



FACT SHEET 30

The Charter of Fundamental Rights of the European Union & The European Commission's Impact Assessment Procedure

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This Fact Sheet aims to explain the Charter of Fundamental Rights, as well as the Commission's Impact Assessment procedure with respect to fundamental rights, with a view to enhancing the accessibility and practical application of these instruments.

Introduction

Human rights are among the core values guiding policy in the European Union. Recent instruments stand to enhance the implementation of these principles by articulating a practical focus on fundamental rights; the right to non-discrimination being key among these. These instruments include annual parliamentary reports, a network of independent experts and an upcoming fundamental rights agency; all established to protect and promote rights laid out in the Charter of Fundamental Rights of the European Union (the Charter).

The Charter summarizes rights previously recognized in a range of sources into one comprehensive document with the aim of increasing the visibility and accessibility of these rights. The Charter also bridges the traditional divide between civil and political rights, and economic and social rights, and addresses modern issues by providing recognition of newer rights. Although the Charter is not yet legally binding, it has had a significant influence on policy-development and judicial decisions at the European level. The European Commission, for example, has launched an integrated Impact Assessment procedure which includes fundamental rights to ensure that all its initiatives are compatible with the Charter.

This factsheet is divided into two sections; the first considers the Charter itself, its content and legal status, while the second part provides an outline of the European Commission's Impact Assessment procedure.

1. The Charter

Following the 50th anniversary of the United Nations' 1948 Universal Declaration of Human Rights, a debate began regarding the need for a catalogue of fundamental rights in the European Union. Until then, the main instruments for safeguarding such rights in Europe were the common constitutional traditions of the Member States and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹ Rulings by the European Court of Justice were based on these sources, taken together with key articles from the Treaty of Maastricht;² in particular articles 6 and 7.³ Article 6 establishes that the Union is founded upon and should respect human rights and fundamental freedoms. Article 7 establishes that the Union can suspend certain rights of Member States that are determined to be in serious and persistent breach of Article 6.

In an effort to increase the visibility of fundamental rights in the European Union through consolidation in a comprehensive document, the process leading to the development and adoption of the Charter was launched:

- **June 1999 - the Cologne European Council** concluded that fundamental rights should be given greater visibility in the European Union through a charter.
- **October 1999 - the Tampere European Council**, reached agreement on body entrusted with drawing up a draft Charter, referred to as **the Convention**.⁴
- **October 2000**: the draft Charter was adopted by the Convention, and **the Biarritz European Council** unanimously approved the draft.
- **November 2000**: the Parliament approved the Charter.
- **December 2000**: the Commission approved the Charter.
- **7 December 2000**: the European Parliament, the Council and the Commission signed the Charter in Nice.

The Charter is the first instrument to comprehensively assemble rights from the constitutional traditions of the Member States, and from international conventions of the Council of Europe, the United Nations and the International Labour Organisation, as well as from the case-law of the European Court of Human Rights and the European Court of Justice. By consolidating these rights into one comprehensive document, the Charter aims to address concerns that these rights were not being adequately protected in the European

¹ The ECHR is a convention of the Council of Europe, which consists of over 40 European member countries. All 25 EU member states and candidate countries have ratified the ECHR. However, the Union cannot accede to it due to restrictions in the convention and in the treaties of the European Union.

² The Treaty on European Union (TEU) was signed in Maastricht and entered into force in November 1993. The Maastricht Treaty, as it is also referred to, amended the former Treaty establishing the European Community (TEC), to create the European Union from the pre-existing European Community, and introduced a three pillar structure including economic and political cooperation. The Treaty of Amsterdam entered into force in May 1999 and it amended and renumbered the EU and EC treaties. The Treaty of Nice entered into force in February 2003 and it reformed EU institutions so as to ensure effective functioning of the Union after enlargement. The Treaty and its amending treaties are often collectively referred to as the Treaty on European Union (TEU). The consolidated version of the TEC contains the text of the TEC amended by the TEU, as well as the TEU's amending treaties.

³ See Annex 1.

⁴ The Convention consisted of Heads of State and representatives from the European Commission and Parliament, and national parliaments, as well as from the Council of Europe, the European Court of Justice and the European Court of Human Rights. Press releases from the Convention containing summaries of the proceedings are available at: http://www.europarl.europa.eu/charter/press/index2_en.htm#PressReleases.

Union by increasing their visibility and accessibility. The Charter also aims to act as an instrument of political and moral legitimacy, by reaffirming the European Union's respect for democracy, human rights and fundamental freedoms and fostering an 'area of freedom, security and justice'. Finally, the Charter is intended to have a specific role in enlargement by offering candidate countries a more precise definition of the common values that must be respected and by establishing a common European language on fundamental rights.

To understand the Charter's objectives, it also is important to understand what the Charter does not aim to do. The Charter does not aim to establish new powers or tasks for the European Union or Member States, or modify those set out by the TEU; this is underlined in Article 51/2. Rather, the aim is to define limits to existing powers and enable the exercise of these powers to be openly monitored. Likewise, the Charter does not oblige Member States to modify their Constitutions. Nor does the Charter operate in competition with the ECHR but in collaboration with it; Article 51/2 states that the Charter respects the ECHR, its protocols and the case-law of the European Court of Human Rights. The collaboration of these two documents is to be guided by the rule that the rights listed in both texts have the same meaning even if their wording is different.

The Charter's Content and Scope

The Charter contains a preamble and 54 articles, setting out a range of civil, political, economic and social rights grouped into six thematic chapters: dignity, freedoms, equality, solidarity, citizens' rights, and justice. The Charter applies to all EU residents and further distinguishes especially vulnerable sections of society such as children, the elderly and those with disabilities. A limited number of the rights in the Charter, those listed in Chapter V, are reserved for EU citizens. These include rights listed in the TEU such as freedom of movement and residence, the right to vote and the right to petition, as well as newer rights such as the right to good administration.

The Charter's content is intended to affirm the principles of indivisibility and universality of rights by putting an end to the divide between civil and political rights, and social and economic rights, and by according rights to all EU residents regardless of nationality or place of residence.

In recognition of the changes that have occurred in society, the Charter includes not only the traditional rights that were addressed in its sources but also newer rights addressing bio-ethical and environmental standards, as well as personal data and consumer protection. It also uses modern language recognising definitions of family other than simply in the context of marriage and no longer refers to marriage between men and women, but simply marriage.

In its treatment of the right to **non-discrimination**, the Charter is progressive in its scope and language. Article 21 of the Charter clearly prohibits:

'any discrimination on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'

In contrast, article 13 of the TEU⁵ is limited in scope to the grounds of ‘sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

Article 21 of the Charter is also progressive in its status as a stand-alone clause; meaning it is independent of other articles. This has not been the case for provisions for the right to non-discrimination in other instruments. Article 14 of the ECHR, for example, prohibits discrimination only in so far as it interferes with ‘the enjoyment of rights and freedoms set forth in the Convention’. Thus, under article 14, the right to non-discrimination can only be invoked in conjunction with other articles, and a violation of this right can only be found if there has been a violation of another right. The adoption of Protocol 12 to the ECHR has sought to address this shortfall, stating that ‘the enjoyment of any right set forth by law shall be secured without discrimination’. Unfortunately, while the Protocol expands upon Article 14 and is free-standing, it has only been ratified by fourteen states, three of those are EU member states.⁶

While the Charter’s progressive scope and language place it in good standing to significantly impact policy in the European Union, its current lack of status as a legally binding instrument means that its role is yet to be fully defined.

The Charter’s Legal Status

During the drafting of the Charter, there was much pressure to give it status as a legally binding document, particularly on the part of the European Parliament, the Economic and Social Committee, the Committee of the Regions and civil society representatives. Thus, in the drafting of the Treaty Establishing a Constitution for Europe, the 2003 Convention on the Future of Europe⁷ proposed to incorporate the Charter as the second part of the draft Constitution. The draft Constitution was approved by the European Council in 2004 and was to be ratified by the 1 November, 2006. Since the Constitution was not ratified, the Charter as it stands is not a legally binding document and its legal status within the European Union remains undetermined.

The Charter’s lack of legal status, however, does not mean it has no effect. In fact, the Charter has had a significant influence on policy-development and judicial decisions at the European level. For example, the European Commission has endeavoured to ensure that all its initiatives are compatible with the Charter by including fundamental rights in its integrated Impact Assessment procedure.

⁵ Articles 12 and 13 were introduced into the TEU by the Treaty of Amsterdam in May 1999. They can be found in the Treaty of Amsterdam itself, but also in the consolidated version of the Treaty establishing the European Community (TEC).

⁶ See Annex 2

⁷ The European Convention, sometimes known as the Convention on the Future of Europe, was a body established by the European Council in December 2001 as a result of the Laeken Declaration. Its purpose was to produce a draft constitution for the European Union for the Council to finalise and adopt. The Convention finished its work in July 2003 with their Draft Treaty establishing a Constitution for Europe. The Convention’s debates and reports, as well as commentaries on the continuing debate on the future of Europe are available at: <http://european-convention.eu.int/bienvenue.asp?lang=EN>.

2. The European Commission's Impact Assessment Procedure

In March 2001, the Commission concluded that any legislative proposal or draft instrument to be adopted by it must first undergo scrutiny for compatibility with the Charter.⁸ In June 2002, the Commission communicated its intention to launch, as of 2003, a new integrated Impact Assessment procedure, to foster coherence and quality in policy development. The new process is intended to assess the economic, social and environmental impact of proposals. Compatibility with the Charter falls under the category of social impact. In April 2005, more than four years after the initial decision, the Commission released a communication outlining a methodology targeted at doing so.⁹

Impact Assessment Methodology

The aim of this Communication was to set out a methodology for ensuring the Charter is properly implemented in Commission proposals. For the Commission, this methodology has a threefold objective: (1) to allow Commission departments to check systematically that all the fundamental rights have been respected in all draft proposals; (2) to enable members of the Commission, and the Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in particular, to follow the results of the scrutiny and to promote a fundamental rights culture; and (3) to make the results of the Commission's monitoring of fundamental rights more visible.

The Communication further explains that to reinforce the screening of draft legislative proposals, fundamental rights will be brought into focus in two key documents submitted together with the proposal: the Impact Assessment and the Explanatory Memorandum. The Impact Assessment should include as full and precise a picture as possible of the different impacts on individual rights. The communication includes a list of questions specifically on fundamental rights that have been introduced into the impacts checklist contained in the Revised Impact Assessment Guidelines.¹⁰ The Explanatory Memorandum, for certain legislative proposals, should contain a section on the legal basis for compliance with fundamental rights. With this provision it will no longer be possible just to add a standard recital on compliance with the Charter. Rather, the memorandum will have to include a section briefly summarising the reasons underlying the conclusions that fundamental rights have been respected. The lead department for the legislative proposal will also have to ensure that the Directorate General Justice, Freedom and Security is involved in the interdepartmental consultation when a proposal is likely to raise fundamental rights issues.

Additionally, the Communication gives guidelines on which legislative proposals should be screened and identifies two categories: (1) a legislative proposal that includes a limitation of a fundamental right which must be justified under Article 52 of the Charter; or where there is a direct or indirect difference in treatment that must be justified in relation to the general principles of equality before the law and non-discrimination; and

⁸ SEC(2001) 380/3, Memorandum from the President and Mr Vitorino on the Application of the Charter of Fundamental Rights of the European Union.

⁹ COM(2005) 172 final, Communication from the Commission on Compliance with Charter of Fundamental Rights in Commission legislative proposals: Methodology for systemic and rigorous monitoring.

¹⁰ SEC(2005) 791, Impact Assessment Guidelines.

(2) a legislative proposal aimed at implementing or promoting a particular fundamental right.

Conclusion

Some have argued that the delay in communicating a targeted methodology raises questions concerning the Commission's commitment to Charter compliance. Considering the clarity of the presented methodology, it is indeed surprising how minimally it translates in the revised impact assessment guidelines;¹¹ the Charter itself being mentioned a mere three times in a hundred pages. This may be due, in part, to the Commission's decision to evaluate fundamental rights considerations under the category of social impact. The Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, in a recent draft report on Charter compliance, has suggested that the procedure be amended to include a specific category dedicated to fundamental rights.

For now, it is too early to judge whether the Commission's impact assessment procedure will live up to its intentions regarding Charter compliance. Indeed, reform of the procedure, as suggested by the LIBE Committee, may prove useful in achieving these end goals. As it stands, however, the Commission's efforts to ensure Charter compliance through the impact assessment procedure speaks to the importance of the Charter itself and may serve as a model to guide Member States in developing national practices.

The impact of the Charter in the European Union has been demonstrated through the many actions and instruments of which it has been the focus. Since 2000, EU citizens are increasingly referring to its provisions in letters and petitions. It has been repeatedly cited by the European Court of Justice and to a lesser extent by the Court of First Instance and the European Court of Human Rights. The establishment of a Network of Independent Experts on Fundamental Rights¹² and the plans to create a European Fundamental Rights Agency¹³ provide further evidence of the Charter's impact. Furthermore, that the Charter was proclaimed by the European Parliament, Council and Commission, made part of the draft Constitution, and now plays a role in the Commission's impact assessment procedure, affirms it as a text that cannot be overlooked. While the Charter's legal status remains to be determined, it is clear that it has had, and will continue to have, a significant influence on policy-development and judicial decisions in the European Union.

¹¹ Released in June 2005 and updated again in March 2006.

¹² Created in 2002, the Network of Independent Experts on Fundamental Rights assesses the application of each of the rights set out in the Charter in its annual reports on the State of Fundamental Rights in the European Union. It also makes recommendations for the EU institutions and Member States and provides the Commission and Parliament with specific opinions. The Network will cease to operate in 2006.

¹³ In late 2006 the Council approved the decision to establish a European Agency for Fundamental Rights. The new Agency is an extension of the mandate of the European Union Monitoring Centre on Racism and Xenophobia (EUMC). The tasks of the Agency will include collecting and disseminating information, advising the institutions and Member States of the European Union, and cooperating with civil society. The agency will not address issues related to police and legal cooperation in criminal matters, such as prisoner treatment and extraordinary renditions; this limitation has received much criticism.

ANNEX 1: Relevant Articles of the TEU

Article 6:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.
2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the Member States, as general principles of Community law (....)

Article 7:

1. The Council (...) may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.
2. Where such a determination has been made, the Council,(...) may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council (...)

ANNEX 2: Provisions on the Right to Non-Discrimination (the Charter, TEU and ECHR)

Article 21 of the Charter:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 12 of the TEU:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council (...) may adopt rules designed to prohibit such discrimination.

Article 13 of the TEU:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council (...) may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 14 of the ECHR:

The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol No.12 to the ECHR, Article 1:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Key Documents

The Charter of Fundamental Rights of the European Union

http://www.europarl.europa.eu/comparl/libe/elsj/charter/default_en.htm

The Treaties of the European Union

<http://europa.eu.int/eur-lex/lex/en/treaties/index.htm>

The European Convention for the Protection of Human Rights and Fundamental Freedoms

<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/>

Communication from the Commission on Compliance with Charter of Fundamental Rights in Commission legislative proposals: Methodology for systemic and rigorous monitoring

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0172en01.pdf

The European Commission's Impact Assessment Guidelines

http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf

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ENAR is a network of some 600 European NGOs working to combat racism in all EU Member States. Its establishment was a major outcome of the 1997 European Year against Racism. ENAR is determined to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national initiatives with European initiatives.



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