



House of Commons

European Scrutiny Committee

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# **The application of the EU Charter of Fundamental Rights in the UK: a state of confusion**

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**Forty-third Report of  
Session 2013–14**



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European Scrutiny Committee

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Session 2013–14

*Report, together with formal minutes*

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## The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No. 143 to examine European Union documents.

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### Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is [escom@parliament.uk](mailto:escom@parliament.uk)

## 2 The application of the EU Charter of Fundamental Rights in the UK: a state of confusion

# Contents

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<b>Report</b>	<i>Page</i>
<b>Summary</b>	<b>5</b>
<b>1 The application of the Charter in the UK — a state of confusion</b>	<b>7</b>
The European Scrutiny Committee	7
The difference between the Charter of Fundamental Rights and the European Convention on Human Rights	7
Confusion about the application of the Charter in the UK	8
The comments of a High Court judge	8
Reported in the London Evening Standard	9
Debated in the House of Commons	9
An urgent need for clarification, and for action	11
Our view	12
Approach taken in this Report	12
<b>2 The negotiation of the Charter—evidence of Lord Goldsmith</b>	<b>13</b>
The need for a Charter	13
A political declaration, not a legally binding instrument	14
The UK Government’s policy in the Convention negotiations	15
Objective 1: making existing fundamental rights more visible	15
Objective 2: not creating new rights	16
Objective 3: not making economic and social rights justiciable under EU law	18
The commentary to the Charter, which became the Explanations	19
From a political declaration to a legally binding instrument	20
Protocol 30	21
Overall assessment of the Charter	21
<b>3 Contents of the Charter, Explanations, and Protocol 30</b>	<b>22</b>
Article 6 TEU	22
The Charter	22
Preamble	22
Articles	23
The Explanations	25
Protocol 30	25
Preamble	25
Articles	26
<b>4 Interpretation of the Charter and Protocol 30—the views of expert witnesses</b>	<b>27</b>
Status, scope and legal effects of the Charter	27
Effect of Protocol 30—application of the Charter in the UK	29
Article 51 and the <i>Fransson</i> case	31
Principles v rights	33
Title IV “Solidarity” Rights	34
Horizontal application of the Charter	34
Parallels with the application of the ECHR	36

The Charter in the future	37
Scope for opting out of the Charter in the UK	38
<b>5 Interpretation of the Charter and Protocol 30—the view of the Government</b>	<b>39</b>
Status, scope and legal effects of the Charter	39
Effect of Protocol 30—application of the Charter in the UK	39
Article 51 and the <i>Fransson</i> case	40
Parallels with the application of the ECHR	41
The Charter in the future	41
<b>6 Division of competence between the ECJ and national constitutional courts—<i>Fransson</i> and beyond</b>	<b>43</b>
<i>Fransson</i>	43
Opinion of Advocate General Cruz Villalón	43
The decision of the ECJ	45
Judicial reaction to <i>Fransson</i>	46
The German Constitutional Court	46
Recent comments of Justices of the Supreme Court in the UK	47
<b>7 Conclusions</b>	<b>49</b>
What the Charter does and does not do	49
It is directly effective in the UK, with supremacy over inconsistent national law	50
It can therefore be used both to interpret and enforce EU law	50
But the Charter does not apply to all areas of national law or action, only those that fall within the scope of EU law	51
It does not include new rights	51
It does not include new economic and social rights	51
It does not give the EU new competences	52
Nonetheless, it will affect how pre-existing EU fundamental rights and principles are applied	52
Impact of the Charter on human rights litigation in the UK	53
Areas of legal uncertainty	53
Rights and principles	54
Pre-existing rights	54
Field of application	55
Consistency with the European Convention on Human Rights	55
Horizontal rights	56
Division of competence between the ECJ and national courts	57
<b>8 Recommendations</b>	<b>58</b>
<b>Formal Minutes</b>	<b>59</b>
<b>Witnesses</b>	<b>71</b>
<b>List of published written evidence</b>	<b>72</b>

## Summary

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This Report arises from the state of confusion which exists in the UK about the applicability of the EU Charter of Fundamental Rights. It was prompted by the comments of a High Court judge in November last year, which the Government sought to correct in the press, and which were debated on the floor of the House of Commons. In the first chapter of the Report we conclude that both this and the previous Government bear some responsibility for this confusion.

In the following chapter we summarise the evidence of Lord Goldsmith, who was the UK's representative in the negotiations on the Charter. He explained that the then Government agreed with the need to make existing fundamental rights (otherwise known as human rights) more visible in the EU, but was keen to prevent any new rights being created, particularly economic and social rights. The Charter was drafted to be a political declaration; but when it was agreed to give it legal status, he explained that the UK's main concern was to ensure that the rights and principles in the Charter were tied back to their sources, as set out in the Explanations, and so limited in scope. Protocol 30, the source of so much confusion, was an after-thought.

Expert opinion on the scope of the Charter's application in the UK is set out in a further chapter of the Report. In the light of this we assess the impact of the Charter on the fundamental question of which courts are responsible for fundamental rights protection in the EU—the European Court of Justice in Luxembourg (the ECJ) or national courts?

In the penultimate chapter of the Report we seek to clarify the impact of the Charter in the UK. We draw the following conclusions about what the Charter does and does not do: Protocol 30 was designed for comfort rather than protection: it is in no sense an opt-out Protocol; consequently, the Charter is directly effective in the UK with supremacy over inconsistent national law (as it is for all other EU Member States); it does not apply to all areas of national law, however, only those that fall within the scope of EU law, a test which the ECJ has interpreted broadly; it will nonetheless broaden the ambit of EU law and increase human rights litigation in the UK.

There remain areas where there is still legal uncertainty about the Charter. These include the distinction between “rights” and “principles”; the application of pre-existing fundamental rights in spite of the Charter; the scope of application of the Charter; the effect of having parallel rights in the Charter and the European Convention on Human Rights; and the possibility of the Charter giving rise to unforeseen “horizontal” obligations on individuals or companies. In all, whilst the Charter has made fundamental rights more visible, we conclude that it has made their application more complex, and question whether this defeats its primary purpose.

Finally, we recommend that:

- the Government's response to our Report states where it agrees and disagrees with our conclusions, so that our Report and its response become a helpful reference point on the Charter's application in the UK;

- the Government intervene in proceedings in the ECJ to limit the scope of the Charter in the UK;
- the Government explains further what it intends to do about the Charter; and
- primary legislation be introduced by way of an amendment to the European Communities Act 1972 to disapply the Charter from the UK.



# 1 The application of the Charter in the UK — a state of confusion

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## The European Scrutiny Committee

1. The European Scrutiny Committee is a cross-party Select Committee appointed under Standing Order No. 143, with all the usual select committee powers. It has 16 Members. The main role of the Committee is to sift EU documents on behalf of the House, identifying those of political or legal importance and deciding which should be debated. It has four additional roles:

- to be a source of analysis and information, by reporting in detail on each document it judges to be important (about 500 a year), and by taking the oral or written evidence it requires to come to a decision;
- to monitor business in the Council of Ministers of the EU, the negotiating position of UK Ministers, and the outcome;
- to keep under review legal, procedural and institutional developments in the EU which may have implications for the UK and for the House, such as this Report; and
- in co-operation with the equivalent committee in the House of Lords, to ensure that the scrutiny system works effectively and that the Government complies with its undertakings to Parliament.

2. Our predecessors scrutinised the EU Charter of Fundamental Rights in 2007 in detail in the course of the intergovernmental conference negotiations leading to it being given legally binding status by the Lisbon Treaty.<sup>1</sup> Many of the conclusions they drew are applicable now.

## The difference between the Charter of Fundamental Rights and the European Convention on Human Rights

3. The Charter of Fundamental Rights (the Charter)<sup>2</sup> is often confused with the European Convention on Human Rights (the ECHR), as the Court of Justice of the EU in Luxembourg (the ECJ) is with the European Court of Human Rights in Strasbourg (the ECtHR). Whilst both contain overlapping human rights provisions, an issue we consider in this Report, they operate within separate legal frameworks. The Charter is an instrument of the EU. It is part of EU law and subject to the ultimate interpretation of the ECJ. EU law is given effect in national law through the European Communities Act 1972. The ECHR is an instrument of the Council of Europe in Strasbourg, and is ultimately interpreted by the ECtHR. It is given effect in national law by the Human Rights Act 1998 (HRA).

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1 European Scrutiny Committee, Third Report of Session 2007-2008, *European Union Intergovernmental Conference: Follow-up Report*, HC 16-iii.

2 Fundamental rights is simply the EU term for what are called human rights under the European Convention on Human Rights.

4. Whilst human rights litigation in the UK most often comes within the framework of the ECHR, and therefore the HRA, EU law in 2009 codified a wide number of human rights, which it calls fundamental rights, in the form of the Charter. It is the national impact of the Charter, rather than of the ECHR, with which this Report is concerned.

## Confusion about the application of the Charter in the UK

5. The inquiry was prompted by a sequence of events in November of last year, which we outline below. From these it appeared to us that there was considerable confusion about how the Charter applied in the UK, which we thought should be rectified so far as possible by means of a short inquiry. This report is the consequence of that inquiry. It seeks to clarify the application of the Charter in the UK, and is based on the evidence submitted by our witnesses, to whom we are indebted, and our analysis of it.

## The comments of a High Court judge

6. On Tuesday 12 November 2013, an article appeared in the *London Evening Standard*, reporting that a High Court judge, Mostyn J, in the case of *R (on the application of AB) v Secretary of State for the Home Department*,<sup>3</sup> had commented on how the Charter of Fundamental Rights, which included rights that go beyond rights protected in the ECHR, was now legally binding in the UK. In the *AB* case the claimant asylum-seeker wished to assert a right—the protection of personal data—which was not expressly protected by the ECHR and which, as such, did not fall within the HRA. However, that right was contained in the Charter, raising the question whether it could thereby be relied upon in this case. Commenting on this, Mostyn J said:

It can be seen that the legal basis of the claimant's claim rests in part on alleged violations of the Charter of Fundamental Rights of the European Union. When I read this in the skeleton argument on his behalf I was surprised, to say the least, as I was sure that the British government (along with the Polish government) had secured at the negotiations of the Lisbon Treaty an opt-out from the incorporation of the Charter into EU law and thereby via operation of the European Communities Act 1972 directly into our domestic law.

7. Mostyn J's comments on the Charter were based on his interpretation of a judgment of the ECJ in joined cases<sup>4</sup> referred to it by the Court of Appeal of England and Wales and the High Court of the Republic of Ireland, commonly known as the *NS* judgment.<sup>5</sup> Referring to *NS* Mostyn J said:

The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union

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3 EWHC/Admin/2013/3453, 7 November 2013

4 C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform*

5 [2013] Q.B 102

contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.

## Reported in the London Evening Standard

8. Mostyn J's comments were *obiter*, meaning they did not form part of the reasoning of his judgment that legally binds a lower court. They were, however, picked up in an article in the *London Evening Standard*, entitled "Top judge 'surprised' that controversial EU laws that we blocked are now legally binding,"<sup>6</sup> which stated that:

One of the country's most senior judges has reignited the debate about the expanding power of European courts by admitting his 'surprise' that a controversial EU charter which ministers opted out of is now legally binding in Britain.

Mr Justice Mostyn said it was 'absolutely clear' from a protocol signed as part of the Lisbon Treaty that the European Charter of Fundamental Rights would not be enforceable in this country.

But he told the High Court that a ruling in Luxembourg had now reversed this position in a move which he said would permanently extend the reach of human rights legislation in Britain.

The judge added that the 'constitutional significance of this decision can hardly be overstated'.

MPs reacted angrily and warned that British control over the justice system was being undermined by 'dangerous and undemocratic' European interference in the rights of Parliament.

9. The Secretary of State for Justice (Rt Hon Chris Grayling) responded to the article in the next edition of the same paper, clarifying that:

[t]he Charter is now very much a part of our law [...] It should only apply when European law applies within the UK. But last week's ruling suggests the possibility of something more than that. I am determined that we challenge this idea and will seek to do so in our courts as soon as possible.

## Debated in the House of Commons

10. On 19 November 2013 the Chairman of this Committee tabled an Urgent Question asking the Government "to make a statement on the status in the United Kingdom of the EU Charter of Fundamental Rights following the ruling by Mostyn J in the High Court on 7 November". In his opening statement, the Secretary of State for Justice stated that the Government did not agree with Mostyn J's analysis of the *NS* case, that it would look for

another case to rectify the situation, and that the Charter applied only to the application of EU law in the UK:

The judge's view was that the Luxembourg court had, in the case of NS, held that the charter could create new rights that apply in the UK. It is important to be very clear to the House: we do not agree with that analysis of the NS case. We intend to find another case—we cannot do it with this one as the Home Office was successful and we cannot appeal a case we have won—at the earliest opportunity to clarify beyond doubt the legal effects of the charter and to put the record straight.

It is no secret in this House that I would not personally have chosen to sign up to the Lisbon treaty or to the charter of fundamental rights. However, it is also important to say that the charter's effects are limited to EU law within the UK, and I have not seen any evidence that it goes beyond that. I would be very concerned if there was any suggestion that the charter did in fact create new rights.<sup>7</sup>

11. Several Members in the debate, including the Shadow Secretary of State for Justice (Sadiq Khan)<sup>8</sup> and the former Home and Foreign Secretary (Mr Jack Straw)<sup>9</sup> said the UK had an opt-out from the Charter. Simon Hughes MP said that the Liberal Democrats had understood that the Charter did not “extend to impose itself across our legislative process”, and that there was a need for consensus across the House on this.<sup>10</sup> The Minister responded that the UK did not have an opt-out from the Charter: Protocol (No 30) to the EU Treaties on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom (“Protocol 30”) simply restated that the application of the Charter was limited to EU law in Member States:

The right hon. Member for Tooting (Sadiq Khan) talks about an opt-out, but that is not what the Labour Government actually negotiated. They negotiated a protocol that stated that the charter would be applied only to EU law. That is the situation today, and it does not enable us to opt out of the charter. We are still subject to it in EU matters.<sup>11</sup> [...]

The reality is that we have a protocol that simply restates the legal position that European law and the charter of fundamental rights sit together and the charter does not apply in UK law.<sup>12</sup>

12. When asked whether he was advocating a policy of “do nothing”, the Minister answered: “I am absolutely not suggesting that we do nothing, and that is why we need to get this point clarified in law at the earliest opportunity”.<sup>13</sup>

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7 HC Deb, 19 November 2013, col. 1087

8 As above, col. 1088

9 As above, col. 1090

10 As above, col. 1093

11 As above, col. 1089

12 As above, col. 1091

13 As above, col. 1090

## An urgent need for clarification, and for action

13. To have such uncertainty about the status of the Charter is concerning. Its entry into force in December 2009 as a set of rights with the legal status of an EU Treaty marked, from any perspective, a significant development in EU policy-making and in EU law. Yet in the UK its domestic effect is surrounded by disagreement and misunderstanding.

14. Our predecessor Committee was told by the then Government that the Charter was legally binding on the UK and that the Protocol it had drafted was not an opt-out.<sup>14</sup> Several of our witnesses confirmed this point too<sup>15</sup>—the then Government did not sell the Protocol as an opt-out. Yet this understanding did not appear to be shared at the highest level, where impacts of Government statements are greatest. This, perhaps, is the source of some of the confusion. The then Prime Minister, Tony Blair, in a statement to the House in June 2007 on the European Council summit that had agreed the main substance of the Lisbon Treaty, said:

[i]t is absolutely clear that we have an opt-out from both the charter and judicial and home affairs. Those were the reasons why people like the right honourable gentleman were saying that they wanted a referendum.<sup>16</sup>

15. When asked about this in evidence Lord Goldsmith said that politicians from both parties sometimes use language in legally complex areas which is inaccurate, but that he, Lord Goldsmith, had not described the Protocol as an opt-out, although he could understand why the then Prime Minister thought in broad terms that the Protocol was:

The way that Mr Blair described it is for him to decide. I would not have described it in those terms. I did not describe it in those terms when I did come to describe it; I described it in different terms. I can understand how in a common-sense, broad way one could say, “Well, it’s an opt-out,” because it means that we are protected and it cannot go any further than we are already bound by. I can understand that entirely.<sup>17</sup>

16. Confusion also arose in 2010 in the national litigation which led to a reference by the Court of Appeal to the ECJ and its decision in the *NS* case. In the High Court Cranston J decided that, in view of Protocol 30, “the Charter cannot be directly relied upon as against the United Kingdom although it is an indirect influence as an aid to interpretation.”<sup>18</sup> But in the Court of Appeal the Government did not support that finding. The Home Secretary’s pleadings stated (emphasis added):

Contrary to the Judge’s holding, the Secretary of State accepts, in principle, that fundamental rights set out in the Charter can be relied upon against the United Kingdom, and submits that the Judge [in the High Court] erred in holding

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14 European Scrutiny Committee, *European Union Intergovernmental Conference*, para 38

15 David Anderson QC (CFR0003) para 4

16 HC Deb, 25 June 2007, col 37

17 Qq90-91

18 *R (on the application of NS) v Secretary of State for the Home Department (Reference to ECJ)* [2010] EWHC 705 (Admin), para 155

otherwise. *The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect.*<sup>19</sup>

This is a further example of judicial confusion over the effect of Protocol 30.

## Our view

17. Some misunderstanding about the Charter is inevitable — it operates in a complex way,<sup>20</sup> and Protocol 30 is deceptive in looking to a non-lawyer as if it provides an opt-out, when it does not, as we conclude later in this Report.

18. However, both this and the previous Government bear some responsibility, we suggest, for the fact that the Charter is still so badly misunderstood: its domestic legal effect has never been clearly and fully communicated, unlike the introduction of the Human Rights Act 1998, by contrast. So it is perhaps not surprising that so much uncertainty still arises. We cite above instances of differing views being taken at judicial level; the Urgent Question debate in November in the Commons elicited similar confusion from both sides of the House. The previous Government gave conflicting accounts of whether the UK had an opt-out. Similarly, whilst the Secretary of State for Justice was correct to say in the debate that the Charter applied only when EU law applied and that Protocol 30 was not an opt-out, he went on to say:

Of course [the Charter] now does have legal force in European law. The issue is about whether that legal force extends to UK law. We regard that matter as being exceptionally important. If there were any question of that linkage being made, we would have to take steps on it. [...]

I am absolutely clear that the charter should not apply in UK law, and we would take serious action if there were any suggestion that it could do.<sup>21</sup>

There is in fact *no doubt* that the legal force of the Charter extends to UK law, as we conclude later in the Report. We look forward to seeing how the Government intends to clarify through litigation that there is no such link.

19. This state of uncertainty should not continue. We set out what action we think the Government should take in the recommendations at the end of this Report.

## Approach taken in this Report

20. We first set out the negotiating history of the Charter, then summarise its contents and those of Protocol 30. We evaluate the written and oral evidence received from expert witnesses and from the Government, and then look at the impact of the Charter on the division of competences between national courts and the ECJ. Finally, we draw conclusions on the scope and legal effect of the Charter and make several recommendations.

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19 R (*on the application of NS*) v *Secretary of State for the Home Department (Reference to ECJ)* [2010] EWCA Civ 990, para 8

20 See in this regard: Lord Goldsmith QC (CFR0009) para 8

21 HC Deb, 19 November 2013, col. 1091

## 2 The negotiation of the Charter— evidence of Lord Goldsmith

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### The need for a Charter

21. To assess the impact of the Charter we wanted to understand how it came about. Lord Goldsmith provided helpful evidence on this. He also attached to his written evidence a speech he gave to the British Institute of International and Comparative Law in 2008 (the BIICL speech)<sup>22</sup> and an article he wrote for the *Common Market Law Review* in 2001 (the CMLR article).<sup>23</sup> He was appointed by the then Prime Minister, Tony Blair, to be the UK representative to the convention drafting the Charter in 1999 and 2000. He was actively involved in the 29 negotiation meetings which took place over nine months. He was subsequently appointed Attorney General in June 2001 and remained in office until June 2007. In that capacity he was also involved with matters concerning the Charter, including the agreement of what became Protocol 30. We set out his evidence in some detail in this chapter for the important record it provides of the negotiation of the Charter and of Protocol 30.

22. In his CMLR article, Lord Goldsmith explained that the ECJ began in the late sixties to include fundamental rights as general principles of EU law in its judgments as a result of a human rights gap in the Community Treaties:

But as the competence and the law-making of the Communities grew, so did the demand for an explicit recognition of people affected by the Communities' laws. The Communities were not, it should be recalled, parties to the ECHR, unlike Member States who in due course were all to become parties. So the Communities were not directly bound by the ECHR's provisions. However, did not the powers of the Community's legislators and administrators need to be constrained by respect for fundamental rights in the same way as legislators and administrators of Member States were constrained?<sup>24</sup>

23. This concern was shared by several constitutional courts in Member States, notably the German Constitutional Court. But it was not until the 1992 Maastricht Treaty that the EU Treaties placed an obligation on the EU to:

respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.<sup>25</sup>

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22 "The Charter of Fundamental Rights", Speech to BIICL, 15 January 2008, the Rt Hon Lord Goldsmith QC ([www.biicl.org/files/3271\\_dpuk-50237553-v2-speech\\_to\\_biicl1.doc](http://www.biicl.org/files/3271_dpuk-50237553-v2-speech_to_biicl1.doc))

23 *Common Market Law Review*, 38: 1201-1216, 2001 ([http://www.biicl.org/files/3272\\_goldsmith.pdf](http://www.biicl.org/files/3272_goldsmith.pdf))

24 CMLR Article, page 1202

25 Article 6(2) TEU

24. Although it had long been established that fundamental rights applied as general principles of EU law, this “did not solve the problem of identifying what those fundamental rights were. EU citizens remained without a clear, accessible catalogue of those fundamental freedoms which the Union Institutions are to respect”,<sup>26</sup> according to Lord Goldsmith. As the European Council made clear when it met in Cologne in June 1999, it was to meet the objective of making rights more visible that the Charter was conceived (emphasis added):

Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. *There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.*<sup>27</sup>

25. The European Council concluded that the scope of the Charter should include economic and social rights as well as civil and political rights:

The European Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.<sup>28</sup>

26. It recommended that the Charter should be drafted by a convention composed of Member State, Commission, European Parliament and national parliament representatives, and should be presented in advance of the European Council meeting in December 2000.

### **A political declaration, not a legally binding instrument**

27. The negotiators in the Convention were drafting a political declaration, rather than the legally binding instrument the Charter eventually became. This was an important distinction: the drafting style for a declaration of rights was different. Lord Goldsmith explained this clearly in the CMLR article, written soon after the Nice European Summit had “solemnly proclaimed”, which is to say as a political rather than a legal commitment, the Charter in December 2000:

My own view is that the political declaration route was the right approach. There are two reasons for that. First, it is easier in a political declaration to show a clear

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26 BIIICL speech, page 8

27 Annex IV of the Cologne European Council Conclusions, 3 and 4 June 1999

28 As above.



statement of values which people can understand without the qualifications and exceptions necessary in a written law. The second reason is that in the end I believe the Charter lacks the precision of language necessary to allow it legal force. President Herzog wanted us to draft so that the Charter could be integrated into the Treaties if that was subsequently decided. In this respect I believe we have not succeeded. Even with the helpful commentary produced by the Presidium, the Charter will lack the precision necessary for a law. So whilst it should be acceptable and valuable as a political statement, my own view is that this text is not suitable for incorporation into the Treaties whether directly or by cross-reference.<sup>29</sup>

28. We asked Lord Goldsmith whether he would have approached the negotiations differently if the goal had been a legally binding set of rights. He replied:

I suppose I would have said, ‘If you are going to do this, you need to draft a longer document.’ In a sense, that is what I did. People will not accept long documents for bills of rights. What I was doing, therefore, was to say, ‘Let’s have a general statement of right, but let’s have a part B that is all the detail.’ That is what then became the explanations. I might have found it easier to argue some of these points if everyone had known that it was going to be legally binding, but I am not sure it would actually, at the end of the day, have made much difference.<sup>30</sup>

### The UK Government’s policy in the Convention negotiations

29. Lord Goldsmith explained that the UK Government’s objectives in the Charter Convention negotiations were threefold:

- i. it agreed with the need to make fundamental rights applied by the Court of Justice more visible, principally to act as a constraint on the EU institutions should it be necessary;
- ii. but in cataloguing existing rights the Charter should be careful not to create new rights;<sup>31</sup> and
- iii. it should not make economic and social rights justiciable where they are not already justiciable.<sup>32</sup>

### Objective 1: making existing fundamental rights more visible

30. Lord Goldsmith put the first objective in the following context:

The political framework in which this was happening was that there was a strong call for an EU-wide statement of fundamental rights for several reasons: one, some people wanted it just because they wanted to see a statement of fundamental rights at the European Union level. Other people believed it was important—and I shared this

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29 Q75; CMLR article page 1215

30 Q74

31 Q70

32 Q70

view—that the EU institutions, and member states therefore when they were implementing Union law, should be constrained in what they did by exactly the same sorts of fundamental principles regarding the protection of individuals that apply to national governments.<sup>33</sup>

## Objective 2: not creating new rights

31. The second objective he described as follows:

So, essentially, the idea was that the most important single body of law setting out what the prohibitions were that generally apply to member states and ought to apply to the EU institutions was the European Convention on Human Rights. There were other areas, too—some of them in EU law specifically and others in the general principles of international law. We, as a Convention, determined which of those we thought were appropriate to be described as visible. The point I am trying to emphasise is that none of them were rights that we created; they were all existing rights. There was some discussion about minting new rights, but we moved quite quickly to the position that we were not going to mint new rights; we were going to make use of the existing rights.<sup>34</sup>

32. However, we note that the Charter’s official Explanations do not point to any pre-existing legal text containing the right under Article 13 of the Charter, on the freedom of the arts and sciences. Instead, they say this right was “deduced primarily” from the right to freedom of thought and expression by those who drafted the Charter.

### *ECHR rights*

33. The Convention agreed that the Charter should cover the same rights as the ECHR, to which, at that time, the EU could not accede, to ensure that EU citizens received the same protection from infringements of human rights by the EU institutions as they did from their governments, all of which had ratified the ECHR. However, a major topic of debate within the Convention was how to reflect the relationship with the ECHR.

34. Lord Goldsmith explained that he was particularly concerned about this issue and argued strenuously against taking any step which could lead to confusion between rights in the ECHR and rights expressed in the Charter where they covered the same grounds.<sup>35</sup> His view was not universally held. Many members of the Convention wanted to bring certain rights “up to date”. He commented that it was, in any event, impossible to assert that the content of the ECHR is precisely as it was when it was promulgated in 1950, given that it is a “living instrument” according to the jurisprudence of the ECtHR, and has to be interpreted in light of present day conditions to be practical and effective. So, for example, the change of “correspondence” in Article 8 of the ECHR to “communications” in Article 7 of the Charter is solely to take account of “developments in technology”, as clearly set out in the Explanations.

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33 Q62

34 Qq68, 70

35 Lord Goldsmith QC (CFR0009) para 13 ff

35. Lord Goldsmith thought that the combination of Article 52(3) of the Charter (one of its “horizontal Articles”)<sup>36</sup>, the official Explanations of the Charter and the later developments including Protocol 30 have the effect of tying back those rights to the ECHR. Article 52(3), which the UK proposed, in particular meant that any perceived risk of confusion was not a real risk. He noted that the ECJ has already respected Article 52(3) in its decisions.<sup>37</sup>

36. We asked Lord Goldsmith whether he thought the last sentence of Article 52(3)—“This provision shall not prevent Union law providing more extensive protection [than the ECHR]”—was a positive development, to which he replied:

That last sentence was obviously deliberate, which is to say that the Charter established a floor, not a ceiling. It is true, with respect, so far as the ECHR is concerned. I believe that this country provides in a number of areas that are covered by the ECHR more extensive protections than the ECHR provides. I regard that as a good thing. But there is nothing inconsistent in saying, “You must be bound by these provisions but you can have more extensive protections if you want.”<sup>38</sup>

37. The Explanations, Lord Goldsmith continued, were a further important mechanism to ensure that the ECHR rights in the Charter are interpreted consistently with the ECHR itself: they “tie back” each right to the ECHR itself.<sup>39</sup>

### Non-EU rights

38. Some of the Articles of the Charter are not derived from pre-existing EU rights. For example, Article 3(2)(b), which prohibits eugenic practices, is derived from the Rome Statute of the International Criminal Court. We asked Lord Goldsmith what consideration had been given to the effect of placing non-EU obligations such as this in a Charter of EU fundamental rights. He explained that the Convention agreed that certain prohibitions—such as this one—that had been accepted as applicable in international law, and which applied to national States in any event, should be reflected in the Charter.<sup>40</sup> He added that Roman Herzog, a former president of the German Constitutional Court and subsequently President of Germany, had strong views on some of the basic civil rights that should be included in the Charter, which also had an influence on the negotiations, but, most importantly, none of the rights in the Charter was new.<sup>41</sup> Another example of Charter rights sourced from a non-EU legal instrument are the rights of the child under Article 24. The Charter Explanations say that this Article is based on the New York Convention on the Rights of the Child.

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36 The horizontal Articles are Articles 51-54 of the Charter; they define the scope and aspects of the application of the Charter.

37 *Aklagaren v Hans Akerberg Fransson* (para 44); *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* C-279/09 (para 35); and the Advocate General’s Opinion in *Secretary for the Home Department v ME and others*, C-411/10 (paras 145-148)

38 Q84

39 Lord Goldsmith QC (CFR0009) para 14

40 Q65

41 Q67

39. We note that in at least one instance a Charter provision draws on a non-EU international obligation to which the UK is not a party. This is the provision on protection in the event of unjustified dismissal under Article 30 of the Charter. The Charter Explanations say that this Article draws in part on the revised European Social Charter—a 1996 Council of Europe treaty that the UK has not ratified.

### ***Objective 3: not making economic and social rights justiciable under EU law***

40. The third objective was more contentious according to Lord Goldsmith:

in Title 4 they are called solidarity rights, but they are really social and economic rights. That was one of the biggest issues for the United Kingdom. A lot of countries want to see social and economic rights made justiciable. It is a very live issue in terms of human rights. The social charter, of course, was very much in existence at the time.

The UK did not want to go further than we were already at that stage, and it was quite a neuralgic issue.<sup>42</sup>

### ***Principles, not rights***

41. Lord Goldsmith explained that the compromise agreed was to distinguish in the Charter between rights and principles, the latter of which were not legally enforceable unless through legislation. This distinction is reflected in Article 52(5) of the Charter, a further horizontal Article:

The provisions of this Charter which contain principles may 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. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

42. We found this provision difficult to interpret and so we asked Lord Goldsmith for his interpretation. He replied that economic and social rights in the Charter were not stand-alone rights: to be justiciable they needed to be implemented either at EU or Member State level; Article 1(2) of Protocol 30 helped clarify this:

What this was intended to do was to say there are, in this Charter, things that are not justiciable rights so let us call them principles, and those inform the way that the EU may legislate. What the paragraph is trying to do is to say that they are not justiciable as they stand, but they may be implemented by legislative and executive acts. When it comes to interpreting the acts that purport to implement them, then you can have a look at the general principles.

The end result is that it is, in fact, expressed more happily in the Protocol by Article 1(2) simply saying that they are only justiciable rights to the extent that they are

created in national law. What we added in 52(5) [...] means you can only have regard to the Charter in this area—the area of principles—when you are looking to see what the legislative act purporting to make that principle into binding law is, when you are interpreting that, or when you are ruling on its legality.

In other words, if you have a principle in relation to minimum wage, that does not mean there is a minimum wage. But once states implement a minimum wage or if the EU were to implement a minimum wage, when it comes to interpreting what the legislation means when it says “minimum wage”, you can look at the principles in the provisions of the Charter to understand it, to interpret it and also to see whether it is lawful. That was the intention. Protocol Article 1(2) actually has a narrower effect as far as the UK is concerned because that is saying “in that field”. If it is not implemented in the UK, it is not justiciable.<sup>43</sup>

### *The commentary to the Charter, which became the Explanations*

43. There were, however, tensions within the Convention between the many who wanted a broader statement of rights, such as in a Bill of Rights, and those, like the UK, who wanted a narrow statement of rights that could be tied back to their source. These tensions were resolved by a compromise suggested by Lord Goldsmith, which was to ensure that each right or principle could be traced back to its source in a commentary accompanying the Charter. The commentary agreed in the Convention later became the Explanations.<sup>44</sup> He explained his approach as follows:

many people wanted a broadly stated Charter of Rights. I have described it occasionally as a sort of poetic statement, in the way that constitutions often are. Everyone is entitled to liberty, freedom, the pursuit of happiness and so forth.

From a legal point of view, it is very nice to have that, but it is very dangerous to have that. The risk is that you do not know what it is that you have created, because a court can interpret that in a particular way. My proposed solution to that was to have the Charter in two parts. Originally I called it part A and part B. Part A would have this nice statement of rights, as indeed the ECHR has itself, because it expresses things in a short, clear, poetic way, but there would be a part B that told you what the detail was. The part B became the explanations, which tied the individual statement of rights back to the underlying right that it was, as it were, reflecting—was making more visible.<sup>45</sup>

44. It was clear from Lord Goldsmith’s evidence that the negotiations on the commentary were difficult:

One of the difficulties in getting everyone to sign up to the explanations was that the secretariat for the Convention did not want to ask—I may make a revelation here—member states to agree the explanations, no doubt because they thought it would be a very complicated process. It was complicated enough as it was. It was not a very

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43 Q78; see also Q70

44 Q75

45 Q63

popular thing that I had done, to create this second part. We did not have that degree of consensus on it.<sup>46</sup>

45. Lord Goldsmith described the Explanations as being of primary importance—“essential gloss”<sup>47</sup>—in terms of understanding the origin and scope of the rights set out in the Charter. They are (based on wording he had proposed), in their own terms, “a valuable tool of interpretation intended to clarify the provisions of the Charter.”<sup>48</sup> He continued that, critically, Article 52(7) of the Charter provides that:

[t]he explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

### From a political declaration to a legally binding instrument

46. When in 2004 in the course of the Constitutional Treaty negotiations it was decided that the Charter was to become legally binding, the status of the Explanations and content of the horizontal Articles were amended to further constrain the Charter’s scope and application. This was largely at the UK’s instigation. In his BIICL speech Lord Goldsmith made clear how important a priority this was:

As noted above, the Charter as originally drafted was a political declaration, lacking the precision of language necessary to allow it legal force. It is this, rather than any concerns over substance, it was been [sic] at the heart of the British Government concerns about enhancing its status.

47. In evidence to us he explained:

When it came to making it legally binding, there were adjustments made to the horizontal articles and to the explanations. I do not think there were any changes made to the substantive articles themselves. I was not personally involved in that, but the horizontal articles and the explanations were changed in order to make it more fit to be part of a treaty. Originally it was going to be the constitution, and then it came into Lisbon.<sup>49</sup>

48. Lord Goldsmith believed the change in status of the Explanations was particularly important:

The status of the explanations has changed from the commentary that was specifically described as non-binding to the position we now have in Article 6 following Lisbon and in Protocol 30. The commentary has been given a very specific legal status, which is even stronger so far as the UK is concerned because of Protocol 30. But it is still a strong legal status as far as other member states are concerned.

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46 Q75

47 BIICL speech, page 16

48 Preamble paragraph to the Explanations

49 Q69; see also Q87

That was a very important part of the negotiations—the difficult negotiations—that took place at the time of the negotiation on the draft constitution.<sup>50</sup>

49. The Treaty of Lisbon also reinforced previous iterations of Article 6 of the Treaty on European Union (TEU) by incorporating the need to have regard to the Explanations and to apply horizontal Articles.<sup>51</sup>

50. When we asked Lord Goldsmith if he thought that the danger of the lack of precision in the language of the 2000 version of the Charter had been overcome by the amendments he outlined above, he thought, broadly speaking, it had.<sup>52</sup>

### Protocol 30

51. Protocol 30 came as a late development, on the cusp of a change in Prime Minister.<sup>53</sup> Lord Goldsmith was involved in the negotiation of it.<sup>54</sup> We suggested to him that Protocol 30 was intended to provide a comfort more than a safeguard. He agreed, saying:

I have tried to describe the Protocol in the address I gave to the British Institute of International and Comparative Law: “In brief, the Charter Protocol is not an opt-out but a guarantee. An explicit confirmation that in relation to the UK and UK law, the limitations and constraints on what it is and what it will do will be strictly observed.” Was it necessary? No, it was not necessary, so long as the Charter was interpreted in the right way. I understand people want additional protections—bootstraps—to make sure there are safeguards. That is the flavour.<sup>55</sup>

### Overall assessment of the Charter

52. Lord Goldsmith said he was no apologist for the Charter: he believed it was necessary to protect the fundamental rights of EU citizens from abuse of power by the EU institutions.<sup>56</sup> We asked Lord Goldsmith to say whether a statement of the previous Government that it “would not accept a treaty that allows the Charter of Fundamental Rights to change UK law in any way” was still tenable: he thought it was.<sup>57</sup>

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50 Q75.

51 See BIICL speech, page 17

52 Q77

53 Q85

54 Q87

55 Q85

56 Lord Goldsmith QC (CFR0009) para 26

57 Q70; see also page 24 of the BIICL speech

## 3 Contents of the Charter, Explanations, and Protocol 30

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### Article 6 TEU

53. The Charter should be read in the light of Article 6 TEU (as amended by the Lisbon Treaty), several of whose provisions are replicated within it:

- Article 6(1), first subparagraph, gives the Charter “the same legal value as the Treaties”;
- Article 6(1), second subparagraph, prohibits the Charter from being used to extend “in any way” the competences of the EU; and
- Article 6(1), third subparagraph, requires the Charter to be interpreted “in accordance with” Title VII of the Charter, the “Horizontal Articles”, and “with due regard to” the Explanations; and
- Article 6(3) states that fundamental rights as guaranteed by the ECHR and “as they result from the constitutional traditions common to the Member States”, constitute general principles of EU law.

### The Charter

#### *Preamble*

#### *Source of the Charter rights and principles*

54. The preamble (the recitals) of the Charter explains that the Charter “reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from”:

- the constitutional traditions and international obligations common to the Member States;
- the ECHR;
- the Social Charters adopted by the EU and by the Council of Europe;
- the case-law of the ECJ and of the ECtHR.

From “in particular” it could be inferred that this list is not intended to be exhaustive.

#### *Explanations*

55. The preamble further requires the ECJ and national courts to interpret the Charter “with due regard to the explanations” prepared in the course of the Convention which drafted the Charter and “updated” in the course of the European Convention, which had agreed to the Charter becoming legally binding.



## Articles

### Substantive Articles

56. The Charter contains 54 Articles, grouped under seven Titles. Articles 1-5 under Title I, “**Dignity**”, concern respect for human dignity, the right to life, the right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, and prohibition of slavery and forced labour.

57. Articles 6-19 under Title II, “**Freedoms**”, concern the right to liberty and security, respect for private and family life, protection of personal data, the right to marry and found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, freedom of the arts and sciences, the right to education, freedom to choose an occupation and the right to engage in work, freedom to conduct a business, the right to property, the right to asylum, and protection in the event of removal, expulsion or extradition.

58. Articles 20-26 in Title III, “**Equality**”, concern equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, and integration of persons with disabilities.

59. Articles 27-38, under Title IV, “**Solidarity**”, concern workers’ right to information and consultation within the undertaking, the right of collective bargaining and action, the right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, and consumer protection.

60. Article 39-46, under Title V, “**Citizens’ Rights**”, concern the right to vote and stand as a candidate at elections to the European Parliament and at municipal elections, the right to good administration, the right of access to documents, the right to refer cases of maladministration to the European Ombudsman, the right to petition, freedom of movement and residence, and diplomatic and consular protection.

61. Articles 47-50, under Title VI, “**Justice**”, concern the right to an effective remedy and a fair trial, presumption of innocence and the right of defence, principles of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

### Horizontal Articles

62. Title VI concerns what have become known as the horizontal Articles (“**General Provisions Governing the Interpretation and Application of the Charter**”). Article 51(1) is critical to understanding the scope and application of the Charter. It states that the Charter applies to all acts of the EU institutions and subsidiary EU bodies, but only to Member States when they implement EU law, and that the rights within it have to be respected whereas the principles within it have to be observed (emphasis added):

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*. They shall therefore *respect the rights, observe the principles* and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

63. Article 51(2) underscores the last sentence of paragraph 1 by restating that the Charter does not confer power on the EU to do anything it is not already authorised to do under the EU Treaties. It also confirms that the Charter does not extend the field of application of EU law:

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

64. Article 52(1) sets out the limitations on derogations from Charter *rights*, and is based on the case law of the ECJ on derogations from EU law. Principles are not included in this paragraph: given that they only have to be observed, the Charter itself sets no limits on derogations from them. (EU or national legislation which implements these principles may be subject to limitations on derogations, however.)

65. Article 52(2) concerns rights in the Charter which are also found in the EU Treaties, principally the “Citizens’ rights”, and provides that they should be exercised under the conditions laid down in the EU Treaties.

66. Article 52(3) provides that if any of the Charter rights correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is to be the same as defined by the ECHR, although EU law may provide for more extensive protection.

67. Article 52(4) provides that where the Charter recognises fundamental rights “as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.” This is in accordance with ECJ case law, and requires a high standard of protection rather than the lowest common denominator.

68. Article 52(5) concerns principles and is set out, with Lord Goldsmith’s explanation, in the previous chapter.<sup>58</sup> The Explanation of this paragraph confirms that some Articles of the Charter may contain rights as well as principles.

69. Article 52(6) requires national laws and practices to be taken into account where referred to in a Charter Article.

70. Article 52(7) requires the Explanations “drawn up as a way of providing guidance to the interpretation of the Charter” to be given “due regard” by the ECJ and national courts.

71. Article 53, “Level of Protection”, is intended to maintain the level of protection afforded by similar rights contained in legal provisions other than the Charter.

72. Article 54 prohibits the abuse of the rights in the Charter, in the same manner as Article 17 of the ECHR: the rights cannot be used to perform any act “aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein”.

### ***The Explanations***

The preamble to the Explanations states that they are “a valuable tool of interpretation intended to clarify the provisions of the Charter.” Each Explanation sets out the source of right or principle in question and, particularly of the horizontal Articles, the meaning to be given to a particular Article.

### **Protocol 30**

73. We set out Protocol 30 in full, given its relevance to this Report:

#### ***Preamble***

Whereas in Article 6 of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union,

Whereas the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 and Title VII of the Charter itself,

Whereas the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article,

Whereas the Charter contains both rights and principles,

Whereas the Charter contains both provisions which are civil and political in character and those which are economic and social in character,

Whereas the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles,

Recalling the obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally,

Noting the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter,

Desirous therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom,

Reaffirming that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter,

Reaffirming that this Protocol is without prejudice to the application of the Charter to other Member States,

Reaffirming that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally,

Have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

## **Articles**

### Article 1

1. 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.

2. 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.

### Article 2

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.

## 4 Interpretation of the Charter and Protocol 30—the views of expert witnesses

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74. We set out below a comparative summary of the written and oral evidence given to the Committee by David Anderson QC, Professor Paul Craig, Professor Sionaidh Douglas-Scott and Martin Howe QC and of written evidence submitted by Andrew Duff MEP, Dr Tobias Lock and Dr Michael Pinto-Duschinsky (on behalf of Policy Exchange).

### Status, scope and legal effects of the Charter

75. Professor Craig said that the Charter was self-consciously drafted to be declaratory of existing rights, rather than constitutive of new rights.<sup>59</sup> Martin Howe added that while many Articles of the Charter were based on pre-existing legal provisions (such as the ECHR or EU secondary legislation, for example, the Data Protection Directive), not all were.<sup>60</sup> This was clear from the Preamble and underscored by the Explanations which had set out the provenance of each right.<sup>61</sup>

76. Dr Pinto-Duschinsky considered that the argument that the Charter did no more than set out pre-existing rights was one of several questionable arguments which was used to disguise the Charter's impact on national sovereignty.<sup>62</sup> He said that the Charter had achieved more than symbolic significance and, being broadly-worded, it would lead to an expansion of the jurisprudence of the ECJ. This case law was more destructive of national sovereignty than that of the ECtHR.<sup>63</sup>

77. Professor Craig acknowledged that Article 51(2) did not prevent the development of new rights on the basis of existing competences (despite precluding the Charter as a legal base for new rights),<sup>64</sup> but Dr Pinto-Duschinsky went further. He said that the argument that Charter rights applied only to matters within the existing competence of the EU (for example, the single market) was another questionable way of concealing the Charter's effect on national sovereignty. He thought the Charter would encourage a broadening of the scope of ECJ decisions in the same way that the Interstate Commerce Clause was used in the battle for civil rights in the USA.<sup>65</sup>

78. David Anderson and Professor Craig considered that the Charter and its rights could act as interpretative devices<sup>66</sup> (with Martin Howe submitting that this was the Charter's sole function prior to the Lisbon Treaty<sup>67</sup>). This occurred when, Professor Craig explained,

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59 Professor Paul Craig (CFR0006) para 4(3)

60 Martin Howe QC (CFR0008) para 2

61 Professor Paul Craig (CFR0006) para 4(3)

62 Dr Michael Pinto-Duschinsky (CFR0005) para 5

63 Dr Michael Pinto-Duschinsky (CFR0005) para 6

64 Professor Paul Craig (CFR0006) para 4(5)

65 Dr Michael Pinto-Duschinsky (CFR0005) para 7

66 David Anderson QC (CFR0003) para 1, Professor Paul Craig (CFR0006) para 4(6)

67 Martin Howe QC (CFR0008) para 3, page 3

the ECJ interpreted EU action or Member State action that fell within the scope of EU law, so ensuring that legislative provisions were read in a way compatible with those rights.<sup>68</sup>

79. The Charter, as held in *RFU v Consolidated Information Services*<sup>69</sup> (the Viagogo case) was, said David Anderson, directly effective in national law,<sup>70</sup> though, as Professor Douglas-Scott commented, the Charter did not state who might benefit from the Charter's rights (whilst being clear on whom obligations were imposed). It dealt with this on a case by case basis in each Article and the Explanations.<sup>71</sup>

80. Given the visibility which the Charter lent to these pre-existing rights, they were given greater force said Professor Craig<sup>72</sup> and, submitted Martin Howe, were more readily deployable.<sup>73</sup> David Anderson acknowledged that some of the more obscure rights had been given greater prominence by dint of their inclusion in the Charter.<sup>74</sup> He submitted, together with Martin Howe, Andrew Duff MEP and Dr Lock that the Charter also acted to invalidate or disapply EU and national rules within the scope of EU law which were inconsistent with the Charter.<sup>75</sup>

81. This effect on EU secondary legislation was illustrated by Martin Howe with reference to the *Test Achats*<sup>76</sup> case. He explained how the derogation to the Directive on equal treatment of men and women in the supply of services (which allowed differentiation between the sexes where gender was a determinative risk assessment factor) was invalidated for being incompatible with Articles 21 and 23 of the Charter. This was, he said, a violation of the sovereignty of Member States which had unanimously agreed to the derogation; an extension of the scope of EU law; an unwarranted transfer of power from the democratically-elected to the judiciary; and a warning that opt-outs and derogations from EU law which had been politically agreed could be undone by the ECJ.<sup>77</sup> Professors Douglas-Scott and Craig, and David Anderson, disagreed with Martin Howe's interpretation of *Tests Achats*.<sup>78</sup>

82. Martin Howe thought that the Charter had led to a significant expansion of the scope of matters subject to EU law and a corresponding reduction in Member State autonomy.<sup>79</sup> Both Martin Howe and Michael Pinto-Duschinsky believed that the Charter had also led, as Martin Howe put it, to the "judicialisation" of matters which should be reserved to national legislators.<sup>80</sup> Legislators, Dr Pinto Duschinsky said, were accountable to the people

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68 Professor Paul Craig (CFR0006) para 4(6)

69 [2012] UKSC 55; [2012] WLR (D) 342

70 David Anderson QC (CFR0003) page 2, para 3

71 Professor Sionaidh Douglas-Scott (CFR0002) para B4

72 Professor Paul Craig (CFR0006) para 4(4)

73 Martin Howe QC (CFR0008) page 2, para 2

74 David Anderson QC (CFR0003) para 20

75 David Anderson QC (CFR0003) para 1, Martin Howe QC (CFR0008) para 2, Andrew Duff MEP (CFR0007) para 3, Dr Tobias Lock (CFR0001) para 24

76 C-236/09

77 Martin Howe QC (CFR0008) pages 2–4, para 3

78 Q35 [Douglas-Scott, Craig, Anderson]

79 Martin Howe QC (CFR0008) para 1

80 Martin Howe QC (CFR0008) para 1, Dr Michael Pinto-Duschinsky (CFR0005) paras 1, 14

and Parliament of the UK, unlike the ECJ when, as an international court, it adjudicated on Charter rights. He added that with most bills of rights there was a transfer of powers from legislatures to judges, but this loss of democratic accountability could be justified if the process had been sanctioned by a super-majority of legislators following public debate and a system of legislative checks and balances. This was not the case with the transfer of powers to the supranational ECJ and arguably Parliament had only ever agreed (at the time of the European Communities Act 1972) to give such powers to the ECJ in single market matters.<sup>81</sup> Also, the content of Charter rights could be extremely vague, according to both of these experts.<sup>82</sup> Martin Howe considered that such vaguely-drafted rights could lead to a substantial expansion of discretionary and political decision-making by the judiciary<sup>83</sup> and, in the view of both experts, increased legal uncertainty.<sup>84</sup> This uncertainty, Dr Pinto-Duschinsky said, was also due to Charter rights being more extensive than ECHR rights, particularly in the inclusion of social and economic rights and the unclear difference between rights and principles. He also said that the Charter had led to increased complexity of the European human rights regime, with three separate competing constitutional courts for the UK: the UK Supreme Court, the ECtHR in Strasbourg and the ECJ in Luxembourg.<sup>85</sup>

### Effect of Protocol 30—application of the Charter in the UK

83. All the experts agreed that Protocol 30 was not an opt-out, with several considering that it was better described as a clarification of the Charter. This was clear from the preamble of the Protocol, said Professor Craig, and it was also clear that Article 1(1) of the Protocol was merely declaratory of Article 51(2) of the Charter on the scope of its application in only reaffirming existing rights.<sup>86</sup> Both he and David Anderson agreed that NS was therefore correctly decided and Mostyn J was wrong.<sup>87</sup> Andrew Duff MEP, also referred to NS, specifically to the view of Advocate General Trstenjak that the Protocol would only apply restrictively if the Charter added new fundamental rights to the EU legal order, that it did not limit the ability of the UK courts to find domestic law incompatible with the Charter (nor did it extend that ability by virtue of Article 1(1) of the Protocol).<sup>88</sup> He also said that the Charter Convention intended that all Member States would respect the Charter<sup>89</sup> and a restrictive application of the Protocol would hinder uniform application needed to ensure legal certainty and coherence across the EU.<sup>90</sup> Both Andrew Duff MEP and Dr Pinto-Duschinsky pointed to the legal uncertainty and political confusion caused by the Protocol.<sup>91</sup>

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81 Dr Michael Pinto-Duschinsky (CFR0005) paras 1, 14

82 Dr Michael Pinto-Duschinsky (CFR0005) para 3, Martin Howe QC (CFR0008) para 2

83 Martin Howe QC (CFR0008) para 2

84 Dr Michael Pinto-Duschinsky (CFR0005) paras 3–4, Martin Howe QC (CFR0008) para 2

85 Dr Michael Pinto-Duschinsky (CFR0005) paras 3–4

86 Professor Paul Craig (CFR0004) para 15–16

87 Professor Paul Craig (CFR0004) para 22, David Anderson QC (CFR0003) para 9

88 Andrew Duff MEP (CFR0007) paras 26–27

89 Andrew Duff MEP (CFR0007) para 9

90 Lord Goldsmith made a similar point: see the BIICL Speech, page 22.

91 Andrew Duff MEP (CFR0007) para 30, Dr Michael Pinto-Duschinsky (CFR0005) para 4

84. David Anderson added that the Protocol had never been sold as an opt-out by the Government<sup>92</sup> and Martin Howe said that it was surprising that it could have been so considered by some.<sup>93</sup> Dr Pinto-Duschinsky said that the argument that the UK had gained an “opt out” from the Charter was used by some to mitigate the loss of national sovereignty.<sup>94</sup> Andrew Duff MEP commented that any presentation of the Protocol to the British public as an “opt-out” from the Charter had been an unhelpful example to others, with Poland and the Czech Republic also having sought to limit the Charter’s application and Hungary having taken “a cavalier approach to the constitutional norms of the EU”.<sup>95</sup>

85. However, some of the experts qualified their overall view that the Protocol was not an opt-out. Both David Anderson and Professor Craig considered that Article 1(2) safeguards against new justiciable “solidarity” rights under Title IV<sup>96</sup> (between private individuals, added Andrew Duff MEP). However, the extent of that protection would, Professor Craig commented, depend on how the wording in that Article, namely, “except in so far as Poland or the United Kingdom has provided for such rights in national law” was interpreted by the ECJ.<sup>97</sup> However, in oral evidence Professor Craig was clear that Article 1(2) provided a substantive safeguard:

there are certain rights or provisions within Title IV, like Article 29, concerning the right to a free placement service, and Article 31, which, in the absence of Protocol 30 Article 1(2), could or might be interpreted by the court as being genuine rights. In relation to the UK, however, Article 1(2) of Protocol 30 would prevent that interpretation from being applicable. In that respect, my view is that Article 1(2) does add a substantive impact in particular in relation to those parts of Title IV where there is no condition of the right being found in a national law or practice.<sup>98</sup>

86. Professor Douglas-Scott agreed that Article 1(2) of the Protocol concerning those particular rights could be a limited exception, but she added that, even if Article 1(2) had this effect, it would not stop pre-existing EU fundamental rights applying as general principles of EU law.<sup>99</sup> Dr Lock considered that the meaning of Article 1(2) was less clear than Article 1(1) as there was currently no ECJ authority on it, but there were three possible views: that it merely confirmed that Title IV did not contain justiciable rights, only principles; or that any rights as such could only be invoked if first implemented at national level; or that it only affirmed that Solidarity rights existed as general principles (he preferred the second view).<sup>100</sup>

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92 David Anderson QC (CFR0003) page 1, para 4

93 Martin Howe QC (CFR0008) page 5, para 5

94 Dr Michael Pinto-Duschinsky (CFR0005) para 5

95 Andrew Duff MEP (CFR0007) para 12

96 David Anderson QC (CFR0003) para 18, Professor Paul Craig (CFR0006) para 2(3)

97 Professor Paul Craig (CFR0004) para 14

98 Q42 [Craig]

99 Q42 [Douglas-Scott]

100 Dr Tobias Lock (CFR0001) paras 10–13 and summary



87. Professors Douglas-Scott and Craig both thought Article 2 could add a further safeguard.<sup>101</sup> Professor Douglas-Scott said that where Charter provisions refer to both EU and national law, and there is a conflict between the two, Article 2 appeared to confirm that national law would have primacy.<sup>102</sup> Professor Craig thought the emphasis on UK or Polish national law could be relevant where a majority of Member States had recognised the right or principle in question—even in such circumstances Article 2 clarifies that it should not be justiciable in the UK or Poland.<sup>103</sup> This is consistent with the explanation provided by Lord Goldsmith that Article 2 was intended to make clear that where reference is made to national laws and practices, it is for the UK to identify what those national laws and practices are.<sup>104</sup>

88. Even if Protocol 30 had constituted an opt-out, both Dr Lock and Andrew Duff MEP pointed out that rights under the Charter would still be applicable in the form of general principles of EU law (by virtue of Article 6(3) TEU).<sup>105</sup>

### Article 51 and the *Fransson* case<sup>106</sup>

89. Both David Anderson and Professor Douglas-Scott commented on the importance of the interpretation of the phrase in Article 51(1) of the Charter “only when implementing Union law”. David Anderson said it was “central to the balance of competences between the Member States and the EU”.<sup>107</sup> Professor Douglas-Scott said that it could be seen as an intention to limit the scope of the ECJ’s right of review; the previous iteration in the negotiations had been “when acting within the scope of European Union law”.<sup>108</sup> However, the Explanations stated that the requirement to respect fundamental rights “defined in the context of the Union”, including the Charter, “is binding on the Member States *when they act in the scope of Union law*”.<sup>109</sup>

90. There was some difference of views about the interpretation by the ECJ in *Fransson* of whether “when implementing EU law” meant “acting within the scope of EU law”. Dr Lock and Martin Howe considered that this was an expansive interpretation<sup>110</sup> and Dr Lock considered that the meaning of “implementing EU law” was still not entirely clear.<sup>111</sup> Mr Howe commented that *Viagogo* showed that even where the proceedings in question had “nothing to do with the EU or EU law”, the Charter would apply if legislation of an EU origin was involved. He added that *Fransson* represented “a naked grab of territory by the ECJ” because in its wake even “a peripheral or tangential element of EU law”, such as the

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101 Q45 [Craig; Douglas-Scott]

102 Q45 [Douglas-Scott]

103 Q45 [Craig]

104 Lord Goldsmith QC (CFR0009) para 32

105 Dr Tobias Lock (CFR0001) para 8, Andrew Duff MEP (CFR0007) para 27

106 See our analysis of *Fransson* in chapter 6, paras 126-132, and our conclusions.

107 David Anderson QC (CFR0003) para 11

108 Professor Sionaidh Douglas-Scott (CFR0002) para B2

109 2007/C 303/02

110 Martin Howe QC (CFR0008) page 4, para 4, Dr Tobias Lock (CFR0001) para 20

111 Dr Tobias Lock (CFR0001) paras 15-22

harmonisation of some elements of national tax law by VAT Directives in that case, could result in the Charter's application.<sup>112</sup> Professor Craig and Dr Lock referred to the role that the German Constitutional Court had played in relation to *Fransson*. Dr Lock thought that the potential for that Court to reject the ECJ ruling as *ultra vires* could influence future interpretation of the Article 51(1).<sup>113</sup> Professor Craig referred to the German Constitutional Court's criticism of *Fransson*, which he said was based on an argument advanced by Advocate-General Cruz Villalón that the relevant Swedish law had not been enacted to implement the VAT Directive and therefore fell outside of the scope of Article 51. He added that although there would inevitably be differences of view as to whether a Member State was "acting within the scope of EU law", the determinative issue was not whether a national law had itself been enacted to implement an EU instrument but whether it was being used to implement the obligations flowing from the instrument. In *Fransson*, he considered that it clearly was and to hold otherwise would mean that the Charter would not be applicable if a Member State chose to meet its obligations through existing legal provisions rather than enacting new, discrete provisions. He considered that the interaction between the national law and EU law was not in some way merely incidental in *Fransson* as a penalty regime for VAT evasion was clearly central to this primary EU revenue base.<sup>114</sup>

91. In any case, Professor Craig argued that a broad reading of the Article 51(1) formulation was supported by the Explanations and the wide interpretation given to fundamental rights as EU general principles by the ECJ. He said that it would be anomalous for the Charter to be interpreted less widely.<sup>115</sup> Professor Douglas-Scott and Andrew Duff MEP considered that the *Fransson* interpretation reflected pre-Charter fundamental rights case law.<sup>116</sup> However, the Professor added that it was interesting to note the basis on which Advocate-General Cruz Villalón's arguments were proposed.<sup>117</sup> David Anderson considered that when the Supreme Court in *Viagogo* interpreted the Article 51(1) formulation to mean "within the material scope of EU law"<sup>118</sup> it took a conventional course and suggested that the UK Government was not concerned by this approach because it did not intervene in *Fransson* to argue for the narrower formulation of "when implementing EU law". He thought that it remained to be seen if *Fransson* could mark the beginning of competence creep but considered that the language of the judgment indicated that this would be, at most, of a modest nature. He also pointed to the many cases where the ECJ had rejected an application for judicial review on the grounds of Charter infringements.<sup>119</sup> Professor Douglas-Scott made a similar point:

I think that the courts—both the European Court and national courts—have been willing to throw out Charter-based claims where the Charter is clearly not applicable,

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112 Martin Howe QC (CFR0008) para 4

113 Dr Tobias Lock (CFR0001) para 22

114 Professor Paul Craig (CFR0006) para 1(1)–(6)

115 Professor Paul Craig (CFR0004) para 1(3)

116 Professor Sionaidh Douglas-Scott (CFR0002) para B2 and Andrew Duff MEP (CFR0007) para 5

117 Professor Sionaidh Douglas-Scott (CFR0002) para B2.1

118 David Anderson QC (CFR0003) para 12

119 David Anderson QC (CFR0003) para 15

and the Charter will not be applicable where the action does not fall within the scope of EU law. For example, we have had cases where applicants have tried to plead road rage claims based on the Charter, and those have failed; cases where Ryanair have tried to rely on the Charter and those have failed. It will not be available in quite a number of cases.<sup>120</sup>

92. Dr Lock said that, in the wake of *Fransson*, the Charter was only justiciable in the UK courts where the UK had acted within the scope of EU law; it could not, however, be invoked in cases concerning purely domestic situations. Likewise, it seemed that Scottish courts could only find that an Act of the Scottish Parliament was *ultra vires* because it was incompatible with the Charter where EU law was applicable.<sup>121</sup>

### Principles v rights

93. All the witnesses agreed in oral evidence that the distinction between a “principle” and a “right” in the Charter was unclear, and as yet without guidance from the ECJ. David Anderson expressed the point clearly:

I agree that the distinction between “right” and “principle” was intended to be significant, as one sees from Article 52(5) and from the explanations, which one must take into account according to the Treaty. I also agree that the distinction, as it appears from the Charter and from the explanations, is entirely confusing, not least because the first of the three examples given in the explanations of a principle is the so-called rights of the elderly. That is not a very promising starting point.<sup>122</sup>

As proof of this, we asked the witnesses to say whether Article 29 of the Charter, which states that “Everyone has the right to a placement service”, was a principle or a right. David Anderson thought it might be a principle, Professor Craig a right.<sup>123</sup> We asked a similar question on Article 33(1) of the Charter, which states that “The family shall enjoy legal, economical and social protection”. Professor Craig thought it would probably be regarded as a principle “[b]ut until it is adjudicated upon by the European Court of Justice, we will not know”.<sup>124</sup>

94. All witnesses agreed that Article 52(5) and the relevant Explanations made clear that a principle could not be a free-standing right under the Charter; in other words, it needed to be implemented in EU or national law before it could become justiciable. However, that was not to say a principle could not be used by the ECJ as a strong interpretative device. Professor Craig said as follows:

The only point I would add is that, even in relation to those Charter rights that are deemed to be principles, one should not imagine that that precludes all forms of judicial oversight. The actual idea of a principle being distinct from a right does not preclude a court taking cognisance of such a principle in an action for judicial

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120 Q15

121 Dr Tobias Lock (CFR0001) paras 14, 19 and summary

122 Q6

123 Q26

124 Q18

review, either under Article 263 or under Article 267 of the Treaty, and using that principle as a strong interpretative device when construing the legality of whatever issue is before it. Even when the court does come around to delineating more specifically the Charter rights that are only principles, one should not conclude that they will be devoid of legal impact.<sup>125</sup>

Martin Howe went further, saying that a principle could be used as a basis either for interpretation or for striking down a measure.<sup>126</sup>

## Title IV “Solidarity” Rights

95. David Anderson said that the UK’s concerns over the Charter had been most acute in relation to these 12 rights of a social or economic nature. He considered that there were some unclear limits on the enforceability of these rights in Article 52(5) of the Charter but that Article 1(2) of the Protocol provided “strong protection” against the creation of free-standing rights in Title IV.<sup>127</sup> Dr Lock agreed, saying that the UK may have successfully opted out of this Title in so far as it contained rights.<sup>128</sup> Professor Douglas-Scott thought that although the scope of Article 1(2) was unclear, in the absence of an ECJ ruling on its interpretation it was arguable that it confirmed the *status quo* that economic and social rights were not directly enforceable.<sup>129</sup> Andrew Duff MEP added that solidarity principles must already be the subject of national legislation in order to be justiciable. He considered that the application of solidarity principles would be unlikely to overturn established principles of British labour law or pay, social security and employment policy. This was because they would only become relevant in the context of EU legislation and there were already specific Treaty limits on EU legislation on matters of pay, the right of association, the right to strike and impose lock-outs or in relation to Member States establishing social welfare systems.<sup>130</sup>

## Horizontal application of the Charter

96. The Charter could be applied between individuals, agreed Professors Craig and Douglas-Scott.<sup>131</sup> This was to be expected as most systems of bills of rights involved horizontality, but the issue in EU law could be complex, cautioned Professor Craig.<sup>132</sup> As Professor Douglas-Scott explained, it was possible for the Charter to be applied horizontally in a number of different ways, not all of them corresponding to direct enforceability of Charter Rights. She noted, however, that some Articles were not capable of horizontal effect because they were addressed to the EU institutions.<sup>133</sup> Professor Craig

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125 Q6

126 Q6

127 David Anderson QC (CFR0003) paras 16–17

128 Dr Tobias Lock (CFR0001) summary

129 Professor Sionaidh Douglas-Scott (CFR0002) paras A3.1–3.4

130 Andrew Duff MEP (CFR0007) paras 20, 28

131 Professor Paul Craig (CFR0004) para 12, (CFR0006) para 3(4), Professor Sionaidh Douglas-Scott (CFR0002) paras C2–6

132 Professor Paul Craig (CFR0006) para 3(2)

133 Q40 [Douglas-Scott] and Professor Sionaidh Douglas-Scott (CFR0002) paras C1 and C6

explained that it was very unlikely that the ECJ would interpret the Charter to enable individuals to rely on it directly against other private parties as such an interpretation jarred with the language of Article 51 (Advocate General’s Trstenjak’s view in *NS*) and would be opposed by some national courts. However, he considered that particular Charter rights corresponding with rights found in the Lisbon Treaty might have horizontal impact because those Treaty provisions had been interpreted in this way by the ECJ. He also thought that there was scope for indirect horizontal application, where Charter rights were used as interpretative devices when construing private law principles in tort or contract or statutes affecting private relations. This was because the Charter obligations were imposed on national institutions including the courts.<sup>134</sup> David Anderson agreed that “Member States” in Article 51 of the Charter included the national courts of Member States.<sup>135</sup> There was therefore a similarity between the effect of the Charter on UK courts and section 6 of the HRA, which states that courts are public authorities and are therefore bound by the requirements of the HRA. Whilst others were more sanguine, Martin Howe was particularly critical of the consequences of indirect horizontal application under section 6 of the HRA:

What has happened is this has been used as an argument to introduce horizontality, most notably in the context of the creation of a new, horizontal right to privacy, which Parliament itself has never decided to create through, among other things, the argument that, since the court is itself bound by Section 6 of the Human Rights Act, the court must adapt substantive doctrines of common law that apply as between citizens in order to create, in effect, new rights. Therefore, the act, in effect, has binding effects on private citizens, through that gateway, as well as on public institutions. Certainly, one can see a road for a parallel chained logic in the application of the EU Charter.<sup>136</sup>

97. When we asked Professor Douglas-Scott about the *AMS* case, she commented that:

Those who would prefer not to see a horizontal effect of the Charter might be quite comforted by the court’s recent judgment, because they did not find a horizontal application of the Charter in that particular case. They did not find that the provision in the Charter could be used to super charge, as it were, a Directive that also covered the relevant law in that field. They found that the provision of the Charter was not sufficiently specific to give rise to a directly enforceable right that could be used in a horizontal situation between two private parties. In that respect, they did not go as far as the judgment of the Advocate General in the *AMS* case, nor did they continue down the line of some of their previous case law in *Mangold* and *Küçükdeveci*, where they seem to admit some sort of horizontal effect of general principles of law.<sup>137</sup>

98. She considered that *Benkharbouche* appeared to be the first case in which Charter rights had been actionable in a UK dispute between private parties (ever since the ECJ’s decision in *Küçükdeveci*, such rights could be enforced directly against private individuals).

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<sup>134</sup> Professor Paul Craig (CFR0006) paras 3(1)–(4)

<sup>135</sup> Q40

<sup>136</sup> Q40

<sup>137</sup> Q38

She explained that the UK statute in question was disapplied to the extent that it was incompatible with the Charter rights relating to aspects of the employment claims falling within the scope of EU law.<sup>138</sup>

99. Professor Craig added that in the *AMS* case the ECJ did not conclude that other Charter provisions could not have a horizontal impact; the ECJ was “leaving the door quite wide ajar in relation to Charter rights that they think are suitable and complete, and therefore susceptible to horizontality.”<sup>139</sup>

### Parallels with the application of the ECHR

100. Professor Craig said that Mostyn J had been wrong to think that the Charter and ECHR had the same scope: the Charter was drafted to cover broader rights than the ECHR.<sup>140</sup> Andrew Duff MEP agreed and said that the Charter was a wider binding instrument than the ECHR at the level of the EU and the Explanations were very useful for interpreting rights and principles in the Charter that went beyond the ECHR. He said that the Charter would remain as part of British domestic law even if the HRA was repealed.<sup>141</sup> Professor Douglas-Scott added that there was also a risk that the scope of the Charter might be interpreted more broadly than the ECHR.<sup>142</sup>

101. Andrew Duff MEP thought that given the close association between the ECHR and the Charter, “it is paradoxical” that these comparable European instruments had been treated in very different ways by the then Government (and Parliament).<sup>143</sup> They had chosen to give direct effect to the ECHR through the HRA, but had sought to “blunt and obscure” the effect of the Charter by insisting on Protocol 30.<sup>144</sup> He also thought that the interpretation of ECHR rights by the ECJ, as general principles of EU law under Article 6(3) TEU, would be more consistent than that of the more diverse ECtHR itself; and any inconsistency as between the two courts would be resolved by EU accession to the ECHR (which had been required by the UK in return for agreeing to give the Charter legal status). It was not in the interests of British citizens to be isolated from the benefits of that development, in his view.<sup>145</sup>

102. Dr Lock commented that since the Charter could only be invoked before the UK courts where the UK was “implementing EU law” and not in purely domestic situations, such a restriction meant that the Charter could not be viewed as a bill of rights or easily compared to the HRA regime.<sup>146</sup> Also, the obligation on *every* court to disapply UK primary law which was incompatible with the Charter should be contrasted with the more

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138 Professor Sionaidh Douglas-Scott (CFR0002) para C5

139 Q39

140 Professor Paul Craig (CFR0004) para 25

141 Andrew Duff MEP (CFR0007) para 4

142 Professor Sionaidh Douglas-Scott (CFR0002) para A 3.4 and conclusion

143 Andrew Duff MEP (CFR0007) para 17

144 *Ibid*

145 Andrew Duff MEP (CFR0007) paras 14, 15, 16

146 Dr Tobias Lock (CFR0001) para 16

limited power of only the *higher* courts merely to issue a “declaration of incompatibility” under the HRA regime: this was recently illustrated in *Benkharbouche*.<sup>147</sup>

## The Charter in the future

103. Professor Douglas-Scott referred to the recommendation of Advocate-General Sharpston in *Zambrano* (which the ECJ did not follow), that to advance “an ideal of consistent interpretation of fundamental rights”, they should apply in all areas of EU competence, irrespective of whether it had actually been exercised.<sup>148</sup> The Advocate General accepted though that this would be a bold step for the ECJ and that it would introduce an overtly federal element into the structure of the legal and political system, as the US’s Supreme Court had done between the wars.

104. Martin Howe and Dr Pinto-Duschinsky both suggested that the problems created by the Charter, in particular, in the latter’s view, the primary and essential question of the “supremacy of the UK Supreme Court” in matters concerning the Charter, should be addressed as part of the UK’s renegotiation of its EU membership.<sup>149</sup> Martin Howe considered that the UK could request that the Charter ceased to apply to the UK with “flanking measures” being required to prevent its “indirect application” via the EU doctrine of general principles.<sup>150</sup>

105. Andrew Duff MEP considered that there was a need for uniformity of international human rights norms, particularly in the context of the EU and the Charter. The Charter had been underestimated in Britain but valued in other Member States as a “key part of the constitutional order of the Union”, of wider application than the ECHR and setting a uniform standard of rights across the Union for the benefit of EU citizens “which is the highest in the world”.<sup>151</sup> In the interests of “legal certainty and political solidarity” the UK should withdraw from Protocol No 30 at the next available ordinary revision of the EU Treaties.<sup>152</sup>

106. Martin Howe concluded in his written evidence that it was wrong to assume that the effect of the Charter was only to inhibit EU organs and that it demonstrably could affect Member States by expanding the scope of EU law and therefore diminishing the autonomy of Member States. He went on to say that:

the only effective way of curtailing the use of the Charter as an instrument for expanding EU competences is to ensure that the courts of the United Kingdom, and those courts alone, are responsible for ensuring the compliance of the authorities with fundamental rights. [...] This outcome might be effectively achieved by a restructuring of the European Communities Act 1972.<sup>153</sup>

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147 Dr Tobias Lock (CFR0001) paras 23–25

148 Professor Sionaidh Douglas-Scott (CFR0002) para B 3.2

149 Dr Michael Pinto-Duschinsky (CFR0005) para 13

150 Martin Howe QC (CFR0008) para 6

151 Andrew Duff MEP (CFR0007) para 8

152 Andrew Duff MEP (CFR0007) para 32

153 Martin Howe QC (CFR0008) para 6(2)

## Scope for opting out of the Charter in the UK

107. We put the following question to the four expert witnesses who gave evidence to the inquiry:

In your view, would the following provision of primary legislation suffice to disapply the application of all EU fundamental rights in the UK, whether derived from general principles of EU law, legal bases within the EU Treaties, or the Charter? The following provision of primary legislation would be as follows:

“Notwithstanding any provision of the European Communities Act 1972, none of the rights, freedoms or principles referred to in Article 6(3) of the Treaty on European Union, or in the Charter of Fundamental Rights of the European Union, or deriving elsewhere from within the EU Treaties, or otherwise determined by the Court of Justice, shall form part of the law applicable in any part of the UK.”<sup>154</sup>

108. All agreed that this would amount to a direct conflict with EU law, leading no doubt to infringement proceedings against the UK, although constitutionally it would be possible by seeking an express amendment to the European Communities Act 1972. Several questioned why the UK would want to opt out from the Charter, given that it is primarily aimed at restraining the power of the EU institutions. Professor Craig mentioned that the UK would still be bound by Article 6(3) of the TEU, which ensured that the pre-existing EU fundamental rights expressed as general principles of EU law would continue to apply in the absence of the Charter.<sup>155</sup> He, like others, thought that the UK has no right, unilaterally, to alter the terms of its membership of the club, unless by withdrawing from the EU.<sup>156</sup> David Anderson thought that the proposed provision was “wildly uncertain in its scope”. It appeared to him to apply to all rights, freedoms or principles deriving from the EU Treaties and he wondered if it was intended as an opt-out from the entirety of European law.<sup>157</sup>

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154 Q50

155 Q51 [Craig]

156 Q52 [Craig]

157 Q54 [Anderson]



## 5 Interpretation of the Charter and Protocol 30—the view of the Government

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109. The Secretary of State for Justice, the Rt Hon Chris Grayling MP, gave evidence on 29 January, together with his advisers, Tim Jewell, Deputy Director, Legal Directorate, Ministry of Justice and Abigail Culank, Head of European Union Human Rights Policy, Ministry of Justice.

### Status, scope and legal effects of the Charter

110. The Secretary of State agreed that it was the current legal position that the Charter did not create new EU fundamental rights, but consolidated existing EU and non-EU obligations in a more prominent form. The Minister said that “It is designed to apply purely to European law and European law matters and not designed to allow the creation of new rights in European law nor in UK law.”<sup>158</sup> The Charter applied “in the law of the UK” where “EU law is applied in the British courts” but “not in UK law”. This, he said, was an important difference.<sup>159</sup>

111. He also considered that the rights consolidated in the Charter had achieved greater prominence by virtue of its existence.<sup>160</sup> He did not think that, to date, this had led to more frequent reliance on Charter rights before the national courts and the ECJ, with the possible exception of the *Fransson* case involving Sweden.<sup>161</sup>

### Effect of Protocol 30—application of the Charter in the UK

112. The Minister said that Protocol 30 “is very clearly not an opt-out”, despite having been presented as such by some members of the relevant previous administration.<sup>162</sup> He agreed that it was “purely an interpretative Protocol which underscores the limited application of the Charter and is of very little if any value to the UK”.<sup>163</sup> Tim Jewell added that “It is a clarification” which “serves for all purposes”, not just the UK’s.<sup>164</sup> The Minister commented that the Protocol was like the explanatory notes that accompany a Bill.<sup>165</sup>

113. The Minister said that Mostyn J had misunderstood that the Protocol was an opt-out, but the Government could not appeal the *AB* case which it had won.<sup>166</sup> Abigail Culank added that to clarify the Charter’s application in the UK, the Government was looking for the right case where it could argue a number of “blurred” points that the European

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158 Q95

159 Q121

160 Q96

161 Q97

162 Q99

163 Q100 [Rt Hon Chris Grayling MP]

164 Q100 [Tim Jewell]

165 Q101

166 Qq97, Q112

Scrutiny Committee had highlighted.<sup>167</sup> The Minister said that the Government had identified two or three possible cases where appropriate clarifications could be made to prevent any suggestion of a precedent from *AB* “kicking around in the UK courts” and implying that the Charter had a greater role to play than it did.<sup>168</sup> Abigail Culank said that *Benkharbouche*, which raised interesting ECHR and Charter arguments, might or might not be the right case.<sup>169</sup>

### Article 51 and the *Fransson* case

114. The Secretary of State indicated that the Government thought that *Fransson* was a legally accurate ruling.<sup>170</sup> Tim Jewell said that the case confirmed that the Charter only applied “within the scope of EU law”. He added that it was important not to take one case in isolation as there had been many cases where the ECJ and national courts had rejected Charter arguments relating to matters outside EU law. *Fransson* was a case on its own facts because of the VAT context.<sup>171</sup> The Minister added that although tax enforcement was a matter for national authorities, VAT was covered by EU law and so, technically, within EU competence.<sup>172</sup> Tim Jewell commented that the German constitutional court had considered that because of its particular VAT context, a narrower view should be taken of *Fransson*.<sup>173</sup>

115. Tim Jewell accepted that the Government in the *NS* case had taken the position that the correct test for the application of the Charter was “acting within the scope of EU law” rather than a narrower interpretation of “implementing EU law”. This, he explained, was because the ECJ in *NS* had agreed with the UK’s assessment of the scope of EU law in the circumstances of that case. He also explained that in the UK domestic proceedings of *Saeedi*, which led to the ECJ reference in *NS*, there was no detailed argument about the effect of Protocol 30 in the High Court. Cranston J nonetheless drew some conclusions on the effect of Protocol 30 with which the Government did not agree. It was in the Court of Appeal that the Government therefore explained the effect of Protocol 30, which it maintained in the reference to the ECJ.<sup>174</sup>

116. The Minister commented that the interpretation of the Charter in *Fransson* demonstrated how, because the Charter was “sufficiently vaguely worded” (and the Lisbon Treaty “broad-ranging”), it could be applied much more widely than the Government

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167 Q112 [Abigail Culank]

168 Q112 [Rt Hon Chris Grayling MP]

169 Q112 [Abigail Culank]. No further discussion of *Benkharbouche* or another case *ZZ* was possible as the cases are *sub judice* and at this time the Government is actively considering whether to intervene in the one case and appeal in the other.

170 Q103 [Rt Hon Chris Grayling MP]

171 Q103 [Tim Jewell]

172 Q105 [Rt Hon Chris Grayling MP]

173 Q105 [Tim Jewell]

174 Q104 [Tim Jewell]

would have wished.<sup>175</sup> However, the key issue was that, legally, the Charter could not be applied to “a purely UK legal matter”.<sup>176</sup>

### Parallels with the application of the ECHR

117. The Minister agreed that it was not necessary for ECHR rights to be incorporated into EU primary law via the Charter, particularly in a different form and with different wording.<sup>177</sup> As to the necessity of EU Accession to the ECHR, he said that this had been agreed to by all Member States in the Lisbon Treaty. In principle, he considered that it was not unreasonable for an EU citizen to be able to bring a case in Strasbourg against the Commission for breach of ECHR rights in the same way that a case could be brought by the citizen against an individual country. However, he said that the Government would seek to ensure that rules governing the participation of the EU in the Council of Europe would not allow the EU to usurp the role of the states participating in the Council in their own right.<sup>178</sup>

118. The Minister considered the human rights’ landscape in Europe was legally “messy”: the UK Supreme Court had a role, the Strasbourg court applied the ECHR and the ECJ applied the Charter. Then there was the German Constitutional Court and other constitutional courts in other countries. He asked which court in each Member State should be regarded as having the “final say”.<sup>179</sup>

### The Charter in the future

119. The Minister agreed that there was a danger that an increase in Charter-based rights litigation could lead to existing EU competencies being interpreted more widely by national courts and the ECJ than had been the case. This could affect national competences, particularly in the context of Free Movement of Persons where rights enshrined in the Charter and the Lisbon Treaty could be used to argue for a broadening of EU competence. The Minister provided a hypothetical example of this—the establishment of a right to vote in national elections, despite the Charter’s silence on this. He said that past experience of wide interpretation of Free Movement rights in the field of social security had indicated that there was a risk of expansion of EU competence.<sup>180</sup>

120. The Minister thought that no “great change” was anticipated amongst Member States that would take the Charter into “wholly new areas of law” in terms of new EU legislation. However, some “loosely-worded elements of the Charter” were now being turned into legislative proposals as demonstrated by, for example, the presumption of innocence proposal. The much greater risk, according to the Minister, was that the ECJ, as in the

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175 Q105 [Rt Hon Chris Grayling MP]

176 Q105 [Rt Hon Chris Grayling MP]

177 Q108

178 Q109

179 Q111

180 Q98

hypothetical example given, would interpret the Charter in such a way as to expand EU competence.<sup>181</sup>

121. The Minister cautioned that the Charter was seen by some as a platform for a more unified European state in the future. Commissioner Reding, the Vice-President of the Commission, had argued that the Charter “should apply to national law as well as European law”.<sup>182</sup> However, the Minister said that it was inconceivable that any proposed treaty change to apply the Charter to all aspects of national law would be acceptable to the UK or a British Prime Minister.<sup>183</sup>

122. The Minister thought that whether the Government would consider using the right of veto over EU accession to the ECHR (both in the EU Council and the Council of Europe) to secure an effective opt-out from the Charter was an interesting question. He considered that the duty of sincere co-operation might militate against the use of the UK veto in the EU Council, but the Government would have the ability to ensure that any final deal was in the UK’s national interest.<sup>184</sup>

123. The present Coalition Government would not, the Minister warned, support the introduction of UK primary legislation to disapply the Charter in the UK and all the pre-existing fundamental rights. He explained that it had no plans to change the nature of the UK’s relationship with the EU. Nor would there be sufficient support for such a measure in both Houses through a Private Member’s Bill. The Minister noted that the position of the Conservative Party was that it supported a renegotiation of the UK’s relationship with the EU. But this could not just address a single issue like the Charter; it needed to be comprehensive in addressing the wider problems the UK faced in its relationship with the EU and a “very vague” Lisbon Treaty.<sup>185</sup>

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181 Q115

182 Q96

183 Q121

184 Q117

185 Q123

## 6 Division of competence between the ECJ and national constitutional courts—*Fransson* and beyond

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124. The impact of the Charter on the division of competence for the protection of fundamental rights between the ECJ and the constitutional courts of Member States is, we think, one of its most significant consequences. In this chapter we assess the implications.

125. For many years, the ECJ on the one hand and national constitutional courts on the other have lived under what one commentator calls “the illusion of unilateral supremacy”:<sup>186</sup> each has been able to find a way to maintain that its constitutional authority is not undermined by decisions of the other. The Charter may have put paid to this illusion, if the reaction of the German Constitutional Court to the ECJ’s decision in *Fransson* can be considered to be illustrative of wider concern. The Charter, being a broad and directly effective statement of EU fundamental rights and principles, among other things renders the ECJ the ultimate interpreter of fundamental rights in Member States which come within the scope of EU law. And it does so in a way that is far more defined, visible, and therefore concrete than was the case under the pre-existing formula of the application of general principles of EU law. Conflict arises because the constitutions of Member States place obligations on the State to respect a broad range of fundamental (or human) rights—the UK is unusual in the EU in not having a written constitution; accordingly the interpretation of those rights is regarded by constitutional courts as coming within their own preserve, where in the past they have been willing to criticise EU law; and by some it is an area which is jealously guarded. Tensions created by the advent of the Charter have become apparent in the different approaches taken by the Advocate General and the ECJ in *Fransson*, and reactions to the ECJ’s decision. *Fransson* is, we think, of such significance because it determines what comes within the scope of EU law, and so where the balance lies between EU and national competence.

### *Fransson*

126. We note what David Anderson QC said:<sup>187</sup> the significance of *Fransson* is not so much in concluding that the test to be applied under Article 51(1) of the Charter is whether Member State action is within the scope of EU law—that much is made plain by the Explanations; it is much more the ECJ’s conclusions on the national circumstances in which that test is met.

### Opinion of Advocate-General Cruz Villalón

127. By the time of the *Fransson* judgment there had long been calls for the ECJ to provide guidance on the division of responsibility between the ECJ and national courts for

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<sup>186</sup> Daniel Sarmiento, *Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, CMLR, Volume 50, Number 5, October 2013.

<sup>187</sup> Q36

guaranteeing fundamental rights under Article 51(1) of the Charter, according to Advocate-General Cruz Villalón.<sup>188</sup> He sets out in his Opinion the principles which he thinks should apply. He explains that the common denominator of the ECJ's case law on when Member States can be said to implement or act within the scope of EU law is the requirement that the connection with EU law must have the capacity to determine or influence the exercise of public authority in the Member State in question: "Union law must have a presence at the origin of the exercise of public authority".<sup>189</sup> He suggests that, as a rule, the "proper interpretation" of the constitutional relationship between the EU and its Member States is that the exercise of public authority within a Member State should be judicially reviewed by national courts in the context of their own constitutional settlement.<sup>190</sup> If, as an exception, this presumption is to be displaced so that judicial review of the compliance of national action with fundamental rights should take place at the level of the ECJ, there must be a "specific interest" of the EU in ensuring consistency with fundamental rights as interpreted by the EU.<sup>191</sup> He goes on:

The mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the "implementation of Union law."<sup>192</sup>

Advocate-General Cruz Villalón also argues that this type of judicial review by the ECJ "must be examined in terms of a transfer, in the sense that the original responsibility of the Member States is passed to the Union as far as the right is concerned."<sup>193</sup>

128. On the facts of *Fransson* he concludes that, whilst the exercise of public authority by the Swedish Public Prosecutor to prosecute Mr Fransson for tax evasion "has its ultimate origin in Union law",<sup>194</sup> the connection with EU law is extremely weak and so should not be considered to amount to implementation of EU law:

It must be recalled that the premise for finding that the Union has an interest in assuming responsibility for guaranteeing the fundamental right concerned in this case is the degree of connection between Union law, which is in principle being 'implemented', and the exercise of the public authority of the State. In my opinion, that connection is extremely weak and is not, in any event, a sufficient basis for a clearly identifiable interest on the part of the Union in assuming responsibility for guaranteeing that specific fundamental right *vis-à-vis* the Union.<sup>195</sup>

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188 See Advocate-General's Opinion, paras 39 and 43.

189 As above, para 33

190 As above, para 35

191 As above, para 40

192 As above

193 As above, para 37

194 As above, para 51

195 As above, para 57

## The decision of the ECJ

129. As is clear from the previous chapter, the ECJ did not follow the Advocate-General's Opinion. It preferred a more absolutist approach, holding that its case law stated that EU fundamental rights are applicable "in all situations governed by EU law";<sup>196</sup> accordingly, if national action was within this scope, the Charter *invariably* became applicable:

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.<sup>197</sup>

130. Applying this test to the facts of the case, the ECJ found that the administrative and criminal proceedings against Mr Fransson were connected in part to breaches of his obligations to pay VAT, and this link rendered them within the scope of EU law: every Member State is under a duty under EU law to take all measures for the collection of VAT on its territory.<sup>198</sup> In addition, Article 325 TFEU obliges Member States to take measures to counter fraud against the EU budget. Given that part of the EU budget is derived from VAT revenue determined by EU rules, there was thus a further link between the proceedings and EU law.<sup>199</sup>

131. As if conscious of concern within Member States that its ruling might cause, the ECJ added that, in a situation where Member State action is not entirely determined by EU law, national courts could apply national fundamental rights standards, subject to two conditions:

That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR I-0000, paragraph 60).

For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.<sup>200</sup>

132. The ECJ's judgment lays down two scenarios, therefore:

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<sup>196</sup> Case C-617/10, para 19

<sup>197</sup> As above, para 21

<sup>198</sup> As above, para 25

<sup>199</sup> As above para 26

<sup>200</sup> As above, paras 29 and 30.

- i. in a situation where Member State action is completely determined by EU law, the Charter provisions displace national fundamental rights. In these cases, the Charter is the sole instrument applicable, and there is no national margin of manoeuvre. The case of *Melloni* is an example of this; and
- ii. in a situation where Member State action is not entirely determined by EU law, national courts can apply national fundamental rights standards, subject to two conditions:
  - a) the level of protection under national law must be as high as in the Charter; and
  - b) the primacy and autonomy of EU law is not affected if, by inference, national standards are higher.

## Judicial reaction to *Fransson*

### *The German Constitutional Court*

133. The German Constitutional Court commented on the scope of the *Fransson* decision in a case concerning the compatibility of the German counter-terrorism database with its Basic Law.<sup>201</sup> In what would appear to be a warning shot, it stated that the database, and any actions based on it, were purely an internal matter of domestic jurisdiction and did not constitute implementation of EU law pursuant to Article 51 of the Charter, a conclusion which was not altered by the *Fransson* ruling:

As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order. The Senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax, and express no general view.

134. In a similar vein of asserting its own autonomy,<sup>202</sup> (albeit not concerning fundamental rights) the German Constitutional Court has recently questioned whether the European Central Bank has power to buy bonds on the secondary market, under the provisions of the Outright Monetary Transactions (OMT) Decision. It held that the decision was an *ultra vires* act (so going beyond the competences of the EU), but also that it amounted to a usurpation of the budgetary responsibility of German legislators. Although it has in past held that it is competent to rule that an *ultra vires* act of the EU is unconstitutional—the illusion of unilateral supremacy<sup>203</sup>—it has referred the question of the OMT Decision's conformity with EU law to the ECJ.

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201 1 BvR 1215/07, Judgment of 24 April 2013

202 7 February 2014. See Press Release No 9/2014 of the German Constitutional Court.

203 See para 125 of this Report



### Recent comments of Justices of the Supreme Court in the UK

135. During recent months there has, unusually, been increased comment from senior members of the British judiciary—Lord Judge, the former Lord Chief Justice, and Lords Sumption and Mance, both Justices of the Supreme Court—voicing concern about the relationship principally between the Supreme Court and the European Court of Human Rights in Strasbourg. However, Lord Mance<sup>204</sup> was also critical of the ECJ decision in *Fransson*, commenting approvingly of the German Constitutional Court, which:

reacted speedily and vigorously, in a decision of 24 April 2013, and in out of court speeches by its President and Vice President. The latter made clear that the Constitutional Court would regard it as beyond the European Court's powers – *ultra vires* – if the European Court were to apply the Charter to any legal relationship not “determined” by European law by “a legally-binding instruction for the specific case”. There is therefore a potential for direct conflict between the national constitutional and European legal orders. But it will probably be avoided if, as both the President and Vice-President counsel, the European Court of Justice engages in the constructive dialogue which they invite.

136. He said the British position was strikingly different:

Parliament by the European Communities Act 1972 stipulated that all rights, powers, liabilities, obligations and restrictions arising by or under the European Treaties “are without further enactment to be given legal effect or used in” the UK. This gives rise to a paradox. Having so stipulated, no explicit constitutional buttress remains against any incursion by EU law whatever. Indeed, the 1972 Act has itself been given a constitutional status lifting it above ordinary statutes. The ordinary rule that a subsequent inconsistent statute impliedly overrules an earlier has no application to it: *Thoburn v Sunderland C. C.* (the “Metric Martyrs” case).

137. Lord Mance concluded that in the UK “there are therefore few limits to the dominance of EU law”.

138. In a speech in February,<sup>205</sup> Lord Neuberger, President of the Supreme Court, noted what he perceived to be the incapacity of the Supreme Court to “fight off” ECJ decisions, as compared with other national courts in the EU such as the German Constitutional Court. He referred to the UK's unwritten constitution as one of the main reasons for UK judicial submission:

A third consequence of not having a constitution is that one way of fighting off some EU decisions, or decisions of the Strasbourg court, which is available to many other European judges is not open to us. The point may be graphically illustrated by the decision last week of the German Constitutional Court, the Bundesverfassungsgericht, which was considering the legality of an essential aspect of the European Central Bank's scheme for supporting the Euro, the so-called outright monetary transactions programme. While the German Constitutional Court has played for time by

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204 In a speech to the World Policy Conference, 14 December 2013

205 Cambridge Freshfields Annual Law Lecture, 12 February 2014

referring to the ECJ the question whether the programme infringes EU law, it has left open the possibility that it, the German Court, may decide that the programme infringes German law, which would, according to some commentators, throw the future of the Euro into doubt. More centrally for present purposes, the fact that Germany has a Constitution enables a German court to say that German law sometimes trumps EU law. This is an option which is much more rarely, if at all, open to a UK court as we have no constitution to invoke.

139. In its recent judgment on the HS2 Hybrid Bill,<sup>206</sup> approximately two weeks after Lord Neuberger's speech, the Supreme Court suggested, to our knowledge for the first time, that the constitutional settlement of the UK, albeit unwritten, may act as a restraint on the supremacy of EU law. The unanimous view of the Court was that EU law should not be interpreted:

- either to require UK courts to adjudicate on, with the corollary of being able to strike down, national parliamentary procedures; or
- to require the abrogation of fundamental constitutional principles, in the UK, notwithstanding the European Communities Act 1972.<sup>207</sup>

140. It may not be coincidental that Lord Neuberger and Lord Mance gave the leading judgment in this aspect of the case.

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<sup>206</sup> *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)*, [2014] UKSC 3, 22 January 2013

<sup>207</sup> See paras 110, 111, 202, 203, and 205-208

## 7 Conclusions

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### What the Charter does and does not do

#### *It applies in the UK—there is no opt-out*

141. Protocol 30 was designed for comfort rather than protection: it is in no sense an opt-out Protocol. This was the view of all of our witnesses based on their interpretation of the Protocol,<sup>208</sup> and in the case of Lord Goldsmith, who had a hand in its drafting, based on the negotiating history as well.<sup>209</sup> As a consequence we think the ECJ's analysis of Protocol 30 in the *NS* judgment was correct.

142. We note that this was also the view of our predecessors, who reported in 2007 that:

Since the Protocol is to operate subject to the UK's obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation.<sup>210</sup>

143. Contradictory statements from the Government of the time about whether Protocol 30 was an opt-out have added to the seemingly widespread confusion about its purpose—among lawyers and non-lawyers alike.<sup>211</sup> In addition, the current Government has done little to explain the effect of the Charter, despite the significant national impact it has.<sup>212</sup>

#### *Protocol 30 is an interpretative Protocol*

144. Articles 1 and 2 of the Protocol place emphasis on provisions which already exist within the Charter, but they do not distinguish them. Article 1(2), for example, states that its existence is “for the avoidance of doubt”.<sup>213</sup> We therefore conclude that Protocol 30 interprets the Charter as much for the benefit of other Member States as it does for the UK and Poland. We note this was the view of the Secretary of State for Justice and his legal adviser,<sup>214</sup> as well as several of our expert witnesses. If it is right that Article 1(2) and 2 of Protocol 30 may provide extra protection in the event that Charter

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208 See para 83 of this Report

209 See para 51 of this Report

210 European Scrutiny Committee, *European Union Intergovernmental Conference*, para 38

211 See para 14 of this Report

212 See para 18 of this Report

213 See also Q64

214 See para 112 of this Report

provisions and Explanations are ignored, a point strongly made by Lord Goldsmith,<sup>215</sup> David Anderson and Professor Craig,<sup>216</sup> in our opinion Member States other than the UK and Poland could avail themselves of that protection too.

145. It follows that we disagree with Mostyn J's description of the effect of Protocol 30 in his judgement in *AB* on 7 November last year, and we note that our witnesses shared our view.

***It is directly effective in the UK, with supremacy over inconsistent national law***

146. With a legal status equal to the EU Treaties, the Charter is directly effective in the UK by virtue of Section 2(1) of the European Communities Act 1972. The rights it contains have supremacy over inconsistent national law or decisions of public authorities, by virtue of sections 2(4) and 3(1) of the same Act.

***It can therefore be used both to interpret and enforce EU law***

147. The Charter can be used to interpret EU law and the national measures implementing EU law by the Court of Justice of the EU (ECJ) and by national courts, in cases where the meaning of a provision is unclear. It can also be used to enforce EU law:

- by the ECJ in invalidating EU legislation, or decisions of EU institutions and bodies acting in accordance with EU legislation, which breach rights within the Charter; and
- by national courts, under the supervisory jurisdiction of the ECJ, in invalidating national legislation and decisions of national public authorities, including courts, which are within the scope of EU law. In this respect our expert witnesses agreed that if a legal challenge were possible under both the Human Rights Act and the Charter, the benefit of a challenge under the Charter would be that it would oblige the court to disapply an Act of Parliament that was inconsistent with a Charter right, in accordance with the principle of the primacy of EU law.<sup>217</sup> Under the Human Rights Act (HRA) a court can only make a “declaration of incompatibility” if an Act of Parliament is inconsistent with a European Convention on Human Rights (ECHR) right. This does not affect the validity of the Act in question until and unless Parliament amends it.<sup>218</sup>

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215 See para 42 of this Report

216 See paras 85-88 of this Report

217 As happened in *Factortame (No 1)* [1990] 2 AC 85; *Factortame (No 2)* [1991] 1 AC 603.

218 Sections 4 and 10 of the Human Rights Act 1998

***But the Charter does not apply to all areas of national law or action, only those that fall within the scope of EU law***

148. The Charter does not apply to all areas of national law where human rights are engaged, as, by contrast, the ECHR does through the HRA: the Charter only applies domestically where State action and/or national law falls “within the scope of EU law”. Before a Charter right can be invoked in national proceedings, therefore, a question of jurisdiction has to be determined, namely whether the act complained of is within the scope of EU law. It should be noted, however, that the ECJ in the case of *Fransson* set a low threshold for this test to be met; and that, where it is met, the Charter is without exception applicable and in cases of uncertainty is to be ultimately interpreted by the ECJ (see further below).

149. Our analysis above should be compared to the Secretary of State for Justice’s evidence on the domestic effect of the Charter. He draws what we consider is a false distinction between EU law and law in the UK: “Where the Charter does have a role—not in UK law, but in law in the UK, and there is an important difference—is where EU law is applied in the British courts.”<sup>219</sup> This, we think, is a case of wishful thinking, which entirely misunderstands the impact of *Fransson*: the Swedish Public Prosecutor no doubt thought his decision to prosecute Mr Fransson for VAT fraud was based on Swedish policy and legislation, but it was held to be within the scope of EU law because it was ultimately derived from the VAT Directive, and VAT collected in Member States contributes to the EU budget. There should be no doubt in the Minister’s mind that the Charter applies to all UK law, or indeed law in the UK, which is within the scope of EU law. It seems to us that this and the past Government indulge in wishful thinking about the true impact of the Charter in the UK. The consequence is, as we note in the first chapter of this Report, that the public can be misled.

***It does not include new rights***

150. None of the Articles of the Charter creates new rights or principles, with the possible exception of Article 13 on the freedom of the arts and sciences. The evidence we received on the negotiating history of the Charter, together with an analysis of the Explanations, amply demonstrate the desire particularly on the part of the UK to tie back each right or principle of the Charter to its source.

***It does not include new economic and social rights***

151. According to the evidence we received<sup>220</sup> and the Explanations of the Charter, principles are not free-standing in the Charter, and so cannot be relied upon alone to invalidate EU or Member State acts or omissions. They require more specific expression in EU or national law before they can become justiciable. According to the Explanation of Article 52(5) they “become significant” for courts only when legislation implementing them is being reviewed.

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219 Q121

220 See para 94 of this Report

152. Title IV of the Charter contains the economic and social rights that the UK was most concerned at the time of the Charter negotiations should not become justiciable in national courts. To the extent that Title IV contains rights as well as principles—our witnesses all agreed that a lack of clarity in the Charter and the Explanations makes this distinction difficult to draw, if not impossible—Article 1(2) of Protocol 30 clarifies that rights too in Title IV are not justiciable (see paragraph 156) unless given effect in national legislation. We therefore conclude that the rights and principles in Title IV of the Charter are not justiciable unless and until they have been given effect in national legislation.

*It does not give the EU new competences*

153. None of the Articles of the Charter provides the EU with new competence to act where hitherto it could not act.

*Nonetheless, it will affect how pre-existing EU fundamental rights and principles are applied*

154. The conclusions in the preceding paragraphs are subject to an important caveat, however. Whilst it may be technically correct to say that the Charter is “declaratory” of, or “reaffirms”, pre-existing rights with the intention of making them more visible, the act of cementing disparate and sometimes obscure rights from different legal sources, with different legal statuses, many of which had not been considered by the ECJ, into a legally binding EU Charter is, we think, very significant indeed. Professor Craig described it as giving these pre-existing rights “a degree or preemptory force that they would not otherwise have had”.<sup>221</sup> It is possible that it will broaden the ambit of EU law (as interpreted by the ECJ in cases where national courts are uncertain, of which we think there will be many) to reflect several, if not many, of the rights or principles in the Charter. As a consequence it could also affect the way in which existing EU competences are exercised. Whilst Lord Goldsmith was not convinced this would be the case,<sup>222</sup> and several witnesses referred to the number of cases where the ECJ has rejected Charter-based actions,<sup>223</sup> other witnesses were convinced, including the Secretary of State for Justice.<sup>224</sup> Again, we note the prescience of our predecessors on this point:

Given the open texture of the drafting of the Charter (which is by no means unusual with human rights instruments) we doubt if it is possible to guarantee that it will not be developed and amplified by the ECJ. We equally doubt if it is possible to guarantee that the ECJ will not draw on the Charter as a new source for interpreting measures of Union law such as Directives.<sup>225</sup>

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221 Q19

222 See para 52 of this Report

223 See Para 91 of this Report

224 See para 119 of this Report

225 European Scrutiny Committee, *European Union Intergovernmental Conference*, para 40

## Impact of the Charter on human rights litigation in the UK

155. Many of the witnesses agreed that the Charter would lead to growth in claims against the EU institutions and EU Member States based on Charter rights, particularly in the Justice and Home Affairs competences of the EU. Professor Craig put the point clearly:

There is an analogy here between the position in the UK pre the HRA and the position in the EU prior to the [Charter]. The courts had already developed the idea that fundamental rights were recognised and embedded in the common law, so they existed prior to the HRA. Nonetheless, when the HRA was enacted and the rights were then laid down definitively in an act of parliament, there was a transformation of judicial review in the United Kingdom. You have rights-based arguments pleaded in a great many cases in a way that you did not in the 1990s and 1980s.

My strong suspicion in the EU is that we are going to see the same thing. In the EU we had fundamental rights developed as general principles of law for many years, and they were used and pleaded. Nonetheless, in the post-Charter world, we are going to see very many more rights-based claims, both against EU institutions and Member States when they act in the scope of EU law. In particular, because of the point that was mentioned by David Anderson, which is that in the post-Lisbon world, the area of freedom, security and justice has been rolled into the main treaty, many of the regulations and Directives passed in relation to immigration, asylum and that kind of thing—criminal procedure—are contentious. They naturally give rise to rights-based claims. The combination of concretising rights in the Charter on the one hand and then including new areas within the court's full jurisdiction is likely to lead to a very significant growth in rights-based claims.<sup>226</sup>

### Areas of legal uncertainty

156. As a general conclusion under this heading, we think that, whilst the Charter may have made EU fundamental rights more visible, it has complicated their application. The Charter and Explanations are difficult documents to navigate, even for experts. We understand that the art of international negotiations is in part to disguise where disagreements lie, but several of the mechanisms employed to achieve this—for example the distinction between rights and principles—are convoluted and will be inscrutable to members of the public who are not experts. We were struck by Lord Goldsmith's concerns about the lack of precision of the language of the Charter adopted in 2000, were it to have become a legally binding document.<sup>227</sup> We are not confident that the change in status of the Explanations, the amendments to the horizontal Articles and to Article 6 TEU, and the addition of Protocol 30, overcome this concern. If they do so, it is certainly at the expense of clarity.

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226 Q47

227 See para 27 of this Report

### *Rights and principles*

157. All witnesses agreed that the distinction between rights and principles was unclear. This was evident from the questions we put to them on Article 29 of the Charter, the right to access to a free placement service, and Article 33(1) of the Charter, family and professional life.<sup>228</sup> Professor Craig commented on the latter that “it would probably be regarded as a principle. But until it is adjudicated upon by the European Court of Justice, we will not know”.<sup>229</sup> David Anderson thought the distinction was entirely confusing:

I also agree that the distinction, as it appears from the Charter and the Explanations, is entirely confusing, not least because the first of the three examples given in the explanations of a principle is the so-called rights of the elderly. This is not a very promising starting point.<sup>230</sup>

158. We agree with his conclusion.

### *Pre-existing rights*

159. One of the complexities of this aspect of EU law is that Article 6(3) TEU states that the pre-existing general principles of EU law still apply, notwithstanding the advent of the Charter. So although the Charter was said to be necessary to make these pre-existing rights more visible, it does not replace them. The consequences of this require some intellectual conjuring. For example, notwithstanding Article 1(2) of Protocol 30 and the attention paid to its effect on economic and social rights, EU law on the justiciability of economic and social rights is just as it was had the Charter and Protocol 30 never been included in the EU Treaties. David Anderson shared our concern on this:

I think you have hit on a very important point there. When in my written submission I pointed to various things that needed to be kept an eye on by those who are concerned about competence creep, I think perhaps I should have added exactly that point. In an ideal world, one might have expected that, having gone to all the trouble of collecting these rights in a Charter, one would then render the Charter the only game in town, at least so far as EU law is concerned. But by Article 6(3) of the Treaty on European Union, it does sound as though the previous jurisprudence of the court is retained at least to some extent, certainly as it relates to the ECHR and as it relates to the constitutional principles of the member states.

Yes, one could conceive of a case—whether this is one of them—in which, frustrated by limitations on the Charter, the Court of Justice were nonetheless to derive a particular right or a particular application of a right from its continuing jurisdiction to apply the general principle of fundamental rights.<sup>231</sup>

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228 See para 93 of this Report

229 Q18 and para 93 of this Report

230 Q6 and para 93 of this Report

231 Q30



### *Field of application*

160. We agree with David Anderson<sup>232</sup> that the significance of *Fransson* is not so much in the ECJ's conclusion that the test to be applied under Article 51(1) of the Charter is whether Member State action is "within the scope of" EU law: as much is made plain by the Explanations and by the ECJ's case law, and by the Supreme Court in the *Viagogo* case, despite the use of "implement" in Article 51(1). It is much more in its conclusions on when Member State action comes within the scope of EU law. The ECJ specifically excludes the need for EU law to play a determinative role in the exercise of public authority in the Member State in question: all that is required is that "the situation is governed by EU law".<sup>233</sup> This, in effect, means that if the power being exercised by the Member States is ultimately derived from EU law, it falls within the scope of EU law. The test is an objective one: there is no requirement for the national legislation in question to be intended to implement an EU obligation.

161. This being so, the results of the Government's Balance of Competences review become increasingly significant: in any national area of policy which is derived from EU law, compliance with fundamental rights will fall under the purview of the Charter as ultimately interpreted by the ECJ.<sup>234</sup>

162. It may also have consequences for principles and certain rights in the Charter which are only justiciable when given effect in national law. Following *Fransson*, the test for whether EU law is implemented is not whether national legislation intends to implement an EU obligation, but whether it is ultimately governed by EU law. The meaning of "recognised" in Article 2 of Protocol 30 may become important in this regard.

### *Consistency with the European Convention on Human Rights*

163. The Charter includes many of the civil and political rights contained in the European Convention of Human Rights. We were told that in the negotiation of the Charter there was particular concern that ECHR rights in the Charter were interpreted as being identical to how the same rights in the ECHR had been interpreted by the ECtHR. It is not clear that Article 52(3) achieves this, given that its stipulation that the meaning of Charter rights corresponding to ECHR rights be the same as those ECHR rights is qualified by its provision that EU law can provide more extensive entitlements (see the following paragraph). The Explanations of Article 52(3) are also unclear, saying, for instance, that the meaning of rights under the ECHR is determined in part by the ECJ. In addition the imperative of consistency is far from helped by the fact that some ECHR Articles in the Charter have been "updated", and so are drafted differently.

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232 Q36

233 See para 129 of this Report

234 In a recent judgment in case C-206/13, *Siragusa*, on 6 March 2014, the ECJ held that an Italian legislative decree did not implement rules of EU law and that the Charter was therefore not applicable. The ECJ commented that the concept of implementing EU law requires "a certain degree of connection above and beyond the matters being closely related or one of those matters having an indirect impact on the other" (paragraph 24). Whether this is simply another piece in the jigsaw, or an attempt by the ECJ to modify the *Fransson* test in favour of national courts, remains to be seen.

Were the Charter still to be a political declaration, this may not matter; where it is a legally binding document, it risks causing possible confusion.

164. Article 52(3) also permits EU legislation to go further than ECHR rights. Recent Commission proposals in the field of legal aid<sup>235</sup> and the presumption of innocence<sup>236</sup> have done so. As a consequence of the latter proposal, juries in the UK may no longer be able to draw an inference from a suspect's non-cooperation or silence during criminal proceedings, although both have been held by the ECtHR to be consistent with the right to a fair trial under Article 6 of the ECHR.<sup>237</sup> The result might be that there would be two standards for the presumption of innocence in Europe: one under EU and one under ECHR law. Whilst some think it desirable that the EU strengthens ECHR rights where it has the competence to do so (and its competence to do so under Title V TFEU is broad) we think it adds possible confusion and amounts to an unwarranted intervention in matters of pre-eminent significance in terms of the constitutional settlement of the UK, and where the existing balance between ECHR and national prerogatives has been hard fought.

### *Horizontal rights*

165. We recognise that indirect horizontal application<sup>238</sup> of the Charter within the UK is possible given that we agree with several of our experts that UK courts are under a legal obligation to respect the Charter,<sup>239</sup> but we are concerned, again, by the legal uncertainty that surrounds this principle. Private individuals and bodies (including employers and their employees) may as a consequence find it difficult to predict whether they may assert a legal right or be vulnerable to legal liability because of the Charter's application. This seems paradoxical given that one of the objectives of codifying pre-existing EU fundamental rights in the form of the Charter was to increase their visibility and applicability. The importance of the principle of legal certainty was emphasised by Lords Neuberger and Mance in the *HS2* case,<sup>240</sup> where they cited with approval the decision of the ECJ in the *Intertanko* case, in which it commented:

The general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.<sup>241</sup>

166. We agree. We acknowledge that the uncertainty of horizontal application of human rights may be a common feature of human rights frameworks in general, such

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235 COM (13) 824

236 COM(13) 821

237 See European Scrutiny Committee, Thirty-second Report of Session 2013-14, HC 83-xxix, paras 1.25 and 1.26; and the debate on the floor of the House on these documents: HC Deb, 18 March 2014, cols 725-745.

238 Under this principle legal rules between individuals, rather than between the State and individuals, are interpreted so far as possible to be consistent with Charter rights (see Professor Paul Craig (CFR0004) para 12).

239 See para 96 of this Report

240 *R (on the application of HS2 Action Alliance Limited) and others v The Secretary of State for Transport and another* [2014] UKSC 3, 22 January 214

241 As above, para 165

as the ECHR as enforced in the UK by the Human Rights Act. We think the problem for private individuals and companies is aggravated in Europe because of the additional uncertainty introduced by the Charter.

### Division of competence between the ECJ and national courts

167. We question the legitimacy of the ECJ's approach in *Fransson*, and so agree with the German Constitutional Court and Mr Howe<sup>242</sup> and disagree with some of the expert evidence we took on this point, particularly from Professor Craig.<sup>243</sup> We, like Advocate General Cruz Villalón, think there has to be a sufficient reason why the ECJ should take over the responsibility, which is more appropriately vested national courts, for interpreting fundamental rights as they apply to the exercise of *national* power. On the facts of *Fransson* the applicability of the *ne bis in idem* principle<sup>244</sup> did not bear upon the implementation of an EU obligation; the ECJ was acting purely as a human rights court.

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242 Q37

243 See para 90 of this Report and Q36

244 The double jeopardy rule that no one can be tried twice for the same offence

## 8 Recommendations

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168. A clear exposition by the Government of the domestic effect of the Charter is long overdue. We ask that the Government provide one in the form of its response to this Report, by stating where it agrees and disagrees with our conclusions together with reasons. We intend that our Report and the Government's response become a helpful reference for anyone who wants to find out what the impact of the Charter is in the UK.

169. We note that the Government did not intervene before the ECJ in the case of *Fransson*; it could have done so had it wished to join the Commission and five other Member States in contesting the application of the Charter. But the Minister indicated that he thought the decision was correct. We urge the Government to think again, and to intervene in future ECJ cases on the Charter in support of a higher threshold—a determinative link—for the test for when Member State action comes within the scope of EU law, as a consequence of which any human rights aspects fall under the Charter, as interpreted by the ECJ rather than national courts.

170. As we say above, we recommend that the current state of uncertainty about the Charter in the UK should end. The inference we draw from the Secretary of State for Justice's evidence is that he too is not content with the *status quo*, but it was not clear what the Government intends to do about it, beyond bringing a test case. We ask him to make this clear.

171. In the light of this, it is clear that the situation cannot remain as it is. The Government has indicated that, to clarify the Charter's application in the UK, it is looking for the right case to argue a number of "blurred" points that we have highlighted.<sup>245</sup> However, we are far from convinced that, for the reasons we set out in this Report, a legal challenge will resolve the issue: it is much more likely to reaffirm the applicability of the Charter to the United Kingdom.

172. Given what we say in these conclusions, in particular in relation to the field of application,<sup>246</sup> and the certainty that the jurisdiction of the ECJ will range across an even wider field with increasingly unintended consequences, we recommend that primary legislation is introduced by way of amendment to the European Communities Act 1972 to exclude, at the least, the applicability of the Charter in the UK. This is what most people thought was the effect of Protocol 30. They were wrong. It is not an opt-out, but for the sake of clarity and for the avoidance of doubt we urge the Government to amend the European Communities Act 1972, as we propose.

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245 Q112 [Abigail Culank]

246 Paras 160-162 of this Report

# Formal Minutes

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**Wednesday 19 March 2014**

Members present:

Mr William Cash, in the Chair

Andrew Bingham	Kelvin Hopkins
Michael Connarty	Chris Kelly
Mr James Clappison	Stephen Phillips
Geraint Davies	Jacob Rees-Mogg
Stephen Gilbert	Henry Smith
Chris Heaton-Harris	Mr Michael Thornton

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Draft Report (*The application of the EU Charter of Fundamental Rights in the UK*) proposed by the Chair, brought up and read.

Motion made, and Question proposed, That the draft Report be read a second time, paragraph by paragraph.—(*The Chair.*)

Amendment proposed, to leave out from “That” to the end of the Question and add “this Committee declines to read the Report a second time because the conclusions do not reflect the balance of evidence taken by the Committee”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 8
Michael Connarty	Andrew Bingham
Geraint Davies	Mr James Clappison
Stephen Gilbert	Chris Heaton-Harris
Mr Michael Thornton	Kelvin Hopkins
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Main Question put and agreed to.

*Ordered,* That the Chair’s draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 13 read and agreed to.

Paragraph 14 read, amended and agreed to.

Paragraphs 15 to 17 read and agreed to.

Paragraph 18 read, amended and agreed to.

Paragraphs 19 to 62 read and agreed to.

Paragraph 63 read, amended and agreed to.

Paragraphs 64 to 86 read and agreed to.

Paragraph 87 read, amended and agreed to.

Paragraphs 88 to 106 read and agreed to.

Paragraph 107 read.

Amendment proposed, in line 1, to leave out “We” and insert “The Chairman”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 6
Michael Connarty	Andrew Bingham
	Mr James Clappison
	Chris Heaton-Harris
	Chris Kelly
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Paragraph agreed to.

Paragraph 108 read, amended and agreed to.

Paragraphs 109 to 114 read and agreed to.

Paragraph 115 read, amended and agreed to.

Paragraphs 116 to 125 read and agreed to.

Paragraph 126 read, amended and agreed to.

Paragraphs 127 to 142 read and agreed to.

Paragraph 143 read.

Amendment proposed, in line 4, to leave out from “Charter” to the end of the paragraph.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 10
Michael Connarty	Andrew Bingham
	Mr James Clappison
	Stephen Gilbert
	Chris Heaton-Harris
	Kelvin Hopkins
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith
	Mr Michael Thornton

Question accordingly negatived.

Paragraph agreed to.

Paragraph 144 read and agreed to.

Paragraph 145 read, amended and agreed to.

Paragraph 146 read.

Amendment proposed, in line 2, to leave out from “1972” to the end of the paragraph.—(*Michael Connarty*.)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 2	Noes, 9
Michael Connarty	Andrew Bingham
Mr Michael Thornton	Mr James Clappison
	Geraint Davies
	Chris Heaton-Harris
	Kelvin Hopkins
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Paragraph agreed to.

Paragraph 147 read.

Question proposed, that the Committee disagrees to paragraph 147—(*Michael Connarty*):—Motion, by leave, withdrawn.

Amendment proposed, in line 14, to leave out from “right” to “Under” in line 15.—(*Michael Connarty*.)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

An Amendment made.

Paragraph, as amended, agreed to.

Paragraph 148 read and agreed to.

Paragraph 149 read.

Amendments made.

Amendment proposed, in line 12, to leave out from “law” to the end of the paragraph.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

An Amendment made.

Paragraph, as amended, agreed to.

Paragraphs 150 to 153 read and agreed to.

Paragraph 154 read.

An Amendment made.

Amendment proposed, in line 11, to leave out from “Charter” to “whilst” in line 12.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 9
Michael Connarty	Andrew Bingham
	Mr James Clappison
	Geraint Davies
	Chris Heaton-Harris
	Kelvin Hopkins
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Amendment proposed, in line 13, to leave out from “case” to “other” in line 14.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

Paragraph, as amended, agreed to.

Paragraph 155 read.

Amendment proposed, in line 1, to leave out “would” and insert “could.”.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.



Paragraph agreed to.

Paragraph 156 read.

Amendment proposed, in line 7, to leave out from “experts” to the end of the paragraph.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 6
Michael Connarty	Andrew Bingham
	Mr James Clappison
	Chris Heaton-Harris
	Chris Kelly
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Paragraph agreed to.

Paragraph 157 read.

Amendment proposed, in line 1, to leave out “All” and insert “Most.”.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

An Amendment made.

Paragraph, as amended, agreed to.

Paragraph 158 read and agreed to.

Paragraph 159 read.

Amendment proposed, in line 5, to leave out from “conjuring” to the end of the paragraph and insert “, which leads to speculation of scenarios, such as outlined by David Anderson QC that are too far removed from the Committee’s consideration of questions relating to the Charter to be useful”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 7
Michael Connarty	Andrew Bingham
	Mr James Clappison
	Chris Heaton-Harris
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Paragraph agreed to.

Paragraph 160 read.

Amendment proposed, in line 1, after “We” to insert “do not”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 2	Noes, 7
Michael Connarty	Andrew Bingham
Mr Michael Thornton	Mr James Clappison
	Chris Heaton-Harris
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

An Amendment made.

Paragraph, as amended, agreed to.

Paragraphs 161 and 162 read and agreed to.

Paragraph 163 read, amended and agreed to.

Paragraph 164 read.

An Amendment made.

Amendment proposed, in line 10, to leave out from “confusion” to the end of the paragraph.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 3	Noes, 7
Michael Connarty	Andrew Bingham
Geraint Davies	Mr James Clappison
Mr Michael Thornton	Chris Heaton-Harris
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Paragraph, as amended, agreed to.

Paragraph 165 read.

An Amendment made.

Amendment proposed, in line 3, to leave out from “Charter” to “Private” in line 4.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

Amendment proposed, in line 7, to leave out from “application” to “The” in line 9.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 9
Michael Connarty	Andrew Bingham
	Mr James Clappison
	Chris Heaton-Harris
	Kelvin Hopkins
	Chris Kelly
	Stephen Phillips
	Jacob Rees-Mogg
	Henry Smith
	Mr Michael Thornton

Question accordingly negatived.

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[Adjourned till Wednesday 26 March at 2.00 p.m.]

## Wednesday 26 March 2014

Members present:

Mr William Cash, in the Chair

Andrew Bingham	Kelvin Hopkins
Michael Connarty	Chris Kelly
Geraint Davies	Jacob Rees-Mogg
Julie Elliott	Linda Riordan
Nia Griffith	Henry Smith
Chris Heaton-Harris	Mr Michael Thornton

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Paragraph 165, as amended, agreed to.

Paragraph 166 read.

An Amendment made.

Amendment proposed, in line 3, to leave out from “Act.” to the end of the paragraph.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

Paragraph, as amended, agreed to.

Paragraph 167 read.

Amendment proposed, in line 1, to leave out “question” and insert “accept”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6	Noes, 6
Michael Connarty	Andrew Bingham
Geraint Davies	Chris Heaton-Harris
Julie Elliott	Kelvin Hopkins
Nia Griffith	Chris Kelly
Linda Riordan	Jacob Rees-Mogg
Mr Michael Thornton	Henry Smith

Whereupon the Chair declared himself with the Noes.

Question accordingly negatived.

Amendment proposed, in line 1, to leave out from “and” to the second “the” in line 2.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6	Noes, 6
Michael Connarty	Andrew Bingham
Geraint Davies	Chris Heaton-Harris
Julie Elliott	Kelvin Hopkins
Nia Griffith	Chris Kelly
Linda Riordan	Jacob Rees-Mogg
Mr Michael Thornton	Henry Smith

Whereupon the Chair declared himself with the Noes.

Question accordingly negatived.

An Amendment made.

Amendment proposed, in line 3, to leave out from “Craig” to the end of the paragraph and insert “The Government must be vigilant in all cases to ensure that the ECJ acts in line with the Charter’s role as it bears on the implementation of EU law in any state, and does not act purely as a human rights court.”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 3	Noes, 6
Michael Connarty	Andrew Bingham
Julie Elliott	Chris Heaton-Harris
Linda Riordan	Kelvin Hopkins
	Chris Kelly
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Paragraph, as amended, agreed to.

Paragraph 168 read and agreed to.

Paragraph 169 read.

Amendment proposed, in line 4, to leave out from “Government” to “to” in line 5.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6	Noes, 6
Michael Connarty	Andrew Bingham
Geraint Davies	Chris Heaton-Harris
Julie Elliott	Kelvin Hopkins
Nia Griffith	Chris Kelly
Linda Riordan	Jacob Rees-Mogg
Mr Michael Thornton	Henry Smith

Whereupon the Chair declared himself with the Noes.

Question accordingly negatived.

An Amendment made.

Paragraph, as amended, agreed to.

Paragraph 170 read and agreed to.

Paragraph 171 read.

Question proposed, that the Committee disagrees to paragraphs 171 and 172.—(*Geraint Davies.*)

Question put.

The Committee divided.

Ayes, 6	Noes, 6
Michael Connarty	Andrew Bingham
Geraint Davies	Chris Heaton-Harris
Julie Elliott	Kelvin Hopkins
Nia Griffith	Chris Kelly
Linda Riordan	Jacob Rees-Mogg
Mr Michael Thornton	Henry Smith

Whereupon the Chair declared himself with the Noes.

Question accordingly negated.

Amendment proposed, in line 4, to leave out from “highlighted” to the end of the paragraph and insert “We urge the Government to pursue that legal challenge to resolve this important issue at the earliest possible moment and to report the detailed outcome of that challenge and the conclusion it draws from the result to Parliament in an oral Ministerial statement in the House.”.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 6
Michael Connarty	Andrew Bingham
Geraint Davies	Chris Heaton-Harris
Nia Griffith	Kelvin Hopkins
Linda Riordan	Chris Kelly
Mr Michael Thornton	Jacob Rees-Mogg
	Henry Smith

Question accordingly negated.

Paragraph agreed to.

Paragraph 172 read, amended and agreed to.

Summary read.

Amendment proposed, in line 14, to leave out from “scope.” to the end of the paragraph.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 2	Noes, 6
Michael Connarty	Andrew Bingham
Linda Riordan	Chris Heaton-Harris
	Kelvin Hopkins
	Chris Kelly
	Jacob Rees-Mogg
	Henry Smith

Question accordingly negated.

Amendment proposed, in line 23, to leave out from “UK” to “(as” in line 24.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

Amendment proposed, in line 26, to leave out from “broadly” to the end of the paragraph.—(*Michael Connarty.*)

Question proposed, That the Amendment be made:—Amendment by leave, withdrawn.

Amendment proposed, in line 42, to leave out from “Charter” to the end of the Summary.—(*Michael Connarty.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 6
Michael Connarty	Andrew Bingham
Geraint Davies	Chris Heaton-Harris
Nia Griffith	Kelvin Hopkins
Linda Riordan	Chris Kelly
Mr Michael Thornton	Jacob Rees-Mogg
	Henry Smith

Question accordingly negatived.

Question put, That the Summary be agreed to.

The Committee divided.

Ayes, 6	Noes, 5
Andrew Bingham	Michael Connarty
Chris Heaton-Harris	Geraint Davies
Kelvin Hopkins	Nia Griffith
Chris Kelly	Linda Riordan
Jacob Rees-Mogg	Mr Michael Thornton
Henry Smith	

Summary accordingly agreed to.

Amendment proposed, in the Title, to insert “: a state of confusion” at the end.—(*The Chair.*)

The Committee divided.

Ayes, 6	Noes, 5
Andrew Bingham	Michael Connarty
Chris Heaton-Harris	Geraint Davies
Kelvin Hopkins	Nia Griffith
Chris Kelly	Linda Riordan
Jacob Rees-Mogg	Mr Michael Thornton
Henry Smith	

*Resolved*, That the title of the Report be changed to the following: *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion.*—(*The Chair.*)

Question put, That the Report, as amended, be the Forty-third Report of the Committee to the House.

The Committee divided.

Ayes, 6	Noes, 5
Andrew Bingham	Michael Connarty
Chris Heaton-Harris	Geraint Davies
Kelvin Hopkins	Nia Griffith
Chris Kelly	Linda Riordan
Jacob Rees-Mogg	Mr Michael Thornton
Henry Smith	

*Resolved*, That the Report, as amended, be the Forty-third Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

Question put, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

The Committee divided.

Ayes, 6	Noes, 1
Andrew Bingham	Geraint Davies
Chris Heaton-Harris	
Kelvin Hopkins	
Chris Kelly	
Jacob Rees-Mogg	
Henry Smith	

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

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[Adjourned till Wednesday 2 April at 2.00 p.m.]



## Witnesses

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### Wednesday 15 January 2014

The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at:

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/inquiries/parliament-2010/the-application-of-the-eu-charter-of-fundamental-rights-in-the-uk/?type=Written#pnlPublicationFilter>.

**David Anderson QC**, Brick Court Chambers, Temple and Visiting Professor at King's College, University of London, **Professor Paul Craig**, Professor of English Law, St. John's College, Oxford University, **Professor Sionaidh Douglas-Scott**, Professor of European and Human Rights Law, Lady Margaret Hall, Oxford University, and **Martin Howe QC**, 8 New Square Chambers, Lincoln's Inn

Q 1-34

### Wednesday 22 January 2014

**David Anderson QC**, Brick Court Chambers, Temple and Visiting Professor at King's College, University of London, **Professor Paul Craig**, Professor of English Law, St. John's College, Oxford University, **Professor Sionaidh Douglas-Scott**, Professor of European and Human Rights Law, Lady Margaret Hall, Oxford University, and **Martin Howe QC**, 8 New Square Chambers, Lincoln's Inn

Q35-56

**Rt Hon Lord Peter Goldsmith PC QC**

Q57-93

### Wednesday 29 January 2014

**Rt Hon Chris Grayling MP**, Secretary of State for Justice, Tim Jewell, Deputy Director, Legal Directorate, Ministry of Justice, and **Abigail Culank**, Head of European Union Human Rights Policy, Ministry of Justice

Q94-131

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## List of published written evidence

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The following written evidence was received and can be viewed on the Committee's inquiry web page at:

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/inquiries/parliament-2010/the-application-of-the-eu-charter-of-fundamental-rights-in-the-uk/?type=Written#pnlPublicationFilter>.

- 1 Dr Tobias Lock, Edinburgh Law School ([CFR0001](#))
- 2 Professor Sionaidh Douglas-Scott, Professor of European and Human Rights Law, University of Oxford ([CFR0002](#))
- 3 David Anderson Q.C. ([CFR0003](#))
- 4 Professor Paul Craig, Professor of English Law, St. John's College, Oxford University ([CFR0004](#)), ([CFR0006](#))
- 5 Dr Michael Pinto-Duschinsky, Senior consultant on constitutional affairs to Policy Exchange ([CFR0005](#))
- 6 Andrew Duff MEP ([CFR0007](#))
- 7 Martin Howe QC ([CFR0008](#))
- 8 Lord Goldsmith QC ([CFR0009](#))