

## Part I - Protecting fundamental rights within the European Union

### Protecting fundamental rights within the European Union

#### 1. The European Union, human rights and fundamental rights

The European Union (EU) is founded on the **values** of respect for **human dignity, freedom, democracy, equality**, the **rule of law** and **respect for human rights** (see [Article 2 TEU](#)).

One of the EU's main goals is to promote human or 'fundamental' rights both internally and around the world.

*Both the terms 'human rights' and 'fundamental rights' appear in the Treaties. The reason for choosing one rather than the other is not clear. However, the expression 'human rights' appears to be preferred in provisions concerning the external relations of the Union (namely its relations with non-Member States and international organisations). In contrast, the Treaty provisions that concern the internal dimension (i.e. the protection of fundamental rights within the EU) use the expression 'fundamental rights'. This tutorial focuses on the internal dimension of protecting rights. Accordingly, the expression 'fundamental rights' will be used.*

Whenever the EU institutions exercise the powers and tasks conferred upon them by the Treaties, they must respect EU fundamental rights. They must also promote the application of such fundamental rights, insofar as this does not involve any increase in their powers as laid down in the Treaties.

Member States are under an obligation to respect EU fundamental rights when implementing EU law. Help is provided in identifying situations in which the EU and its Member States are under an obligation to protect EU fundamental rights in [Part II](#) of this tutorial.

Before looking into those aspects, the following sections illustrate the fundamental rights protected within the EU and the instruments with which individuals may seek damages for breaches of those rights.

#### 2. The fundamental rights protected within the EU

With the entry into force of the Lisbon Treaty on 1 December 2009, the EU acquired a proper *Bill of Rights*, or **charter of written rights**, the [Charter of Fundamental Rights of the European Union](#) (hereafter 'the Charter').

The Charter contains a Preamble and 54 Articles, organised into **seven** Titles. Titles I to VI (**Dignity, Freedoms, Equality, Solidarity, Citizens' rights**, and **Justice**) set out the fundamental rights concerned, while Title VII (*General provisions governing the interpretation and application of the Charter*) lays down a series of rules on the interpretation and application of those fundamental rights.

The Charter and its contents will be examined in greater depth in sections [2.1](#) and [2.2](#) of Part I of the tutorial. The main rules in Title VII are, however, addressed in [Part III](#).

The Charter has the **same legal value as the Treaties** upon which the EU is based (the TEU and TFEU). All three are therefore regarded as EU primary law and, therefore, ranked first among the sources of EU law. For this reason, EU institutions are obliged to respect the Charter, as are Member States when they are implementing EU law. This expression means that the Charter does not replace national constitutions, although in certain cases it may override them (on the relationship between the Charter and national sources of fundamental rights, see [Part III, section 2](#)).

Nonetheless, the Charter is not the only source protecting fundamental rights within the EU.

Since the 1970s, the [Court of Justice of the European Union](#) has, in the absence of a charter of written rights, ensured the protection of individual rights by raising them up to **general principles of EU law**. With the Lisbon Treaty, these principles were confirmed among the sources of EU fundamental rights (more information on this point is provided in [section 2.3](#)).

In addition, the EU may become party to international treaties concerning the protection of fundamental rights. Since 22 November 2011, the EU has been party to the [United Nations \(UN\) Convention on the Rights of Persons with Disabilities](#), the first international legally binding instrument dedicated to setting minimum standards for the protection of people with disabilities. This is also the first human rights treaty to which the EU has become a party.

Moreover, under the Lisbon Treaty, the EU is under **a legal obligation to accede to the**

[European Convention for the Protection of Human Rights and Fundamental Freedoms](#), better known as the **European Convention on Human Rights (ECHR)**.

The ECHR, which entered into force in 1953, was created by the [Council of Europe](#), an international human rights organisation which, at present, has 47 Member States, of which 28 are EU Member States.

The ECHR was the first instrument by which a group of States agreed to be bound with respect to a range of rights, essentially civil and political rights.

Significantly, the ECHR allows individuals to seek redress for the violation of the fundamental rights concerned by a State party to the Convention before a supranational court, the [European Court of Human Rights](#), sitting in Strasbourg.

Although the Lisbon Treaty established an obligation upon the EU to accede to the ECHR, the EU has yet to do so for the time being. This does not, however, mean that the ECHR plays no role within the EU system of human rights protection. On this point see [section 2.4](#).

#### 2.1 The origins of the EU Charter

In June 1999, the [Cologne European Council](#) concluded that the fundamental rights applicable at EU level should be consolidated into a single document to ensure greater visibility.

The Heads of State and Government of the Member States, meeting in Cologne, wanted to include in the Charter the general principles set out in the ECHR in 1950 and those deriving from the common constitutional traditions of EU countries. In addition, the Charter was supposed to include the fundamental rights applying to EU citizens like the economic and social rights contained in the Council of Europe's European Social Charter and the Community Charter of Fundamental Social Rights of Workers. It was also supposed to reflect the principles arrived at in the case-law of the Court of Justice and the European Court of Human Rights.

The Charter **was drawn up by a Convention** consisting of a representative from each EU country and the European Commission, as well as members of the European Parliament and national parliaments.

It was **formally announced in Nice in December 2000** by the European Parliament, the Council and the Commission. A second proclamation of the Charter followed in 2007, in Strasbourg, in order to acknowledge a set of amendments brought to the initial version.

In **December 2009**, with the **entry into force of the Lisbon Treaty**, the EU Charter was given **binding legal effect equal to the Treaties**.

#### 2.2. The Charter: content

The Charter brings together in a single document rights which were previously contained in a variety of EU instruments and national legislation, as well as in a series of conventions adopted within the framework of the Council of Europe, the United Nations (UN) and the International Labour Organization (ILO).

By affording **greater clarity and visibility to fundamental rights**, the Charter aims to ensure legal certainty within the EU.

The Charter contains a **Preamble and 54 Articles**, organised into **seven Titles**:

Title I: **Dignity** (human dignity, the right to life, the right to integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour);

Title II: **Freedom** (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, protection in the event of removal, expulsion or extradition);

Title III: **Equality** (equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between women and men, the rights of the child, the rights of the elderly, integration of persons with disabilities);

Title IV: **Solidarity** (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, consumer protection);

Title V: **Citizens' rights** (the right to vote and stand as a candidate at elections to the European Parliament, the right to vote and stand as a candidate at municipal elections, the right to good administration, the right of access to documents, the European Ombudsman, the right to petition, freedom of movement and residence, diplomatic and consular protection);

Title VI: **Justice** (the right to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties, the right not to be tried or punished twice in criminal proceedings for the same criminal offence);

Title VII: General **Provisions governing the interpretation and application of the Charter** (field of application; scope and interpretation of rights and principles; relationship with the ECHR; distinction between 'rights' and 'principles'; level of protection).

### 2.3 The general principles of EU law concerning the protection of fundamental rights

The Treaty that established the European Economic Community did not contain provisions on the protection of fundamental rights. Nevertheless, early cases brought before the **Court of Justice** showed that EEC acts could interfere with fundamental rights such as, in particular, the freedom to engage in an economic activity or the right to property.

In the 1970s, the Court of Justice acknowledged **its own competence in ensuring respect for fundamental rights as 'general principles of law'** (see Case [11-70 Internationale Handelsgesellschaft](#), paragraph 4). This meant that national courts were to refrain from ruling on EEC acts on the basis of national sources of protection for fundamental rights.

Subsequently, the Court asserted that national legal provisions falling within the scope of (at the time) EEC law also had to comply with the fundamental rights protected by EEC law as general principles (see Case [C-60/84 Cinéthèque](#), paragraph 26).

However, in order to establish the existence of a link between national and EEC fundamental rights, the Court of Justice further found that it was **bound 'to draw inspiration from the constitutional traditions common to the Member States'** (see Case [4-73 Nold](#), paragraph 13). Similarly, it made reference to **'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' as a source of guidelines** (Ibid.). The Court of Justice also argued that the ECHR was of particular relevance (see Case [C-260/89 ERT](#), paragraph 42).

**Article 6(3) TEU**, in its current version, provides that: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

Therefore, the **Treaty of Lisbon confirmed** the possibility available to the Court of Justice to develop protection of fundamental rights by way of the general principles.

Nevertheless, **the relationship between fundamental rights as general principles of law and the Charter is complex**. These two sources share the same legal status and, with respect to the protection guaranteed, very frequently overlap (this is because the case-law of the Court of Justice on general principles informed the content of the Charter, and the sources of inspiration behind the Charter and the general principles overlap significantly).

The Court of Justice has not yet taken a clear stance on this relationship: there are simply cases where reference is made to both sources (see, for instance, Case [C-441/14 Dansk Industri \(DI\)](#), paragraph 22).

However, it seems reasonable to acknowledge that the general principles on fundamental rights have at least two functions:

**aiding in the interpretation of the Charter**: if a provision of the Charter codifies a fundamental right that the Court of Justice has already acknowledged as a general principle, the case-law in which it was acknowledged should guide the interpretation of that provision of the Charter; acting as an alternative means **for protecting fundamental rights that are not acknowledged by the Charter**.

It should be noted that, despite the (sole) reference to the ECHR in Article 6(3) TEU, the Court of Justice has drawn on other international treaties as sources of the general principles of EU law: for instance, the UN Convention on the Rights of the Child or the [European Social Charter](#).

Consequently, the current wording of Article 6(3) TEU should not prevent it from drawing on such other instruments.

### 2.4 The relationship between the EU and the ECHR

At present, although all EU Member States are parties to the European Convention on Human Rights (ECHR), the European Union is not. Therefore, the European Court of Human Rights (ECtHR) in Strasbourg has no jurisdiction to review the compliance of EU acts and provisions with the ECHR. In contrast, it has the jurisdiction to rule on the acts of the Member States, including those putting into effect obligations deriving from EU law.

The ECtHR has made a distinction between the acts of Member States implementing EU law obligations which grant some degree of discretion to the Member State in implementing them and those obligations which grant no such discretion. Where no discretion is allowed for, the Strasbourg court will not review Member States (legal) acts, on the presumption that the protection of fundamental rights afforded within the EU system is at least equivalent to that of the ECHR. This presumption is relative: it will be rebutted if the protection in the case at issue was manifestly deficient (this is the so-called *'Bosphorus presumption'*, named after the case in which it was developed).

In contrast, there is no special treatment for the acts of Member States implementing obligations deriving from EU law where no discretion is afforded to Member States.

Following the entry into force of the Lisbon Treaty, the EU is under a legal obligation to accede to the ECHR. Article 6(2) provides that: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

For the European Union to accede, an Accession Agreement between the Union and the States that are parties to the ECHR must enter into force. In 2013, a Draft Accession Agreement was finalised, but the Court of Justice declared it incompatible with the EU Treaties and the Charter (see [Opinion 2/13](#)).

However, the fact that the EU is not currently a party to the ECHR does not mean that the Convention has no legal relevance under EU law. At present, the ECHR (and the case-law of the Strasbourg court interpreting it) performs two functions:

it acts as a minimum standard of protection with respect to the Charter, Article 52(3) of which provides that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection' (see

[Part III, section 5.1](#) for more information on this);

the ECHR and the case-law of the Strasbourg court can be relied upon to protect fundamental rights as general principles of EU law, in accordance with Article 6(3) TEU (see [section 2.3](#)).

### 3. The functions performed by EU fundamental rights

The EU institutions and bodies (whatever their official title: agencies, offices, etc.) must abide by EU fundamental rights and promote their effective application whenever they perform their activities. Any acts adopted by them must comply with the requirements of fundamental rights protection. The EU Member States must respect EU fundamental rights and promote their application as well, but only when they are acting within the scope of EU law (see [Part II, section 3](#)).

Therefore, as regards EU acts, fundamental rights perform two main functions.

In the first instance, they act as *a benchmark for interpretation*. EU acts must be interpreted in the light of EU fundamental rights and, if EU acts are open to differing meanings, the interpretation that is most in line with EU fundamental rights must be preferred.

For instance, in [Case C-131/12 Google Spain](#), the Court of Justice *interpreted Directive 95/46/EC on the protection of individuals with regard to the processing of personal data in the light of Articles 7 and 8 of the EU Charter on the right to respect for private life and the right to the protection of personal data. Although there is no express provision in the Directive, the Court held that it must be interpreted as acknowledging the 'right to be forgotten': the right of a person to obtain from the operator of a search engine the removal of information related to him/her.*

Secondly, EU fundamental rights act as a basis for and *benchmark of validity*. An EU act that does not comply with EU fundamental rights and cannot be interpreted in conformity with them is invalid and can be annulled through an annulment action before the Court of Justice or the General Court, or be declared invalid by a preliminary ruling of the Court of Justice (see [section 4](#)).

For instance, in [Case C-293/12 Digital Rights Ireland](#), the Court of Justice declared Directive 2006/24/EC on data retention invalid, because its provisions did not establish sufficient safeguards to ensure that personal data were treated in compliance with Articles 7 and 8 of the Charter.

EU fundamental rights also act as a benchmark of compatibility for national legal provisions which are within the scope of EU law. They must be interpreted in conformity with EU fundamental rights. In the event of a conflict that cannot be resolved through interpretation, the national provision can be repealed or amended by the national legislative body. Furthermore, if the EU fundamental right at issue satisfies the requirements for direct effect, national courts and administrative authorities can apply it and not apply the conflicting national provision. They do not need to wait for a formal amendment of the existing national legislation by the domestic legislative body (on this see [Part III, section 7](#)).

### 4. Judicial means available to individuals to seek protection of their EU fundamental rights

There are various means and mechanisms provided by different judicial and non-judicial bodies for obtaining proper protection in the event of a breach of EU fundamental rights.

Judicial protection of fundamental rights under the Charter is provided by the Court of Justice of the European Union in Luxembourg and by the national courts of the Member States.

If **the violation of fundamental rights derives from an EU measure**, only the Court of Justice can annul the act which gave rise to the breach. There are two ways in which to prompt the Court of Justice to examine the compatibility with the Charter of an EU measure:

through an [action for annulment](#) before the court, which has the jurisdiction to hear actions for annulment brought by individuals;

through a reference to the Court of Justice for a preliminary ruling submitted by a national judicial body.

These two means of action are not interchangeable: they are subject to different requirements and procedural rules.

For instance, by virtue of [Article 263\(4\) TFEU](#), a time limit applies to actions for annulment. In addition, the applicant needs to demonstrate sufficient direct, individual interest in annulment of the measure being challenged to be entitled to seek redress in this way. The rules governing this point, referred to as 'standing', are very strict and it is often difficult for individuals to bring a case directly before the EU courts.

In contrast, there is no time limit for submitting a reference for a preliminary ruling, but only national courts can file such requests with the Court of Justice (see [Article 267 TFEU](#)). Thus, for such a request to be submitted, judicial proceedings must be ongoing at national level which concern the alleged failure to comply with EU fundamental rights of an EU act (or a national measure implementing EU law). Any of the parties to the national proceedings may ask the national court to refer a matter to the Court of Justice, but the ultimate decision lies with the national court (which may also submit a reference on its own motion).

Where **a violation of fundamental rights derives from a national legal measure, national courts have the primary responsibility to provide protection to individuals** (the competent judicial body must be identified according to the national provisions concerning the attribution of jurisdiction among the courts of the Member State concerned).

First, the national court must establish whether the issue is within the scope of application of EU fundamental rights or whether it concerns only national fundamental rights. If EU fundamental rights apply (see [Part II, sections 1 to 3](#)), the national court must provide the protection they afford. **In the event of doubt**, the national court can submit a **reference for a preliminary ruling** to the Court of Justice on the interpretation of EU law.

The choice of the most appropriate procedure may not be an easy task, and qualified legal advice may be useful: certain indications in this respect are given in [Part III, section 2](#). In order to afford the parties and their legal representatives a better understanding of the rules governing the conduct of the abovementioned procedures, the Court of Justice has adopted some [Practice directions](#) for parties to cases before it. In addition, the Court has created some [Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings](#), providing guidance on whether it is appropriate to file a reference for a preliminary ruling, and practical information on the form and effect of such a reference.

### 5. Non-judicial means available to individuals to seek protection of their EU fundamental rights

Problems concerning the protection of EU fundamental rights can also be tackled through non-judicial channels.

#### Breaches of fundamental rights by EU institutions, bodies, offices and agencies

**Complaint to the European Ombudsman:** the right to address the [European Ombudsman](#), which is in itself a fundamental right (enshrined in Article 44 of the EU Charter), enables EU citizens and residents in the Union to denounce issues of 'maladministration' by EU institutions, bodies and agencies, with the exception of the Court of Justice of the European Union acting in its judicial role.

**Complaint to the European Data Protection Supervisor:** anyone who considers that their rights have been infringed when an EU institution, body, office or agency has processed data relating to them can lodge a complaint with the European Data Protection Supervisor, using the [complaint submission form](#).

#### Breaches of fundamental rights by a Member State

**Complaint to the European Commission,** concerning the infringement of fundamental rights by national authorities (providing they are acting within the scope of EU law: see [Part II, sections 1 to 3](#)). Detailed information on how to submit a complaint and how the Commission will handle it is available [here](#).

**Petition to the European Parliament:** the right to petition, which is in itself a fundamental right (laid down by Article 44 of the EU Charter), enables EU citizens and residents in the Union to draw the European Parliament's attention to a subject that falls within the competences of the Union and concerns the petitioner directly. More information on the right to petition can be found [here](#).

Through the [European Parliament's Petition Portal](#), it is possible to start a new petition or to support an existing one.

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