

What this Briefing Note is for:

This Note is intended to provide an overview of the Charter of Fundamental Rights of the EU and the effect of Clause 5(4) of the Bill, which excludes the Charter from retention after withdrawal. It is aimed at assisting Members of Parliament during debate of Clause 5.

1. What is the Charter of Fundamental Rights?

The [Charter of Fundamental Rights of the EU](#) brings together all the fundamental rights protected under the EU framework. It has been binding since 2009, when the Treaty of Lisbon entered into force. In fact, the Treaty of Lisbon specifically provides for the Charter to be binding in Article 6(1) and gives it the same legal status as the EU Treaties. The Charter is binding on the EU institutions and the Member States.

The Charter is organised into six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Though many of the rights and freedoms in the Charter mirror those contained in the [European Convention on Human Rights](#) (ECHR), a number of additional rights come from the case law of the Court of Justice of the European Union (CJEU) or relate to EU Citizenship. More on these differences is discussed below in section 3.

The Charter does not extend the competence of the EU.¹ In addition, the rights and freedoms safeguarded in the Charter are consistent with the case law of the CJEU, which has long concerned itself with the protection of fundamental rights.²

2. When does the Charter apply in the UK?

The Charter applies to the EU Member States when they are "implementing Union law".³ This CJEU has explained that this means that the Charter is binding on the Member States when they are acting within the scope of EU law.⁴ This means that the Charter applies where the UK has given effect to, or derogates from, an EU law obligation.⁵

3. Does the UK have an opt out to the application of the Charter?

Despite commentary to the contrary,⁶ the UK does not have an opt-out to the Charter. This has been confirmed not only by the CJEU,⁷ but also by the UK Government. The confusion was based on the text of [Protocol 30](#) to the Charter, which is intended only to reiterate that the Charter does not impose new obligations on the UK. In fact, this is already provided by Article 51(2) of the Charter which states that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." Protocol 30 also states that nothing in Title IV of the Charter (Solidarity) creates enforceable rights beyond those already protected by domestic UK law.⁸

4. What is the relationship between the Charter and the ECHR?

Where rights in the Charter overlap with rights in the ECHR, the Charter provides that the protection offered by the Charter must be at least equivalent to that in the ECHR. This means that the Charter may afford greater protection than the ECHR.⁹

* This Briefing Note was prepared by Justine Stefanelli, Maurice Wohl Senior Research Fellow in European Law, Bingham Centre for the Rule of Law.

5. How does the Charter differ from the ECHR?

The Charter differs from the ECHR in two ways: in terms of rights protected and remedies available.

As noted above, many of the rights contained in the Charter can also be found within the ECHR. However, in many cases, the Charter protects rights not found in the ECHR (or the common law of the UK). One of the more popular examples of this is the Article 8 right to the **protection of personal data** which has no ECHR equivalent.¹⁰ Without that right, it is likely that the legal challenge mounted by David Davis MP and Tom Watson MP in the *Watson* case, in relation to the Data Retention and Investigatory Powers Act 2014 and the processing and retention of personal data, would not be possible after exit.¹¹ However, a number of other differences can be identified. For example, the right to equality is unqualified in the Charter, whereas in the ECHR, it applies only in connection with other ECHR rights. In addition, the Charter's provisions on **fair trial rights** in Article 47 of the Charter are not limited to civil and criminal matters like they are in Article 6 ECHR. This restriction means that administrative procedures are excluded from protection. Therefore, immigration and asylum matters do not benefit from the protections in Article 6 ECHR, though they would under the Charter.¹² The Charter also provides a general **right to marry** in Article 9, as opposed to the right to marry between a man and woman in Article 12 ECHR.¹³

The Charter also offers **enhanced remedies** for violations of fundamental rights. First, if primary domestic legislation is incompatible with the Charter, it must be disapplied. This is in contrast to the Human Rights Act, which only permits courts to make a declaration of incompatibility where a breach has occurred.¹⁴ In these cases, the conflicting legislation will continue to have effect unless and until Parliament amends or repeals it. In addition, where a UK court has referred a case concerning the interpretation of the Charter to the CJEU, the interpretation given to the Charter will have direct effect in the UK. This means that the UK courts are bound to apply the interpretation given, and, if necessary, amendments must be made to the legislation at issue.

Standing to bring a case asserting a violation of a Charter right is broader than with respect to the Human Rights Act. Whereas the Human Rights Act allows only a victim of a human rights violation to bring a claim against a public authority,¹⁵ claims under the Charter require a showing of "sufficient interest" to proceed.¹⁶ Moreover, available damages for Charter violations are not as limited as those available under the Human Rights Act.¹⁷

6. How does the EU (Withdrawal) Bill treat the Charter (and what is the problem)?

Under Clause 5(4) of the Bill, the EU Charter of Fundamental Rights will not be retained after withdrawal. The Explanatory Notes state that this is because the Charter "did not create new rights, but rather codified rights and principles which already existed in EU law" and such rights and principles will be saved under the Bill (in clauses 2-4).¹⁸ However, as discussed above, we know that the Charter in fact provides rights additional to those in the ECHR and the common law, so we will lose fundamental rights protection in certain areas.

In addition, the principles in the Charter are fundamental to the interpretation of EU law, and would be a valuable tool in the interpretation of retained EU law by the courts after withdrawal. Because Clause 5(4) does not retain the Charter, it cannot play this role, and it is unclear how existing domestic fundamental rights principles and ECHR fundamental rights can fill this gap.

7. Does non-retention of the Charter impact Northern Ireland?

The protection of fundamental rights is central to the Good Friday Agreement, and receives its own section in the Agreement.¹⁹ Therefore, the Bill's non-retention of the EU Charter of Fundamental Rights raises additional concerns.²⁰ In particular, the Good Friday Agreement requires "at least an equivalent level of protection of human rights" in Ireland and Northern Ireland.²¹ Once the UK withdraws from the EU, Northern Ireland will no longer benefit from the Charter's protections, which could pose significant problems in relation to this provision of the Good Friday Agreement.

-
- ¹ Treaty on European Union (TEU), art 6(1).
- ² Explanations Relating to the Charter of Fundamental Rights [2007] OJ C-303, p. 17. For an overview of fundamental rights protection in the EU, see M. Horspool et al, *European Union Law* (9th edn, OUP) 6.60-6.125.
- ³ Charter, art 51(1).
- ⁴ Case C-617/10 *Åkerberg Fransson*, para 20
- ⁵ A. Patrick, 'Mapping the Great Repeal: European Union Law and the Protection of Human Rights' (Thomas Paine Initiative, October 2016), para 50.
- ⁶ For example, in 2007, Tony Blair was recorded as saying "It is absolutely clear that we have an opt-out from both the charter" (Hansard, Official Report, 25 June 2007; Vol. 462, c. 37).
- ⁷ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, para 119; UK Ministry of Justice, *Balance of Competences Review: Fundamental Rights* (21/10/2013), para 3.6, stating "...the Protocol is not, and never has been, an opt out for the UK from the application of the Charter."
- ⁸ Protocol 30, art 1(2). Protocol 30 applies to the UK and Poland
- ⁹ Charter, art 52(3).
- ¹⁰ This discrepancy was pointed out by the CJEU in Joined Cases C-203/15 and C-698/15 *Secretary of State for the Home Department v Watson*, para 129.
- ¹¹ *ibid*.
- ¹² See, e.g., Case C-146/14 *PPU Mahdi*, paras 37-52 discussing the application of Article 47 of the Charter in the context of the right to be heard prior to a decision to extend detention under the EU Return Directive 2008/115/EC and the requirement to provide detainees with written reasons supporting the decision to detain.
- ¹³ Further discussion of differences can be found in A. Patrick (n 5) paras 55-56 and C. Gallagher and K. O'Byrne in 'Report on how designated special status for Northern Ireland within the EU can be delivered' (16 October 2017), para 2.32, available at: http://www.doughtystreet.co.uk/documents/uploaded-documents/NI_Special_status_report_161017_FINAL.pdf.
- ¹⁴ Human Rights Act 1998, s 4.
- ¹⁵ Human Rights Act 1998, s 7(1).
- ¹⁶ As Angela Patrick points out, most claims under EU law are brought by way of judicial review, whereby the standard is 'sufficient interest' according to section 31 of the Supreme Courts Act 1981. See (n 5) para 58.
- ¹⁷ *Ibid*, especially note 55 *infra*.
- ¹⁸ European Union (Withdrawal) Bill Explanatory notes (Bill 5-EN), para 99.
- ¹⁹ See section entitled 'Human Rights' under 'Rights, Safeguards and Equality of Opportunity'.
- ²⁰ These concerns have been expressed in detail by Gallagher and O'Byrne (n 13) paras 2.15-2.39.
- ²¹ Good Friday Agreement, para 9.