU law is not compromised.

42. In this respect it should be noted that some non-discrimination rights contained in the TFEU have been found to be binding also on private parties by virtue of the Treaties (non discrimination on grounds of sex;²⁶ non discrimination on grounds of nationality in the context of employment relationship²⁷). The reason for the horizontal application of those rights is that they are mandatory in nature and designed to ensure that there is no discrimination in the labour market.
43. Furthermore, in *Mangold* the Court held that the right not to be discriminated on grounds of age is a general principle of EU law which is capable of imposing obligations on individuals in those cases that fall within the scope of EU law (by virtue of a directive).²⁸ This was then reaffirmed in *Küçükdeveci* and *Danmark*.²⁹
44. It should be noted that this case law applies regardless of the Charter which means that this case law is not affected by Protocol no 30 (regardless of the latter legal significance). Furthermore, this case law raises unresolved issues in relation to the other general principles (all codified in the Charter) insofar as it is not clear whether horizontal application is limited to non-discrimination rights (possibly those rights detailed in the framework directive on discrimination)³⁰ because of their perceived centrality in the European project, or whether it could be extended to other rights.
45. In this respect, it could be argued that the *Mangold* case law should be limited to non-discrimination rights in the context of employment (i.e. those rights that are detailed in Directive 2000/78). Thus, they would complement the dicta of the Court in *Angonese*, so that those rights (and only those rights) can be applied horizontally because there should be no unjustified discrimination in the employment market. This would limit the reach of the case law and would be justified both in terms of aims of the Treaty and efficiency arguments (discrimination might result in an inefficient allocation of resources driven by prejudice rather than merit).
46. It should be remembered that discrimination can be justified so that if the difference in treatment is due to rational considerations it would be accepted.
47. Beyond the *Mangold* case law there is no evidence of fundamental rights imposing obligations on private parties by virtue of the Charter or the general principles.³¹

Conclusions

²⁶ Case 43/75 *Defrenne v Sabena* [1976] ECR 455.

²⁷ Case C-281/98 *Angonese* [2000] ECR I-4139.

²⁸ Case C-144/04 *Mangold* [2005] ECR I-9981.

²⁹ Case C-555/07 *Küçükdeveci* [2010] ECR I-365; Case C-476/11 *HK Danmark v Experian A/S*, judgment of 23 September 2013, nyr.

³⁰ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

³¹ Fundamental rights might be relevant in resisting a claim in EU law – e.g. when the Treaty provisions apply horizontally.

48. The main advantage deriving from the Charter to private parties, as well as groups and NGOs, is a clearer catalogue of rights upon which to base challenges to EU action.

49. In relation to the application of EU fundamental rights to national law:

- EU fundamental rights reduce risks and transaction costs in free movement cases and in so doing inevitably ‘interfere’ with national sovereignty;
- EU fundamental rights ensure a minimum level of protection in cases where EU rules have not provided for a uniform (harmonised) regime, whilst leaving space to national courts to enforce their own standards of fundamental rights protection. It is in relation to those cases that Member States and their courts need to take an active role to reduce the risk of excessive interference from the Luxembourg courts.
- The most problematic issue, from a national perspective, is the confusion as to when and to what extent EU fundamental rights apply: this might lead to national courts wrongly enforcing EU fundamental rights when the matter should be resolved only or primarily having regard to national law.³²

³² The risk of national courts not applying EU fundamental rights might also be a problem, but it is more difficult to determine how widespread this is.

Annex – List of most relevant publication

Wyatt and Dashwood's European Union Law (6th edition, 2011, Hart Publishing), A. A. Dashwood, M. Dougan, B. Roger, and D. Wyatt; editor together with M. Dougan; author of chapters 11 (General Principles), 12 (Fundamental Rights); 13 (Charter of Fundamental Rights).

'Fundamental Rights in EU Law' in C Barnard and S Peers *European Union Law* (OUP 2014 forthcoming)

'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in A Arnall, C Barnard, M Dougan and E Spaventa (eds) *A Constitutional Order of States – Essays in Honour of Alan Dashwood* (Hart Publishing, 2011) p. 199-218

'Federalization versus Centralization: Tensions in *Fundamental Rights Discourse in the European Union*' in Dougan and Currie (eds) *50 Years of the European Treaties* (Oxford, Hart Publishing, 2009), p. 343-364.

'Fundamental Rights and the Interface between Second and Third Pillar' in A. Dashwood and M. Maresceau (eds) *Recent Trends in the External Relations of the European Union* (Cambridge, CUP, 2008), p. 122-144.

'Fundamental What? The Difficult Relationship between Foreign Policy and Fundamental Rights' in M. Cremona and B. de Witte (eds) *EU Foreign Relations law: Constitutional Fundamentals*, p. 233-255 (Oxford, Hart Publishing, 2008).

'Remembrance of Principles Lost: on Fundamental Rights, the Third Pillar and the Scope of Union Law' (2006) *Yearbook of European Law* 153-176

Evidence submitted to the House of Lords Constitution Committee, 6th Report of 2007-08 Session, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution*, Report with evidence, available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/84/84.pdf>

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

10/01/2014

Response by Prof Rory O'Connell,

Professor of Human Rights and Constitutional Law, Transitional Justice Institute / School of Law, University of Ulster.

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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?

Regarding the *Charter*

There seem to be six key benefits of the EU Charter.

First, the Charter incorporates the rights in the familiar European Convention on Human Rights but in some important ways enhances some of them. Thus the prohibition on slavery and forced labour (Article 5) includes an explicit prohibition on human trafficking, which in the Convention system is found in an ECtHR chamber judgment.¹ The right to marry (Article 9) is expressed in gender neutral language. The equality clauses include a free standing guarantee of equality before the law (Article 20), while the list of prohibited grounds of discrimination explicitly include disability, age, sexual orientation, genetic features (none of these are explicitly included in the Convention provision).

Second, the Charter includes many rights which are not listed in the Convention (though in some cases they may be implicit). These include specific mention of academic freedom, freedom to conduct a business, asylum, the rights of the child, the rights of the elderly, integration of persons with disabilities, workers' rights to information and consultation, collective bargaining and action, placement services, dismissal protection, fair and just working conditions, family and professional life, social security and

¹ *Rantsev v Cyprus and Russia* application no. 25965/04, (2010) 51 EHRR 1, 7 January 2010

assistance, health care, access to services of general economic interest, environmental protection and consumer protection. The Charter also includes 'citizens' rights' which particularly relate to the relationship with Union institutions and provide for European Parliament and municipal elections, good administration, access to documents, an Ombudsman, right to petition, free movement and residence and diplomatic protection.

The Charter contains a number of rights which are distinctly business friendly eg the freedoms in the charter contain the *freedom to conduct a business* and the right to property. In early 2013 the CJEU handed down an interesting judgment concerning Ryanair. Ryanair had argued that imposing on it obligations to compensate passengers for disruption caused by the Icelandic ash cloud would endanger its rights under Articles 16 and 17 – the right to conduct a business and the right to property. The Court concluded that these were qualified rights which had to be balanced against Article 38 on consumer protection. There is a balance to be struck and so there are also limits on what the passenger can claim.² Another 2013 case though makes it clear the freedom to conduct a business has real teeth. In *Alemo-Herron*, the CJEU invoked Article 16 to interpret an EU directive as giving protection to someone who buys a business against the 'dynamic' effect of collective agreements subsequent to the date of the transfer.³ This would seem to have offered a benefit to the new owner of a business.

A third key potential of the Charter system stems from the specific legal status of EU law. EU law benefits from doctrines like direct effect, supremacy, indirect effect and state liability. These are legal tools often considerably stronger than those within the Convention system.

Fourth, the Charter system includes some important information tools provided by the Commission and the Fundamental Rights Agency. These include the FRA's Charterpedia database which provides information on Charter related case law for instance⁴ and the Commission's e-justice portal <https://e-justice.europa.eu> which provides information on justice systems throughout the EU.

Fifth, the Charter system provides for monitoring of the state of human rights in the EU – this is provided by the Fundamental Rights Agency reports and by the Commission including the Commission's Annual Charter Report. These reports sometimes highlight good news stories for the UK; the UK for instance is one of the countries with the best record on recording details of racist and xenophobic crime.⁵

Sixth, and perhaps most importantly, the Charter system has the possibility for an enforcer - the Commission has the power to take enforcement action against states if they are in breach of their EU

² *McDonagh v Ryanair* Case C-12/11, 31 January 2013

³ *Alemo-Herron v Parkwood Leisure* Case C-426/11, 18 July 2013

⁴ Available at <http://infoportal.fra.europa.eu/InfoPortal/>

⁵ European Union, *2012 Report on the Application of the EU Charter of Fundamental Rights* (2013) 53.

obligations. This can result in a court case before the Court of Justice. Importantly for instance the Commission took a successful case against Hungary arising of its judicial reform laws⁶ and has begun another case against Hungary based on data protection laws. In the judicial reform case, the CJEU found that decision to lower the retirement age for judges by eight years without any staggering process constituted a disproportionate form of age discrimination. It is notable that this case was expedited by the Court of Justice; the process took a mere five months. While this is a high profile and high politics case, the Commission's work covers a great deal else. It can receive communications alleging breaches of Union law and can make representations, engage in negotiations etc based on the information received.

Regarding the *broader framework*

Looking outside the UK, the potential for EU human rights policy to improve human rights standards across Europe is of benefit to UK nationals. Looking for instance at EU measures to improve the rights of victims or to tackle the problem of human trafficking; these are areas where UK law may already be quite advanced and little is required to bring UK law into conformity with EU standards. But this is not necessarily the case across all EU states, and UK nationals benefit by the general raising of standards; eg UK nationals travelling abroad who have the misfortune to be the victim of crime might be thankful that other EU countries are implementing standards in the Victims' Directive.⁷

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?

⁶ *European Commission v Hungary* C-286/12, 6 November 2012

⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2012.

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?

In the Balance of Competences report: When discussing the Kamberaj case after paragraph 39, the report should note that the UK has an opt-out from the relevant directive and so that reasoning could not apply to the UK.

The CJEU has shown itself cautious about the scope in two recent cases which demonstrate the sorts of lines drawn by the Court of Justice. In *Dereci*, the case concerned a third country national living with Union nationals in a Union state (Austria).⁸ They were denied residence permits. The national authorities considered that Union law did not apply as the Union citizens had not exercised free movement rights. However an earlier case, *Ruiz Zambrano*, suggested that Union law did cover this situation, In *Dereci*, the Court of Justice drew a distinction on the basis that the Union citizens in the instant case were not faced with a threat of deprivation of subsistence; more particularly, the Union citizen would have to be faced with a threat of having to leave the Union territory as a whole, as a consequence of the non-granting of the residence permit. If that were the case then Union law would apply and the Charter would be applicable; if not then EU law and the Charter are inapplicable.⁹ This is confirmed also in *Ymeraga*.¹⁰ Even more recently, the *Pringle* case considers the question of charter applicability. Pringle challenged the use of Council Decision to amend Article 136 TFEU to provide for a stability mechanism for states using the Euro.¹¹ The Supreme Court of Ireland referred questions on the validity of this Decision and the legal obligations of member states under EU law to the Court of Justice. The CJEU concluded that the amendment was permitted and did not extend the competences of the Union. With regard to the

⁸ *Dereci* Case C-256/11, 15 November 2011

⁹ *Dereci*, paragraphs 66-72.

¹⁰ *Ymeraga* Case C-87/12, 8 May 2013.

¹¹ *Pringle v Ireland* C-370/12, 27 November 2012.

argument about compatibility with various EU obligations, including the Charter and fundamental rights, the Court of Justice reasoned that the States were not implementing EU law 'when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU treaties do not confer any specific competence on the Union to establish such a mechanism.'¹²

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

¹² *Pringle*, paragraph 180.