



HOUSE OF LORDS

European Union Committee

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16th Report of Session 2005-06

# Human Rights Proofing EU Legislation

Report with Evidence

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## **ABSTRACT**

The Commission has recently adopted a Communication setting out a new mechanism to ensure that its legislative proposals are systematically and rigorously checked for compatibility with the EU Charter of Fundamental Rights.

The Communication is as much concerned with raising awareness, both within and outside the Commission, of the need to check that draft legislation is compatible with fundamental rights, as it is with changing processes within the Commission.

Improvements are, however, to be made in relation to the preparation and content of impact assessments, which precede, and explanatory memoranda, which accompany, Commission legislative proposals. These changes are most welcome.

But attention also needs to be paid to continuing to check compliance as and when legislative proposals undergo amendment during the course of negotiation in the Council and the Parliament. Recitals and supporting explanatory memoranda should be updated as necessary so as to explain how the details of the measure in question respect the Charter.

Examination of the Communication reveals the absence of (i) any form of independent check on the Commission's fundamental rights analysis and conclusions, and (ii) any compliance mechanisms in the legislative procedures of the Council and the Parliament. The report makes a number of recommendations for dealing with these shortcomings. The European Parliament and national parliaments may have a part to play. The role of the proposed Fundamental Rights Agency as scrutineer also needs to be considered.

The Communication also aims at raising awareness of the fundamental rights implications of EU legislation and encouraging citizens and civil society to assert their fundamental rights when the Commission is consulting on a proposal. But the Communication contains no practical suggestions to help outsiders make such an input and the Report recommends that there should be clearer mechanisms to assist the citizen and NGOs to assert fundamental rights.

The Report concludes that the Communication is nonetheless a positive step that should increase awareness of the Commission's procedures and encourage interested parties to raise fundamental rights concerns when the Commission is developing policy and legislative proposals.



# Human Rights Proofing EU Legislation

## CHAPTER 1: INTRODUCTION

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1. This Report addresses a particular aspect of the Union's policy and law-making process, namely the need to ensure the compatibility of Union acts with fundamental rights. All those involved in the Union's legislative process (and especially the Council of Ministers and the European Parliament as legislators) should ensure that regulations, directives, framework decisions etc comply with fundamental rights<sup>1</sup>, many of which are restated in the EU Charter of Fundamental Rights (the Charter).
2. A particular responsibility falls on the Commission which in the large majority of cases is responsible for the preparation and drafting of EU legislation. How the Commission goes about ensuring its compliance with fundamental rights is the subject of a recent Communication from the Commission, *Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systematic and rigorous monitoring*.<sup>2</sup> The Communication is one of the first initiatives of the Commissioners' Group on Fundamental Rights, Anti-discrimination and Equal Opportunities, recently established under the Barroso Commission.

### The 2005 Communication

3. The Communication of 27 April 2005:
  - explains how Commission departments monitor compliance with fundamental rights at the preliminary stages<sup>3</sup> of EU legislation;
  - indicates how the current system is to be strengthened by making changes to the impact assessment and the explanatory memorandum;
  - clarifies the role of the Commissioners' Group on Fundamental Rights, Anti-discrimination and Equal Opportunities, including their role in monitoring the work of the Council and the European Parliament as legislative authority;
  - points out how the public would be made more aware and informed about Commission monitoring of respect for fundamental rights in EU legislation.

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<sup>1</sup> The Treaty on European Union (TEU) requires the Union to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law (Article 6(2) TEU). The European Court of Justice has often said "Fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories". Cases C-387/02, 391/02 and 403/02, *Silvio Berlusconi and others*, judgment of 3 May 2005.

<sup>2</sup> COM(2005) 172 final.

<sup>3</sup> That is at preparatory and inter-departmental consulting stages, see the Commission's Memorandum printed with this Report (p 1).

### Reasons for our inquiry

4. Compatibility of EU legislative proposals with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other international human rights instruments, as well as the Charter, is a matter of continuing concern to the Committee. In carrying out its detailed scrutiny of draft EU legislation, we frequently raise ECHR and other fundamental rights issues with Ministers and have been concerned to ensure that EU law is ECHR compliant both in the form it is agreed in Brussels and when implemented at national level. We therefore decided to conduct a brief inquiry into the issues raised by the new Communication.
5. The changes set out in the Communication have been described as “the first fruits of the Commission working groups on fundamental rights set up by Commission President Jose Manuel Barroso in 2004 to appease European Parliament concerns about his new team”.<sup>4</sup> The Communication replaces a 2001 Decision of the Commission on the application of the Charter. It does not change the status of the Charter or individual provisions of it. Nor does it anticipate the Constitutional Treaty.<sup>5</sup> The Communication is essentially directed at the Commission’s internal procedures and thus we sought to obtain more information about current and proposed practice in this area and to ascertain the extent to which the Communication would bring about real changes in the Commission’s practice. Secondly, the inquiry complements that recently undertaken by the Committee into Ensuring Effective Legislation in the EU.<sup>6</sup> The purpose, form and content of impact assessments are common ground. Thirdly, our inquiry sought to assist in further defining our own practice in scrutinising EU legislation for compatibility with fundamental rights and thus to take forward a recommendation outstanding from the Committee’s 2002 Review of Scrutiny of European Legislation.<sup>7</sup>

### The inquiry

6. The inquiry was carried out by Sub-Committee E (Law and Institutions)<sup>8</sup> under the chairmanship of Lord Brown of Eaton-under-Heywood. The views of interested parties (including those who assisted the Committee in its earlier inquiries into the EU Charter) were sought. The Committee also had the benefit of meetings with Dr Clemens Ladenburger (Commission’s Legal Service), representatives of the Immigration Law Practitioners’ Association (ILPA) and JUSTICE, and Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, Department for Constitutional Affairs. A list of those who gave evidence is set out in Appendix 1. The evidence, written and oral, is printed with the Report. We would like to thank all those who assisted in the inquiry.

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<sup>4</sup> See *europe information* 2958—April 30, 2005, at p I.4.

<sup>5</sup> The Communication has, however, been differently construed. See *EU ‘cherry picking’ from rules the voters rejected*. Sunday Telegraph, 16 October 2005, at p 2.

<sup>6</sup> 9th Report, 2005-06, HL Paper 33.

<sup>7</sup> The Select Committee’s 2002 *Review of Scrutiny of European Legislation* (1st Report, 2002–03, HL Paper 15) recommended that the Government’s Explanatory Memoranda (EMs) delivered to Parliament should include “a section on any potential human rights issues. The Government should consider making a formal statement as is now issued on primary legislation, that, in the view of the Minister signing the EM, the proposal is compatible with the provisions of the Human Rights Act 1998” (para 48).

<sup>8</sup> The membership of the Sub-Committee is listed on the inside cover page of this Report.



7. This Report is made for the information of the House.

## CHAPTER 2: ESTABLISHING A HUMAN RIGHTS CULTURE

### The Charter

8. The focal point of the new Communication is the need to ensure the compatibility of EU legislative proposals with fundamental rights, and in particular the EU Charter of Fundamental Rights.
9. The Charter<sup>9</sup> brings together into a single text the personal, civic, political, economic and social rights enjoyed by the citizens and residents of the European Union. The provisions of the Charter are addressed to the institutions and bodies of the Union and to the Member States when they are implementing Union law.

#### The EU Charter of Fundamental Rights

The Charter's 54 Articles encompass a wide range of civil, political, economic and social rights. Most are applicable to all persons in the EU but some are limited to EU citizens. The Charter does not contain "new" rights but substantially reproduces the rights contained in the ECHR and, in accordance with the political mandate given at the 1999 Cologne European Council,<sup>10</sup> goes further and includes certain economic and social rights. These are drawn from the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties.

All these rights are set out in six sections:

- Dignity;
- Freedoms;
- Equality;
- Solidarity;
- Citizens' rights;
- Justice.

A final section (General Provisions) deals with the scope of the Charter and its provisions and with their relationship to the Community Treaties and other instruments, including the ECHR. These are the so-called "horizontal clauses". They play a key role in determining the status and effects of the Charter (and were the subject of considerable debate and then amendment during the negotiations leading to the conclusion of the Constitutional Treaty).

The precise status of the Charter may be debated, but two things are clear. The Charter is a document of major political significance. The European Parliament, the Council and the Commission cannot, whether acting in a legislative, administrative or policy-making role, ignore the Charter: it is a

<sup>9</sup> The Charter was drawn up by an *ad hoc* body, formally designated a Convention. The Convention was made up of representatives of Member States, the European Parliament, national parliaments and the Commission. It started its work in December 1999 and adopted a draft text on 2 October 2000. The text was unanimously approved at the Biarritz European Council (13-14 October 2000) and forwarded to the European Parliament and the Commission for their approval.

<sup>10</sup> In June 1999, the European Council meeting in Cologne decided that a European Union Charter of Fundamental Rights should be established to consolidate fundamental rights applicable at Union level and to make "their overriding importance and relevance more visible to the Union's citizens".

document they have unanimously approved and solemnly proclaimed.<sup>11</sup> Second, the Charter is not legally binding, though a number of its provisions may independently have legal force as general principles of EC law. The Community Courts will, in practice, have regard to the Charter when determining those fundamental rights that form an integral part of the general principles of law.<sup>12</sup> The Charter is thus being used as an authoritative source in identifying and defining fundamental rights at the EU level.

### Applying the Charter—the 2001 Decision

10. In a Decision of 13 March 2001,<sup>13</sup> the then Commission President, Romano Prodi, and Justice and Home Affairs Commissioner, António Vitorino, declared that compliance with the Charter’s provisions should be “the touchstone” for future Commission action. The 2001 Decision stressed the “fundamental nature” of the Charter, and required all proposals for legislation “as part of the normal decision-making process, first [to] be scrutinised for compatibility with the Charter”.

### The legislative drafting process

11. The Commission generally has the right to initiate proposals for EU legislation. A draft for a piece of legislation, such as a regulation, directive or framework decision, is normally prepared by the lead service in the Commission following internal consultation of all other services concerned and external consultation of national authorities, interested parties and stakeholders. We are grateful to the Commission for providing a Memorandum which describes in detail the Commission’s current practice in preparing legislation.<sup>14</sup>

We note:

- (i) preparation of legislative proposals is characterised by a substantial measure of co-ordination between departments within the Commission, including the Justice, Freedom and Security Directorate-General;
- (ii) the Commission’s Legal Service plays an important role in seeking to ensure the legality of proposed legislation;
- (iii) there is no external check to ensure compliance with fundamental rights, though the Legal Service is “independent” of the lead department.

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<sup>11</sup> The Presidents of the European Parliament, the Council and the Commission signed and “solemnly proclaimed” the Charter on behalf of their institutions on 7 December 2000 in Nice.

<sup>12</sup> Reference has also been made to the Charter by the Community Courts. Advocates General at the Court of Justice have referred to the Charter in order to identify the fundamental rights that have to be respected within the Community. In his opinion (para 83) in the *Hautala* case, Advocate General Léger described the Charter as “a source of guidance as to the true nature of the Community rules of positive law”: Case C-353/99P *Council v Hautala* [2001] ECR I-9565, at p. 9586. The Court of First Instance has also referred to the Charter on a number of occasions: eg Case 177/01 *Jégo-Quéré et Cie v Commission* [2002] ECR II-2365, at para 42. A summary and analysis of references to the Charter can be found in *Judicial Reference to the EU Fundamental Rights Charter: First experiences and possible prospects*, a paper submitted to the Convention of the Future of Europe by John Morijn. Published on the Convention website: [http://europa.eu.int/constitution/futurum/documents/other/oth000602\\_en.pdf](http://europa.eu.int/constitution/futurum/documents/other/oth000602_en.pdf)

<sup>13</sup> Application of the Charter of Fundamental Rights of the European Union. SEC(2001) 380/3.

<sup>14</sup> See p 1.

### Chronology of events

7 December 2000—the Charter is “solemnly proclaimed” at Nice.

13 March 2001—Commission adopts Decision on the *Application of the Charter of Fundamental Rights*.

5 June 2002—Commission issues Communication on *Impact Assessment*.

29 October 2004—the Constitutional Treaty, incorporating in the Charter, is signed.

21 December 2004—Commission issues Communication about the functioning and internal coordination of the Commission—this establishes five groups of Commissioners.

27 April 2005—Commission issues Communication, *Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systematic and rigorous monitoring*.

15 June 2005—Commission adopts revised Impact Assessment Guidelines.

### Experience to date

12. The new Communication replaces the 2001 Decision. We enquired as to what effect the 2001 Decision had had in practice.
13. The Commission believed that the 2001 Decision had produced some tangible results on individual legislative proposals, particularly in respect of certain proposals in the area of justice and home affairs. Dr Ladenburger, for the Commission, gave the example of the European Arrest Warrant which, he said, had been the subject of intense discussion within the Commission’s services during its preparation so as to ensure respect for fundamental rights (Q 5). However, one problem with the 2001 Decision was the fact that it was a “purely internal decision of the Commission”. Dr Ladenburger acknowledged that its existence had not been widely known, even within the Commission (Q 5).
14. The Government were not aware of any particular problems in the working of the 2001 Decision (Q 110). But ILPA drew attention to the Directive on Family Reunification<sup>15</sup> (Q 70). This measure was adopted well after the critical date of 13 March 2001, the date by which Commission legislative proposals had to be accompanied by a fundamental rights check.<sup>16</sup> However, the Reunification Directive contains three provisions about which the European Parliament has been so concerned in respect of fundamental rights compliance that it has commenced proceedings for annulment before the European Court of Justice.<sup>17</sup>

### No radical change

15. The new Communication does not propose any radical change in the way Commission legislative proposals are to be checked to ensure they respect fundamental rights. The Communication states that the approach taken in

<sup>15</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. [2003] OJ L251/12. The Directive does not apply in relation to the United Kingdom, which did not exercise its right to “opt in”.

<sup>16</sup> The last Commission proposal for a directive was published on 2 May 2002 (COM (2002) 225 final).

<sup>17</sup> C-540/03 *Parliament v Council*, case pending.

the 2001 Decision “will be retained in principle”. Ensuring compliance with fundamental rights remains an integral part of ensuring the legality of the proposal. “It seems neither necessary nor appropriate to create new specific administrative structures or procedures for this aspect of verification of legality”.<sup>18</sup> We return later to the question of verification and, in particular, whether there should be an independent check.

16. The Law Society of England and Wales<sup>19</sup> (the Law Society) confirmed that the methodology set out in the Communication would have few procedural implications for preparation of legislation by the Commission. They noted that current practice is for the Legal Service to check compliance with the fundamental rights guaranteed in the Charter as part of the Commission’s interdepartmental consultations (p 49).

### Raising awareness

17. The Communication seems primarily concerned with raising awareness amongst all parties, including the departments and services of Commission and civil society, of the need to take proper account of fundamental rights in formulating policy and for legislative proposals to comply with the Charter (Q 20). The Government believed that it was important that the Commission should examine its legislative proposals to ensure compliance with fundamental rights. Secondly, the Communication evidenced a desire to involve more bodies in talking to the Commission. Baroness Ashton of Upholland considered both these elements to be “eminently sensible proposals” (Q 109).
18. **Much of the Communication is not new but builds on existing provisions and practice. It is nonetheless a vast improvement on its predecessor simply by reason of the fact that it is in the public domain. As mentioned above, the 2001 Decision was essentially an internal memorandum distributed to Commission departments in March 2001. It is clear that if awareness and standards are to be raised, the Communication will have practical implications for the education and training of Commission staff and for the relationship of the Commission with civil society. We consider some of the practical aspects, including resources, in the following chapters.**

### A cautious welcome

19. NGOs gave the Communication a cautious welcome. JUSTICE believed that “this initiative will demonstrate the Commission’s effort to secure compliance with fundamental rights, which will reinforce the credibility of its initiatives and will also publicly promote the image of the Charter as an essential vehicle based on common values” (p 26). ILPA added: “this strategy must be combined with a real commitment to act in accordance with the highest levels of rights protection by the Commission and the Member States in the Council. Too often in the field of Freedom, Security and Justice, Member State governments, and to some lesser extent the Commission, have ignored concerns raised by the European Parliament and

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<sup>18</sup> Communication, at para 8.

<sup>19</sup> The Brussels Office represents the Law Society of England and Wales, the Law Society of Scotland and the Law Society of Northern Ireland.

civil society during the legislative process. If this attitude persists we doubt whether this strategy alone can achieve much” (p 25).

20. Both JUSTICE and ILPA believed that it was more important to ensure respect for fundamental rights in the outcome. ILPA said: “One conclusion might be that as statements of the EU’s respect for fundamental rights have multiplied at the EU institutional level, scepticism at the reality of that respect has mushroomed at the national and ECHR level” (p 22). Professor Guild, for ILPA, commented: “the more noise there is about human rights and fundamental rights protection does not mean that there is better protection” (Q 62).
21. Baroness Ashton of Upholland, for the Government, also welcomed the Commission’s Communication. She said: “We will all have to see whether there are implications for the way in which we operate, but on the basis of what they propose so far my view is it is to be welcomed and they are to be congratulated on doing it” (Q 150).
22. **We share the hope that the Communication will result in a raising and maintenance of standards of compliance. While undoubtedly actions speak louder than words in this context, it would be somewhat unfair to be overly critical of the Commission and the new Communication, which is trying to lay down and instil a number of procedures aimed at ensuring that fundamental rights are not just a lot of “noise” but actually mean something and are a reality in EU legislation.**

### **A fundamental rights culture**

23. Introducing the new Communication, Mr Barroso said: “it reflects our determination to lock-in a culture of fundamental rights in the EU legislation”<sup>20</sup>.
24. The Law Society considered the Communication to be “a welcome expression of the Commission’s commitment to embedding a culture of fundamental rights in its working methods”. In the Law Society’s view, “International human rights standards should underpin all drafting and implementation of EU legislative and non-legislative measures” (p 49). JUSTICE also believed the establishment of a methodology for the systematic and rigorous monitoring of legislative proposals to ensure compliance with the Charter would promote a strong “fundamental rights culture” within the EU (p 25).
25. Not all agreed. Fair Trials Abroad said: “The severe limitation of this housekeeping arrangement is its lack of emphasis on the ‘practical and real’ as opposed to the ‘theoretical and illusory’. There is nowhere in this document a commitment to conduct any form of fundamental research or investigation when the so called ‘systematic and vigorous monitoring’ might require it” (pp 48–49). ILPA said: “our primary concern is that fundamental rights are actually secured better in the EU, not that the institutions spend more time reassuring us that they are protected better” (p 22).
26. **We welcome the Communication. It is a useful, though limited, Commission initiative to improve the quality of internal monitoring.**

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<sup>20</sup> Commission Press Release IP/05/494.

**The Communication does not, and could not, even if it were intended to do so, address the wider issues raised by our witnesses. It is nonetheless a significant step by the Barroso Commission which, as we explain below, exposes the Commission’s legal reasoning in relation to particular proposals and also challenges the other institutions and the Member States to justify their actions.**

### **The other institutions**

27. JUSTICE wanted to see the Communication’s scrutiny process extended beyond the Commission to the other legislative processes within the EU institutions, the Council and the Parliament (Q 64). Professor Guild (ILPA) spoke of the need for “a bit more participation from the European Parliament to give it some teeth on the legitimacy front” (Q 72).
28. **The Communication is directed at the Commission and its departments but has implications for the other institutions, particularly for the Council and the Parliament.** Some of these are expressly identified in part VI (Monitoring respect for fundamental rights in the work of the legislature). Others would seem to arise as a consequence of the discipline that the Communication imposes on the Commission when, for example, the Council and/or Parliament amend a Commission proposal or where Member States themselves initiate legislation. We return to these issues in the following Chapters.

## CHAPTER 3: REINFORCING THE PRESENT REGIME—IMPACT ASSESSMENTS AND EXPLANATORY MEMORANDA

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### The key documents

29. The Commission proposes to reinforce the present regime by bringing fundamental rights “into even sharper focus in two key documents”:
  - the impact assessment, which is proposed before the preparation of the draft legislative text;<sup>21</sup> and
  - the explanatory memorandum, which accompanies the legislative proposal adopted by the Commission.
30. In future, impact assessments should include “as full and precise a picture as possible of the different impacts on individual rights”. For certain legislative proposals, the explanatory memorandum should “contain a section on the legal basis for compliance with fundamental rights”.<sup>22</sup>

### Impact assessments

31. The development of impact assessment has been a key element in the Commission’s programme for delivering Better Regulation. A new method of impact assessment was introduced in 2002,<sup>23</sup> integrating and replacing previous single-sector type assessment. The procedure was reviewed in 2004<sup>24</sup> and in June 2005 the Commission issued revised internal Guidelines on Impact Assessments.<sup>25</sup> With effect from 2005, all items included on the Commission’s Legislative Work Programme are to be subjected to an impact assessment. As a first step in the process all Work Programme items must be accompanied by a Roadmap<sup>26</sup> providing an estimate of the expected timetable for the proposal and detailed information about how the impact assessment is to be taken forward.
32. The aim of an impact assessment is to identify and assess the problem at stake and the objectives pursued. It should also identify the main options for achieving the objective and analyse their likely impacts in the economic, environmental and social fields. The advantages and disadvantages of each option should be examined and possible synergies and trade-offs described.

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<sup>21</sup> There may, however, have been an earlier “working draft” used by the lead department in its public consultations.

<sup>22</sup> Communication, at para 9.

<sup>23</sup> See Communication from the Commission on Impact Assessment. COM(2002) 276 final, which was part of the Better Regulation Action Plan (COM(2002) 278 final).

<sup>24</sup> Commission report on Impact Assessment: *Next steps—In support of competitiveness and sustainable development*. SEC(2004) 1377 of 21 October 2004.

<sup>25</sup> *Impact Assessment Guidelines*. 15 June 2005. SEC(2005) 791.

<sup>26</sup> SEC(2004) 1175.



### What is Impact Assessment?

Doing an IA involves answering a number of basic analytical questions: *What is the nature, magnitude and evolution of the problem? What should be the objectives pursued by the Union? What are the main policy options for reaching these objectives? What are the advantages and disadvantages of the main options? And, last but not least: How could future monitoring and evaluation be organised?* An IA need not involve a long and detailed study in every case ... but it should allow for an informed debate in all cases.

The IA should not be confused with the policy proposal or with the explanatory memorandum which precedes the proposal. It gathers and presents evidence that helps in determining possible policy options and their comparative (dis)advantages. The IA work should run in parallel with and feed into the development of the Commission's proposal. The College of Commissioners will take the IA findings into consideration in its deliberations. The IA will not, however, dictate the contents of its final decision. The adoption of a policy proposal is a political decision that belongs solely to the College, not to officials or technical experts.

Source: *Impact Assessment Guidelines* 15 June 2005 SEC(2005)791.

33. The impact assessment accompanies the draft proposal submitted to Commissioners. If the proposal is adopted by the Commission the impact assessment will be annexed (usually with the designation and status of a Commission Staff Working Document) to the proposal sent to the Council and the Parliament. It will also be published on the Europa impact assessment website.
34. New Impact Assessment Guidelines were introduced very soon after the Communication—the drafting of the revised Guidelines was conducted in parallel (Q 9). They draw attention to the fact that fundamental rights may place legal limits on the Union's right to take action in response to a problem.<sup>27</sup>

### Scope of application

35. The Communication does not extend the Commission's obligations to produce impact assessments. Impact assessments are required for all items on the Commission's Work Programme, though the Commission can always prepare an impact assessment for an item that is not listed on the Work Programme. The Guidelines merely refer to this being done "on a case-by-case basis".<sup>28</sup>
36. Statewatch pointed out that only a small percentage of Commission proposals were at present subject to impact assessment. They also noted that some recent proposals had lacked a detailed explanatory memorandum. Statewatch gave as an example the proposals for the Schengen Information System II (SIS II).<sup>29</sup> These had been issued in May 2005 (a month after the

<sup>27</sup> *Impact Assessment Guidelines*. 15 June 2005. SEC(2005) 791, Part III, at para 1.3 (Does the Union have the right to act?).

<sup>28</sup> *Impact Assessment Guidelines*. SEC(205) 791, at para II.1.

<sup>29</sup> The SIS is a computerised database of information relating to immigration and law enforcement. The United Kingdom has opted into only parts of the Schengen *acquis* dealing with law enforcement. The draft Council Decision and Regulations concerning the establishment, operation and use of the second

present Communication), but were not subject to an impact assessment and did not have an explanation of the individual articles of the proposals (p 51).

37. JUSTICE also regretted the fact that not every proposal carried an impact assessment (pp 25–26). Dr Metcalfe, for JUSTICE, said: “We find the Communication’s justification for not requiring an impact assessment in every case to be unsatisfactory. While it may be correct that some problems only arise ‘with detailed implementing provisions or with very specific elements of a legal instrument which an impact assessment could not forecast,’ it does not seem to us to be an adequate reason for not carrying out the impact assessment in the first place” (Q 73). JUSTICE did not believe any particular subject area of legislation should be ruled out *a priori* as unsuited for impact assessment and called on the Commission to set out the criteria for deciding whether to subject specific legislative proposals to impact assessment (p 26).
38. **It would be helpful if, as JUSTICE suggested, the Commission could identify and publish the criteria, and any guidance given, for deciding to carry out an impact assessment of a proposal not appearing on the Work Programme. In principle all legislative proposals should be subject to impact assessment. Therefore, in any instance where no impact assessment has been carried out, and especially any proposal relating to freedom, security and justice issues, the Commission should set out the reasons for not doing so in the explanatory note accompanying the proposal.**

### Third Pillar proposals

39. A major category of documents falling outside the requirement to have an impact assessment is Third Pillar measures (Police and judicial co-operation in criminal matters) introduced by Member States. Some such proposals, Statewatch contended, should clearly have been subjected to such an assessment (*e.g.* the proposed Framework Decision on data retention) (p 51). Baroness Ashton of Upholland explained: “There is no uniform method for Member States to explain the human rights compliance of their proposals, but it is the responsibility of each Member State to review the consistency of their proposals with human rights standards, and to ensure that their proposals are in line with the principles of subsidiarity and proportionality. Once a Member State proposal goes to a working group for negotiation, human rights compliance (and especially compliance with Article 6 TEU), is a key issue for discussion.” (p 47)
40. Both ILPA and JUSTICE considered that there was a *lacuna* that needed to be filled. Dr Metcalfe said: “Just as the Commission should be carrying out impact assessments in every case, there is no reason why impact assessments should not be carried out by Sweden or by the United Kingdom when they are proposing measures”. But JUSTICE accepted that the Communication was unable to cover what the Member States should do when bringing forward proposals under the Third Pillar (Q 73).
41. **It is our experience that Third Pillar measures commonly raise issues relating to fundamental rights. We have no doubt that impact**

**assessments are particularly important in respect of such proposals. Indeed the failure of Member States to provide background information and explanations for the measure being proposed makes our own scrutiny work that much more difficult and places a further burden on the Government faced with our requests for clarification.<sup>30</sup> We therefore recommend that Member States should carry out impact assessments before bringing forward any proposal under the Third Pillar. Any such proposal should also be supported by a full explanatory memorandum including a section dealing with fundamental rights.**

### **Comitology**

42. A separate issue relating to the scope of the requirement for impact assessments is that of comitology (the procedure by which subordinate legislation or decisions is made by the Commission subject to the supervision of committees made up of representatives of the Member States). The issue is touched upon briefly in the Communication. It is acknowledged that fundamental rights issues can arise in the Commission's exercise of implementing powers. The Communication states that the preparation of Commission regulations and decisions is subject to the interdepartmental consultation procedure. There would, however, be no requirement to produce an impact assessment or an explanatory memorandum.<sup>31</sup>
43. Dr Ladenburger, for the Commission, emphasised that impact assessment was not itself the means of checking compliance with fundamental rights but was a tool for preparing the factual material upon which such legal verification can take place. Where an impact assessment was not conducted for a legislative proposal the Commission Services would nonetheless be required to evaluate the impacts on fundamental rights (Q 57).
44. The Government did not believe that the Communication raised any particular problems for delegated or implementing legislation but accepted that it was necessary to see how the Communication worked out in practice. Its application to comitology was a matter to be kept under review (Q 115).  
**We agree.**

### **The checklists**

45. The "checklists" (Tables 1-3 in the Impact Assessment Guidelines) of the impact assessment address three main issues: economic, social and environmental impacts. There is no separate or new category to deal with fundamental rights. This is a deliberate decision on the part of the Commission. The approach taken by the Communication, and by the revised Guidelines, is to incorporate additional questions on fundamental rights within the existing three Tables. The Communication explains: "The reason for this approach is that the fundamental rights of the Charter are diverse

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<sup>30</sup> A recent example is the Draft Council Framework Decision on the European Enforcement Order and the transfer of sentenced persons between Member States of the EU (Doc 5597/05). This is an initiative of Austria, Finland and Sweden. The proposal is currently held under scrutiny while the Committee seeks to ascertain the practical problems which the proposal seeks to address, in particular as they may relate to the European Arrest Warrant. Correspondence with Ministers on this proposal can be found on the Committee's website.

<sup>31</sup> Communication, at para 16.

and cut across all sectors. Thus, impacts on, say, rights of ownership, on the freedom to run a business, are an occupational freedom, are best detected and assessed within the section ‘Economic Impacts’. By the same token, questions on social rights should be dealt with in the section on ‘Social Impacts’”.<sup>32</sup>

“Proposals must be prepared on the basis of an effective analysis of whether it is appropriate to intervene at EU level and whether regulatory intervention is needed. If so, the analysis must also assess the potential economic, social and environmental impact”.

Commission White Paper on European Governance, 2001, COM(2001) 428

46. Dr Ladenburger, for the Commission, said: “We have, in fact, tried to include new questions under all three of these headings and particularly under economic and social”. The questions touch on a variety of matters including equal opportunities, discrimination, personal data and property rights (QQ 12-13). The Communication states: “This should ensure that fundamental rights impacts are identified comprehensively and that a proportionality analysis is carried out in relation to their scope and extent”.<sup>33</sup>
47. ILPA were “somewhat disappointed that the question of fundamental rights still does not rate a separate category alongside these other three impact categories, nor even a clearly separate particular sub-heading within the broader category of social impacts (where it is largely located now)” (p 23). JUSTICE considered the lack of a fourth category to be “quite unfortunate” (p 26). Dr Metcalfe said: “we consider the categories which have been relied upon by the Communication, that is to say economic, social and environmental impacts, to be profoundly unsatisfactory. We do not think it is possible to capture the full range of possible impacts on fundamental rights” (Q 73).
48. Statewatch pointed out that many EU measures, particularly in the field of justice and home affairs, touch on civil rights (civil liberties). Statewatch doubted whether these rights could be clearly measured within the heads of “economic” or “social” impact and suggested that a case specific category of analysis within impact assessments should be developed for this purpose (p 51). The Law Society said: “It is important that Commission officials consider the Charter as a whole irrespective of the specific questions in the impact assessment guidelines, as not all rights in the Charter are referred to in the questions and not all fit easily into economic, environmental and social impacts” (p 50). JUSTICE argued similarly (p 26).
49. The Government, on the other hand, believed that the approach adopted in the Communication was a good place to start (Q 112). Baroness Ashton of Upholland said: “I think we will begin to see perhaps greater openness which will be to the good, but we will have to wait and see how this works out to be completely sure of the effect” (Q 111). Much would depend on how effective the “checklists” were in practice in identifying fundamental rights issues (Q 112).
50. **We share the doubts as to whether the current categories of economic and social rights issues will be sufficient to provide for the analysis of**

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<sup>32</sup> Communication, at para 19.

<sup>33</sup> Communication, at para 18.

**all relevant fundamental rights. We regret that the Commission has not taken the opportunity to include a separate (fourth) section for fundamental rights in impact assessments. We are not persuaded by the argument that a separate section would result in “needless repetition”.<sup>34</sup> The form of the impact assessment has been developed from that initially devised for environmental cases and there is already crossover between the current threefold (economic, social and environmental) division. We believe that it would be more helpful if all fundamental rights issues were addressed in a separate section. This would help to avoid the risk of rights being overlooked in some cases.**

51. A further concern expressed by ILPA was that the impact assessment might be used to justify a decision to go ahead rather than simply inform the decision-taking. Dr Toner said: “From looking at the literature of environmental impact assessments there is some concern that in some contexts this operates in such a way as to simply permit a developer to justify what they wish to do in practice. It is not always effective in preventing or allowing concerns to be raised about potentially environmentally damaging development and sometimes simply allows the developer to justify what it wishes to do ... We hope that this will not be the case here transferred into the context of fundamental rights assessments, that this will just permit political decisions essentially that have already been made or political preferences that are there within the Commission or within other institutions to be justified without adequate and proper scrutiny” (Q 80).
52. **It is a matter of concern that the impact assessment might be misused in such a way. The purpose of the impact assessment, it will be recalled, is to inform a decision whether to go ahead rather than merely justify a decision to go ahead. This is something on which we will need to keep an eye.**

### Justifying exceptions

53. ILPA expressed concern that the relationship of fundamental rights and exceptions to them seemed to be in a process of change and that the balance between them was being recast giving a weight to the exceptions and rights which elevated the exceptions to the same position as the rights (p 24). ILPA considered this to be a “worrying and negative development” (p 24).
54. **This is certainly a matter over which a careful watch will also need to be kept. As mentioned above, we believe that it would be helpful if all fundamental rights issues were addressed in a separate prominent section of the impact assessment. This might go some way in countering the perceived shift in the balance between rule and exception.**

### Relationship with Better Regulation

55. ILPA drew attention to the tension between human-rights proofing and competitiveness. ILPA said: “Reading the documentation on Impact Assessments, it comes across quite clearly that this integrated impact assessment initiative is intended to further better regulation, competitiveness,

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<sup>34</sup> Communication, at para 19.

and sustainability. There is bound to be some scepticism about the extent to which strategies developed with these aims in mind can be expected to translate comfortably to the rather different context of fundamental rights protection” (p 23).

56. The Government did not believe that there was necessarily a tension between economic policies and fundamental rights. The Commission, when formulating a proposal, would need to consider both very carefully (Q 114). **We agree. Having a separate category for fundamental rights in impact assessments would greatly assist in such consideration by the Commission.**
57. It is clear that the preparation of impact assessments has substantial resource implications for the Commission.<sup>35</sup> **The need to identify and examine the fundamental rights implications of proposals during that process will increase that burden. But it is a cost which we believe is necessary if better regulation is to be achieved.** We return below to the need for extra guidance for Commission officials.

### Explanatory memoranda

58. Section IV of the Communication is entitled “Taking fundamental rights into account in the explanatory memorandum”. It points out that there is presently no systematic practice applicable to proposals raising fundamental rights questions.
59. There is a link between the explanatory memorandum and the use of the Charter recital (the statement in the preamble to an instrument that it is compatible with the Charter. See below). The Communication proposes that, in future, whenever a legislative proposal contains the standard Charter recital the explanatory memorandum must include a section briefly summarising the reasons pointing to the conclusion that fundamental rights have been respected. Such a rule is aimed at providing a public account of the Commission’s legal scrutiny of respect for the rights secured by the Charter and at enhancing the effectiveness of internal scrutiny.<sup>36</sup>
60. **We welcome the inclusion in the explanatory memorandum of a special section summarising the reasons for concluding that fundamental rights have been respected. The Commission is to be commended. Its strategy is not, however, without risk: disclosing its position in the explanatory memorandum may increase the Commission’s exposure to criticism and challenge.**

### Consequence of amendments

61. We queried what would happen if the proposal was amended during the legislative process in a way which further impinged on fundamental rights. Would the explanatory memorandum be amended?
62. The Commission acknowledged the point. Dr Ladenburger said: “The legislator itself, as you know, does not accompany the final act by an explanatory memorandum, of course. There the recitals are the motivation of

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<sup>35</sup> See evidence of Commissioner Verheugen to the Select Committee during its inquiry into Better Regulation (Q 88). See footnote 6.

<sup>36</sup> Communication, at paras 23-4.

adopted legislation” (Q 34). Formal amendments made by the Commission during the legislative process would be accompanied by an explanatory memorandum. Dr Ladenburger said: “It is a matter for reflection for the Commission how the explanatory memoranda may be more easily made accessible to the public, although they are, of course, published on our websites, but perhaps there is scope for improvement as to a coherent presentation of adopted legislation together with its legislative history” (Q 37).

63. Baroness Ashton of Upholland did not think it appropriate to comment on how the explanatory memorandum might be kept up to date as a legislative proposal proceeded on its course through the Council and the Parliament. But the Minister acknowledged that the memorandum would not be much use to anybody if it was out of date because the Council or Parliament had amended the original proposal (QQ 119-20).
64. **The 2003 Inter-Institutional Agreement on Better Regulation already contemplates impact assessments being prepared for amendments during co-decision.<sup>37</sup> This only partly addresses the problem. Serious thought needs to be given to how explanatory memoranda and other supporting documentation are kept up to date as proposals proceed through the legislative machine. It would be desirable, where changes are adopted, for the institution or institutions concerned to provide a supplementary memorandum explaining the change and how compliance with fundamental rights is assured. We can think of cases (such as the European Arrest Warrant and the proposed Directive on Asylum Procedures) where this would be especially helpful and time-saving.**

### Extra guidance for Commission officials

65. The Communication recognises that scrutinising legislation to ensure compatibility with the provisions of the Charter and the ECHR requires “specific expertise”. It is envisaged that that scrutiny will commence within the lead department itself and then be continued, during the interdepartmental consultation procedure, principally by the Legal Service. The lead department also has to ensure that the Directorate-General for Justice, Freedom and Security is involved in the interdepartmental consultation whenever a proposal is liable to raise issues relating to fundamental rights (in this respect the Communication consolidates current practice—Q 56). The External Relations Directorate-General should also be involved where a proposal might affect the fundamental rights of third country nationals outside the Union.<sup>38</sup>
66. In practice the Legal Service of the Commission has and seems likely to continue to have a key role to play in scrutinising Commission proposal to ensure their legality. But clearly lead departments within the Commission must have some awareness and knowledge of fundamental rights if the

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<sup>37</sup> The Inter-Institutional Agreement on Better Lawmaking was signed by the European Commission, the European Parliament and the Council in December 2003. The Agreement provides a framework for simplifying and reducing the volume of Union legislation. Under the Agreement the three institutions are committed to improve legislative planning, transparency and co-ordination and to take forward parts of the Better Regulation Action Plan which require co-operation between the Community institutions.

<sup>38</sup> Communication, at paras 12 and 15.

methodology prescribed by the Communication is to be successful in raising standards of compliance.

67. Dr Ladenburger, for the Commission, explained that the Legal Service had developed internal training of all its 130 lawyers on fundamental rights and on the Charter and was currently envisaging offering the same training sessions to lawyers in the legal affairs units within directorates-general. In addition, references to the Communication and guidance would be included in the Commission's internal manual of procedures and manual on legislative drafting. There would also be a reminder in the Commission's IT template for legislative drafting (Q 22).
68. Both JUSTICE and ILPA were clear that further and better guidance would be needed to give effect to the Communication (Q 75). Dr Toner, for ILPA, said: "We understand that a document has been prepared about how to do impact assessments on fundamental rights and how to deal with these issues within the impact assessment framework" (Q 81).
69. **We do not underestimate the importance of Commission staff being adequately trained and supported. Public confidence will be increased if that process is visible and open to comment and review. In particular, any guidance issued by the Commission should be made publicly accessible. This would go a long way to meet some of the concerns expressed by witnesses.**

#### **No independent check on Commission**

70. Statewatch described the Commission's procedure as being "self-regulating" (the Commission monitoring itself) without proper external scrutiny (p 52). The absence of independence in the methodology set out in the Communication was linked by ILPA with their criticism that it lacked democratic legitimacy because of the absence of Parliamentary involvement or control (Q 62).
71. Dr Ladenburger, for the Commission, emphasised that the aim of the Communication was to provide an explanation of what was happening inside the Commission. The Communication did not exclude the Commission from drawing on external expertise, such as the present Network of independent experts or, in the future, the Fundamental Rights Agency (Q 17). Dr Ladenburger also drew attention to the special position of the Legal Service: "It is not a political service, it is an independent service and it is its task ... to function as an independent reviser of fundamental rights questions" (Q 24).
72. Statewatch proposed two ways to overcome the lack of external scrutiny: ensuring, first, that all the documentation leading to compliance (including interdepartmental consultation on legal opinions) were publicly available for inspection, and, secondly, that national and European parliaments created committees empowered to scrutinise implementation and practice and make proposals for amendment (p 52).
73. We note the criticism from some witnesses that the Communication involves only internal monitoring by the Commission and therefore there is no independent control or supervision, even though the Legal Service is closely involved. **As we explain in the next Chapter, the European Parliament could have a greater involvement. There is also a continuing role for national parliaments.**



### Recitals/compliance statements

74. The 2001 Decision set out a standard form one sentence recital to be used in all cases where the instrument affected fundamental rights and added that, in appropriate cases, a second sentence might be included which would identify the rights of particular relevance and concern in the instant case.

#### 2001 Decision—standard form Charter recital

Legislative proposals or draft instruments which have a specific link with fundamental rights will incorporate the following recital as a formal statement of compatibility:

“This act respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.”

When certain rights and/or individual principles of the Charter are specifically involved, a second sentence may be added:

“In particular, this [act] seeks to ensure full respect for [right XX] and/or to promote the application of [principle YY] / [Article XX and/or Article YY of the Charter of Fundamental Rights of the European Union].”

75. Dr Ladenburger explained that in past practice the second sentence has been used more in cases where a legislative measure served to promote or implement a particular fundamental right and less so when there was simply one fundamental right particularly affected by the measure being proposed. Dr Ladenburger confirmed that the Commission intended to continue to use the first sentence as a standard recital. He thought that greater use might be made of a second sentence to identify a particular right or rights affected (Q 31).
76. The Law Society considered that the Communication did “little more than provide new guidelines for deciding which legislative proposals should contain the Charter recital. These will not necessarily increase the instances in which the recital is inserted, but simply ‘guide current practice’” (p 50). JUSTICE, however, were more positive about this development but considered that the criteria put forward to guide current practice when the Charter recital should be used needed to be explained in more detail (Q 76, p 26).
77. As mentioned above, witnesses generally welcomed the statement in Part IV of the Communication that whenever a legislative proposal contains the Charter recital, the explanatory memorandum should include a section briefly summarising the reasons pointing to the conclusion that fundamental rights have been respected.<sup>39</sup> Two questions arise.

#### *(a) Relationship of the explanatory memorandum and recitals*

78. As already mentioned, the changes to the explanatory memorandum are most welcome but the information may need to be added to or qualified if changes are made to the text during the legislative process. We raised the question whether it might be preferable to employ a more detailed recital, tailored to the specific legislation in question.

<sup>39</sup> Communication, at para 23.

79. Dr Ladenburger, for the Commission, did not exclude the possibility. The issue was how succinct the recital should and could be. In his view, there might be problems “because recitals are to be quite short and it is perhaps doubtful whether a convincing argument can be included in a recital”. That was why the Commission thought that the more appropriate place would be its explanatory memorandum. Depending on how successful the new procedure was in succinctly demonstrating fundamental rights compliance, then it would be for the legislators to consider whether it would be possible and advantageous to translate that into short language in the recitals (QQ 34, 41).
80. JUSTICE said that “the standard recital would be acceptable so long as the explanatory memoranda set out in detail the reasons” (Q 85).
81. **Further consideration needs to be given to the possibility of incorporating more specific and detailed recitals addressing any fundamental rights issues of legislation. But a recital, even if substantially expanded beyond the standard Charter form, may be no substitute for the more coherent approach proposed for explanatory memoranda provided that they are readily accessible. It is for consideration, we believe, whether explanatory memoranda, though forming no part of legislation, should be attached, as a matter of course, to the legislation. This could be done perhaps by a suitable footnote reference against the Charter or other recital in the preamble.**

*(b) Presumption of compatibility*

82. ILPA said: “Our concern, however, is that any compatibility assessments/statements/certificates and the like must not create a *prima facie* legal presumption that the legislative act is in fact fundamental rights compliant. The aggrieved individual who claims that his or her fundamental rights have not been respected must not be faced with a further legal hurdle to overcome in the quest for redress on account of the existence of a rights impact assessment or a fundamental rights certificate” (p 22). ILPA expressed concern that such statements could be used later as a “buffer” and act as an obstacle in subsequent judicial scrutiny (p 24). Dr Toner said: “these processes should not add spurious legitimacy that is not really deserved by the reality of what has gone on” (Q 79).
83. **Much will depend on the approach and attitude of the courts. What seems clear is that to date formal statements in recitals have not, as ILPA said, stopped overt condemnation of measures, particularly those in the area of immigration and asylum law, and their challenge, or threat of challenge, in the Court of Justice on grounds of incompatibility with fundamental rights.**<sup>40</sup>

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<sup>40</sup> ILPA referred to the Family Reunification Directive and the Asylum Procedures Directive.

## CHAPTER 4: MONITORING COMPLIANCE

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### Monitoring the passage of legislation

84. The Communication goes further than its predecessor, the 2001 Decision, by including a new separate section entitled, “Monitoring respect for fundamental rights in the work of the legislature”. The Commission, and especially the Group of Commissioners (described below), are to monitor “the work of the two branches of the legislative authority” (*i.e.* the Council of Ministers and the European Parliament) in order to ensure compliance with fundamental rights. The Communication continues: “The Commission will defend the standards for the protection of fundamental rights laid down in its proposals for legislation and will warn against any unjustified violation of them by the legislature”.<sup>41</sup>
85. We asked the Commission what was envisaged in practice. Dr Ladenburger explained that the Commission would react whenever amendments were presented by the Council or Parliament which it could not accept because it believed they violated fundamental rights. He made clear that the Communication would not require the introduction of specific new measures. It was merely a statement that the Commission was resolved to use its normal authority, as a participant in the legislative process, to defend human rights (Q 25).
86. ILPA was sceptical as to how effectively the Commission would maintain a strong human rights position. Experience in relation to Justice and Home Affairs matters had not been promising. Professor Guild said: “the engagement of the Commission officials in brokering a compromise among the Member States in the Council and with the Parliament has the tendency of compromising their position as an independent actor in assessing whether or not fundamental rights continue to be complied with”. Where the negotiations took place against the background of a political or Treaty deadline, “the political pressure to reach agreement at all costs leads to a diminution of standards”. ILPA did not have great confidence that the Commission would carry out effective monitoring throughout the legislative process. They doubted whether the new Group of Commissioners would add much (Q 89).
87. **Notwithstanding the strengths and merits of the methodology set out in the Communication, any system of proofing EU legislation which is solely internal to or dependent on the Commission is subject to two criticisms. First, as Statewatch pointed out, no system of ensuring that EU measures are compatible with fundamental rights can be effective unless the Council and the European Parliament also ensure, throughout their role in EU legislative and decision making processes, that final texts are compatible with fundamental rights. Second, however admirable internal regimes may be, experience, particularly in the United Kingdom context, would suggest that independent expertise from outside the administration may be needed to inform and, where necessary, act as a check on the actors during the legislative process.**

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<sup>41</sup> Communication, at para 28.

88. Baroness Ashton of Upholland believed that the European Parliament, and in particular the Committee on Civil Liberties, Justice and Home Affairs (“the LIBE Committee”), could play a role in monitoring the legislative process. The Minister said: “[The LIBE Committee] has the capacity to take on many of the functions of the Joint Committee on Human Rights as we know it in our Parliament. We must bear in mind, with the amount of proposals that come out of the Commission, the fact that it probably would be impossible to do all of them, but it certainly can look at, and does look at, proposals that are important to it. The Parliament has its own role in addition to that” (Q 122).
89. **Viewed from our perspective, and particularly in light of the work of the Joint Committee on Human Rights, it seems a little odd that the Commission should be monitoring the legislative process rather than the European Parliament. As the Minister suggested, there is a monitoring role for the LIBE Committee to develop. We greatly encourage it to do so and would welcome the opportunity to discuss with them how best this might be done and what assistance might be given by national parliaments.**

### **Annulment proceedings**

90. The Communication also states that the Commission reserves the right to initiate annulment proceedings (under Article 230 TEC) where it considers an infringement of fundamental rights has occurred and “there is no possibility of interpreting the act adopted as being compatible with fundamental rights”. The Communication acknowledges that such proceedings would be “a last resort”.<sup>42</sup>
91. We queried how timely and effective an approach annulment proceedings were to the problem. It is always possible for the Commission to withdraw or alter its proposed legislation before adoption by the Council (Article 250(2) TEC) and so avoid what would seem to have been the most blatant violation. Further, the European Court of Justice might give short shrift to an application to strike down the whole or part of a measure which the Commission had apparently (if only by its silence or inaction) accepted.
92. Dr Ladenburger did not accept this assessment: “First, the extent of and the conditions for the Commission’s right to withdraw are, as you know, not entirely settled in Community law yet; second, the Commission may find it preferable to bring a well defined human rights question before the Court of Justice rather than to block an entire legislative procedure in which it has high interest; and, third, this way of proceeding may be particularly appropriate where it is possible to challenge only particular detachable provisions of a legislative act rather than the act as a whole” (Q 26).
93. The NGOs acknowledged that the Commission’s ability to bring annulment proceedings in the event of an infringement of fundamental rights was potentially an important means of protecting fundamental rights. But again there was an element of scepticism in their comments. Statewatch said: “these are empty words if the Commission does not take the opportunity to bring proceedings against acts which deserve to be challenged on such grounds—in particular the asylum procedures Directive and Framework

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<sup>42</sup> Communication, at para 29.

Decision on data retention, which are due to be adopted shortly” (p 52). ILPA commented: “We look forward to the day when the Commission will match this high-sounding rhetoric with real action, but we remain to be convinced that we will see this any time soon” (p 25).

94. **The Commission’s right to bring annulment proceedings is very much a last resort and its exercise may be complicated by political and procedural considerations. We would prefer to see the Commission being more active during the negotiation of legislation in resisting any amendment which may violate fundamental rights and where necessary exercising its right to withdraw or alter its proposed legislation before adoption by the Council.**

### The Group of Commissioners

95. In September 2004, shortly after taking up his Presidency of the new Commission, Mr Barroso issued a Communication on the functioning of the Commission.<sup>43</sup> He set down key principles designed to govern the Commission’s work and to strengthen the collegiality of Commission policy-making and decision-taking. The 2004 Communication provides: “New momentum needs to be given to the use of groups of members of the Commission ... to prepare the work of the College and to provide policy input and guidance”.<sup>44</sup>
96. Five groups<sup>45</sup> of Commissioners have been established, including the Group on Fundamental Rights, Anti-discrimination and Equal Opportunities (“the Group”). It is intended that the groups should, within particular “families” of Commissioners or particular policy areas or issues, contribute to the better preparation and coordination of the Commission’s activity, taking account of the Commission’s priorities and the political guidance given by the President.<sup>46</sup> The groups are not empowered to take decisions on behalf of the College of Commissioners.

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<sup>43</sup> Commission’s Communication of 21.12.2004 on the functioning of the Commission and internal coordination ((SEC) 2004 1617/4).

<sup>44</sup> *Ibid*, at para 28.

<sup>45</sup> The Commission’s Rules of Procedure enable the President to set up working groups of Members. See Article 3 of *The Rules of Procedure of the Commission*. C (2000) 361, [2000] OJ L308/26.

<sup>46</sup> The 2004 Communication on the functioning of the Commission envisages the groups contributing to the improved implementation of the Commission’s political priorities with its Annual Work Programme, developing a medium term strategic vision for broad policy areas within their responsibility, and providing policy orientations at an early stage for important issues (*e.g.* prior to the drafting of Green Papers, Communication, work on impact assessment *etc.*). They would also prepare, at the request of the President, items to be placed on the agenda of Commission meetings.

**The Fundamental Rights, Anti-Discrimination and Equal Opportunities Group (CG4)**

Participation:

- Chair: President
- Vice Chair: Commissioner for Justice, Freedom and Security
- Commissioner for Institutional Relations and Communication Strategy
- Commissioner for Administration, Audit and Anti-fraud
- Commissioner for Information Society and Media
- Commissioner for Education, Training, Culture and Multilingualism
- Commissioner for Enlargement
- Commissioner for Development and Humanitarian Aid
- Commissioner for External Relations and European Neighbourhood Policy, and
- Commissioner for Employment, Social Affairs and Equal Opportunities.

Mandate: Its mandate is to:

- Drive policy and ensure the coherence of Commission action in the areas of fundamental rights, anti-discrimination, equal opportunities and the social integration of minority groups;
- Ensure that account is taken of gender equality in Community policies and actions, in accordance with Article 3.2 of the Treaty.

Proposed frequency: every 3 or 4 months.

Preparation: Mixed Cabinet-Services group, chaired by a Deputy Secretary-General.

The other groups are the Lisbon group (CG1), the Competitiveness Council Group (CG2), the External Relations Group (CG3), and the Communications and Programming Group (CG5).

97. Dr Ladenburger explained that the main remit of this Group in practice would be to prepare Commission initiatives for adoption by the College (Q 46). In this context we note that the Group has responsibility for taking forward the proposals to create an EU Fundamental Rights Agency (which would replace the European Monitoring Centre on Racism and Xenophobia (EUMC) and have a wider mandate) and a European Institute for Gender Equality (to combat sex discrimination in the EU and promote equality between women and men), as well as formulating an anti-discrimination strategy. Both these proposals are currently held under scrutiny by the Committee.<sup>47</sup>
98. The Communication states that in addition to the monitoring of compliance with the Charter carried out within the Directorates General, it is “nonetheless important that Members of the Commission, especially those in

<sup>47</sup> The proposal for a Fundamental Rights Agency (doc 10774/05) is held under scrutiny by Sub-Committee E. The proposal for a European Institute for Gender Equality (doc 7244/05) is held under scrutiny by Sub-Committee G.

the Group ... keep a close eye on its operation and the main results”.<sup>48</sup> JUSTICE welcomed the fact that the Communication envisages the Group being kept informed on a regular basis and hoped that information would not be limited to cases where fundamental rights have been subject to internal monitoring (p 26).

99. The Legal Service will in practice have the job of keeping the Group informed of developments and preparing a general appraisal of internal monitoring in 2007. The report is to be prepared in conjunction with the Justice, Freedom and Security DG and the Secretariat General of the Commission. The Communication indicates that the report may include proposals to amend or supplement the procedures described in the Communication.<sup>49</sup>
100. The Communication also envisages that the Group may produce policy guidelines “in very special cases where proposals require a careful balance between several opposing fundamental rights”. The Communication acknowledges that its guidelines could not exceed the margins for political discretion afforded for the provisions of the Charter.<sup>50</sup> The Law Society supported the idea that the Group should produce policy guidelines for the case where fundamental rights have to be weighed up against each other. Such guidelines should be drawn up with reference to the case of the European Court of Human Rights, which had much experience of balancing competing rights under the ECHR (p 50).
101. ILPA doubted whether the Group could play an effective monitoring role if they could not impose sanctions where inadequacy was found (QQ 68, 70). The Government were waiting to see how the Group proposed to take forward its work (Q 125).
102. **We wait to see how active the Fundamental Rights Group will be and what effect the Group will have on the development and implementation of Union legislation and policies enhancing respect for fundamental rights.**

### **Monitoring Member States**

103. The Communication is, as already mentioned, principally limited to the internal legislative processes of the Commission and its monitoring of others restricted to the law making and decision taking processes of the Council and the Parliament. We asked whether the Commission should be monitoring compliance with human rights in relation to Member States’ implementation and application of EU measures.
104. Dr Ladenburger replied that it was a conscious choice of the Commission to restrict the scope of the Communication to the institutions and first and foremost the Commission. Failure of a Member State properly to implement Community legislation, including a violation of fundamental rights, would be a matter on which the Commission could bring infringement proceedings under Article 226 EC (Q 39).

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<sup>48</sup> Communication, at para 25.

<sup>49</sup> Communication, at para 25.

<sup>50</sup> Communication, at para 25.

105. Statewatch acknowledged that monitoring Member States' implementation of Community law would entail a different process than that described in the Communication. The matter was, however, of "critical practical importance" and Statewatch urged the Commission to consider developing such a process: "One element of this could be the issue of interpretative communications by the Commission, suggesting interpretations of relevant EU measures that would ensure the full compatibility of those measures with human rights obligations. Another could be reflecting on the use of the infringement procedure" (p 51).
106. Both JUSTICE and ILPA saw a role for the Fundamental Rights Agency in monitoring Member States (QQ 92–93). As we explain below, the role of the Agency in this regard is controversial.
107. **Ensuring Member States' respect for fundamental rights within the scope of application of EU law is a matter of concern, as recent developments surrounding the European Arrest Warrant demonstrate.<sup>51</sup> Monitoring Member States is, however, a matter outside the scope of the present Communication.**

### Strengthening the role of Parliaments

108. As mentioned above (paras 70–73), attention has been drawn to the lack of external control or supervision of the mechanisms proposed in the Communication.
109. JUSTICE believed that the Fundamental Rights Agency and national parliaments had an external scrutiny role to play (Q 95). ILPA looked more to the European Parliament: "we have seen the democratic arm of the European Union, the elected part, perhaps more sensitive to fundamental rights issues than any of the other institutions, barring of course the ombudsman" (Q 99). Professor Guild said: "It seems to me that the protection of fundamental rights in any liberal democracy is intrinsically tied to the Parliament; it is the job of the Parliament, it is not a job of the Executive" (Q 100). She did not believe that the proliferation of bodies was necessarily the answer, but the reinforcement of existing committee structures (including the LIBE Committee) and widening the remit might provide a more effective mechanism (Q 101).
110. **The Communication views the European Parliament as one subject for the monitoring to be undertaken by the Commission. But it prompts the question whether the Parliament, and in particular the LIBE Committee, should also assume an active role in monitoring draft legislation for compliance with fundamental rights. As Statewatch suggests, consideration also needs to be given to whether more could be done by national parliaments. Greater involvement by the European Parliament and by national parliaments would go a long way to address the perceived democratic deficit in the mechanisms promoted by the Communication.**

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<sup>51</sup> The German Constitutional Court has recently struck down the way in which Germany has implemented the Framework Decision on the European Arrest Warrant. See *Bundesverfassungsgericht* Press Release no 64/2005 of 18 July 2005.



## The Fundamental Rights Agency

111. The Communication envisages a role for the Fundamental Rights Agency (“the Agency”): “Its activities and work ... should be used as input for the methodology”.<sup>52</sup> At present the Agency is merely a proposal,<sup>53</sup> but the Commission is proceeding on the basis that it will be operational in 2007. However, the extent of the Agency’s mandate and its relationship with the EU institutions and the Member States are, as the Minister explained, subjects on which there are widely differing views (Q 127). Baroness Ashton of Upholland said: “We do not see it as having a role with individual Member States but we recognise that it would want to work across Member States ... in looking at analysis of data, making sure we have consistency of view, and so on” (Q 128).
112. JUSTICE expressed concern about the reference to the Agency being “used as input for the methodology”. JUSTICE said: “it is not quite clear what is understood by this, especially when uncertainty still exists surrounding the exact scope and remit of the FRA” (p 26). Statewatch was also critical of the Communication for not going far enough in spelling out the role that the Agency might play. Nor did the Communication address the position of the existing Network of independent experts (p 52).
113. JUSTICE saw the Agency as having a role in pre-legislative scrutiny as well as implementation (Q 92). The Law Society also wanted the new Agency to undertake pre-legislative scrutiny: its expertise should not be limited to formal consultations undertaken by the Commission but should be sought during preparations of any proposal affecting fundamental rights. In the Law Society’s view, the expertise and data collected by the Agency “should feed into the Commission’s impact assessments and its legal analysis of compatibility with the Charter” (p 50).
114. But the Government were cautious as to whether the Agency should take on such a role because of the possible implications for resources and therefore for what else the Agency would be able to do (Q 129).
115. We asked the Commission whether it was envisaged that the Agency would act as a scrutineer during the process of the legislation, with its own procedures and conclusions being open to the public. Dr Ladenburger thought that the Agency’s input would not be limited to the methodology itself. It would also address substantive questions, in the sense that the Commission would be able to make use of the research, data, analyses etc of the Agency. Dr Ladenburger accepted that the possibility of the Agency scrutinising proposals and draft legislation was something to be considered (QQ 18-19).
116. **As mentioned above, the Fundamental Rights Agency is currently only a proposal and there are differing views on what its role should be, not just in relation to draft EU legislation but also the Member States. There is also a need to make clear how the work of the Agency would relate to the well-established role of the Council of Europe**

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<sup>52</sup> Communication, at para 26.

<sup>53</sup> Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and a proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union. COM(2005) 280 final. The proposal is currently held under scrutiny—doc 10774/05.

**concerning the definition and safeguarding of human rights.<sup>54</sup> The proposal raises a number of concerns and is currently held under scrutiny. We shall pursue these questions further in that context.**

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<sup>54</sup> *The Hague Programme: a five year agenda for EU justice and home affairs* (10th Report, 2004–05, HL Paper 84, at para 15).

## CHAPTER 5: PUBLICITY

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117. The final section of the Communication deals with publicising the Commission's internal monitoring of fundamental rights. Although the Communication speaks of internal monitoring forming the "subject of an appropriate communication *targeted at European citizens*"<sup>55</sup> it seems that no further Communication from the Commission is anticipated.

### Aim and purpose

118. As already mentioned, the Communication replaces a 2001 Decision which was very little known, even within the Commission. A key objective of the new Communication is to raise awareness of the fundamental rights implications of EU legislation and of what the Commission is doing to seek to ensure compliance.

119. The purpose of increasing publicity is threefold:

- to reinforce the credibility of the Commission's own initiatives;
- to promote the image of the Charter "as an essential vehicle of the European civic identity based on common values";
- to encourage citizens and civil society to assert their fundamental rights in consultations held by the Commission.<sup>56</sup>

### Increasing publicity at three levels

120. The Communication contemplates the public being informed at three levels. First, the Communication itself is a published document. Second, impact assessments and explanatory memoranda will be publicly available. They should alert the public as to how specific proposals address human rights concerns. Finally, at the pre-legislative consultation stage, the Commission will draw attention to the rights set out in the Charter and invite interested parties to say what concerns about human rights they have.<sup>57</sup>

121. Accordingly, at several stages in the development of any particular policy or proposal which might have an impact on fundamental human rights, publicity will be given to what is happening and interested members of the public, including individuals and NGOs, should have the opportunity to make their comments and seek to influence the Commission. Dr Ladenburger said: "Certainly one hope connected to this Communication is that any such contributions will be encouraged and intensified, and also that as public knowledge about this internal mechanism will spread out beyond those NGOs that are specialising in human rights concerns, this will encourage more widely members of civil society to rely on the Charter and on this mechanism" (Q 52).

122. The Commission's proposal to give extra publicity to its actions was generally welcomed. However, some witnesses thought the Commission could go further. ILPA expressed disappointment with some aspects of Commission consultation exercises. Professor Guild: "I think that leaves us

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<sup>55</sup> Communication, at para 30.

<sup>56</sup> Communication, at para 31.

<sup>57</sup> Communication, at para 32.

with constantly having to reassess the mechanisms by which consultation with civil society takes place in the drafting of legislation” (Q 102). There was even less room to influence the Commission at the later stages: “the Commission officials responsible for shepherding it through its legislative process are already deep in the negotiations with the Parliament and with the Council” (Q 103).

123. Dr Metcalfe, for JUSTICE, contrasted the domestic position: “in the United Kingdom, the human rights organisations have a standing four-monthly meeting with the Minister for Human Rights in the Department for Constitutional Affairs. It is not necessarily an ideal arrangement, but it is nonetheless a useful step in having regular contact between human rights groups and the Executive. It is possible that something similar could be arranged in relation to the European Union having regular meetings with the Commissioners possibly” (Q 104).
124. **There is no doubt that the Communication is an improvement on the 2001 Decision, but it would have been even better had it provided practical ideas and means for improving communication with outsiders and enabling them to have an input. To encourage assertion of rights is the aim, but it is not best achieved by anything in the Communication. There need to be clearer mechanisms for NGOs and others to be able to identify problems and, in the language of the Communication, “assert their fundamental rights” in the preparation and passage of EU legislation. This is something to which we would urge the Commission to give further consideration.**

### **Reviewing the Communication**

125. The Communication is silent on how the Commission might monitor the effects of the new Communication within the Commission itself. Might some independent group of experts provide an annual report to the President? Or might this be another possible job for the Fundamental Rights Agency?
126. Baroness Ashton of Upholland agreed that this was an issue which should be taken up with the Commission. But the Government would want to establish what the Commission was intending to do and also whether the Council would be looking at the matter, perhaps on the basis of a report from the Commission or in discussion with the Parliament or the LIBE Committee (Q 123).
127. **We welcome the Government’s positive approach to the need to monitor application of the Communication by the Commission. Should the opportunity arise, particularly during the United Kingdom Presidency, we urge the Government to initiate a discussion in the Council, drawing attention to the importance of the Communication for the standing of EU legislation and inviting the Commission to produce an annual report on the working of the Communication.**

## CHAPTER 6: IMPLICATIONS OF THE COMMUNICATION FOR OUR OWN WORK

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128. As mentioned at the outset of this Report, compliance with fundamental rights is an important aspect of our own scrutiny of EU legislation. The issue is particularly acute in relation to initiatives in the area of Justice and Home Affairs (for example, immigration and asylum policy, data protection, criminal law and police co-operation) but is also relevant in relation to a range of other EU policy and activities, including relations with third States. We have, for some time now, been considering how our scrutiny work might be improved in this respect.
129. In our 2002 Report on review of scrutiny of EU legislation we recommended that the Government's Explanatory Memoranda (EMs) delivered to Parliament should include "a section on any potential human rights issues. The Government should consider making a formal statement as is now issued on primary legislation, that, in the view of the Minister signing the EM, the proposal is compatible with the provisions of the Human Rights Act 1998".<sup>58</sup> In their Response to that Report, the Government said: "Where human rights issues arise, the EM will of course draw attention to them in the section on legal implications. The Government will in future offer a preliminary view on the compatibility of the proposal with the 1998 Human Rights Act. The EU is in any case, by virtue of Article 6(2) of the TEU, committed to respect fundamental rights as guaranteed by the European Convention on Human Rights". Discussions have since been going on to see how human rights issues might best be dealt with in EMs.
130. We asked whether the Government's view had developed in the light of recent experience, including the volume of work in the area of justice and home affairs (which seems likely to increase further under the Hague Programme). If the Commission's "verification" of legislative proposals extends to the Charter why should not the Government's preliminary view on compatibility also encompass the Charter and not just the ECHR? Baroness Ashton of Upholland replied: "We have never been shy in expressing our views on proposals that have come from the Commission, either ones with which we are in full agreement or others perhaps where we take a slightly different view. Certainly we would expect in the course of looking at the proposals that come forward to take note of what has been said in this context and to look at that in the context both of our own legislation and also in terms of the human rights legislation and also in terms of the Charter. If we felt there was something where we had a difference of opinion I think we would say so" (Q 136).
131. But it was not clear whether the Government would in the context of EMs delivered to Parliament express a view on compatibility with the Charter. The Minister said: "it would be my expectation that we would behave in the context of the proposals in Europe in exactly the same way as we behave in the context of our proposals on domestic legislation. We have as a Government taken a view about the importance of human rights and I expect that to continue in our attitude towards Europe" (Q 138).

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<sup>58</sup> *Review of Scrutiny of European Legislation*. 1st Report, 2002–03, HL Paper 15, at para 48.

132. We are conscious of the burdens which the scrutiny timetable may impose on Departments. An EM has to be delivered to Parliament no later than 10 working days from the deposit of the document to which it relates. We accept that it may take a little longer where documents pose special problems. But a general extension for any proposal raising a fundamental rights issue would, in our view, be unacceptable. The scrutiny committees need to be able to start their work as soon as possible and it is not infrequent that we face a tight political or legislative Brussels timetable.
133. On the other hand it is our experience that a thorough analysis of all EU documents deposited for scrutiny would be time consuming and in many cases scarce resources would be taken up endeavouring to prove a negative (*i.e.* that there were no fundamental rights obstacles or objections to the document in hand).
134. **We therefore conclude that, while we will continue to look at all documents for human rights implications, the obligation on the Government to include a paragraph (not just a statement of compliance) on fundamental rights in EMs should be restricted to draft EU legislative acts (*e.g.* regulations, directives, framework decisions). That paragraph should address but not be limited to ECHR rights. Appreciation of fundamental rights in the widest sense (including the Charter) should be part of all Ministers', and their officials', mindset. The Charter may have its imperfections but in many respects it gives a clear statement of rights generally identifiable and accepted under international and/or Community law.<sup>59</sup> Further, if the Commission has done its homework under the Communication (by including sections in explanatory memoranda addressing fundamental rights) then the burden on Departments should not be great.**

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<sup>59</sup> The Explanatory Notes to the Charter, prepared by the Praesidium of the Convention, set out the derivation of each Charter Article. CHARTE 4473/00 CONVENT 49, of 11 October 2000.

## **CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS**

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135. We welcome the Communication. It is a useful, though limited, Commission initiative to improve the quality of internal monitoring of EU legislation in order to ensure its compatibility with fundamental rights. The Communication does not, and could not, even if it were intended to do so, address the wider issues raised by our witnesses. It is nonetheless a significant step by the Barroso Commission which exposes the Commission's legal reasoning in relation to particular proposals and also challenges the other institutions, particularly the Council and the Parliament, and the Member States to justify their actions (paragraphs 26 & 28).

### **Establishing a human rights culture**

136. Much of the Communication is not new but builds on existing provisions and practice. It is nonetheless a vast improvement on the 2001 Decision it replaces simply by reason of the fact that it is in the public domain. It is clear that if awareness and standards are to be raised, the Communication will have practical implications for the education and training of Commission staff and for the relationship of the Commission with civil society (paragraph 18).
137. We share the hope that the Communication will result in a raising and maintenance of standards of compliance. While undoubtedly actions speak louder than words in this context, it would be somewhat unfair to be overly critical of the Commission and the new Communication, which is trying to lay down and instil a number of procedures aimed at ensuring that fundamental rights are not just a lot of "noise" but actually mean something and are a reality in EU legislation (paragraph 22).

### **Reinforcing the present regime—impact assessments, explanatory memoranda and recitals**

138. It would be helpful if the Commission could identify and publish the criteria, and any guidance given, for deciding to carry out an impact assessment of a proposal not appearing on the Work Programme. In principle all legislative proposals should be subject to impact assessment. Therefore, in any instance where no impact assessment has been carried out, and especially any proposal relating to freedom, security and justice issues, the Commission should set out the reasons for not doing so in the explanatory note accompanying the proposal (paragraph 38).
139. It is our experience that Third Pillar measures commonly raise issues relating to fundamental rights. We have no doubt that impact assessments are particularly important in respect of such proposals. Indeed the failure of Member States to provide background information and explanations for the measure being proposed makes our own scrutiny work that much more difficult and places a further burden on the Government faced with our requests for clarification. We therefore recommend that Member States should carry out impact assessments before bringing forward any proposal under the Third Pillar. Any such proposal should also be supported by a full explanatory memorandum including a section dealing with fundamental rights (paragraph 41).

140. The application of the Communication to delegated or implementing legislation (comitology) is a matter to be kept under review (paragraph 44).
141. We doubt whether the current categories of economic and social rights issues used in impact assessments will be sufficient to provide for the analysis of all relevant fundamental rights. We regret that the Commission has not taken the opportunity to include a separate (fourth) section for fundamental rights. We are not persuaded by the argument that a separate section would result in “needless repetition”. The Commission, when formulating a proposal, needs to consider both economic policies and fundamental rights very carefully. Having a separate category for fundamental rights in impact assessments would greatly assist in such consideration (paragraph 56). It would also help to avoid the risk of rights being overlooked in some cases (paragraph 50). It might go some way in countering the perceived shift in the balance in the relationship between fundamental rights and exceptions (paragraph 54).
142. It is a matter of concern that the impact assessment might be misused to justify a decision to go ahead rather than simply inform the decision-taking. This is something on which we will need to keep an eye (paragraph 52).
143. The preparation of impact assessments has substantial resource implications for the Commission. The need to identify and examine the fundamental rights implications of proposals during that process will increase that burden. But it is a cost which we believe is necessary if better regulation is to be achieved (paragraph 57).
144. We welcome the inclusion in the explanatory memorandum of a special section summarising the reasons for concluding that fundamental rights have been respected. The Commission is to be commended. Its strategy is not, however, without risk: disclosing its position in the explanatory memorandum may increase the Commission’s exposure to criticism and challenge (paragraph 60).
145. Serious thought needs to be given to how explanatory memoranda and other supporting documentation are kept up to date as proposals proceed through the legislative machine. The 2003 Inter-Institutional Agreement on Better Regulation only partly addresses the problem. It would be desirable, where changes are adopted, for the institution or institutions concerned to provide a supplementary memorandum explaining the change and how compliance with fundamental rights is assured (paragraph 64).
146. We do not underestimate the importance of Commission staff being adequately trained and supported. Public confidence will be increased if that process is visible and open to comment and review. In particular, any guidance issued by the Commission should be made publicly accessible (paragraph 69).
147. Further consideration needs to be given to the possibility of incorporating in EU legislation more specific and detailed recitals addressing any fundamental rights issues. But a recital, even if substantially expanded beyond the standard Charter form, may be no substitute for the more coherent approach proposed for explanatory memoranda provided that they are readily accessible. It is for consideration whether explanatory memoranda should be attached, as a matter of course, to the legislation, perhaps by a suitable footnote reference against the Charter or other recital in the preamble (paragraph 81).



148. The extent to which compatibility statements or certificates create a legal presumption that a legislative act is fundamental rights compliant will depend on the approach and attitude of the courts. To date formal statements in recitals have not stopped overt condemnation of measures, particularly those in the area of immigration and asylum law, and their challenge, or threat of challenge, in the European Court of Justice on grounds of incompatibility with fundamental rights (paragraph 83).

### **Monitoring compliance**

149. Notwithstanding the strengths and merits of the methodology set out in the Communication, any system of proofing EU legislation which is solely internal to or dependent on the Commission is subject to two criticisms. First, no system of ensuring that EU measures are compatible with fundamental rights can be effective unless the Council and the European Parliament also ensure, throughout their role in EU legislative and decision making processes, that final texts are compatible with fundamental rights. Second, however admirable internal regimes may be, experience, particularly in the United Kingdom context, would suggest that independent expertise from outside the administration may be needed to inform and, where necessary, act as a check on the actors during the legislative process (paragraph 87).

150. Viewed from our perspective, and particularly in light of the work of the Joint Committee on Human Rights, it seems a little odd that the Commission should be monitoring the legislative process rather than the European Parliament. The European Parliament could have a greater involvement in monitoring compliance of legislative proposals with fundamental rights. There is also a continuing role for national parliaments (paragraph 73). There is a monitoring role for the Parliament's Civil Liberties, Justice and Home Affairs Committee to develop. We greatly encourage it to do so and would welcome the opportunity to discuss with them how best this might be done and what assistance might be given by national parliaments (paragraph 89). Greater involvement by the European Parliament and by national parliaments would go a long way to address the perceived democratic deficit in the mechanisms promoted by the Communication (paragraph 110).

151. The Commission's right to bring annulment proceedings (under Article 230 TEC) is very much a last resort as a remedy to secure compliance with fundamental rights in EU law-making and its exercise may be complicated by political and procedural considerations. We would prefer to see the Commission being more active during the negotiation of legislation in resisting any amendment which may violate fundamental rights and where necessary exercising its right to withdraw or alter its proposed legislation before adoption by the Council (paragraph 94).

152. We wait to see how active the Commissioners' Fundamental Rights Group of Commissioners will be and what effect the Group will have on the development and implementation of Union legislation and policies enhancing respect for fundamental rights (paragraph 102).

153. Ensuring Member States' respect for fundamental rights within the scope of application of EU law is a matter of concern, as recent developments surrounding the European Arrest Warrant demonstrate. Monitoring Member

States is, however, a matter outside the scope of the present Communication (paragraph 107).

154. The Fundamental Rights Agency is currently only a proposal and there are differing views on what its role should be, not just in relation to draft EU legislation but also the Member States. There is also a need to make clear how the work of the Agency would relate to the well-established role of the Council of Europe concerning the definition and safeguarding of human rights. The proposal is currently held under scrutiny and these are questions that we shall pursue further in that context (paragraph 116).

### **Publicising the Commission's internal monitoring of fundamental rights**

155. There is no doubt that the Communication is an improvement on the 2001 Decision, but it would have been even better had it provided practical ideas and means for improving communication with outsiders and enabling them to have an input. To encourage assertion of rights is the aim, but it is not best achieved by anything in the Communication. There need to be clearer mechanisms for NGOs and others to be able to identify problems and, in the language of the Communication, "assert their fundamental rights" in the preparation and passage of EU legislation. This is something to which we would urge the Commission to give further consideration (paragraph 124).
156. We welcome the Government's positive approach to the need to monitor application of the Communication by the Commission. Should the opportunity arise, particularly during the United Kingdom Presidency, we urge the Government to initiate a discussion in the Council, drawing attention to the importance of the Communication for the standing of EU legislation and inviting the Commission to produce an annual report on the working of the Communication (paragraph 127).

### **Implications for the work of the Committee**

157. In our 2002 review of scrutiny of EU legislation we recommended that the Government's Explanatory Memoranda (EMs) delivered to Parliament should include a section on any potential human rights issues. We have reviewed that recommendation in the light of the Commission's Communication. We conclude that, while we will continue to look at all documents for human rights implications, the obligation on the Government to include a paragraph (not just a statement of compliance) on fundamental rights in EMs should be restricted to draft EU legislative acts (*e.g.* regulations, directives, framework decisions). That paragraph should address but not be limited to ECHR rights. Appreciation of fundamental rights in the widest sense (including the Charter) should be part of all Ministers', and their officials', mindset. The Charter may have its imperfections but in many respects it gives a clear statement of rights generally identifiable and accepted under international and/or Community law. Further, if the Commission has done its homework under the Communication (by including sections in explanatory memoranda addressing fundamental rights) then the burden on Departments should not be great (paragraph 134).

## **APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)**

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The members of the Sub-Committee which conducted this inquiry were:

Lord Borrie  
 Lord Brown of Eaton-under-Heywood (Chairman)  
 Lord Clinton-Davis  
 Lord Goodhart  
 Lord Grabiner  
 Lord Henley  
 Lord Lester of Herne Hill  
 Lord Lucas of Crudwell and Dingwall  
 Lord Neill of Bladen  
 Lord Norton of Louth

### **Declaration of Interests**

Lord Lester of Herne Hill

*Co-editor of Butterworths Human Rights Law and Practice as well as being a contributor*

*Unremunerated Director of The Odysseus Trust Ltd (a not-for-profit company limited by guarantee that conducts research into human rights and constitutional matters and gives advice and information on all-party basis)*

*Governor, British Institute for Human Rights*

*Hon. President and Board Member of INTERIGHTS (International Centre for the Legal Protection of Human Rights)*

*Member of Expert Counsel Panel, LIBERTY*

*Member of the Council, JUSTICE*

*Complimentary Member, Amnesty International*

Lord Goodhart

*Trustee, Fair Trials Abroad*

*Vice Chair of Council, JUSTICE*

## **APPENDIX 2: LIST OF WITNESSES**

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The following witnesses gave evidence. Those marked \* gave oral evidence.

- \* Baroness Ashton of Upholland, Parliamentary Under Secretary of State,  
Department for Constitutional Affairs  
Fair Trials Abroad
- \* Immigration Law Practitioners' Association (ILPA)
- \* JUSTICE
- \* Dr Clemens Ladenburger, Legal Service, European Commission  
The Law Society of England and Wales  
Statewatch

## APPENDIX 3: REPORTS

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### Recent Reports from the Select Committee

Evidence from the Minister for Europe—the European Council and the United Kingdom Presidency (10th Report, Session 2005-06, HL Paper 34)

Ensuring Effective Regulation in the EU (9th Report, Session 2005-06, HL Paper 33)

Evidence by Commissioner Franco Frattini, Commissioner for Justice, Freedom and Security on Justice and Home Affairs Matters (1st Report, Session 2005-06, HL Paper 5)

Finland's National Parliamentary Scrutiny of the EU (16th Report, Session 2004-05, HL Paper 103)

Strengthening National Parliamentary Scrutiny of the EU—the Constitution's subsidiarity early warning mechanism (14th Report, Session 2004-05, HL Paper 101)

### Recent Reports prepared by Sub-Committee E (Law and Institutions)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II, and Better Regulation (8th Report, Session 2005-06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005-06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004-05, HL Paper 95)

The Hague Programme: a five year agenda for EU Justice and Home Affairs (10th Report, Session 2004-05, HL Paper 84)—*Joint Report with Sub-Committee F (Home Affairs)*

Procedural Rights in Criminal Proceedings (1st Report, Session 2004-05, HL Paper 28)









# Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE E)

WEDNESDAY 29 JUNE 2005

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Present	Borrie, L	Lester of Herne Hill, L
	Brown of Eaton-under- Heywood, L (Chairman)	Lucas of Crudwell and Dingwall, L
	Clinton-Davis, L	Neill of Bladen, L
	Goodhart, L	Norton of Louth, L

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## Memorandum by the Commission Services

In the context of the above referenced inquiry, this note from the Commission services replies to questions asked by Dr Christopher Kerse, Legal Adviser to the Select Committee, by e-mail of 14 June 2005 to Dr Clemens Ladenburger, Member of the Legal Service of the Commission. The note follows the order of questions asked by Dr Kerse (restated in *bold and italics*) on the two topics (a) Current practice, and (b) the Group of Commissioners.

### (a) Current practice

*Please describe the current internal drafting process and timetable. At what stages and with whom does inter-departmental consultation take place?*

The basic rules on interdepartmental co-ordination and consultation are set out in Article 21 of the Commission's Rules of Procedure<sup>1</sup> as well as in the "Rules Giving Effect" to these Rules of Procedure ("Implementing Rules"), in particular those adopted in respect of Article 21 of the Rules of Procedure<sup>2</sup> (see the relevant extracts in Annex 1).

*The following practical indications may be added:*

- (a) In practice the timetable varies in the light of the nature, scope and urgency of the legislative initiative in question.

Generally speaking, the following stages of interdepartmental co-operation may be distinguished:

- For all initiatives submitted to impact assessment (for details, see below), the lead DG for the initiative must involve all interested Directorates General ("DGs") in the impact assessment work, which will start well before a concrete draft proposal is elaborated (for details, see below).
- Points 1 to 3 of the Rules Giving Effect deal with the informal "interdepartmental co-ordination" (or: "pre-consultations") with other departments concerned, which the lead DG is expected to engage in as soon as work on a concrete draft begins, and long before the mandatory formal interdepartmental consultation (or: "Interservice Consultation") required by point 4 of the Implementing Rules.

Responsibility for this early informal co-ordination lies with the lead department, which should contact other departments with a legitimate interest in the matter in hand as soon as work on drawing up proposals begins. It should tell them informally what the likely stages will be and consult them on the planned approach. It will also draw up a timetable for the work, allowing sufficient time for formal consultation of the other departments concerned and for the proposal to be submitted for a decision.

As work progresses, the lead department and the departments associated or consulted will continue to exchange the necessary information.

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<sup>1</sup> O.J. L 308/26 of 8.12.2000.

<sup>2</sup> Document C(2001)1 of 12.1.2001 ([http://europa.eu.int/comm/secretariat\\_general/regdoc/rep/3/2001/EN/3-2001-1-EN-1-0.Pdf](http://europa.eu.int/comm/secretariat_general/regdoc/rep/3/2001/EN/3-2001-1-EN-1-0.Pdf)).

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The Commission's internal rules certainly leave considerable flexibility to the lead DG on how to organise this informal stage. However, lead DGs have to keep in mind if they neglect that stage they run the risk that an initiative may encounter major opposition and therefore be held up or even abandoned at the stage of formal Interservice Consultation. While associated DGs often reserve their detailed comments and indeed their final judgment for the formal Interservice Consultation, this early informal co-ordination is very helpful in removing major obstacles and clarifying basic questions early on in the process.

- For many initiatives of major importance, the DGs will carry out this type of early co-ordination *on the basis of a preliminary draft* of the legislative proposal, which is informally passed for comments to the other DGs concerned.
- In particular, such early co-ordination on a *preliminary* draft becomes necessary where the lead DG wishes to use a “departmental working document”, containing a draft of the future initiative, in prior public consultations, which the Commission departments are now normally expected to conduct before proposing important legislative initiatives to the Commission for decision<sup>3</sup>.
- The formal interdepartmental “Interservice Consultation” (CIS), within the meaning of point 4 of the Implementing Rules, is launched by the lead department once a proposal, generally intended for adoption by the Commission, is sufficiently far advanced within the lead department, in collaboration, from the outset, with the other departments most closely involved. It is therefore an advanced step in interservice co-ordination whereby the lead department asks *all* the Directorates-General and services with a legitimate interest in the proposal for their opinion.

The CIS is the crucial step in the process of interdepartmental co-operation, in which all departments concerned are invited take an official stance on a draft initiative. Its procedure is regulated in detail at points 4 to 9 of the Implementing Rules, and it is carried out by means of a central database (CIS-Net) accessible by all departments.

- (b) As to the choice of departments to be formally consulted, it is in principle for the lead DG to evaluate, under the oversight of the Secretariat General (“SG”), which departments are “*concerned by virtue of their powers or responsibilities or the nature of the subject*”, within the meaning of Article 21 of the Rules of Procedure. This is subject to the mandatory consultation of the Legal Service (see below), the SG, and the other departments specifically set forth in Article 21 and in point 5 of the Implementing Rules, and, in the future, subject to point 15 of communication COM (2005)172.

### ***How soon is the Legal Service involved?***

(a) It is standard practice for the Legal Service to be consulted/associated from the outset in any upstream interdepartmental co-ordination concerning legal instruments. Whenever during such interdepartmental consultation the lead DG shares with other DGs an early draft of such a legal instrument, the Legal Service is included amongst the DGs consulted. Furthermore, the Legal Service is always consulted on any “working draft” which the lead department wishes to use for public consultations.

At that early stage, however, the Legal Service will often limit itself to preliminary reactions on any major legal questions and to advice on the basic choices to be made, whilst reserving its detailed scrutiny and final opinion for the Interservice Consultation stage.

(b) Consultation of the Legal Service is mandatory under Article 21 of the Commission's Rules of Procedure at the stage of the formal CIS, for all “drafts or proposals for legal instruments and on all documents which may have legal implications”.

The CIS is the decisive moment for the Legal Service to perform its role of scrutinising exhaustively and formally the legality of the entire draft legislative proposal, including respect for fundamental rights. The Legal Service's scrutiny is based on the lead DG's draft of the initiative which reflects that DG's formal position, accompanied by a draft explanatory memorandum (in which, under Communication COM (2005) 172, the lead DG will have to set out its proposed justification for respect of fundamental rights), as well as on a draft impact assessment report and preparatory documents drawn up in the course of the impact assessment.

<sup>3</sup> See President Barroso's Communication to the Commission on the Functioning of the Commission and Internal Co-ordination, SEC (2004)1617/4, ([http://europa.eu.int/comm/secretariat\\_general/regdoc/rep/2/2004/EN/2-2004-1617-EN-4-0.Pdf](http://europa.eu.int/comm/secretariat_general/regdoc/rep/2/2004/EN/2-2004-1617-EN-4-0.Pdf)); see relevant extracts in Annex 2).

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This formal scrutiny by the Legal Service at the stage of Interservice Consultation is the key element of the methodology for checking fundamental rights compliance as set out in the communication COM (2005)172.

It should be noted that the authority of the opinions rendered by the Legal Service on that occasion is buttressed by the Commission's Rules of Procedure, which provide that any recourse to the written procedure or a procedure of empowerment for adoption of any Commission proposal requires endorsement by the Legal Service. In other words, a negative opinion of the Legal Service can only be overcome by the College itself. In practice this rarely occurs, given that the Director-General of the Legal Service is directly placed under the authority of the President and that he takes part in all meetings of the College (and all weekly preparatory meetings of the Heads of Cabinet) and may himself address the College of Commissioners or their heads of Cabinet directly on any legal concerns.

***Is DG Freedom, Security and Justice regularly consulted and if so when in the drafting process?***

A practice which is already emerging is that other DGs associate DG JLS in the preparation of proposals raising issues relating to fundamental rights. This practice is now enshrined in Communication COM(2005)172 which requires lead DGs to ensure formal consultation of that DG in such cases.

***Will the DG draftsman be legally qualified and/or have knowledge of the Charter and other international fundamental rights instruments?***

Obviously draftsmen in the various DGs that may act as lead services have a variety of professional backgrounds and are therefore not always lawyers. However, many DGs have established their own Units for Legal Affairs, which are staffed with lawyers and will be closely involved from the outset in the drafting of legislative proposals by their own DG.

Moreover, it is precisely the function of the Legal Service to provide full legal expertise to all departments on all questions of law, including respect for fundamental rights. This is why internal rules and practice place strong emphasis on early co-ordination with the Legal Service and on its role in the CIS.

The Charter is certainly very widely known amongst Commission officials generally; the DGs' Units for Legal Affairs and the members of the Legal Service have expertise also on other relevant international fundamental rights instruments.

***How early in the process are impact assessments and explanatory memoranda prepared?***

*Impact Assessment:*

A comprehensive overview of procedure and practice of Impact Assessment in the Commission is given in the recently established Revised Guidelines on Impact Assessment<sup>4</sup>.

The following general remarks may be made in reply to the question:

- Work on impact assessment starts very early on, normally well in advance of the preparation of the concrete proposal.
- It can begin prior to an initiative being presented for inclusion in the Commission's Annual Policy Strategy (preparations for which begin more than one year in advance of the year to which it applies, and which will be adopted by the Commission in February of the year preceding the year covered).
- For inclusion as an initiative in the APS, the Commission service must produce an Impact Assessment Roadmap which sets out the work already undertaken and the planned timetable and orientations for future work. At this stage, the option of taking no initiative at all must also be considered.
- When an APS initiative is subsequently taken up as an item on the Commission's Annual Work Programme (to be adopted in November prior to the year covered), the Impact Assessment Roadmap needs to be updated to take account of developments in the impact assessment work since the APS.

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<sup>4</sup> Document SEC (2005) 791 of 15.6.2005 ([http://europa.eu.int/comm/secretariat\\_general/impact/docs/SEC2005\\_791\\_IA\\_per\\_cent20\\_guidelines\\_annexes.pdf](http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA_per_cent20_guidelines_annexes.pdf)).

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- Items that did not appear in the APS, but which are presented for inclusion in the Commission Work Programme, also require an Impact Assessment Roadmap.
- All Impact Assessment Roadmaps are published at the same time as the Commission Work Programme.
- It is difficult to give more precise indications on the concrete organisation and timetable of Impact Assessment, which will depend on the scope of the likely impacts (principle of proportionate analysis<sup>5</sup>). However, the Commission's Impact Assessment web site<sup>6</sup> contains illustrative examples both for completed Impact Assessment Reports and for Impact Assessment Roadmaps.

#### *Explanatory Memorandum*

Explanatory memoranda are prepared at a much later stage than impact assessments. They are drawn up concurrently with the draft of the text of the legislative proposal itself. Both form part of the same COM document submitted to the formal CIS and for subsequent approval by the College.

#### ***In practice, what criteria are presently employed to decide whether to include the standard recital on the Charter? Are DGs inclined to err on the side of caution and include the recital?***

Since 2001 the decision whether or not to include the standard recital has been made on an *ad hoc* evaluation by the respective lead DG, under the oversight of the Legal Service, as to whether the proposal in question has a “sufficiently specific link” with fundamental rights. It is not possible at present to draw general conclusions on whether the practice over the last four years has “erred on the side of caution” by including the recital too systematically. One of the aims of communication COM (2005)172 is precisely to clarify for all lead DGs the general criteria that should guide a coherent practice in the future. The Legal Service will bear particular responsibility for ensuring consistency in this field.

#### **(b) The Group of Commissioners**

***When was the Group established and which Commissioners are in the Group? What is the mandate of the Group? What powers does it have? Can it, for example, call on another Commissioner or a DG to provide information and explain themselves? What sanctions can it impose if it discovers failures, maladministration or default? Are the Group's own proceedings, recommendations and decisions open to the public?***

Answers to these questions may be found in the Communication from President Barroso to the College of 21 December 2004 on the “Functioning of the Commission and internal co-ordination” (SEC (2004)1617/4).

Point 27 defines the functions of Groups of Commissioners in general, and the Annex contains the President's decision setting up 5 Groups and defining their composition and mandate, including the Group relevant to the present inquiry.

#### **(a) The Mandate of the Group:**

As point 27 of that Communication makes plain, Groups of Commissioners are not empowered to *take any decisions* on behalf of the College.

Instead, they will “. . . for particular policy areas or issues:

- Contribute to the improved linking and implementation of the Commission's political priorities with its annual Work Programme both at the time of their formulation and in following Commission initiatives through the decision making machinery;
- Develop a medium-term strategic vision for broad policy areas within their responsibility, and ensure coherence and consistency within the day to day work on those policies;

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<sup>5</sup> See Impact Assessment Guidelines, page 8.

<sup>6</sup> [http://europa.eu.int/comm/secretariat\\_general/impact/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/impact/index_en.htm)

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- Provide policy orientations at an early stage for the services on important issues (eg prior to the drafting of Green Papers, Communications, work on impact assessment, etc);
- Prepare, at the invitation of the President, items to be placed on the agenda of future Commission meetings.”

The mandate of the “Fundamental Rights, Anti-Discrimination and Equal Opportunities Group (CG 4)” in particular has been defined, in the Annex to that Communication, as follows:

- “— Drive policy and ensure the coherence of Commission action in the areas of fundamental rights, anti-discrimination, equal opportunities and the social integration of minority groups;
- Ensure that account is taken of gender equality in Community policies and actions, in accordance with Article 3§2 of the Treaty.”

As regards the more specific questions, it follows from the above that groups of Commissioners have no decision-making powers, nor powers to “call on another Commissioner or a DG to provide information and explain themselves” or to inflict “sanctions” within the Commission. It would be misplaced to compare these groups generally, and the Group CG 4 in particular, with a kind of “quasi-judicial body” operating within the Commission. Instead, that Group’s function is essentially oriented towards *preparing the formulation of policy* in the field of fundamental rights, a policy which is ultimately to be defined and adopted by the College through its decisions.

(b) *The composition of the group is as follows:*

- Chair: President,
- Vice Chair: Commissioner for Justice, Freedom and Security,
- Commissioner for Institutional Relations and Communication Strategy,
- Commissioner for Administration, Audit and Anti-fraud,
- Commissioner for Information Society and Media,
- Commissioner for Education, Training, Culture and Multilingualism,
- Commissioner for Enlargement,
- Commissioner for Development and Humanitarian Aid,
- Commissioner for External Relations and European Neighbourhood Policy,
- Commissioner for Employment, Social Affairs and Equal Opportunities.

(c) *Transparency in regard to proceedings and recommendations of the Groups:*

Just as the meetings of the College itself, the meetings of these Groups are in principle internal to the Commission and therefore not open to the public.

As the President’s Communication of 21 December 2005 specifies, in order to reflect the political character of these groups participation is limited to Commissioners, who may be accompanied by their Director General and/or Head of Cabinet. Where a Commissioner is unable to attend a meeting, he may be replaced by his or her Head of Cabinet as an observer, who may in exceptional circumstances be invited by the Chair to speak on behalf of his or her Commissioner. Other people may only participate at the invitation of the Chair. A member of the President’s Cabinet, the Director-General of the Legal Service and the Secretary General or a Deputy Secretary General also participate in the Group meetings.

However, the Group of Commissioners “Fundamental Rights, Anti-Discrimination and Equal Opportunities Group (CG 4)” has so far held one extraordinary meeting, at the special occasion of International Women’s Day on 8 March 2005, in which members of the other institutions as well a representative of civil society took part<sup>7</sup>.

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<sup>7</sup> Three MEPs, including the chairperson of the Committee for Women’s Rights and Gender Equality, the Luxembourg Minister for Gender Equality, a Section President of the European Economic and Social Committee, and a representative of the European Women Lobby.

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The Groups' proceedings and recommendations are contained in internal documents, which are not published by the Commission. As any document in the Commission, they are of course subject to the general regime of public access to documents under Regulation 1049/2000, including examination on a case by case basis of grounds for mandatory refusal of access, in whole or in part, under Article 4 of that Regulation.

## Annex I

### *Article 21 of Rules of Procedure:*

“In order to ensure the effectiveness of Commission action, departments shall work in close co-operation and in co-ordinated fashion in the preparation or implementation of Commission decisions.

Before submitting a document to the Commission, the department responsible shall, in sufficient time, consult other departments which are associated or concerned by virtue of their powers or responsibilities or the nature of the subject, and shall inform the Secretariat-General where it is not consulted. The Legal Service shall be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications. The Directorates-General responsible for the budget, personnel and administration shall be consulted on all documents which may have implications concerning the budget and finances or personnel and administration respectively. The Directorate-General responsible for financial control shall likewise be consulted, as need be.

The department responsible shall endeavour to frame a proposal that has the agreement of the departments consulted. In the event of a disagreement it shall append to its proposal the differing views expressed by these departments, without prejudice to Article 12.”

*Implementing Rules (“Rules Giving Effect to the Rules of Procedure of the Commission”, see document C(2001) 1 of 12.1.2001)*

### *“Rules to give effect to Article 21—Interdepartmental co-operation and co-ordination*

1. In order to ensure genuine co-ordination of substance in compliance with the political priorities set by the Commission, the department responsible for preparing a Community initiative shall contact departments associated or concerned and the Secretariat-General as soon as work begins, to inform them of the timetable for the measure in question and enable them to co-operate at an early stage, notably where national government departments, experts or other outside agencies are to be consulted during the drafting process.
2. The departments responsible, associated or concerned shall work in close collaboration and for this purpose shall exchange all the necessary data and information before and after the formal interdepartmental consultation referred to in paragraph 4.
3. The department responsible may, in the interests of effective co-ordination, set up an interdepartmental working party or other structures as appropriate. It shall inform the Secretary-General. To facilitate interdepartmental co-ordination, the Secretary-General may, if he considers it useful, organise or encourage interdepartmental meetings and joint meetings of Commissioners' Offices and departments concerned.
4. When a document is finalised for decision by the Commission, the department responsible shall formally consult the departments associated or concerned in writing and by electronic transmission. These departments shall be given at least 10 working days in which to submit their comments. This period shall be extended to 15 working days for consultation on documents of over twenty pages excluding annexes. Unless the Commission specifically provides otherwise, this period may be shortened in genuine emergencies only, and not, therefore, in order to catch up on an administrative delay. Where a department consulted or associated has not reacted within the time allowed, it shall be deemed to have given its agreement. Additional time may be requested in the event of *force majeure*, but grounds must be given and the case must be exceptional.
5. In the formal consultation process, the Secretariat-General must be consulted on all initiatives and in particular on those which are of political importance and/or which concern subsidiarity, proportionality or committee procedure.
6. For the purposes of initiating a written procedure and for carrying out the empowerment, delegation and subdelegation procedures, the prior agreement of departments associated or concerned shall be required. The approval of the Legal Service is always required, except for decisions concerning standard instruments where its agreement has already been secured (repetitive instruments).

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For the purposes of exercising conferred powers, the agreement of a service in an interdepartmental consultation is presumed to have been given with the agreement of the responsible commissioner, in accordance with the arrangements that may have been agreed with him or her.

7. The Commission may ask a group of Members of the Commission to prepare the ground for the discussion of a specific point which may be raised at a subsequent meeting of the Commission. The Commission may agree that preparation by such a group counts as formal interdepartmental consultation (fast-track procedure), provided that the departments directly concerned are represented in the group, in particular those which must be consulted.

8. Similarly the Secretary-General may decide that the work of an interdepartmental co-ordination group on a given initiative counts as formal interdepartmental consultation if the departments most closely concerned are represented in the group. At all events the department responsible must secure the agreement of the departments which must be consulted. This agreement and that of the other departments concerned must be recorded in the record of the group's meeting.

9. When presenting documents to the Commission for consideration by oral procedure, the Secretary-General shall make express reference in the covering memorandum to the department responsible, the departments associated or concerned and to their opinion on the measure in question expressed in the formal interdepartmental consultation or in an interdepartmental co-ordination group, or to the opinion expressed in a group of Members of the Commission.

10. The rules of co-operation set out in this Article apply to consultation of representatives of the Member States under the relevant committee procedures. No draft measure may be presented to the Member States unless all departments associated or concerned are in agreement. This also applies to Commission positions to be presented by Commission representatives to the governments of Member States, to other Community institutions, to international organisations or in the course of negotiations with non-member countries.

11. When they are consulted as required by Article 21 of the Rules of Procedure, the Legal Service and the Directorates-General for the Budget, for Financial Control and for Personnel and Administration shall be considered to be departments associated."

## Annex II

Relevant Extracts from the Communication from President Barroso to the Members of the Commission of 21/12/2004 on the functioning of the Commission and internal co-ordination (SEC(2004)1617/4):

### "III.4 The role of Groups of Commissioners

(27) New momentum needs to be given to the use of Groups of Members of the Commission (see annex) to prepare the work of the College and to provide policy input and guidance. Although they are not empowered to take decisions on behalf of the College, they will assume greater importance in an enlarged Commission, providing they operate within a defined framework, meet regularly and assume clear tasks:

- (a) The President of the Commission may create either permanent or *ad hoc* Groups of Members of the Commission. He nominates the Chair and, if appropriate, Vice Chair of the group, selects its members and approves its mandate and internal arrangements. He may make changes to the mandate and the composition of groups at any time and may wind groups up, where they have completed the tasks for which they were created. The Chair of each group may invite other Commissioners to attend particular meetings on an *ad hoc* basis.
- (b) In order to reflect the political character of these groups, participation is limited to Commissioners, who may be accompanied by their Director General and/or Head of Cabinet. Where a Commissioner is unable to attend a meeting, he may be replaced by his or her Head of Cabinet as an observer, who may in exceptional circumstances be invited by the Chair to speak on behalf of his or her Commissioner. Other people may only participate at the invitation of the Chair. A member of the President's Cabinet also participates in the Group meetings.
- (c) These Groups will contribute to the better preparation and co-ordination of the Commission's activity, taking account of the Commission's priorities and the political guidance given by its President.
- (d) The groups will within particular "families" of Commissioners or for particular policy areas or issues:

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- Contribute to the improved linking and implementation of the Commission's political priorities with its annual Work Programme both at the time of their formulation and in following Commission initiatives through the decision making machinery;
  - Develop a medium-term strategic vision for broad policy areas within their responsibility, and ensure coherence and consistency within the day to day work on those policies;
  - Provide policy orientations at an early stage for the services on important issues (eg prior to the drafting of Green Papers, Communications, work on impact assessment, etc);
  - Prepare, at the invitation of the President, items to be placed on the agenda of future Commission meetings.
- (e) In order to focus work within these Groups, the Chair of the Group may appoint a Commissioner as Rapporteur or create sub-groups of Commissioners for particular themes. The secretariat of the groups will be assured by the Secretariat General. Other relevant Directorates General may assist the groups as appropriate.
- The agenda for the meeting is set by the Chair. The agenda and minutes for Groups of Commissioners shall be circulated to all the members of the Commission;
  - Meetings of Commissioners Groups can be prepared by the Heads of Cabinet concerned, with the participation of the Secretariat General and Directorates-General. Preparatory meetings are chaired by the Head of Cabinet of the Chair and/or a senior representative of the Secretariat General;
  - In principle, where consensus is reached in a Commissioners' Group on a particular initiative, the President may determine that the initiative does not need to be subject to further interservice or inter-cabinet consultation and it may be presented directly for decision of the College via the weekly meeting of Heads of Cabinet.

### *III.5 The good preparation of Commission initiatives*

(28) Commission initiatives must be of high quality and well prepared, reflecting principles of better regulation, good governance, subsidiarity and proportionality. In particular:

- (f) All important initiatives, particularly legislative initiatives, will be accompanied by an integrated assessment of their likely impact, in particular of their economic, social and environmental impact. This should include an analysis of their compliance with subsidiarity and their respect for fundamental rights as set out in the Charter of Fundamental Rights;
- (g) Work on impact assessment will start well in advance of the preparation of the proposal (normally being identified as part of the Annual Policy Strategy in the year preceding the presentation of the proposal) and will involve all interested departments. The option of taking no initiative must be considered. A preliminary analysis of why an initiative is required and which options have been explored should be available before an item may be included in the Commission annual Work Programme<sup>8</sup>. All items should also include a clear timeline of the steps to be taken towards adoption;
- (h) Important legislative initiatives will normally be subject to broad public consultation before they are presented to the Commission for a decision. This could include making drafts of Commission proposals available on-line—while clearly clarifying their status—and making public the comments received on those proposals (except where a specific request for confidentiality has been received);
- (i) The Secretariat General, in liaison with the lead department and the Commission Legal Service, will screen proposals to ensure that the principles of subsidiarity, proportionality and good legislative practice, as well as linguistic requirements, are respected, as well as ensuring the formal quality and form of initiatives. They will provide guidance where this is needed on the most appropriate form of action to achieve the objective pursued. They will also liaise with DG Budget to ensure that the budgetary and resource implications of proposals have been adequately assessed and are compatible with the overall financial programming of the Commission.

(...)

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<sup>8</sup> This requirement shall apply for the first time to the Commission annual Work Programme for 2006.



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### **Annex: Groups of Commissioners**

Groups of Commissioners shall assist the work of the College. The principles governing the operation of the individual groups are set out below:

#### **1. The Lisbon Group (CG1)**

*Participation:*

- Chair: President.
- Vice Chair: Commissioner for Enterprise and Industry.
- All Commissioners may participate in this group.

*Mandate:* This group is responsible for the co-ordination and preparation of all Community action relating to the Lisbon strategy.

*Proposed frequency:* 6–8 week intervals.

*Preparation:* Mixed Cabinet-Services group, chaired by the Secretary General

#### **2. The Competitiveness Council Group (CG2)**

*Participation:*

- Chair: Commissioner for Enterprise and Industry,
- Commissioner for Science and Research,
- Commissioner for Health and Consumer Protection,
- Commissioner for Competition,
- Commissioner for the Internal Market and Services, and
- Commissioner for Trade.

(Other Commissioners whose portfolios are occasionally treated on the agenda of the Competitiveness Council will be invited by the Chair to participate on that occasion)

*Mandate:* Its mandate is to:

- ensure coherence of the Commission's position on issues related to competitiveness,
- ensure that the Commission has a single and coherent position on issues related to competitiveness vis-à-vis the other institutions, including preparing upcoming meetings for the Competitiveness Council,
- prepare jointly its input to the work of the Lisbon Group,
- review regularly the economic situation and progress on structural reforms in the European Union, and, when appropriate, discuss strategic issues related to competitiveness and
- at the request of the President, consider the impact of significant draft Commission proposals outside the Competitiveness Council's remit, and in particular, to ensure that the impact assessments accompanying such proposals adequately take account of competitiveness.

*Proposed frequency:* monthly, in any case ahead of the Competitiveness Council.

*Preparation:* Mixed Cabinet-Services group chaired by the Head of Cabinet of the Commissioner for Enterprise and Industry.

#### **3. The External Relations Group (CG3)**

*Participation:*

- Chair: President,
- Vice Chair: Commissioner for External Relations and European Neighbourhood Policy,
- Commissioner for Economic and Monetary Affairs,
- Commissioner for Enlargement,
- Commissioner for Development and Humanitarian Aid,
- Commissioner for Trade,
- and on an *ad hoc* basis, the Commissioner responsible for Financial Programming and Budget.

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*Mandate:* Its mandate is to ensure the coherence, impact and visibility of the Commission's external action, and in particular, to:

- Co-ordinate external policies of the Commission, in particular, define strategic priorities, prepare events in the international calendar and plan activity in relation to its external relations, security, international economic and development policy;
- Ensure the coherence of overall policy for which External Relations Commissioners are responsible, including discussing organisational issues affecting their services, as well as the coherence between their work and the work of colleagues responsible for other policies which have external implications (eg justice, liberty and security, environment, energy, transport);
- Prepare and co-ordinate the positions of the Members of the Commission in relation to the other EU institutions and, in particular, with the Council High Representative/Secretary General, as well as co-ordinate the necessary action to prepare for the entry into force of the Constitution and the launch of the European External Action Service;
- Monitor the activity of EuropeAid on the basis of regular reports by the Commissioner for External Relations and European Neighbourhood Policy.

*Proposed frequency:* Monthly, but may need to meet more frequently in its initial stages.

*Preparation:* Mixed Group of Heads of Cabinet and Directors General in the external relations area together with the Secretariat General, chaired by the Head of Cabinet of the President.

#### **4. The Fundamental Rights, Anti-Discrimination and Equal Opportunities Group (CG4)**

*Participation:*

- Chair: President,
- Vice Chair: Commissioner for Justice, Freedom and Security,
- Commissioner for Institutional Relations and Communication Strategy,
- Commissioner for Administration, Audit and Anti-fraud,
- Commissioner for Information Society and Media,
- Commissioner for Education, Training, Culture and Multilingualism,
- Commissioner for Enlargement,
- Commissioner for Development and Humanitarian Aid,
- Commissioner for External Relations and European Neighbourhood Policy, and
- Commissioner for Employment, Social Affairs and Equal Opportunities.

*Mandate:* Its mandate is to:

- Drive policy and ensure the coherence of Commission action in the areas of fundamental rights, anti-discrimination, equal opportunities and the social integration of minority groups;
- Ensure that account is taken of gender equality in Community policies and actions, in accordance with Article 3§2 of the Treaty.

*Proposed frequency:* every three or four months.

*Preparation:* Mixed Cabinet-Services group, chaired by a Deputy Secretary-General.

#### **5. The Communications and Programming Group (CG5)**

*Participation:*

- Chair: Commissioner for Institutional Relations and Communication Strategy,
- Commissioner for Transport,
- Commissioner for Information Society and Media,
- Commissioner for Regional Policy, and
- Commissioner for Financial Programming and Budget,
- Commissioner for Education, Training, Culture and Multilingualism, and
- Commissioner for Trade.

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*Mandate:* Its mandate is to:

- Streamline programming to maximise delivery against policies.
- Steer, monitor and provide feedback on the effective implementation of the annual policy strategy and the Commission's annual work programme to ensure consistency with the 5-year strategic objectives and effective delivery.
- Organise programming to allow for effective communication.
- Advise on, champion the development of, and monitor the delivery of the new communications strategy of the European Commission.

*Proposed frequency:* every six to eight weeks

*Preparation:* Mixed Cabinet-services group, co-chaired by the Head of Cabinet of the Chair and a Deputy Secretary-General."

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### Examination of Witness

Witness: DR CLEMENS LADENBURGER, Legal Service, European Commission, examined.

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**Q1 Chairman:** Welcome, Dr Clemens Ladenburger. We are very grateful to you for coming here. We have all indulged ourselves by removing our jackets. Please feel free to do the same. This is a brief English summer; we try to take advantage of it, or, rather, not to suffer too dreadfully in it! It is extremely good of you to come. I will not introduce the members of the Committee who are here. You can see who we all are, because our names are displayed in front of us. We are very concerned indeed, as you know, with this particular topic and that is why we have invited you. The compatibility of Brussels' legislation with fundamental rights, particularly, of course, ECHR, is something with which we have been concerned in the past few years, particularly, obviously, where we get into sensitive areas of criminal law and asylum. This particular Committee in the past has done quite a lot of work on the Charter on Fundamental Rights, but that was in the pre-Nice days, and things have, of course, since moved on. We have decided to hold this particular inquiry into your very recent communication which is obviously designed to underpin the European Convention on Human Rights, and obviously there are links here with better regulation and, as you know, the Lords Select Committee is currently holding an inquiry into that and will be reporting on that imminently. This is the first of our oral evidence sessions. We shall also be taking evidence from NGOs and, of course, from the Government. You have, I think, had an opportunity to look at the matters in which we are particularly interested, and you have very helpfully already communicated with us, and that has been of great assistance. If during the course of this afternoon there is anything you feel difficulty with, reticent about, unable to deal with or want to add to in writing, we would welcome any further written communication from you. With that, can we perhaps start? Before I ask you any direct question about the matters of

concern, can I get a better picture of your own position? Of course I know that you are in the Legal Service?

*Dr Ladenburger:* Yes.

**Q2 Chairman:** But I don't know a great deal about the size of it or your role within it. Can you help, firstly, with that?

*Dr Ladenburger:* Yes. I am a member of the institutional team of the Legal Service. The Legal Service is structured into 10 teams, most of them covering sectoral areas of community policy. The institutional team is concerned with horizontal aspects, and within the institutional team I am responsible for fundamental rights matters of concern to the Legal Service. I have had that position since early 2000. I was in that capacity involved in advising Commissioner Vitorino in the drafting of the Charter of Fundamental Rights. At one time for 18 months, I was seconded to the Secretariat of the second Convention—the European Convention that drafted the Constitution—and amongst other things I was responsible again for fundamental rights matters and for working group II which dealt with these matters. This is my main responsibility. I have others as well in the institutional team, and I certainly liaise with other lawyers in the Legal Service whenever a fundamental rights question comes up. These questions by nature need to be treated in tandem by the lawyer competent for the respective area and an expert on fundamental rights.

**Q3 Chairman:** So you are the senior human rights lawyer in the Commission?

*Dr Ladenburger:* I would not go so far as to say that, but I am the lawyer in the Legal Service who specifically deals with fundamental rights matters.

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**Q4 Chairman:** Thank you very much. The brief history, as I understand it, just to put your recent communication in context, is this: Nice December 2000, everybody signs up to the Charter. Then the following March there is a Commission decision on its application, and initially there is provision for recital, not, as I understand it, on a routine basis, but, so to speak, custom-built for the particular legislative proposal or draft instrument in question. Then, in June the following year, 2002, in come impact assessments; is that right? For the first time the Commission issue a communication on them, although that is only in respect of a limited number of legislative proposals. Then there is the incorporation of the Charter into the Constitutional Treaty in October 2004 and the Commission at that stage issue a report, leading up to their later guidelines on impact assessments. Then, in December of last year, the President of the Commission issues a communication about the functioning and internal coordination of the Commission and sets up these five groups one of which, of course, group four I think it is, has specific responsibility for human rights compliance. On 27 April the Commission's communication in respect of compliance is issued, which is what we are particularly focusing on, and, even more recently, on the fifteenth of this very month there are the new impact assessment guidelines which stretch, I think, to 48 pages, but until your recent communication you were still operating under the March 2001 communication. Is that right?

*Dr Ladenburger:* Yes.

**Q5 Chairman:** On the whole was that found to work satisfactorily?

*Dr Ladenburger:* Yes, this communication, or this decision, which is a purely internal decision of the Commission, has certainly produced some tangible results on individual legislative proposals of the Commission that have been scrutinised by the services in respect of fundamental rights. You can see that in particular in respect of some proposals in the area of justice and home affairs, ie immigration, asylum, criminal cooperation, etc The European arrest warrant was one of those instruments that, when drafted, was discussed quite intensely amongst the services for its respect for fundamental rights. But some of the factors that contributed to the drafting of this communication were that, first, in the meantime, impact assessment had emerged and was gradually introduced as a new tool in the Commission, and therefore a need was felt to make use of that tool also for scrutinising fundamental rights. Next, one difficulty, with the decision of 2001 was that it was completely unknown to the public. It had remained internal. Word about it had spread a little through academic writing, but it had never been published by

the Commission. NGOs and members of the European Parliament had asked about it, and so, for the reasons set out at the end of the communication, the Commissioners felt that it would be advantageous to explain to the public what this compliance control is all about. Even within the Commission's services the decision of 2001 had perhaps not become as well-known as it should have been, so another goal of this communication was to raise awareness amongst all Commission departments of fundamental rights.

**Q6 Chairman:** I see from the very end of the communication that the public is to be informed at three levels. First, the actual communication itself is a published communication, as I understand it. This is paragraph 32.

*Dr Ladenburger:* Yes.

**Q7 Chairman:** Then, because you are going to be publishing impact assessments and the explanatory memoranda, they too will alert the public insofar as those matters now specifically address human rights concerns, and, finally, at the consultation stage, as I understand it, you are going to invite any submissions, any concerns, about human rights?

*Dr Ladenburger:* Yes.

**Q8 Chairman:** So in part, therefore, the need for the new communication is to take on board the intervening introduction of the impact assessments?

*Dr Ladenburger:* Correct.

**Q9 Chairman:** Do they take on board the even more recent new impact assessment guidelines?

*Dr Ladenburger:* Yes. In fact, the drafting of this communication, my Lord Chairman, and the drafting of the "revised guidelines for impact assessment" have been conducted in parallel. It then so happened that the revised guidelines took a little bit longer to be finalised than this communication, but when these revised guidelines were drafted, particular care was exercised by the services, and this includes the Legal Service and DG JLS (as we say; ie DG Justice, Freedom and Security), to include particular questions in a set of check-list questions, so to speak, in the revised guidelines which are geared towards fundamental rights and which should help the services find out as best they can about possible impacts on these rights.

**Q10 Chairman:** So there has been a correlation between the new guidelines and your communication?

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*Dr Ladenburger:* Yes.

**Q11 Chairman:** One sees, as you point out in the new impact assessment tables, particularly, I think, not so much under economic impact but to some extent under environmental impact, and then I think even more under, what is the other one?

*Dr Ladenburger:* Social.

**Q12 Chairman:** The social impact. That is right?

*Dr Ladenburger:* Also some on economic impact. If one compares the new list with the older one, quite a number of additional questions have been inserted, for example, asking about effects on property rights and intellectual property and some others. We have, in fact, tried to include new questions under all three of these headings and particularly under economic and social.

**Q13 Chairman:** And questions going to equal treatment, equal opportunities, discrimination, personal data and matters of that sort?

*Dr Ladenburger:* Exactly.

**Chairman:** Thank you very much. Can we then perhaps move to the impact assessment and explanatory memoranda? Lord Clinton-Davis, I think you had a question you wanted to raise?

**Q14 Lord Clinton-Davis:** As a former member of the Commission in charge of transport and the environment, and other things as well, I thought it was very important to have informal contact with the Parliament. What has happened in this case? Have you had any informal contact with them, and with what result?

*Dr Ladenburger:* President Barroso introduced, when he gave a presentation before the relevant committee of Parliament (the LIBE Committee) on his agenda for the work of this group of commissioners, and he put strong emphasis on this forthcoming communication which at that moment was about to be adopted. I am not informed about prior informal contacts in the short round period when this communication was drafted between January and April, but it was important for the President to present this paper to the Parliament just before it was adopted.

**Q15 Lord Clinton-Davis:** All I can say is when I was faced with a similar but not identical situation I would make it my job and that of my cabinet to make sure that the Parliament or the relevant committee to the Parliament, or certainly the Chairman of the relevant committee, would be kept well informed of what was being done. The situation between the Commission and the Parliament is at the moment rather sensitive. Do I understand that between

January and April of this year there has been no contact whatsoever, or has there been?

*Dr Ladenburger:* My Lord Chairman, I am just not in a position to inform you whether there have been such informal contacts between the President himself, or Vice-President Frattini or his cabinet and members of the Parliament. I can certainly get back to you on that question, but it has not been within my mandate to be constantly informed about any such contacts.

**Q16 Chairman:** Perhaps that is something that you might reflect on and possibly write a note if you can discover something in response to Lord Clinton-Davis' question on that.

*Dr Ladenburger:* Yes, certainly.

**Q17 Lord Lester of Herne Hill:** Following on from that, I wonder whether, before I ask my question, I could just briefly explain the contrast between these proposals and what happens in the UK. These proposals for human rights profiling have been implemented obviously *mutatis mutandis* because we are talking about a state and not the European institution, but these have been in place in this country for about 30 years. What this is doing is to admirably produce a systematic form of internal human rights proofing, but some years ago we decided that, although this is an important element, what is vital is independent expertise from outside the administration to inform the administration in the law-making process and the legislative process. My colleague, Lord Clinton-Davis, has referred to the European Parliament. What strikes me as strange, but maybe it is because I am not a member of your administration, is that one would expect external scrutiny in some way to be linked to the European Parliament during the law-making process, so that this rather old-fashioned approach which would get the internal scrutiny right is enriched by external scrutiny. I will come back to this in later questions, but I wanted to say that at the beginning. What is your comment upon that? That this a vital inward process, but it does not open the windows at the critical stage for external scrutiny. I am not saying there is anything wrong with these proposals as a modest first step.

*Dr Ladenburger:* This communication is certainly not meant at all to exclude the Commission from drawing on external expertise when preparing its legislative proposals. Quite on the contrary, the Commission has developed a practice, and that is codified in a communication of 2002, on broad public consultations. It has developed an approach of drawing of external expertise and seeking broad consultations with the public. Thus, I would simply say that the scope of this communication is limited: it is to provide some better explanation about

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something that is going on internally and has so far not been explained to the public. Specifically in the area of fundamental rights, you know that there is for the moment a so-called Network of independent experts in the area of fundamental rights which has been preliminarily set up by DG JLS and up-coming on the horizon is, of course, the Fundamental Rights Agency, which is mentioned in this communication. Therefore I think this shows that the communication does by no means want to rule out or under-estimate the need to draw on external expertise. It is just not the central subject matter of this communication.

**Q18 Lord Lester of Herne Hill:** I was going to ask this later but since you mentioned the Fundamental Rights Agency. What the communication says is that it should be used as an input for methodology. What I am suggesting is that, if one is going to go to the expense and trouble of setting up such a body, input methodology is all about process but it does not seem to me that it is meeting the point I am making, which is the need for timely, quick, expert input by, let us say, the Fundamental Rights Agency of a transparent kind so the public knows what is going on. Let me give you an example. Let us suppose you produce a proposal for regulating broadcasting and it has implications for free speech and you have a wonderful internal audit going on about Article 10 of the European Human Rights Convention and how to implement it, there is no external watchdog or critic or public interest body, other than the network of experts, which is a different matter, to say, "Look, the way that is framed, whatever your internal human rights profiling may say, will not pass muster under the Human Rights Convention for the following three reasons. What do you say about that?" It is that dialogue between, let us say, a Fundamental Rights Agency and the administration which has enriched our system greatly. Therefore, is it envisaged for the Fundamental Rights Agency that it would be more of an input for methodology, it would be a scrutineer during the process of the legislation and its process will be open to the public; they will know what is going on? I am sorry to take so long.

*Dr Ladenburger:* No, no. I must first make the proviso that I cannot be very concrete today on what input the Fundamental Rights Agency may provide because the Commission has not even adopted its proposal for a regulation setting up that agency. It would be inappropriate, even afterwards, for the Commission to anticipate the legislative process on the Agency, and that is also the reason why this communication could not at the time it was adopted go in any further detail into this matter. But one possible misunderstanding, which may be due to the drafting of the text at least in this English version, and which I want to clarify, is that input envisaged by the agency is certainly not only or even primarily

envisaged on the methodology itself, ie on procedural questions, but on substantive questions. I think that what that paragraph in the communication wanted to say is that, as parts of the overall methodology, the Commission will in the future in some way make use of the substantive work of the agency. Assuming now for a moment that the tasks of the agency would be similar to those of the current monitoring centre in Vienna for racism and xenophobia, this task would include drawing up opinions or conducting scientific research on particular subjects on request by the justifications. If that is the case, then certainly something to be considered by the Commission is what you have just mentioned, namely that when the Commission sees coming up a particular fundamental rights issue becoming relevant for planned legislation, then it timely asks the agency to provide input. I think that is something that could usefully be considered for the agency.

**Q19 Lord Lester of Herne Hill:** And answers questions from the agency?

*Dr Ladenburger:* Absolutely.

**Q20 Lord Borrie:** Dr Ladenburger, in your opening remark, I think it was, you mentioned that between the decision in 2001, and 2005 the new procedures which the decision of 2001 introduced in relation to proofing of human rights had not been publicised even within the Commission, let alone elsewhere. It struck me in your answers to my two colleagues for the last few minutes that part of the answer that you may have to their questions is that there is a very close inter-relationship in the setting up, in the devising of this communication of 2005 between the publicity and the three levels, I notice, which the Lord Chairman introduced early on, the three levels of publicity mentioned on page eight and the detailed statements, much more detailed than the 2001 decision, on how you are to go about the proofing and the impact assessments and the explanatory memoranda, etc Is not part of the answer to my colleagues that at various stages, and not just at the one stage but at many stages of the development of any particular programme which might have an impact on fundamental human rights, there will be publicity given to what is happening and, therefore, interested members of the public, including, of course, if there be this new agency set up, they will be alerted to what is happening and it will be part of their job, I would imagine, to make their comments and seek to influence you? It strikes me that it may be a most important feature—I am asking for your confirmation—of the 2005 communication that the publicity is closely related to all the other things, because the publicity that you will give means that you have to be better at all the other things, because otherwise you will be found out?

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*Dr Ladenburger:* Yes. I fully confirm that this communication is not so much about introducing new or different formal procedures, and that is explicitly stated in the communication and it was stated in the very succinct 2001 decision. The communication is about raising greater awareness amongst all actors, and the communication uses as one powerful tool of raising awareness amongst commission services, precisely the instrument of publicity: publicity given to this communication; the invitation to civil society and citizens to rely on it at all stages of drafting—and that is consistent with the general policy of the Commission now for public consultations—; and the hope is that the general public will make responsible all actors within the Commission for looking seriously at fundamental rights.

**Q21 Lord Lucas of Crudwell and Dingwall:** You said earlier on “whenever a question of fundamental rights comes up”. How does a question of fundamental rights come up? How is it born?

*Dr Ladenburger:* This can happen in very different ways. It can be obvious from the outset, from the very topic of an initiative, and most of those that you have mentioned, my Lord Chairman at the outset arising in justice and home affairs, of course, are obvious to everyone. It can also be raised within a more classic Community legislative framework related to the internal market. It can then be raised by interested groups—by the public, by stakeholders—who can choose to explicitly rely on the Charter of Fundamental Rights or to invoke fundamental rights when perhaps in the past they would not have explicitly presented an issue as a fundamental rights issue; but it can also be detected (and in my practical experience this is not so rare) only by the lawyers at a quite late stage of drafting. A recent example for this which I would mention is our current on-going work on the new revised customs code which has for the moment got to the preliminary stage of public consultation on a working draft. That is a highly complex technical and classic Community law matter, and lawyers in the Legal Service—my colleagues together with me—have spotted that there may be an issue as to a particular procedure in this customs code, which is called “the ex-host recovery procedure”, where, as a consequence of the right to good administration and to prior hearing by the administration as established in the Charter and in case law, we might need to include in this article of the customs code a right to be heard by the administration. That is just a recent example of a fundamental rights problem that can arise in a very technical context, and that would not normally be spotted by impact assessment but would come up at a later stage.

**Q22 Chairman:** Doctor, obviously that sort of situation is then very dependent upon the particular expertise of those within the relevant directorate. What guidance or training is given to lawyers? How alert are they to the need to spot these human rights problems?

*Dr Ladenburger:* That is a very important concern, and it will be one of the practical consequences the Commission services will have to draw from this communication. The Legal Service itself has developed internal training for all its 130 lawyers over the last years on fundamental rights and on the Charter, and we are currently envisaging, indeed, to offer the same training sessions to lawyers from other Directorates General, and in particular to lawyers from the units for legal affairs that many Directorates General have set up meanwhile. In addition, guidance is provided through references to this Communication that now will be included in our internal manual of procedures and manual on legislative drafting. It goes as far as including a reference or a reminder, in our IT template for legislative drafting, to the section on fundamental rights compliance to be drafted in the Explanatory Memorandum.

**Q23 Lord Lester of Herne Hill:** I was following up the Lord Chairman’s question in a way, which is that I entirely appreciate the answers you have given about publicity and about the process enabling NGOs and other expert groups, as it were, to make representations (and that is obviously beneficial and is referred to in paragraph 31 of the communications specifically), but my experience on the Joint Committee on Human Rights is that, however good the human rights proofing by the administration and however good the representations from a civil society, there is nothing like a body, let us call it a fundamental rights agency, with an expert independent lawyer as well, able to look at what the NGOs are saying, look at what the administration are saying and then focus with much more authority because of its expertise the minds of administrators, and my experience is that, however good our human rights proofing in this country, that Committee often spots issues that not even the NGOs themselves spot. Is that not another reason why one should think seriously about the Fundamental Rights Agency as the place where all of this can be reviewed and coordinated and fed back to the administration in an expert and focused way?

*Dr Ladenburger:* My Lord Chairman, I fully take your point and I think it will need to be appropriately addressed in the upcoming legislative procedure on the Fundamental Rights Agency. You will understand that I am not in a position today to comment on that, given that the Commission has not yet adopted its proposals for the Fundamental

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Rights Agency, and that therefore the scope of this paper is limited to what is going on internally in the Commission.

**Q24 Lord Lester of Herne Hill:** I understand.

*Dr Ladenburger:* At the same time, I hope that it has become a little clearer from the paper that we have sent in, that the Legal Service of the Commission, while it is, of course, an internal service placed under the authority of the President, does perform a special role within the Commission. It is not a political service, it is an independent service and it is its task, though in purely internal dealings and, of course, not through its advice given in public to function as an independent reviser of fundamental rights questions.

**Lord Lester of Herne Hill:** I appreciate that. I know it is absolutely the case.

**Q25 Lord Norton of Louth:** The questions so far have largely related to the extent to which the communication will facilitate those external to the Commission to have some input into the process, if you like, to monitor what the Commission is doing, but, of course, the communication itself envisages the Commission itself having a monitoring role in relation to the legislative process. It seems to us a little odd that the Commission is monitoring the legislative process rather than Parliament monitoring the Executive, which is what we have been used to here. How is it envisaged that will work? What is the process, because presumably there are sensitivities involved, and what can you do if you take the view, “Well, what is proposed by the Parliament actually clashes with fundamental rights?”

*Dr Ladenburger:* The thrust of this communication is that the Commission wanted to show that it takes fundamental rights seriously in its own action, and, as President Barroso put it when presenting this communication, it wishes to lead by example. Therefore this is the first step, and it is the main part of the communication. The communication then says that the Commission will within its normal role in the legislative procedure, with its normal institutional political means, react whenever amendments are presented in one of the branches of the legislator with which it cannot agree, and in this context with which it cannot agree for the reason that it believes they violate fundamental rights. The communication does not intend to introduce specific new measures in such a case; it is merely a statement that the Commission is resolved to use its normal authority, not one of monitoring, but of a participant, of a facilitator in the legislative process, but to do it in a way, if possible, to defend its own standards of human rights compliance as it has defined them in its original proposal.

**Q26 Lord Norton of Louth:** But in the communication itself you do envisage that once the legislation has been adopted there is the prospect of annulment proceedings? How realistic is that, how necessary, because presumably you can withdraw it in any event?

*Dr Ladenburger:* The Commission’s right to withdraw the legislative proposal while the procedure is ongoing does certainly not eliminate all interest in a possible annulment procedure—of which we will all agree that it hopefully would be a very exceptional hypothesis. That is for several reasons. First, the extent of and the conditions for the Commission’s right to withdraw are, as you know, not entirely settled in Community law yet; second, the Commission may find it preferable to bring a well defined human rights question before the Court of Justice rather than to block an entire legislative procedure in which it has high interest; and, third, this way of proceeding may be particularly appropriate where it is possible to challenge only particular detachable provisions of a legislative act rather than the act as a whole. This is, for example, what the Parliament has been doing in the pending procedures concerning the family reunification directive where the oral hearing was just yesterday and I pleaded for the Commission. So that is a clear demonstration as to why the prospect of possible withdrawal is not always the satisfactory answer.

**Q27 Lord Norton of Louth:** I noticed there when you said “the proposal going before”, you said, “Parliament”, so you want the branches of the legislature—

*Dr Ladenburger:* Also the Council.

**Q28 Lord Norton of Louth:** You take the Council as part of the legislative process?

*Dr Ladenburger:* In co-decision.

**Q29 Lord Lester of Herne Hill:** Is there not another very serious reason why it is unrealistic to think about the annulment possibility as a real one? I am thinking of cases I have been involved with myself before the Luxembourg court. The Commission support a directive; let us say an equal treatment directive. The directive is then alleged to be incompatible in proceedings, let us say, referred by the national court. The Commission turns up before the court and supports the applicant’s view that actually the directive is *ultra vires*, is incompatible in some way, but judges get very angry, in my experience, and say to the Commission, “Hang on, you supported this measure. What are you now doing saying it is invalid?” My question is really this: the better your human rights proofing the more committed the Commission becomes to the legality of the letter and to its compatibility with human rights; because you



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have got terrific human rights proofing, you are then locked into the process of law making. How can you then turn up before the Court of Justice and say, "Dear, oh dear, this is incompatible with human rights. It should be annulled"? The court will surely be a bit cross with you and say, "There is a conflict of interest. There is an embarrassment about all of this. You are trying to have your cake and eat it as well." That seems to me to be what is at the heart of the weakness of the annulment procedure, and I am only speaking from practical experience in asking that question. I have seen the Commission ticked off by the court when it tries to do that, and, I would suggest, in a sense, rightly so?

*Dr Ladenburger:* Yes, I think that already in the way this sentence is drafted it is clear that the Commission envisages this hypothesis only as a matter of last resort in extreme cases, hypothetical cases perhaps, where within the legislative procedure the legislator departed drastically from the Commission's proposal or put in specific amendments which the judgment of the Commission would be clearly in violation of fundamental rights, and it would then also have to be the case that the Commission could not have convinced the legislator of its view. However, the mere fact that the Commission put in this sentence and reserved its right to use the annulment procedure in such a way serves more to underline that it wishes to take fundamental rights seriously within the legislative procedure when discussing with the Council and the Parliament. I do not think that such an action for annulment will actually happen frequently.

**Q30 Chairman:** Doctor, can I ask you a question about recital. It links, I think, too with the new scheme for explanatory memoranda. I think under the old 2001 communication recitals were pretty standardised. Is that right?

*Dr Ladenburger:* The formulation of the recital?

**Q31 Chairman:** The formulation, yes, of the recital of, in effect, compliance with human rights, that respect has been given to fundamental rights. As I understand it, under the new scheme a somewhat more flexible and a more fact sensitive approach is to be taken. Is that right?

*Dr Ladenburger:* Already the decision of 2001 formulated one standard sentence for a recital to be used in all cases and added that, in appropriate cases, a second sentence might be added which would identify particular fundamental rights of particular concern in the context at issue, and this has happened in practice quite often. This is to be maintained and developed. It is true that perhaps in past practice this second sentence has been added more in cases where a legislative measure served to promote or implement a particular fundamental right and less so when there

was simply one fundamental right particularly affected by a legislative measure proposed; and in the future it is not excluded that also in the second hypothesis a specific sentence identifying a particular right might be added, but the Commission does wish to continue to use the same first sentence in this standard recital.

**Q32 Chairman:** As I understand it, where in future you get these recitals, the explanatory memoranda is, in effect, going to argue the case and explain why it is regarded as complying with the human rights requirements?

*Dr Ladenburger:* Yes; absolutely. That is a new rule to be introduced, but that succinct argument about the fundamental rights will be found in the explanatory memorandum, not in the recital itself.

**Q33 Chairman:** Quite. When then the matter goes on to Parliament alone or in joint decision with the Council, there will be the explanatory memorandum. Will this not operate as a caution about amending the legislation in a way which could alter the balance? Do you foresee that as helping to safeguard the future course of the proposals?

*Dr Ladenburger:* Excuse me?

**Q34 Chairman:** Would this explanatory memorandum and the argument it sets out about human rights considerations not provide some caution to those who then are going to tamper with it, tinker with it and may be alter the balance? Would it not serve to alert them to the risks that they would run if they amend in a way which could violate human rights?

*Dr Ladenburger:* The purpose of this succinct argument in the explanatory memorandum is to explain to the legislator, but also to the public, why the Commission believes that its proposal does respect fundamental rights, and we, of course, thought that this is useful for the legislator and that the legislator will take this into account when thinking about amendments. The legislator itself, as you know, does not accompany the final act by an explanatory memorandum. There the recitals are the motivation of adopted legislation. One question that is really for the legislator is whether it will wish to enrich the recitals themselves by a succinct argument on a fundamental rights respect, although this may be problematic because recitals are to be quite short and it is perhaps doubtful whether a convincing argument can be included in a recital. That is why the Commission at least thought that the more appropriate place would be its explanatory memorandum.

**Q35 Lord Lester of Herne Hill:** In our system now the explanatory memoranda are considered by judges to be a better source of guidance in supplementing the

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text of legislation than what ministers say in Parliament, and the explanatory memoranda are the place now where the administration states its view on human rights, on why there is compatibility, and that is very important because it means that judges can see, in a coherent form, the explanatory memoranda; but in our system that begins the discussion and does not end it in the sense that it is the response to what is in the explanatory memoranda that leads to a report to Parliament later. What troubles me in your approach is, as you rightly say, recitals are no substitute for the more coherent approach in the explanatory memoranda. The explanatory memoranda are not easy to get at in the argument before, say, the Court of Justice, and so one has to do a lot of legal archaeology in order to arrive at some kind of coherent position. Is it not possible for the explanatory memoranda, as a matter of course, to be in some way attached to the dossier which forms part of the legislation so that it can be—

*Dr Ladenburger:* Adopted legislation.

**Q36 Lord Lester of Herne Hill:** Adopted legislation. So that at least the poor old court and courts nationally can get a better picture than simply looking at the recitals?

*Dr Ladenburger:* I will take that point. Certainly as for the Court of Justice, the Court of Justice is used to looking also at the Explanatory Memorandum of the Commission, to the extent that adopted legislation still corresponds to what the Commission proposed, of course. That is an additional problem.

**Q37 Lord Lester of Herne Hill:** Of course, and it can be amended in our system, by the way as well. They amend the explanatory memorandum at the end of the process?

*Dr Ladenburger:* There may be an amended proposal by the Commission with its own explanatory memorandum. It is a matter for reflection for the Commission how the explanatory memoranda may be more easily made accessible to the public, although they are, of course, published on our websites, but perhaps there is scope for improvement as to a coherent presentation of adopted legislation together with its legislative history, and I take that point home.

**Lord Lester of Herne Hill:** Thank you very much.

**Q38 Lord Neill of Bladen:** I apologise for being late to you and the Committee and also to the witness, who I have not heard, so you may have dealt with this. Listening to the last five or 10 minutes and what you have been discussing, how do you envisage it working if the explanatory memorandum in fact presents arguments that turn out to be quite controversial, in other words, it is not a knock over document—if anyone has worries on fundamental

rights grounds, we will not say that is completely convincing—and within the Parliament what will happen? In other words, are you more exposed? It is a greater exposure to attack on fundamental rights grounds when you come clean and give the reasons in explanatory memoranda. Then I am going to go on to the Council. How do you see it working out if it is a controversial piece of argument?

*Dr Ladenburger:* We will have to see, I think. It is difficult to anticipate in practice. In some instances in the past there have been developments in explanatory memoranda on fundamental rights issues, but what remains to be seen is how a coherent future practice of having a section of its own defending the whole text against standards of fundamental rights will play out, and what reactions in Parliament and the Council there may be. In any event, though, I think the Commission is willing to take such risks, because for it the most important point is to be able to show not only that a fundamental rights control has been carried out but also why the Commission has come to the view that fundamental rights are respected. This is, as the text recognises, one criticism that has been levelled against the old practice of simply putting a recital without providing any explanation as to why fundamental rights are complied with.

**Lord Neill of Bladen:** I wanted to ask a follow-up, Lord Chairman, but it is a slightly different question. I have got the answer to my first question, thank you very much.

**Q39 Chairman:** I was just going to pass on to another aspect of monitoring and ask whether, besides monitoring the legislative process in the Union, you are also proposing to look at implementation of Directives and framework decisions within the individual Member States. Have you any plans in that regard?

*Dr Ladenburger:* This Communication consciously focuses on compliance with fundamental rights by the institutions themselves, first and foremost by the Commission. This was a conscious political choice. Therefore, the issue you have mentioned is outside the scope of this Communication. Of course, in the past it has been, and it will continue to be in the future, one of the roles of the Commission as guardian of the Treaties to look at implementing legislation and to bring infringement proceedings under Article 226 EC Treaty. It is not excluded that the Commission may in any possible infringement action under Article 226, brought against adopted implementing legislation, also raise a fundamental rights problem when it sees one. This is possible but it is independent from this Communication. It is something it has done in the past, although not frequently. There was one example recently: This is an infringement case, pending before the Court, where one of the pleas in law made was linked to

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fundamental rights, but it was only one amongst other violations. It is a case against Germany concerning the expulsion of Italian citizens from German territory in which the Commission, amongst other grounds of violation of Community law, also put forward a complaint of violation of Article 8 of the ECHR, family life. It does happen.

**Chairman:** Thank you very much. Lord Neill, you wanted to ask a further question?

**Q40 Lord Neill of Bladen:** I just wondered about the reasons. If you do not have the reasons I am just wondering what happens to one of the central planks of EU legislation of all action. You are going to end up with some quite brief recitals which will not actually explain in the particular area we are talking about the full motivation. Is that legally a difficult problem or not? The simple point is should there be some attempt to convey the flavour of the Explanatory Memorandum by way of reasons?

*Dr Ladenburger:* In the recitals adopted?

**Q41 Lord Neill of Bladen:** Yes.

*Dr Ladenburger:* I think this is a point on which we shall have to reflect together with the Council and the Parliament on the basis, perhaps, of a practice that should now emerge on the Explanatory Memoranda. One will first have to see how the Commission Services and the Commission implement this new rule, how well they actually succeed in succinctly presenting their reasons for fundamental rights compliance, and then it is for the legislator to consider whether it is possible and advantageous to translate that into short language in the recitals. I would not exclude it but I think I am not in a position to make a clear recommendation today.

**Q42 Lord Neill of Bladen:** It is a question for the future perhaps.

*Dr Ladenburger:* I think so.

**Q43 Chairman:** Can I ask you a question about the new Group of Commissioners that have, as their explicit mandate, to drive policy and ensure the coherence of Commission action in the areas of fundamental rights, anti-discrimination, equal opportunities and the social integration of minority groups, and also to ensure that account is taken of gender equality. That Group is already now in being, is that right?

*Dr Ladenburger:* Yes.

**Q44 Chairman:** How does it propose to set about its task?

*Dr Ladenburger:* What tasks?

**Q45 Chairman:** Its task is presumably implicit in its mandate. It is generally charged, as it says, with driving policy and ensuring human rights compliance.

*Dr Ladenburger:* Yes.

**Q46 Chairman:** How is it going to achieve that? What is its direction?

*Dr Ladenburger:* I think the main remit of this Group in practice will be to prepare Commission initiatives for adoption by the College; that is the general idea of the Group of Commissioners. It is also to ensure coherence of ongoing work within departments, both in the preparation and the implementation of policy. It does not have decision-making powers, as you know. The particular role of the Group envisaged in this particular Communication as one part of this methodology is perhaps exceptional in nature for a group because this checking compliance with fundamental rights is essentially a task for the Commission Services, given that it is a question of legal scrutiny. The Communication envisages regular reporting to the Group so that the Group can have some oversight, and the Communication says that in very special cases the Group, within the limits left by the law, can discuss policy orientations to be taken when different fundamental rights conflict, but I do not think this will occur very often. It will have to be seen in practice how interested the members of the Group of Commissioners are in this particular activity and how much space they will allow to this alongside their more classic tasks of preparing policy for the College.

**Q47 Chairman:** They will operate entirely in private, nothing that they do will be public, is that right?

*Dr Ladenburger:* That is right.

**Q48 Lord Clinton-Davis:** Who is in the Chair?

*Dr Ladenburger:* The Chair is the President.

**Q49 Chairman:** I wondered if it would be to them that you would have to resort for extra resources—you may need to train up a whole lot of new human rights lawyers.

*Dr Ladenburger:* That is perhaps a very welcome suggestion to be put forward by this Committee . . . From our point of view, it is still a bit early to appreciate exactly to what extent there is a need for additional resources; we will have to see.

**Chairman:** I think Lord Goodhart, who is a member of more than one interested NGO, would like to ask you a question about publication.

**Q50 Lord Goodhart:** Yes. Looking at paragraph 31 on page seven, one of the purposes of increasing publicity is that public awareness will encourage citizens and civil society “to assert their fundamental

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rights in consultations held by the Commission". First of all, at what stage are the consultations held?

*Dr Ladenburger:* This varies in practice. Certainly they are held well before what we call the formal inter-service consultation, that is before the lead DG produces its final draft legislation that it submits for formal inter-departmental discussion. They are often now held on the basis of what is called a working draft of the Services which is published on the Internet with the proviso that it does not represent the views of the Commission, that it is suggested only for consultation purposes. Consultations can thus take place at a fairly early stage of the proceedings.

**Q51 Chairman:** If it is consultation on a working draft, will that working draft also be accompanied by drafts of an Explanatory Note or of an Impact Assessment?

*Dr Ladenburger:* In my experience it is normally accompanied by a draft Explanatory Memorandum, albeit perhaps a shorter one. It could be an Explanatory Memorandum Article by Article. I am not entirely sure—I can verify if you wish—whether the practice is completely established on this. Sometimes public consultation may also take place not on the basis of a concrete draft but of an options paper or a consultation paper describing the possible elements of future legislation.

**Q52 Chairman:** To what extent under the current practice or the pre-2005 practice were contributions received from citizens and civil society, in particular the NGOs?

*Dr Ladenburger:* I think, as the text itself recognises, given that the 2001 decision has unfortunately remained unknown to the public, the extent to which public reactions on fundamental rights concerns have or have not been received by the Commission is not influenced very much by the 2001 decision. Since I am in the Legal Service, I am not in one of the lead Directorates-General drafting legislation, I do not have the overview of how intensely the public raises fundamental rights issues. I would assume they do but it is rather independent from the 2001 decision. Certainly one hope connected to this Communication is that such contributions will be encouraged and intensified, and also that as public knowledge about this internal mechanism will spread out beyond those NGOs that are specialising in human rights concerns, this will encourage more widely members of civil society to rely on the Charter and on this mechanism.

**Q53 Lord Goodhart:** I should say that I am on the governing body of two NGOs—JUSTICE and Fair Trials Abroad—which do monitor fairly closely new legislation coming out.

*Dr Ladenburger:* Yes.

**Q54 Lord Goodhart:** You think the knowledge of what the practice is under the 2005 statement will increase the number of NGOs or public groups, public bodies, that will take up the possibilities of making replies?

*Dr Ladenburger:* That is certainly the hope of the services. Of course, the two organisations that you have just cited are amongst the specialised bodies that do not need to be encouraged by this Communication to confront the Commission with human rights concerns. I think one hope is that, even more broadly, members of the civil society may acquire knowledge of this mechanism and rely on the Charter in their dealings with the Commission.

**Q55 Lord Goodhart:** So that organisations, for instance, concerned with issues like the rights and needs of older people, which may not regularly monitor what is coming out of the Commission, may find it easier to do so?

*Dr Ladenburger:* For example, but even for organisations representing certain businesses it may also be interesting to note that the Commission has introduced this methodology of internal compliance, so that the next time they file a statement with the Commission they may wish to refer to it.

**Q56 Chairman:** Dr Ladenburger, just a word, if I might, about the Directorate-General for Justice, Freedom and Security when that is not the lead department for the proposed legislation. As I understand it, already they have to be involved in a case which raises a fundamental rights issue, is that right or is that merely proposed?

*Dr Ladenburger:* This is a recent practice that has emerged amongst the services. We should remember that it is still a pretty young Directorate-General and it has received overall responsibility for policy activities related to fundamental rights since 2000 approximately, so it is an emerging practice but the purpose of this Communication is to formally consolidate this practice and to make it clear to all lead DGs that they are supposed to consult DG JFS.

**Q57 Chairman:** Finally, if I could just ask you a question with regard to comitology: does that cause any particular problems now with regard to human rights? I understand that unlike any legislative proposals there are no Impact Assessments, no Explanatory Memoranda. How does a human rights concern get raised and resolved in that process?

*Dr Ladenburger:* I do not think that acts adopted in comitology or, indeed, acts by the Commission adopted directly on the basis of the Treaty cause particular problems but the Commission wanted to show, through the relevant passage in its

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Communication, that it is mindful that these acts may occasionally be as sensitive to fundamental rights concerns as legislative proposals and, therefore, they are not forgotten but, to the contrary, also dealt with by the services in inter-departmental consultation. The Communication adds that Impact Assessment, although not compulsory for these acts, may be conducted for them if it shows that this would be useful. The paper also stresses that Impact Assessment is not as such the methodology for fundamental rights verification, it is one tool used in order to prepare the factual material upon the basis of which a legal verification can take place. Where an Impact Assessment is not conducted for a legislative proposal the Commission Services will be required nonetheless to evaluate impacts of fundamental rights based on their best knowledge and appreciation of these impacts.

**Q58 Chairman:** Thank you very much. I think that probably ends the specific questions we were concerned to put to you unless any Member of the Committee has any other particular question, or is

there anything you would like to add before we bring your extremely useful evidence to a close?

*Dr Ladenburger:* No, my Lord.

**Q59 Chairman:** On behalf of the Committee, may I express our gratitude to you for coming. You will get a copy of the transcript of the helpful evidence you have given to us this afternoon and you will have an opportunity, therefore, to reflect on that. If there are any matters, and there was one particularly in answer to Lord Clinton-Davis that you were going to consider whether you would be able to put something in writing to us, we would be very grateful for that too. Thank you, and thanks to your officials also, for coming and helping us. This evidence will prove enormously valuable to us in this inquiry. Thank you very much.

*Dr Ladenburger:* Thank you very much, my Lord Chairman. It has been a great honour for me and it has also been an extremely fruitful dialogue. I have many important elements to take home to reflect upon, thank you very much.

**Chairman:** Good, thank you.

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**Supplementary memorandum by Dr Clemens Ladenburger, Member of the Legal Service of the European Commission, on Question No 15 by Lord Clinton-Davis on the Commission's contacts with the European Parliament in the context of the Communication on Compliance with the Charter of Fundamental Rights in Commission legislative proposals**

In response to the question asked by Lord Clinton-Davis, I am pleased to provide the following supplementary information:

The Commission attaches high importance to maintaining a permanent dialogue with the European Parliament, and its LIBE Committee in particular, on matters related both to the respect of fundamental rights and to impact assessment.

In this context, the seminar organised by the LIBE Committee on 25 and 26 April presented an appropriate opportunity for President Barroso and Vice-President Frattini to present to, and discuss with, Members of European Parliament the key fundamental rights initiatives of the Barroso Commission, as prepared in particular within the Group of Commissioners GC 4.

President Barroso devoted the main part of his intervention of 26 April 2005 at that seminar (to which I referred in my oral reply) to a detailed presentation of the draft Communication on Compliance with the Charter of Fundamental Rights in Commission legislative proposals, qualifying this initiative as a "flagship example" of the principled approach of his Commission to taking fundamental rights seriously. The President deliberately chose the LIBE Committee as the first forum within the Union institutions in which to explain the Commission's future rules on its internal monitoring of fundamental rights. This initiative was very well received by the members of the LIBE Committee.

Furthermore, the Commission has regularly informed the European Parliament and the Council on its ongoing work on the development of the impact assessment tool, notably within the High Level Technical Group established to implement the Inter-Institutional Agreement on Better Lawmaking. In particular, in that Group's meetings of 17 February and 13 June 2005 the Commission representatives gave short verbal updates on the main developments in the Commission approach to Impact Assessment, covering notably the revision of the Commission's Impact Assessment Guidelines which now explicitly includes the dimension of the impact on fundamental rights. In addition, the Commission recently explained some of the main developments in its reply to a written question (E-0859-05) from Toine Manders MEP.

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WEDNESDAY 13 JULY 2005

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Present	Brown of Eaton-under-Heywood, L (Chairman) Borrie, L Clinton-Davis, L	Goodhart, L Lucas of Crudwell and Dingwall, L Norton of Louth, L
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**Memorandum by Immigration Law Practitioners' Association (ILPA)**

1. The Immigration Law Practitioners' Association is a UK based, non-governmental organisation which is concerned primarily with immigration and asylum issues at the national and European levels. Its membership includes over 1,000 practitioners.

2. ILPA is grateful to be invited to participate in this inquiry into the European Commission's Communication on Compliance with the EU Charter on Fundamental Rights. Together with the other instruments referred to in the call for evidence, this is clearly a development of concern to ILPA in particular as regards access to fundamental rights both at the national, EU and Council of Europe levels by individuals, including citizens of the Union who have exercised their free movement rights and their family members of any nationality, third country nationals and refugees.

3. We note, as a starting place, that the protection of fundamental rights<sup>9</sup> in the European Union has been a matter of substantial concern for some time. As regards the EU legislator, there has there been a steady insertion of references to fundamental rights in the EU treaties from 1987 onwards. As regards the European Court of Justice, the frequency with which references to fundamental rights are made has increased dramatically over the past 10 years.<sup>10</sup> This increasing concern about fundamental rights in EU law at the EU institutional and judicial level has not, however, resolved the question of compliance. Not only have a number of constitutional courts in the Member States expressed their concerns about the protection of fundamental rights in the EU but the European Court of Human Rights is also being seized on an increasing number of occasions relating to the human rights consequences for individuals of EU legislation.<sup>11</sup> One conclusion might be that as statements of the EU's respect for fundamental rights have multiplied at the EU institutional level, skepticism at the reality of that respect has mushroomed at the national and ECHR level.

4. This also seems to be an appropriate moment to note that, not least at the behest of the UK Government, the EU Charter of Fundamental Rights adopted in 2000, was so adopted as a political document, not a legally binding one. The attempt to transform it into a legally binding 'bill of rights' through its insertion into the proposed EU Constitutional Treaty seems to have come to a halt with that draft Treaty for the moment.

5. Moving to the more specific field of concern of this Association, we would note that the Directive on Family Reunification (2003/86) in respect of which the UK has not exercised its "opt in", was adopted well after the critical date of 13 March 2001 on which the Commission decided that all legislation must be accompanied by a fundamental rights check. Indeed, the last Commission proposal for a directive was published on 2 May 2002 (COM (2002) 225 final). However, the Directive contains three provisions of which the European Parliament is so concerned in respect of fundamental rights compliance that it has commenced proceeding for annulment before the European Court of Justice.<sup>12</sup>

6. Thus our primary concern is that fundamental rights are actually secured better in the EU, not that the institutions spend more time reassuring us that they are protected better. In so far as a monitoring system integrated into the legislative process at the EU level contributes to better protection we are in favour of such a measure. Our concern, however, is that any compatibility assessments/statements/certificates and the like must not create a *prima facie* legal presumption that the legislative act is in fact fundamental rights compliant. The aggrieved individual who claims that his or her fundamental rights have not been respected must not be faced with a further legal hurdle to overcome in the quest for redress on account of the existence of a rights impact assessment or a fundamental rights certificate. The creation of fundamental rights impact assessments must not be legally cognisable to the disadvantage of the individual seeking to establish his or her rights.

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<sup>9</sup> While fundamental rights as a concept is not fully convergent with the concept of human rights the two do overlap, primarily in so far as human rights are internationally recognised fundamental rights while at the national level the concept of fundamental rights tends to include also the concept of civil liberties.

<sup>10</sup> Elspeth Guild & Guillaume Lesieur (editors), *The European Court of Justice on the European Convention on Human Rights: Who said what when*, Kluwer Law International, The Hague, 1997.

<sup>11</sup> E Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, Kluwer Law International, The Hague, 2004.

<sup>12</sup> C-540/03.

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*The Commission's Communication*

7. Two main practical measures of significance are suggested by the Communication which we will address in turn: the use of *integrated impact assessments* and the use of *Charter compliance/compatibility statements*. We start by saying that we give this initiative a cautious welcome and recognise that any development whereby fundamental rights compliance is rigorously and systematically monitored and built into the very earliest stages of policy and planning is to be welcomed. However, despite this cautious welcome, we do also wish to raise some concerns.

8. *Integrated impact assessments* (IAAs) have been used since 2002. A review was conducted of the first phase of implementation of the IAA programme during 2004. IAAs are now since 2005 to be used more systematically, and the guidance for those conducting impact assessments has recently been amended following the review.<sup>13</sup> These Integrated Assessments are structured in such a way as to examine social, environmental and economic impacts of proposed measures during their development. We are somewhat disappointed that the question of fundamental rights still does not rate a separate category alongside these other three impact categories, nor even a clearly separate particular sub-heading within the broader category of social impacts (where it is largely located now). We note the explanation that the diversity of rights contained in the Charter means that they find themselves scattered throughout the three categories of impacts studied, and recognise that fundamental rights impacts can and do find a place in the framework,<sup>14</sup> both before and after the recent amendments.

9. We also have some concerns that not providing at least a separate sub-heading for fundamental rights issues under 'social impacts' may serve to undermine the strategy of locking in a culture of rights awareness and of highlighting the commitment to identifying, assessing and evaluating potential rights impacts within this integrated framework. In particular, while it may be that Impact Assessments carried out by Directorates General which have a good awareness of fundamental rights impacts, we wonder whether this may always be the case where such impacts are less obvious and where the assessment is carried out primarily by others with less awareness and experience of fundamental rights issues. Reading the documentation on Impact Assessments, it comes across quite clearly that this integrated impact assessment initiative is intended to further better regulation, competitiveness, and sustainability. There is bound to be some scepticism about the extent to which strategies developed with these aims in mind can be expected to translate comfortably to the rather different context of fundamental rights protection.<sup>15</sup>

10. Connected to these two points above, we consider that some more thought might be given to the process of assessing fundamental rights impacts and to greater transparency about how this will take place, and how it will be ensured that all Commission Officials drawing up impact assessments have appropriate levels of knowledge and expertise in fundamental rights issues. We understand<sup>16</sup> that guidance and directives is being drawn up by officials from the Freedom Security and Justice Directorate-General to assist others elsewhere in the Commission in drawing up human rights impact assessments, but little is said about this in any of the documentation we have seen; in particular we see no such specific guidance is referred to in the updated impact assessment guidelines<sup>17</sup> (although further guidance on competition impacts is referred to).

11. We also note that there are bound to be difficulties in determining the criteria against which compatibility assessments to be judged since these may vary substantially. For instance, the questions which would be asked by an executive anxious to avoid legal challenges will be different from the assessment which might be carried out by an NGO seeking to establish rights for the individual. Further within governments, assessments will be substantially different. For instance, a Treasury may seek a fundamental rights assessment which indicates the cost of fundamental rights while a Social Affairs Ministry may seek an assessment of fundamental rights from the perspective of social cohesion.

12. For this, amongst other reasons, we are also concerned to ensure that the widest possible range of organisations and voices from civil society are heard in assessing the potential impacts of proposals and measures fundamental rights. The Commission states that wider political and ethical issues can and should be

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<sup>13</sup> These comments may helpfully be read together with the most recent Impact Assessment guidelines SEC (2005) 791.

<sup>14</sup> The documentation on impact assessments seems somewhat contradictory as to how clearly fundamental rights impact is singled out as a particular issue which should be addressed. Some do not do this clearly, while others do so more clearly and specifically, and the most recent high profile impact assessment that has serious fundamental rights impact implications (on the Visa Information System, COM (2004) 835) does in fact address fundamental rights impact within the social impacts category.

<sup>15</sup> See generally on impact assessments in the context of mainstreaming fundamental rights, pointing out some difficulties and concerns, De Schutter "Mainstreaming Fundamental Rights" in Alston & De Schutter (eds) *Monitoring Fundamental Rights in the EU* (Hart Oxford 2005).

<sup>16</sup> De Schutter, above, page 54.

<sup>17</sup> SEC(2005) 791.

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addressed in impact assessments and we consider that evaluating potential fundamental rights impacts will be a critical test of the Commission's commitment to this openness and debate. This will be crucial in allaying fears that the impact assessment process—with its roots in better regulation and sustainability—may be of limited use in this somewhat different rights context, and even at its worst potentially unhelpful to the long term strategy of rights protection.

13. We are concerned that the Commission—and others involved later in the legislative process—should take very seriously the fundamental point that impact assessments are merely a guide to *assist* in the ultimate decision and not a substitute for it. The final determination on whether to act where negative fundamental rights impacts are anticipated and if so what kind of action to take (in particular the balance to be struck between protected rights and permissible exceptions, proportionality) *must remain with the properly allocated (and in some way politically accountable) decision-makers*. The EU processes of law and policy-making have sufficient accountability gaps already and care should be taken that these impact assessments are used in a way which enhances openness, transparency and quality of decision-making rather than exacerbating the difficulties that already exist.

14. Finally, we are concerned to ensure that the existence of impact assessments evaluating potential negative fundamental rights impacts does not lead indirectly to an approach whereby decisions with negative rights consequences may be regarded more lightly or easily. Pursuing policy options or legislative instruments whereby a certain degree of negative rights impact is anticipated may sometimes be necessary but should never be done lightly. In pursuing the Hague programme and the Agenda for Action implementing it we detect something of a shift away from existing rights paradigm. There is a worrying shift of framework regarding the relationship of rights and exceptions. While in EC law there has been a very clear focus on the rights of individuals either as EU rights or human rights against which exceptions must be justified by the Member States, in the Agenda for Action the motif is one of balance. There seems to be a transformation of the primacy of rights against which any exception must be justified by the Member State on very limited grounds into more of an equilibrium between exceptions and rights.

15. Both in EU law and international human rights law, rights are established which the individual is entitled to exercise, such as the right to free movement for economic purposes or the right to family life. A state which seeks to interfere with the right is only permitted to do so on the basis of the exceptions set out in the legislation and subject to the judicial supervision of the courts. As the European Court of Justice has clarified on many occasions, the exceptions are exactly that—exceptions to be interpreted narrowly as restricting rights which the individual is entitled to exercise. However, in the document there seems to be a change in this basic and fundamental principle of EU law. The relationship of rights and exceptions seems to be in the process of change and being recast into one of balance. This risks giving a weight to the exceptions to rights equation which elevates the exception to the same status as the right. We consider this to be a worrying and negative development. In the light of this, we are concerned that the impact assessment process should not be used in any way that would trivialise or marginalise the seriousness of any decision in which negative rights consequences are seen to be outweighed by benefits gained.

16. *Compatibility statements* are also used and greater attention will be paid to the reasoning behind measures. These compatibility statements are statements included in Proposals or the preamble to legislative instruments indicating that they comply with the Charter fundamental rights. We welcome the move to encourage more detailed and reasoned compatibility statements as we share the concern pointed out by the Commission that without such enhanced reasoning these statements may indeed be criticised for lacking substance and justification and being empty gestures or formalities. We raise two further concerns here: first, that these statements are only as good as the standards used to judge compliance. In particular we would raise concerns that too often these statements have been made in respect of measures—particularly those in the area of immigration and asylum law—which have been roundly condemned as being in breach of fundamental rights, and which are being or may be challenged in the Court of Justice as being incompatible with fundamental rights.<sup>18</sup> Care should be taken not just that these statements are made, but that before making them, rigorous and high standards of rights protection are used to judge whether compatibility may be stated.

17. We also wish to point out the risk that such statements could be used later as a “buffer” or a protection against proper and rigorous subsequent judicial scrutiny. In this respect, much will depend on the attitude of the Court of Justice which is somewhat problematic to predict. We are concerned that the combination of impact assessments and compatibility statements may, in practice, act as an obstacle in subsequent judicial scrutiny.

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<sup>18</sup> We would particularly mention here the Family Reunification Directive and the Asylum Procedures Directive.



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18. We are interested to note that the Commission reiterates its commitment to following through the results of rights impact assessments and charter compliance statements, even to the extent of suggesting that it may threaten to take legal action to annul measures if the standards of rights protection in its own Proposals are badly compromised during the subsequent stages of the legislative process. We look forward to the day when the Commission will match this high-sounding rhetoric with real action, but we remain to be convinced that we will see this any time soon.

#### CONCLUSION

19. We give this initiative a cautious welcome. Nonetheless, our expectations of what this strategy can achieve are modest, and we are concerned to ensure that the combination of impact assessments and compliance statements does not shift the balance too much in favour of deference towards executive and legislative decisions on proportionality, necessity of interference with protected rights, and overall standards of rights protection, at the expense of an appropriate standard of subsequent rigorous independent judicial scrutiny of such decisions. And we emphasise that this strategy must be combined with a real commitment to act in accordance with the highest levels of rights protection by the Commission and the Member States in the Council. Too often in the field of Freedom, Security and Justice, Member State governments, and to some lesser extent the Commission, have ignored concerns raised by the European Parliament and civil society during the legislative process. If this attitude persists we doubt whether this strategy alone can achieve much.

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#### Memorandum by JUSTICE

1. JUSTICE is an independent all party law reform and human rights organisation whose purpose is to advance justice, human rights and the rule of law through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. JUSTICE welcomes the House of Lords Select Committee's inquiry into the practical implications of the European Commission's Communication of 27 April 2005: "*Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systematic and rigorous monitoring*". The introduction of a new mechanism to ensure that all Commission legislative proposals are "systematically and rigorously" checked for compatibility with the EU Charter of Fundamental Rights is needed especially in light of a European Union founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.<sup>19</sup> The increasing capacity of the Union's institutions to affect the human rights of its citizens makes it a pre-requisite for all Commission legislative proposals to be checked for compatibility with the EU Charter of Fundamental Rights.
3. JUSTICE believes the establishment of such a methodology will promote a strong "fundamental rights culture" within the EU which will give credibility and authority in monitoring respect for fundamental rights in the activities of the Commission.

#### SYSTEMATIC MONITORING OF RESPECT FOR FUNDAMENTAL RIGHTS

##### *The impact assessment*

4. In order to comply fully with the Charter of Fundamental Rights in Commission legislative proposals, the Commission has equipped itself with new horizontal policy programming instruments, notably the impact assessment form. The introduction of two key documents, ie impact assessment and explanatory memorandum, submitted together with the draft legislative proposals at the preparatory and interdepartmental consultation stages will improve the scrutiny for fundamental rights. The impact assessment is intended to give a full and precise picture of the different impacts on individual rights. This impact assessment, however, won't be carried out for all legislative proposals. The reason given is that fundamental rights problems sometimes only arise with detailed implementing provisions or with very specific elements of a legal instrument which an impact could not forecast.<sup>20</sup> JUSTICE regrets that the impact

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<sup>19</sup> Article 6(1) TEU.

<sup>20</sup> Commission Communication on Compliance with the Charter of Fundamental Rights in Commission legislative proposals—COM(2005) 172 final, 27.4.2005, paragraph 14.

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assessment will be not applicable to all legislative proposals and would like to know what the criteria will be for deciding whether or not to subject specific legislative proposals to such an assessment.

5. The introduction of a number of additional questions specifically on fundamental rights in the impacts checklist are very welcome. Unfortunately, the Commission's Communication doesn't include the list of questions. JUSTICE would like to see this list of questions in order to check whether the questions asked are relevant concerns of fundamental rights.

6. The refusal to create in the checklist of the impact assessment a fourth separate category for fundamental rights aside from the three existing ones (economic, social and environmental) is quite unfortunate. JUSTICE wonders what will happen to those fundamental rights that don't feature in the three categories of the checklist. It is extremely important that all the rights incorporated into the Charter of Fundamental Rights are reflected in the checklist so that an accurate assessment of the human rights situation can be made.

#### *The explanatory memorandum*

7. Aside from the impact assessment, fundamental rights will also be taken into account in the explanatory memorandum. In 2001 the Commission decided for the inclusion of a recital in "legislative proposals or draft instruments which have a specific link with fundamental rights". JUSTICE regrets that the Charter recital won't be used systematically in the explanatory memoranda. The use of the recital on specific occasions won't bring any coherence in the legislative proposals but rather confusion. The criteria put forward in the Commission's Communication to guide current practice when the Charter recital will be used need to be explained in more detail.

8. The rule of briefly summarising the reasons pointing to the conclusion that fundamental rights have been respected in the explanatory memorandum whenever reference is made to the Charter recital is highly appreciated.

#### *Follow-up by the Group of Commissioners*

9. JUSTICE welcomes the follow-up of the internal monitoring by the members of the Commission, especially those in the Group on Fundamental Rights and Equal Opportunities. Keeping them informed should happen on a regular basis and not only when fundamental rights have been subject to internal monitoring.

10. JUSTICE raises some concern to the reference made in relation to the Fundamental Rights Agency. The Commission's Communication mentions "the FRA should be used as input for the methodology"<sup>21</sup> but it is not quite clear what is understood by this, especially when uncertainty still exists surrounding the exact scope and remit of the FRA.

#### *Monitoring the work of the legislature*

11. JUSTICE is happy to see that the work of the two branches of the legislative authority will be adequately monitored, particularly to determine compliance with fundamental rights. The ability to annul proceedings in the event of an infringement of fundamental rights is an important step forward into the protection of fundamental rights.

12. The initiatives put forward by the Commission establish a sound basis to ensure that all Commission legislative proposals are systematically and rigorously checked to fundamental rights. Despite the couple of concerns expressed, JUSTICE believes that this initiative will demonstrate the Commission's effort to secure compliance with fundamental rights, which will reinforce the credibility of its initiatives and will also publicly promote the image of the Charter as an essential vehicle based on common values.

June 2005

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<sup>21</sup> Commission Communication on Compliance with the Charter of Fundamental Rights in Commission legislative proposals—COM(2005) 172 final, 27.4.2005, paragraph 26.

13 July 2005

### Examination of Witnesses

Witnesses: PROFESSOR ELSPETH GUILD, Partner, Kingsley Napley, DR HELEN TONER, University of Warwick, Immigration Law Practitioners' Association (ILPA); Ms MARILYN GOLDBERG, Director of Legal Policy, and DR ERIC METCALFE, Director of Human Rights Policy, JUSTICE, examined.

**Q60 Chairman:** Good afternoon. May I welcome you and say how grateful we are to you for coming. As you know, we are live, the television screens are on. There is a transcript of what is said this afternoon. You will get a copy of that and have a chance to revise it syntactically or otherwise if you need to. May I ask you in turn to introduce yourselves so that that will be on the record too? I am not sure who wishes to start. Professor Guild?

*Professor Guild:* Thank you very much. I am Professor Elspeth Guild of the University of Nijmegen and I am here in my capacity as Co-Chair of the Immigration Law Practitioners' European Sub-Committee.

*Dr Toner:* Dr Helen Toner, a lecturer in law at the University of Warwick and also a member of the ILPA European Law Sub-Committee.

*Ms Goldberg:* I am Marilyn Goldberg. I am working for JUSTICE as an EU Legal Officer on the European Charter projects.

*Dr Metcalfe:* Dr Eric Metcalfe. I am the Director of Human Rights Policy at JUSTICE.

**Q61 Chairman:** Thank you very much. You can see who we are because we display our names in front of us. I know you have all had sight of the questions that we want your help on this afternoon. I think the best thing is if we ask all of you to deal with the questions as they arise. Perhaps I can start by thanking you for your written contributions which have been of enormous help. In a sense we will take them as read, but if you want to expand on aspects of them, that would also be very helpful. The first question is whether you think that the Communication should indeed be welcomed. Is it on the whole an encouraging thing? I get the sense that ILPA are rather more sceptical about this than JUSTICE. Is that fair? Have you seen each other's contribution?

*Professor Guild:* Yes.

**Q62 Chairman:** Perhaps you could give an overview on how you reacted to the Commission's proposal.

*Professor Guild:* Thank you very much, my Lord Chairman. We have indeed had the benefit of reading the evidence of the other parties. The scepticism which appears in our submissions I think rests primarily on four issues. We welcome the Communication. However, we would wish to note that more noise about human rights and fundamental rights protection does not mean that there is better protection. As we hear more and more about fundamental rights at the EU level we are concerned that it is not in fact leading to better

protection. Secondly, it seems to us that the European Charter of Fundamental Rights is perhaps a good legal base on which to seek to achieve better human rights proofing of EU legislation and that it is in fact a justiciable set of rights against which individuals can seek to promote their rights. Thirdly, in the Communication there is a suggestion that the protection of fundamental rights should fall on a series of bodies which are not in fact in any way related specifically to the democratic process. We would just wish to reiterate that in our view democracy is the mechanism in which the protection of fundamental right is inserted as a central element and one cannot offload one's duties to protect and ensure that legislation complies with fundamental rights by giving it to agencies or monitoring bodies that are outside the democratic process itself. Our fourth and final point is that we are very concerned that any mechanisms which seek to fundamental rights-proof legislation of the three kinds proposed in the Communication must not have the consequence of constituting an obstacle to judicial scrutiny of compliance with fundamental rights implications, in respect of the concerns of individuals that their rights have not been protected.

**Q63 Chairman:** Thank you very much. Dr Toner?

*Dr Toner:* I do not think I have anything to add at this stage to that general introductory question, thank you.

**Q64 Chairman:** Dr Metcalfe?

*Dr Metcalfe:* I would like to state at the outset that JUSTICE welcomes the principle of the Communication, which is that all legislation should be subject to internal scrutiny before it is presented. We do, however, share some of ILPA's reservations in relation to the practice. In relation to the principle, I would say that perhaps historically too much emphasis has been placed upon the judiciary and the courts to protect fundamental rights and perhaps too little attention has been paid to the idea of the legislators themselves, including those who drafted and prepared the legislation, the obligations upon them to come up with law that is compatible with fundamental rights and in that spirit we welcome the Communication. The constitutional burden for protecting rights should fall, first and foremost, on those who come up with the legislation, not those who enforce it. In practical terms, however, we do think that it is possible to go further. In terms of the Communication itself, we think that the Commission should require impact assessments in all cases. We

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also think they should extend the categories under which impact assessments are required. A third and perhaps more general point that is beyond the remit of the Communication or indeed the Commission itself is that we would like to see the scrutiny process extended beyond the Commission to the other legislative processes within the EU institutions, the Council and the Parliament. In that sense we welcome the spirit of the Communication even if in practice it falls short.

**Q65 Chairman:** So you think it can be usefully built upon but it is incomplete insofar as it offers sufficient safeguards at the moment?

*Dr Metcalfe:* It would be incomplete if it were to be the only protection in terms of legislative scrutiny within the EU institution as a whole, yes.

**Q66 Lord Lucas of Crudwell and Dingwall:** If your job in the Commission is, say, compiling regulations on the permitted colours of cows, how familiar are you going to be with human rights legislation? Will you be able to see the human rights problems coming up if you are an ordinary run-of-the-mill lawyer doing drafting and that sort of regulation or do you need a specialist unit? If you do need a specialist unit, should it be independent of the Commission or should it be a creature of the Commission?

*Dr Metcalfe:* I think in the first instance you would turn to the Legal Services Unit, but if you are concerned you do not have the expertise yourself and it is outside your Directorate General then you would turn to the DG for Human Justice and Security and seek their advice. What you should be looking at is an internal awareness. Even the person who is charged with picking the colours for particular motifs or whatever should still have an awareness that there are these principles out there that can have an impact on their own decisions.

**Q67 Lord Lucas of Crudwell and Dingwall:** Does anything like that exist? Is that the way the Commission works?

*Dr Metcalfe:* I could not tell you. I am not in a position to offer that kind of analysis about how the Commission works.

*Professor Guild:* My Lord Chairman, I think that is definitely a question to ask the Commission officials, particularly the Legal Service, how they ensure that their legislation takes account of obligations at the EU level.

**Chairman:** We have a note of that.

**Q68 Lord Borrie:** I wonder if I might ask Professor Guild a question, it is really raising an issue with her about the general point with which I entirely agree, that sometimes if there is a lot of noise about fundamental rights there is not necessarily the proper

procedures to ensure that they exist and are enforced. I think it was in the second of her four points that she seemed to be somewhat unfair to this particular Communication, which after all is trying to actually devise a number of procedures within the legislative process so that experts, such as the Legal Service and other possible bodies in the future, if there is a fundamental rights agency who will be expert on this, would have a say and would report and would have the value in impact assessments and so on of ensuring that fundamental rights were not just a lot of noise but actually meant something and was a reality.

*Professor Guild:* I do not want to be too harsh on this proposal, but it seems to me that this Communication cobbles together three quite disparate ideas into one document which come from a variety of different sources and are perhaps not fully digested. The first is the idea that references to fundamental rights should be going into explanatory memoranda and into recitals of EU legislation where appropriate. Then there is the question about how we determine which legislation requires a mention in the recitals and which legislation requires something in the explanatory memoranda, but there is no question about whether or not something needs to go into the body of the text of the Commission proposal for legislation beyond the recitals and the explanatory memoranda, that seems to me to be a bit problematic. The second thing which the Communication does is it takes a process which seems to have been pulled together on impact assessments driven by the environmental protection lobby, which set out as a policy tool the use of this impact assessment idea. In 2002 we extended this from environmental to economic and also social impacts and then in this Communication we pull out a couple of words that appeared in that 2002 Communication on impact assessments referring to fundamental rights and we said, "This would be jolly good. Let's have fundamental rights impact assessments in respect of legislation." So it is a bit out of context, it is freeloading on the back of a policy tool which has been designed in completely different fora and for completely different purposes. Maybe it will be a jolly good idea and maybe it will not be, but it seems to me it needs to be digested a little bit further. The third thing is that we decided to set up this committee of commissioners that is supposed to be monitoring. One of the interesting things which I noted from the evidence you have had from the Commission's Legal Service is that the remit is fairly unclear as to what it is supposed to be monitoring, who it is supposed to be monitoring and it clearly does not have any power to require anybody else to be monitored, nor to provide sanctions in respect of a decision of inadequacy as a result of the monitoring process. So we have something which purports to be some sort of monitoring taking place, which limits to a small

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number of persons those who are monitoring, but where it is fairly unclear exactly what they are monitoring and the question of relationship with monitoring implementation at the national level is left completely aside, with only a reference to the Fundamental Rights Agency, and the question of what we are going to be monitoring and how is fairly unclear except that they seem to think they are going to be monitoring the two other branches, which must be the Parliament and the Council.

**Q69 Chairman:** How would you like to see the group develop? Its remit is to drive forward the interest in human rights and concern for human rights. How would you like to see it brought into play in order to further the objectives of the Communication?

*Professor Guild:* From what I understand of the supplementary document about the group of commissioners, which my colleague, Helen Toner, has managed to extract from the internet with great difficulty, it seems that what this group of commissioners does is it reduces from 25 to eight commissioners those who are responsible for monitoring fundamental rights. They can be replaced, of course, by members of their Cabinet. It seems from the document that the person who is going to hold the power on deciding the monitoring is the Deputy Secretary General. If this group of commissioners is actually given any powers, that person will become a key person in terms of the power of monitoring what happens to Commission proposals as they go through the legislative process and in calling to task all of the different parts of the Commission, the Council and the Parliament as regards fundamental rights. So it could become, were it to be given any power to require anyone to produce any information about monitoring, were it to be given any sanctions as regards failure, a rather powerful role. Then you have to ask who is going to be this Deputy Secretary General and what will its relationship be to the democratic bodies in the European Union, both at national and EU level of course.

**Q70 Lord Goodhart:** I should perhaps start by making a declaration of my interest. I was Vice-Chair of JUSTICE. Professor Guild, there are all sorts of interesting questions following on from what you have said. There are proposals—indeed we have them before us today—for setting up a Fundamental Rights Agency as part of the EU. Is there any point in having a Fundamental Rights Agency and a separate group of commissioners to monitor what the Commission is doing in terms of fundamental rights, or would it be better to merge the two and have the Fundamental Rights Agency responsible for monitoring the Commission?

*Professor Guild:* It seems to me the Fundamental Rights Agency has an absolutely critical and different role from this group of commissioners because the Fundamental Rights Agency is supposed to be reaching into the Member States, so that is where we get the question of compliance with EU fundamental rights obligations at the national level. The question is what is the relationship with the Ombudsman as regards the EU level. I will leave that aside perhaps for a later investigation into what the Fundamental Rights Agency is doing. At least we have the idea, as we have at the national level with the CRE and this new body that we are about to set up, of an intermediary body between our democratically elected Parliament, our bodies that are part of the democratic process and our citizens to help the citizen to access rights and to ensure that rights are protected. I think the Fundamental Rights Agency, should it work in a particularly effective manner to help those who live within the European Union, should be fulfilling that kind of a monitoring role vis-à-vis the implementation as regards what is happening at the national level and fundamental rights. This group of commissioners seems to have a duty which is much more related exclusively to the EU level. If I have understood it correctly, though I could be entirely wrong and one of my colleagues will correct me on this if I am, it is about what happens in the legislative process. Perhaps I might be permitted to be slightly colloquial in an explanation. Let us say the Commission proposes a Directive, for instance the Directive on Family Reunification for Third Nationals, and it is a rather nice proposal, it has got its human rights stuff in there, its explanatory memorandum and its recital and it is all looking quite satisfactory. It goes off to the Parliament and the Parliament mauls it a bit. It goes off to the Council, the Council mauls it entirely and demands a redraft with much less fundamental rights stuff in it. So out it comes, the Commission has to obey its political masters and it produces a second draft where a whole series of rights have been taken out. It then goes back and gets mauled further. Nobody is overseeing this process from the declaration that everything is satisfactory as regards fundamental rights in the first draft until it eventually gets adopted in a form which the European Parliament considers to be so inadequate that the Parliament has started proceedings against the Council before the European Court of Justice because it considers the Directive does not comply with fundamental human rights. I think it is that process that this group is going to be monitoring. I think what they would like to be able to do is to call in the Council and say, "You can't do that, fundamental rights are getting lost in this process," and so it goes on, but as it has no powers and no sanctions it is not entirely clear how this is going to happen.

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**Q71 Chairman:** So you would like to see the Council introduced into the process and perhaps submitting to some extent to oversight by this group? Is that a possible way forward?

*Professor Guild:* My Lord Chairman, I have not thought about that. That is an option that I have not really reflected on. Something needs to happen. The fact that what is going on at the moment is not entirely satisfactory I think is well reflected in the document. The fact that we need to find some other mechanism is self-evident. When we look in our policy toolbox, it is not good enough just to pull out human rights assessments or fundamental rights assessments or groups of commissioners, I think we have to have a little bit more reflection and the role of the Council is fundamental in this.

**Q72 Chairman:** This is a Commission Communication and in a way it cannot be criticised for not carrying the matter beyond the powers of the Commission itself, but you are really saying that it needs co-operation from the other organs of government in Brussels, are you not?

*Professor Guild:* Indeed. I would say in particular it would benefit enormously from a little bit more democratic legitimacy, for instance a bit more participation from the European Parliament to give it some teeth on the legitimacy front.

**Q73 Chairman:** Let us move on to impact assessments which are obviously a very important aspect of that and I think, Dr Metcalfe, you have already mentioned those. Can you focus on what you see as the inadequacies of the Communication so far as carrying impact assessments to where it ought to go?

*Dr Metcalfe:* We find the Communication's justification for not requiring an impact assessment in every case to be unsatisfactory. While it may be correct that some problems only arise "with detailed implementing provisions or with very specific elements of a legal instrument which an impact assessment could not forecast," it does not seem to us to be an adequate reason for not carrying out the impact assessment in the first place. It seems puzzling to us how you can arrive at a conclusion that a particular piece of information is not suited for an impact assessment until you have carried out an impact assessment and, if that is the conclusion, then that should inevitably form part of the assessment's conclusion itself. I do not think it is possible to rule out *a priori* the idea that any particular legislation by subject area is unsuited for impact assessments. We consider that impact assessments are particularly important in respect of proposals carried out under the Third Pillar and this is a lacuna in the Communication because a Member State can initiate a proposal for legislation and the Communication

obviously is unable to cover what the Member States are able to do when they bring forward proposals. Just as the Commission should be carrying out impact assessments in every case, there is no reason why impact assessments should not be carried out by Sweden or by the United Kingdom when they are proposing measures. I have already noted that we consider the categories which have been relied upon by the Communication, that is to say economic, social and environmental impacts, to be profoundly unsatisfactory. We do not think it is possible to capture the full range of possible impacts on fundamental rights. I think, building on what Professor Guild has already said in relation to how the impact assessment device came about, that is to say through the environmental lobby, it becomes clear that that has been unsatisfactorily adopted to the field of fundamental rights, because you are not talking for instance about the CO<sub>2</sub> emissions that are going to be emitted by a factory, you are dealing with how this particular proposal will impact fair trial rights. Fair trial rights do not fall within economic or environmental considerations and I think it is only by distorting their importance quite considerably that you could assess their impact in social terms. Accordingly, we do not think that the existing range of categories is at all adequate. We accept it is perhaps a problematic device to use in relation to fundamental rights because rights protect values and goods and these are unquantifiable to a certain extent. So how can you assess the impact of something when it is unquantifiable? Nonetheless, we would like to see some sense of a broader picture so that when the Commission itself is drawing up proposals it should have regard to those rights and should give their insight as to how they believe their particular proposals will affect those values. We accept it may be a difficult exercise for European civil servants to carry out, but, nonetheless, we feel it is important if this scrutiny is to have any real value.

**Q74 Lord Goodhart:** Given what has happened to the EU constitution, it looks as if we are going to be stuck with the Third Pillar for a good many years to come. Is not one of the major problems here that the Commission has no role in relation to Third Pillar matters, and does that not mean that a fundamental rights impact assessment is actually not going to apply to a great deal of business carried out by the EU nations where an impact assessment is most needed?

*Dr Metcalfe:* Yes, and we are deeply concerned about that. That is why we have said that the Communication has no scope to cover what Member States do in relation to Third Pillar activities. We thought it was important to highlight in our evidence today and in our submissions that this is what we see as a major area, I completely agree with that.

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**Q75 Lord Clinton-Davis:** Have you imparted those views to anybody in the Commission or anywhere else? What has been the response?

*Dr Metcalfe:* I know from recent conversations I had with civil servants in Brussels not so long ago about the problems they had themselves in preparing the impact assessments. It seems to me anecdotally that the civil servants themselves find it very difficult to carry out the impact assessments in relation to fundamental rights because of a lack of guidance. We have not made—other than this evidence—any formal submissions to the Commission in relation to this, but I would say from my own impressions certainly that they regard it as something in need of a great deal of development. If they are going to continue to do these impact assessments and we hope that they do, we hope they give a great deal more thought in terms of the guidance that they give to the people who are carrying them out because it is clear at the moment—again this is purely anecdotal evidence—they seem to be floundering in certain areas.

**Q76 Lord Goodhart:** Do you think it would be desirable if all EU legislation followed the practice now followed in Parliament here and contained a note saying that this legislation is compliant with the Charter of Fundamental Rights?

*Dr Metcalfe:* Absolutely. Under Section 19(1) (a) of the Human Rights Act all primary legislation introduced at Second Reading is required to have a statement of compatibility. There has been one instance of a statement of possible incompatibility and we feel the same should be true in European matters, that all legislative proposals, whatever their provenance or origin, should carry with them this certification. I see that in the role carried out both in the recital but also in the explanatory memorandum and it is a positive development. Whereas you do not have a statement of reasons attached to a statement of compatibility in UK legislation, with the explanatory memoranda you have the possibility of giving substantive reasons by the Commission that can then be deliberated upon by those who come afterwards to discuss its merits.

**Q77 Lord Lucas of Crudwell and Dingwall:** In paragraph 5 of their submission Fair Trials Abroad talk about the lack of fundamental research that is done before creating an impact assessment. Do you all agree with that assertion and, if so, how would you express an obligation that might be put on the Commission to deal with that?

*Dr Metcalfe:* My own experience of the research which was carried out in relation to impact assessments is only anecdotal. We do not have any information to say how well the Commission has performed in relation to impact assessments

generally. It is apparent from their own communication that they are somewhat *ad hoc*. They themselves say that they do not carry them out when they do not see a sufficient connection with fundamental rights. As to how we would require that from the Commission, I am afraid that off the top of my head I do not have a useful formulation to offer, but we would be happy to think about that and perhaps write to you.

**Q78 Chairman:** They have not yet started producing impact assessments in accordance with these recent guidelines, 15 June was when the new impact assessment guidance came out, but when they do and when they start filling out these various boxes under the various headings, economic, social and environmental, and start addressing the human rights questions you will no doubt be alert and in a position at that stage to comment upon how successful this new scheme is.

*Dr Metcalfe:* We hope so, but again we are judging by outcomes. It is not always apparent in an impact assessment from what has been written up as to the research they may have carried out. We hope that they will go into detail in their assessments as to the research that they have carried out, but I think that is something that remains to be seen.

**Q79 Chairman:** Does ILPA have anything to add on the question of impact assessments? Dr Toner, I think you are worried that any averment of compliance should not be seen as a buffer and it should not discourage investigation as to the reality of the assertion.

*Dr Toner:* Yes, that is one of our concerns. While we obviously welcome the idea of scrutiny and locking in this process of respect for fundamental rights from a very early stage, which is one of our concerns, that these processes should not add spurious legitimacy that is not really deserved by the reality of what has gone on, obviously in the end it will be of some interest to us, should it ever happen, what kind of attitude the Court of Justice will take as to what importance it attaches to the fact that something has gone through this process. I have four brief points that I think I would like to add. Firstly, a very brief point about the question of impact assessments by Member States and at other stages in the legislative process. That is obviously a concern and I am grateful to my colleagues for raising that. My understanding from the impact assessment literature rather than this particular Communication is that the Commission is quite aware of that and does wish to spread this practice and encourage it elsewhere, but obviously the Commission is telling us what it is doing internally. So it remains to be seen whether this practice will in fact spread and be used in other contexts. Secondly, we also share the concerns of

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JUSTICE about the inadequacy of this tripartite system of economic, social and environmental impacts. I will not dwell on that but, suffice to say, I think we can see these impact assessments as having a dual role and a dual purpose and certainly from the literature on the environmental assessment this comes through, that it can act both as a process of information gathering and can be seen as a way of instilling a culture of respect either for environmental concerns or for fundamental rights. In practice we have some concerns as to how effectively this tripartite structure, without a clear focus on fundamental rights to sharpen that, may not optimise either the information gathering or the culture building potential of this exercise.

**Q80 Chairman:** So you would like a discrete section dealing with all aspects of human rights?

*Dr Toner:* I think that might be helpful, yes. We do recognise that in the guidelines and in the literature that is there already to guide the use of impact assessments there are questions that relate to fundamental rights, but we do think it would be helpful to collect together everything under one heading to focus people's minds on this. My third point relates back to our welcoming of this in principle but having some concerns about how it may work in practice. From looking at the literature of environmental impact assessments there is some concern that in some contexts this operates in such a way as to simply permit a developer to justify what they wish to do in practice. It is not always effective in preventing or allowing concerns to be raised about potentially environmentally damaging development and sometimes simply allows the developer to justify what it wishes to do, and I have certainly picked that up from the background reading that I have done on the environmental use of impact assessments. We hope that this will not be the case here transferred into the context of fundamental rights assessments, that this will just permit political decisions essentially that have already been made or political preferences that are there within the Commission or within other institutions to be justified without adequate and proper scrutiny.

**Q81 Chairman:** It ought to inform a decision whether to go ahead rather than merely justify a decision to go ahead, is that what you are saying?

*Dr Toner:* We hope it will work in that way, but we wonder. Finally, we have some remaining concerns about how this will actually operate in practice within the Commission. One of our concerns at this particular stage is that we understand that there is further guidance for Commission officials. We understand that a document has been prepared about how to do impact assessments on fundamental rights and how to deal with these issues within the impact

assessment framework. I understand that it has even been used on one or two occasions, but I have not had sight of that yet and we do think it will be important to see that and to get behind the scenes and know what is going on before we can give any more definitive assessment of how this process will work and what use it will be.

**Q82 Chairman:** It would be helpful to see the internal guidance that is in fact going to direct the way ahead with impact assessments.

*Dr Toner:* Yes, I think it will.

**Q83 Chairman:** Let us move on to comitology. Are there any special problems that arise through that process?

*Professor Guild:* This question has fallen to me by common agreement among all four of us! What I want to say is about comitology being the mechanism through which a decision is taken, at what level a particular form of regulation takes place and what kind of legislative scrutiny that legislation should be subjected to. This particular proposal seems to insert a whole separate layer of possible provisions going into legislation, certainly in the form of recitals and into the explanatory memoranda, which are not subject to the same scrutiny. Unless it fits within the existing rules on comitology it seems to me that it will create difficulties.

**Q84 Chairman:** Does JUSTICE have anything to add on that one?

*Dr Metcalfe:* No, my Lord Chairman.

**Q85 Chairman:** We have already touched on recitals and the explanatory memoranda. JUSTICE greatly welcomes the thought that finally there is going to be some, however brief, reasoned exposition of the approach to human rights for a particular measure. Is there anything you feel that could strengthen that or should that be subject to any additional validator process or anything of that sort?

*Dr Metcalfe:* I do not have anything more to add in relation to what I said earlier. I know there is a debate as to whether this extended recital should be used or whether it should be tailored to the specific legislation in question. In our view, and we are not fixed to this particular point, the standard recital would be acceptable so long as the explanatory memoranda set out in detail the reasons. However, from the common lawyer's point of view, we would tend to regard the recital and the statement of compatibility as somehow equivalent. However, it may be that a different approach is required in relation to European law.



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**Q86 Chairman:** You are going to get something more, as I understand the Commission's Communication, than you would get under a section 19 bare declaration here.

*Dr Metcalfe:* Yes, we very much hope so. This is why we welcome the use of explanatory memoranda.

**Q87 Chairman:** I do not think there has ever been any question of the courts here being enthralled with a Section 19 declaration.

*Dr Metcalfe:* There was one case where a Section 19 declaration had been made in relation to the 1999 Immigration and Asylum Act for trucks carrying illegal immigrants and that was subsequently found to be incompatible by the High Court and Court of Appeal. That was one instance in UK law where a statement of compatibility has been shown to be inadequate.

**Q88 Chairman:** This was the fining of the lorry drivers, was it not?

*Dr Metcalfe:* That is correct.

**Q89 Chairman:** I believe I sat on that myself. The part that the group is going to play, how does that interact with the part that other monitoring bodies within the Commission are already intended to play? There is a legal consultation process and as I understand it very often there is consultation with the Security, Freedom and Justice Group. How do you see the interplay between these internal bodies?

*Dr Metcalfe:* My Lord Chairman, having discussed this with Professor Guild earlier, we felt that she might be better placed to take the lead in relation to this.

*Professor Guild:* My Lord Chairman, I will pick up the question. Our experience so far is that, in following the adoption of legislation under what used to be called 'justice and home affairs' and now within the remit of the Commission is justice, freedom and security, the engagement of the Commission officials in brokering a compromise among the Member States in the Council and with the Parliament has the tendency of compromising their position as an independent actor in assessing whether or not fundamental rights continue to be complied with. At the first stage where a proposal is made, if that proposal is made by the Commission, and of course in the First Pillar they now have a monopoly, the Third Pillar remains another matter; at least one has some sense that there has been some attempt made to ensure that there is compliance. In the negotiations, particularly in the first five years of the area of freedom, security and justice, we had a deadline in which the legislation had to be adopted and we see the political pressure to reach agreement at all costs leads to a diminution of standards, leading to a series of problems, for example I mentioned already

the Family Unification Directive. The Asylum Procedures Directive, which this Committee has looked at on two occasions so far and has criticised, looks like it may well be passed in an even more disastrous form, as regards the international obligations under the Geneva Convention, than it was the last time your Lordships looked at it. Therefore, we are looking at a situation which is not leading us to have a huge amount of confidence in the fundamental rights monitoring which is taking place throughout the process of the adoption of legislation. Will our group of Commissioners do better? Well, the question, I think, to a very large extent will be: what powers will that group actually have? Here, I think the answers which you have had from the Legal Services Commission are not particularly encouraging. They certainly have no coercive powers to ask anybody to come and give them evidence and no sanction powers, so it is a difficult to see what they are going to do. Also of course the Commissioners are part of the college of Commissioners and they have joint responsibility for ensuring that the treaties are respected, including the deadlines, and, therefore, they are under the same pressures. Can we expect that we will have different political negotiations as to the relaxing of fundamental rights standards in order to achieve a deadline from this group than we would have from one particular DG in itself? That is not entirely clear, and this brings us back to our Deputy Secretary General of that group who will be the lynchpin. I would also add that we have just had at the end of last month the decision of the European Court of Human Rights in *Bosphorous Hara* about the compatibility of EC legislation, concerning the freezing of assets in the Bosnian crisis. The case finally made its way to the European Court of Human Rights. The detail is infinitely complex, so I will not go through it all, but what the Court of Human Rights has done is it has set a new threshold for when it will intervene in the human rights protection regarding the ECHR compatibility of Member State acts pursuant to EC legislation where Member States act as a matter of obligation rather than discretion. It has set that threshold at 'manifestly deficient'. Unless it is clear that the legislation is manifestly deficient and that the procedure through which the individual has gone in seeking to put forward his or her claim to fundamental rights is manifestly deficient, then the Court of Human Rights will not intervene. Now, we have not yet had any academic writing on the field or any other judicial consideration after this decision, so we are not entirely clear where it will go, but it looks as if it is a very, very high barrier. In other words, the EU is to take care of its fundamental rights concerns on its own and the Court of Human Rights will only intervene in very exceptional circumstances. This is very good for the coherence of EC law. We are not

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being challenged from the European Court of Human Rights on the supremacy of EC law, but it means that we have to be absolutely sure we are getting it right within the EC. The scrutiny level of the Court of Human Rights will be at a much lower level.

**Q90 Chairman:** But will the European Court of Justice itself not entertain human rights-based arguments?

*Professor Guild:* When it has competence.

**Q91 Chairman:** Of course.

*Professor Guild:* Indeed it will when it has competence, but the competence rules are quite different.

**Q92 Chairman:** The next question is directed to the Commission monitoring the implementation of Directives and so forth, but in the Member States, and I think again we have touched on that, you contemplate that really being the task of the Fundamental Rights Agency when it comes into being. I think you, Dr Metcalfe, discussed that earlier on.

*Dr Metcalfe:* Yes, we took the view that the Commission itself should play a role in monitoring this and also that there was a role for the Fundamental Rights Agency as well. I think in her earlier answer, Professor Guild referred to the role of the Fundamental Rights Agency as monitoring the implementation, perhaps leaving it to the Commission to look towards pre-legislative scrutiny. I would say that the Fundamental Rights Agency in an ideal world should perform both functions and that will come down to a practical matter of resources, but I do not see any reason why you could not have both functions being carried out by both groups, that is to say, the Commission should be conducting pre-legislative scrutiny of its own legislative proposals and monitoring implementation by Member States and, similarly, the Fundamental Rights Agency should be looking at implementation by Member States and, in addition to that, looking at how well the Commission is doing when the Commission is coming up with its own proposals. I do not think it is redundant because I think it is particularly important for both groups to be carrying out their roles from their respective positions, the Commission as the legislator and as part of the Executive and the Fundamental Rights Agency as an independent, impartial body of experts. I believe that they both have a role to play at both stages of the legislative process both in terms of pre-legislative scrutiny and in terms of implementation.

**Q93 Chairman:** Do you all perceive that the same way?

*Professor Guild:* Yes, my Lord Chairman, I think we certainly agree that the role of the Fundamental Rights Agency, subject to the subsidiarity rules, is as regards implementation. The Commission, in guarding the treaties, is under a duty to ensure that EC law is correctly applied in the Member States, so it has an obligation which is set out in the treaties themselves of monitoring applications at the national level of fundamental rights. In my experience though, while I have been involved as an expert for the European Commission monitoring the application in the UK of certain parts of EU legislation, I have never come across anybody who has been asked, as an expert in any Member State, to monitor the application of specific legislation in the context of fundamental rights. Therefore, on the one hand, you have a monitoring of fundamental rights by the Commission as a general topic and its committee of experts, but within the context of the monitoring of, say, the free movement of workers, an area one would imagine was quite sensitive to the issue of fundamental rights, there is no specific remit, so we do not see that happening at the moment.

**Q94 Chairman:** How would you envisage they would set about that? Would they set up a group to investigate some particular aspect of implementation of Community law or how would they do that?

*Professor Guild:* I think we are pulling in two different directions in the Commission at the moment. On the one hand, we are going to create this Fundamental Rights Agency and we are going to amalgamate two different bodies into that agency, so in one sense we are almost hiving that off away from the normal monitoring procedures which the Commission is required to carry out as regards legislation and saying, "Well, this is being done by an independent agency and takes place elsewhere, so it is not really us; it is one of those agency issues". On the other hand, it seems to me that certainly in the field of justice, freedom and security there is an increasing awareness of the need to monitor fundamental rights issues, and we have recently had the fundamental rights teams in DG Internal Market moved over to DG Justice, Freedom and Security, and DG Employment and Social Affairs lost its human rights competence some time ago. Therefore, we are seeing a consolidation, but, on the other hand, it does not seem as yet to be making its way outside or even within DG Justice, Freedom and Security into the actual units which are drafting up legislation, let alone monitoring it. If we take as an example the Asylum Reception Conditions Directive, the implementation date of which was passed on 2 February of this year, the Commission has been asked on a number of occasions to monitor the fundamental rights compliance of the Directive's application in a number of Member States and so far the Commission has declined to respond even to

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requests which have been put to it and, as far as we can tell, it is only bringing enforcement actions against those Member States which have failed to provide any legislation whatsoever to implement the Directive.

**Q95 Chairman:** Question 12 is directed to independent pre-legislative scrutiny and we have already touched on the procedures set out in the Communication as being self-regulating without, on the face of it, any external scrutiny. How do you see the need for external scrutiny? Who should supply it and is there a role for national parliaments? Who would like to respond to that question?

*Dr Metcalfe:* In relation to the Fundamental Rights Agency, yes, we believe it should play an active role. We also believe that the national parliaments should continue to play the role, obviously speaking from JUSTICE's perspective and from a UK perspective, and, to avoid flattering my audience, we believe that the EU Committee does a particularly important job in this respect. What we are looking for in relation to the scrutiny of fundamental rights is something akin to what the Joint Committee on Human Rights does in the context of the national parliaments, so we would like to see that role continue. I am not sure to what extent there are analogues in the other European Member States, but I should be surprised if, by and large, they do not exist, but to the extent that they do not, it would be good for them to develop along this model. Just to make a very quick point to reinforce something which Professor Guild has said, we would not want to see this kind of scrutiny lead the European Commission itself to abdicate responsibility, just as we would not want to see government departments suddenly not bothering with the Human Rights Act simply because we had the Joint Committee or the forthcoming Commission on Equality and Human Rights. The mere fact that you have an independent agency that has been assigned to provide external scrutiny does not relieve the individual members of the Executive or the Legislature of their own responsibility to fundamental rights.

**Q96 Chairman:** The principal and initial responsibility is on the body who is proposing the legislation?

*Dr Metcalfe:* Yes, my Lord.

**Q97 Chairman:** Can I just ask you, when you see proposed legislation in Brussels and impact assessments and your antennae start quivering because you sense human rights concerns here, do you immediately communicate with somebody and, if so, who? Do you communicate with the Commission or do you communicate with us or who?

*Ms Goldberg:* It is quite difficult to establish communication sometimes with the Commission, I must say. There is not a lot of transparency, so in that respect we sometimes do not know to whom we should address ourselves and to which DG we should write to. Maybe Professor Guild can add something to this point about how easily we could address our points and concerns to the Commission.

**Q98 Chairman:** How do ILPA react when they are concerned about a proposed piece of European legislation, Brussels legislation?

*Professor Guild:* Well, my Lord Chairman, the first thing that happens is that there is a massive amount of traffic on the Internet and everyone starts emailing everybody else. We start to pull together ideas and we talk to our colleagues at JUSTICE and NGOs throughout the UK, saying, "What do you think about this?" When we consolidate this into a position, either it will formulate itself into a position or someone, for instance Professor Peers, will say, "Oh no, that's been dealt with already and the results are out", and that might end the discussion or it might not. We then proceed to formulate a position which may be a joint position with other NGOs working in the field, depending what the particular issue is. We have a number of problems that are ongoing with the correct application, for instance, of the pre-Accession agreements with Bulgaria and Romania as regards free movement of the self-employed. Here we discussed widely with other NGOs and with lawyers about what the problems were and then we have entered into dialogue with the Commission to some extent, with goodwill on some parts and kicking and screaming on other parts, trying to get some kind of response. Of course we enter into discussions with the national government as well regarding compliance with EU obligations and of course if this all comes to nought, then, as an association of solicitors and barristers, the issue tends to become judicialised.

**Q99 Lord Goodhart:** It is my impression that in many cases actually the most effective way of making objections on human rights grounds known is to go through the European Parliament. Is that correct?

*Professor Guild:* Yes, indeed. My Lord, the European Parliament is perhaps one of the most responsive and the most likely to pick up the issue, to instigate some kind of action, at least parliamentary questions, if not a debate, or if not in one of the committees an inquiry. Yes, we have seen the democratic arm of the European Union, the elected part, perhaps more sensitive to fundamental rights issues than any of the other institutions, barring of course the ombudsman.

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**Q100 Lord Lucas of Crudwell and Dingwall:** Would you like to see the group of Commissioners having an open-door policy on this, welcoming people's thoughts on what the human rights implications of proposals were? Certainly when the Commission talked to us, they did not seem to have any formal mechanism for raising or inspecting proposals for human rights consequences where those were not obvious. These things are perhaps more likely to be seen by outsiders. What if the Commission, say, operated an open bulletin board on the web or something like that which was completely transparent, or how would you like to see it?

*Professor Guild:* The first thing is that if they had a bulletin board, would anybody read it, particularly themselves? Therefore, if we take as an example the Commissioner's Green Paper on Economic Migration in the European Union issued at the beginning of this year, there is a consultation process which has been extended, but we see in The Hague Action Plan that, even though we have had no response from the Commission to all of the submissions made to this Green Paper inquiry, we see in The Hague Action Plan that they are planning to take action, so even when they do ask us for our views on areas where they indicate that they want our views, it seems that the decision to take action will be taken irrespective of what our views are and before they have read the papers which is somewhat disappointing and does not lead us to have huge amounts of confidence in this additional question of fundamental rights. It seems to me that the protection of fundamental rights in any liberal democracy is intrinsically tied to the Parliament; it is the job of the Parliament, it is not a job of the Executive. It is the responsibility of the representatives to ensure that the constitutional norms are obeyed and upheld and I do not think that that end-of-the-line control can be moved forward in the process to the Executive which is under a whole series of political pressures about drafting legislation and adopting legislation. Of course we want them to take this into account and we would be delighted if they would listen at an early stage, front-loading is always better than end-loading, but it seems to me, and perhaps I am going beyond what we think and I am certainly not speaking for JUSTICE in this regard, though I am speaking on behalf of ILPA, that we think that the democratic process in the EU is part of the problem, the so-called "democratic deficit" which is picked up by the democratic scrutiny provided in some Member States, but certainly not all 25 and certainly not with the same power as in respect of national legislation, and can only partially fulfil this general problem which is structural.

**Q101 Lord Norton of Louth:** Really it is that very point I would like to continue because what I wanted to raise was the role of the Parliament which we have

only briefly touched on. What we have heard about the European Parliament so far has tended to be looking at it as the recipient of the monitoring, that there is monitoring of legislation going through the Parliament, rather than the Parliament itself having a fundamental role of monitoring which is the sort of thing we are used to. Could the European Parliament do more, and your earlier answer suggested that yes, it was useful when prompted, but is there a role it could fulfil on a much more consistent basis in terms of monitoring? Also you backed a point about national parliaments being mentioned, that what is done so far is good work in terms of the EU Committee here or the Joint Committee on Human Rights, but is there more that could be done at the national level, given the point you made about democratic deficit, in terms of the role that national parliaments could actually play in the process? Given the very point you have just made about the role of national parliaments, what is the process by which they could actually be doing more to address the very problem you just identified?

*Professor Guild:* I think that there is much which needs to be done. I think that we need to look at what the structures are, particularly at the committee structures within the European Parliament. They, like many parliaments, have a human rights committee. Well, that is all very well and good, but that only picks up those issues which come to them dressed as human rights issues, so if you have legislation which is coming here dressed up as, for instance, the Services Directive, it will not be scrutinised necessarily by that committee. This then leads to: what are the structures we need to put into place? Do we need to reinforce fundamental rights scrutiny in all the European Parliament committees? I think that is certainly one option which is available. Do we need to ensure that there is some super-body, like our group of Commissioners that supervises what everybody is doing in the committees and supervising, supervising and supervising? I do not know. It seems to me that the proliferation of bodies is not necessarily the answer, but the reinforcement of existing committee structures and widening the remit might perhaps be a more effective mechanism. In respect of national parliaments we have the example of a number of Member States, the UK being one, where there is a very high level of scrutiny, where structures have been put in place over the last 10 years which in fact are very effective and one sees regularly different sub-committees of this Committee insisting on the right of scrutiny whenever there seems to be a failing on the part of the administration in submitting documents for scrutiny, so a very active role which it seems to me is extremely important not only in scrutinising EU measures, but also fundamental rights measures.

**Q102 Chairman:** Can I just ask you this, and I do not think it is related specifically to any of the listed

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questions, but do you feel that you are consulted as early as you should be in cases raising particular problems in your own spheres, human rights-related problems, or indeed problems related to other aspects in the field of immigration in ILPA's case?

*Professor Guild:* My Lord Chairman, as a non-governmental organisation, we are never consulted early enough. Indeed to resolve this problem back in 1999, we drafted up for all of the institutions a set of draft proposals and directives to adopt in the field of immigration and asylum because we were a bit worried that they might not get it right. Of course they found our work terribly interesting and went ahead and drafted their own thing, so we did feel that they ought to have taken our efforts to consult with them a little bit more seriously. Yes, there is always the question: how do you get the business of government done when you have non-governmental organisations representing interest groups with particular constituencies, saying, "You have to consult us now"? It is always a matter of trade-offs. At what point in the deliberation, before it is congealed into a decision to proceed with legislation in a particular form, should that be open to consultation? There is a series of mechanisms where that is supposed to take place, for instance, Green Papers. We have a series of mechanisms where that discussion should take place, though the example I gave was one where certainly we have been given the impression that the consultation was not perhaps quite as open as we had thought it was when the Green Paper was released. Where does that leave us? I think that leaves us with constantly having to reassess the mechanisms by which consultation with civil society takes place in the drafting of legislation.

**Q103 Lord Clinton-Davis:** But presumably you have communicated your concerns to those responsible in the Commission and what has been their response?

*Professor Guild:* Indeed, we communicate our concerns to those responsible in the Commission on a very regular basis and in respect of some concerns, we have tremendous co-operation. We find that officials within the Commission respond immediately and they express concern about, for instance, the misapplication or bad interpretation of EC law at the national level in some circumstances. We find, however, that when we are criticising measures which they have drafted themselves which are in the process of being adopted, there is perhaps less room for discussion and manoeuvre, not least because by the time a proposal for a Directive is on the table, the Commission officials who are responsible for shepherding it through its legislative process are already deep in the negotiations with the Parliament and with the Council. There is very little space in that particular time-frame for the Commission to enter into discussions with NGOs about proposals which

are under consideration by the Parliament and the Council. At that point of course our efforts then go to discussing with the Parliament or with the Council and, of the three, the Council is the most difficult body to engage with where one is least likely to have a positive response. That being said, we have certainly noticed in some fields, immigration and asylum being one of them, that since the Council lost power and it all went off to the Commission, the people in the Council are terribly interested in talking to us.

**Q104 Chairman:** Can we come then to the final question which is reviewing the Communication itself. How should that be taken forward? Should there be some annual report to the President or is this something again which should be left to the Fundamental Rights Agency or some other external body?

*Dr Toner:* I think I will kick off by saying that it has become apparent from what we have said that we are very interested to see how this will operate and we are very concerned to follow this up and to have it reviewed and to see how it operates in practice, so I think it is vital. I do not know if anyone else wants to pick that up and give more thoughts about that and the detail.

*Dr Metcalfe:* No, we do not have any more particular thoughts in relation to the detail. I would just perhaps like to add something and our experience I believe is very similar to that of Professor Guild in relation to the lobbying of the European Commission. There is a profound sense of inertia when one deals with civil servants, even when they are consulting at a relatively early stage because, if I take a recent example, we were speaking to someone in relation to something which was implementing part of The Hague Programme, so you already had a strong sense of the Commission and its relative, I would not quite say "indifference", but something quite close to it, to concerns in relation to fundamental rights. There is a very strong sense of inertia that comes from some of the consultations that we have. By contract, in the United Kingdom, the human rights organisations have a standing four-monthly meeting with the Minister for Human Rights in the Department for Constitutional Affairs. It is not necessarily an ideal arrangement, but it is nonetheless a useful step in having regular contact between human rights groups and the Executive. It is possible that something similar could be arranged in relation to the European Union having regular meetings with the Commissioners possibly.

**Q105 Lord Goodhart:** Could I just ask you something which is not entirely covered by any of the questions here, but it is something I would like to take up as a result of something I have read in ILPA's submission to us. In paragraph 15, talking about the

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Commission's Communication, it says that the relationship of rights and exceptions seems to be in the process of change and being recast into one of balance, giving a weight to the exceptions and rights which elevates the exceptions to the same purpose as the rights. You say that this seems to be a worrying and negative development. I wondered if ILPA could just point to any particular provisions in the Communication which lead them to raise this particular concern.

*Professor Guild:* My Lord, this is a passage which is my responsibility and I am just going to try to find the exact position.

**Q106 Chairman:** I think paragraph 14 is where you introduce the question of balance. You are troubled by The Hague Programme and the Agenda for Action.

*Professor Guild:* Yes, indeed. If I could perhaps speak to our memorandum and my particular concerns in that regard, we take the view that if one is speaking of fundamental rights, one is speaking about rights which are contained either in national constitutional settlements or in supra-national or international human rights treaties of which the UK is a party. Certainly in the Human Rights Act or the European Convention on Human Rights, there is the primacy of the right and the interference by the State, permissible in a variety of the rights, is permitted

under certain circumstances as an exception to the right itself. Therefore, in the assessment of rights, we are increasingly concerned as, for instance, in the Action Plan on The Hague Programme that these are increasingly presented as security and rights as a balancing operation and not as a relationship of primacy of rights against which an interference must be justified.

**Q107 Lord Goodhart:** Are there any particular provisions in the Communication which give you concerns under this heading?

*Professor Guild:* May I come back to you on this in writing because I am not sure I am going to be able to put my finger on it right now?

**Chairman:** Indeed you may and that would be very helpful. Indeed if JUSTICE too have anything as an afterthought or anything which they would like to add, we would be grateful for that too. If there are no other specific questions and unless any of our four witnesses would like to add anything at all to what they have said, then it remains for me to thank you all very much indeed for coming. It has been enormously helpful. As I have indicated, we have already seen a lawyer from the Commission and we are going to see the Minister next week and we will then report and we hope that that will carry this enduring problem in respect of human rights a stage further. Thank you all very much indeed for coming.

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TUESDAY 19 JULY 2005

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Present	Borrie, L Brown of Eaton-under- Heywood, L (Chairman)	Lucas of Crudwell and Dingwall, L Neill of Bladen, L Norton of Louth, L
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**Examination of Witness**

Witness: BARONESS ASHTON OF UPHOLLAND, a Member of the House, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, examined.

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**Q108 Chairman:** Minister, thank you very much indeed for coming to address the Committee and answering our questions. We are very conscious of the fact that you have a tight and busy schedule. We shall not delay you longer than we need to. I am afraid we are ourselves rather thin on the ground, but, as you will appreciate, this has had to be arranged at fairly short notice for today because of your own difficulties and so a number of our members were not able to be here. The hearing is public and the television screens are on. You have had an opportunity to see the particular questions on which we want your assistance. Would you like to make any introductory statement or are you happy to go straight into the questions that we want you to address?

*Baroness Ashton of Upholland:* The only statement I wanted to make, my Lord Chairman, was to thank you for arranging this Committee around me. Last week I was in Brussels for three days at the emergency Justice and Home Affairs Committee meeting and that meant I was not able to join you then. So I am extremely grateful. That is really all I wanted to say to begin with.

**Q109 Chairman:** I am glad we have been able to find a time which suits all of us. Thank you for the explanatory memorandum which we have just had. It is a fairly exiguous document. That is not a complaint, but it does not tell us a great deal. What is your general reaction to the Commission's Communication? As you will appreciate, what it proposes is that there is a further upgrading of the internal monitoring scheme to secure compliance with the Charter of Fundamental Rights. It is supposed to be an improvement on the approach adopted originally in the March 2001 decision. How do you react to it?

*Baroness Ashton of Upholland:* I think it is quite a positive proposal in two ways. First of all, it is important that when the Commission puts forward proposals it looks at them in the context of fundamental rights and, secondly, within the proposal there is a desire to involve more bodies in talking to the Commission. Both of those seem to me eminently sensible proposals.

**Q110 Chairman:** Did you find that there were problems over the last few years working under the March 2001 decision?

*Baroness Ashton of Upholland:* I did not notice particular problems. I have just come from a quadrilateral meeting on the Presidency of which the Commission was a part. There were not particular issues that concerned me. I am always keen to see institutions, particularly perhaps at the moment in Europe, thinking about how better to engage the wider public, thinking about ensuring that its proposals do address issues of human rights or fundamental rights.

**Q111 Chairman:** You will have seen the new Commission guidelines on impact assessments that were introduced on 15 June, I think it is a 48 page document, and I am sure you will appreciate that that was in part conceived in relation with this Communication on proofing for fundamental rights compliance. Do you think the new scheme for impact assessments is going to achieve what is necessary in the way of evaluating the human rights implications?

*Baroness Ashton of Upholland:* I think it will go some way. We will have to see the truth of it because obviously these are new proposals. My ambition would be that if you look at what is being proposed by the Commission both in terms of impact assessments, a very important element of the proposals and something that we feel very strongly about in the Government in the context of better regulation more generally, combined with the proposals to examine proposals on fundamental rights, I think we will begin to see perhaps greater openness which will be to the good, but we will have to wait and see how this works out to be completely sure of the effect.

**Q112 Lord Borrie:** Minister, you probably know that we have had some criticism of the proposal of the Communication and the fact that the "checklists" are going to cover the three headings of economic, social and environmental matters, and the critics seem to think this is a bit artificial, to squash fundamental rights into those and there should be a fourth category entitled fundamental rights which they will look at. Do you think the Communication

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as it currently is is satisfactory or do you agree with what I suggest is the critics' view?

*Baroness Ashton of Upholland:* In a sense it is too early to say. I am sorry to say that to you, my Lord, but I think it will really depend on how this works out in practice. I think stakeholders looking at it from the outside or organisations that have an interest will need to work closely with the Commission. I am sure they will have made representations to the effect of saying they would prefer to see it done differently. Nonetheless, if one looks across the whole Charter of Fundamental Rights, there are lots of different ways that one could have thought of addressing the question. It seems to me a good place to start. We will have to see. Inevitably the answer I am afraid I am going to give you is that we will have to see how it works out. Certainly their representations will be taken quite seriously by the Commission as they look at how best to make this work in practice, especially in the context of them wanting to be more open and talking to stakeholders.

**Q113 Lord Lucas of Crudwell and Dingwall:** As you will be aware, Minister, the question of human rights pops up all over the place. The latest one I am dealing with is that schools are starting not to use detention as a punishment because of worries about the human rights implications of doing so. The Commission appears to think that it will just wait for these issues to be raised and then go about bringing them into this procedure rather than having any informed look at all new proposals to see if, given an experienced eye, they might possibly raise human rights questions. Does that not seem a bit lackadaisical? Would you not prefer to see something where they were having a proactive look for human rights implications rather than simply waiting for them to happen?

*Baroness Ashton of Upholland:* The way that I have read this is that I think it is a bit of both in that for major proposals I do expect the Commission will look to what the implications will be. What they have not done is assumed that they have the font of all knowledge and, therefore, they have also provided for other people to raise questions and issues with them. So I would see it slightly differently, I would see it as a bit of both. The point you made at the beginning about the mythology that grows up is something we need to deal with because so many of our institutions need to understand the benefit of thinking about human rights and human rights compliance and not see it as somehow taking away from the way that they work.

**Q114 Chairman:** Minister, I think impact assessments were devised principally with environmental considerations in mind, I think that was the first context in which they arose and now, of course, they have been enthusiastically extended to

the world of better regulation generally and not least with the Lisbon considerations in mind, competitiveness and sustainability. ILPA are rather concerned on that score that there is a tension. I wonder if you see a tension between those considerations, really the economic competitive viability of a proposal and the very different consideration of how it affects human rights and questions of equality and the like. Do you see a tension in the way the impact assessments are devised?

*Baroness Ashton of Upholland:* I do not. I do not think there is a tension necessarily between wanting to make sure that in terms of economic considerations a proposal is viable. I think that is very sensible. As I have already indicated, the Government has been very keen to make sure that we look at better regulation and impact assessments and so on both domestically and in terms of our approach to Europe. Having said that, the idea that somehow you could have a proposal with economic considerations that somehow took away from people's human rights does seem to me to be something that we would want to look at very carefully because it would have to be compatible. I do not think there is a tension in terms of saying that if it is an economically viable proposition it might impact on human rights. I think what the tension might be is trying to make sure that the work is done consistently, enabling us to look at all of those issues at once. I think it would be quite interesting for the Commission to think about how it is going to tackle all of those issues at the same time.

**Q115 Chairman:** On the discrete issue of comitology, do you think there are any particular problems that arise in that regard from this Communication? There will not be impact assessments in the area of delegated legislation in the Commission. Does that worry you?

*Baroness Ashton of Upholland:* Not at the moment. Part of what we need to do is to see how the proposal works out in practice. We will be watching quite carefully to make sure that the way in which the Commission does this is indeed as they have indicated in the Communiqué and also to give our views, if that is appropriate, on how we think it is working in practice. At the moment it does not worry us, but that does not mean that we are not going to keep it under review.

**Q116 Chairman:** Ever since the 2001 decision there has been a provision for a standard form recital in a number of legislative Instruments, those that obviously raise human rights questions. Now, on top of that, there are going to be explanatory memoranda which are going to give something of the reasoned case for asserting, which the recitals will do, that the



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proposals are compliant with the Charter of Fundamental Rights. Do you welcome that?

*Baroness Ashton of Upholland:* At the moment, yes. The way in which they have used recitals thus far seems to me to be reasonably straightforward. I do not yet know, because this is a new proposal, whether this is going to be something that we would consider either incompatible or too wordy or whatever. Thus far there is nothing that I have seen that makes me feel anything other than let us look at how they do this. They will not be doing this proposal on every single piece of legislation by any means, as indeed they do not on recitals.

**Q117 Chairman:** Going back to the actual Communication, as I understand it this will only be so in respect of those provisions specifically raising human rights questions and which indicate that there is a balance to be struck between competing human rights interests. Do you foresee the possibility of it being too wordy?

*Baroness Ashton of Upholland:* No. I was merely making the point that perhaps that would be something that we would look at to see whether, in putting in additional proposals, one takes away from the proposal itself. It was no more than a comment.

**Q118 Chairman:** Under section 19 of the Human Rights Act we have just a bare assertion of compatibility with the European Convention on Human Rights. You would not like to see that fleshed out by something of a reasoned argument as to how a particular proposal is reconcilable with what, on the face of it, might look like some interference with human rights?

*Baroness Ashton of Upholland:* I do not think it is appropriate in our domestic legislation to do other than we do. Obviously when a Minister signs that they are very aware of what they have done in doing so and have addressed the issues that might be raised if people felt there was an issue of potential incompatibility. The passage of legislation, for example the report from the Joint Committee on Human Rights, issues raised by individual members of the House of Lords or the House of Commons, is very important in addressing those issues and I doubt very much whether a piece of legislation would reach the Statute Book without having good and appropriate scrutiny in that way. So I feel it is appropriate for the way we do it. I have yet to see quite how it would work in the context of the Commission's proposals.

**Q119 Chairman:** The way the Commission propose to do it as I understand it is there is the recital in the legislative Instrument, there is the Explanatory Memoranda, but then the matter goes from the proposers to the Parliament and Council. How

would you like to see that paperwork developed to ensure that it keeps pace with the legislative process in Brussels?

*Baroness Ashton of Upholland:* I do not think it is for me to comment on how the paperwork of the Commission should develop. It is always my view that paperwork should be appropriate to what you are trying to achieve and, therefore, I am always of the view that slimmer is better if it is possible, but I really do not think it is appropriate for me to comment on that at this stage.

**Q120 Lord Borrie:** Minister, the paperwork is not going to be much use to anybody if it is out-of-date because Council or Parliament has altered the original proposals.

*Baroness Ashton of Upholland:* Indeed!

**Q121 Chairman:** The Communication proposes that the Commission itself is going to be monitoring the legislative process, if necessary, to the point where it can take non-compliance, if it so regarded the Parliament's or Council's eventual legislation, to the European Court. Are you content with the monitoring that the Communication proposes for this work in proofing legislation against noncompliance?

*Baroness Ashton of Upholland:* I am as far as the internal monitoring of the Commission's proposals goes. There will be an opportunity through both the LIBE Committee and the Parliament as a whole for external monitoring together with what I think is an important part of the Commission's proposals, the opportunity for external groups, stakeholders and so on, to be able to comment on the proposals at the same time. I think this should be viewed in the context of those other opportunities for external review, such as opportunities to look at them through the committees in the Parliament as well.

**Q122 Chairman:** What do you see as the best possibility of, so to speak, external regulation rather than merely self-regulation in terms of producing compliant legislation?

*Baroness Ashton of Upholland:* I think the role of the LIBE Committee (I was at it last week) is very important. It has the capacity to take on many of the functions of the Joint Committee on Human Rights as we know it in our Parliament. We must bear in mind, with the amount of proposals that come out of the Commission, the fact that it probably would be impossible to do all of them, but it certainly can look at, and does look at, proposals that are important to it. The Parliament has its own role in addition to that. The combination feels strange to me at this stage. We will have to see how the Commission's proposals play out in practice. I feel that we have the right kind of

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combination of scrutiny that will enable us to ensure that we do have that compatibility.

**Q123 Lord Lucas of Crudwell and Dingwall:** Minister, you have said that you want to wait and see how this procedure develops. How long are you going to give the Commission to run this process before you want to make a formal review of how they are doing, and how should we handle that review in Parliament?

*Baroness Ashton of Upholland:* That is a fair question. The first thing I would need to do, which I have not done yet, is to have a conversation with the Commission itself about how it proposes to review what it is planning to do both in terms of whether people come forward with views and ideas on proposals, how it fits together with the external reviews that are going on at the same time, and how it will judge its own success. That does not mean it has not thought about that, it is just that I have not had that conversation yet. We will have to establish what they are proposing to do. I think the second thing to do is to look at what the proposals will be in terms of whether the Council will be looking at these issues, whether the Commission will be coming forward to tell the Council what has happened and how well it has gone, or whether they will be proposing to discuss this with either the LIBE Committee or Parliament itself. From there what I suggest would be that we would communicate that with this Committee. I am sure the Committee will want to review how this works and at that point we will be able to give any proposals that we have as a Government for how we will ensure we have reviewed this more effectively.

**Q124 Chairman:** Do you welcome this new Group of Commissioners, I think there are nine of them, the fundamental rights, anti-discrimination and equal opportunities group, with oversight over this whole area of pre-scrutinising the legislation? Do you welcome that?

*Baroness Ashton of Upholland:* I do welcome that. I have not met with the whole group of Commissioners yet, although I know Commissioner Frattini reasonably well. I think it is important to be able to bring groups of Commissioners together to look at particular issues.

**Q125 Chairman:** How would you like to see it work? What particular role would it play?

*Baroness Ashton of Upholland:* I have yet to discuss exactly how they propose to take forward their work. It does seem to me that there is an opportunity here to look across the work of the Commission, using the Commissioners to be able to see both what is currently coming forward and what proposals might come forward in the future and each of them operating in a sense both as Commissioners with

particular responsibilities and as a group, and to be able to think perhaps holistically about the way in which the Commission operates and the work it is trying to do. We are at the early stages of this. I have not yet had an opportunity for them to explain more directly precisely how they will work and that is probably because they are in the process of establishing that themselves. In principle I am a believer in people working collaboratively to get better results.

**Q126 Lord Lucas of Crudwell and Dingwall:** Do you think there is any role for this Group in having a public face, interacting with NGOs and others who have views on the way that this is developing within the Commission? When we talked to the NGO they appeared pretty jaundiced on the subject and they thought there was no way this Group would ever support a website of their own and that if you did send e-mails or communications to it they would probably never be heard of again. Is this a suitable Group to have a public face or should it just be internal? If it should have a public face, do you think that you can promote this?

*Baroness Ashton of Upholland:* I would expect you to be able to come up with some sort of IT proposal there! I am not sure that a website is necessarily the best way to interact with Commissioners just because of the logistics of life. I am sure you would be able to find a way to resolve that for them. I am not sure what is the answer to that question at this stage because I think what is very important as a general observation is that the Commission and the Commissioners are able to be more public in their profile and are able to represent what we know to be the best thing about being part of Europe. In my experience over a reasonably short time of watching only one at work, I think they do an incredibly important role and they work incredibly hard. They spend a lot of their time travelling to different Member States to do particular pieces of work and in a sense hold the ring quite often in a whole series of quite difficult debates and discussions and proposals. It is an amazing feat to undertake. I think it is very important generally that the Commission has the opportunity to understand what is happening outside and what NGOs or other bodies feel and how they react to proposals. Whether that should be through this particular group, I do not know. Whether you could find a way of achieving it, I do not know. What I do know is that the proposition that the NGOs put to you, as I understand it, of being able to interact more effectively and being understood by the Commissioners is very important. Precisely how you do it I think needs to be worked through. Whether that is a very public role for the Commissioners or whether that is much more about the way in which

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the Commission interacts with those bodies and then makes sure that the Commissioners are informed, I am not sure about. It is not unlike how Government works in this country and how best you make sure that you keep in touch with what is happening outside, on the ground, in real life, whatever you wish to call it, while recognising that your time is limited to achieve that.

**Q127 Lord Lucas of Crudwell and Dingwall:** I suppose you might achieve the same effect with a strong independent element in the Fundamental Rights Agency. Is that something that we are aiming for?

*Baroness Ashton of Upholland:* We have only just got the proposals on the Fundamental Rights Agency and there are differing views across the European Union as to quite how it should work. As we have the Presidency at the moment our job will be to take forward the proposals in the best way possible and to try within the group to look at the different options that are available. There are some Member States who see the Agency having a much stronger role in terms of talking to the institutions, particularly to the Commission, but others see it more as an opportunity to analyse and to get the consistency of data across the European Union, which itself would be quite a huge task.

**Q128 Chairman:** Can you whet our appetite as to how HMG sees the Fundamental Rights Agency and what sort of role we would like to see it play?

*Baroness Ashton of Upholland:* Primarily our view would be that we would want to see this as a body that was able to look strategically across the way in which the European Union implements its policies and strategies. We do not see it as having a role with individual Member States but we recognise that it would want to work across Member States, as I have already indicated, in looking at analysis of data, making sure we have consistency of view, and so on. That is our proposition at the moment. We have yet to work through with our colleagues across the Union and in our role as Presidency to see quite where that ends up and we will have to wait and see what happens.

**Q129 Chairman:** So it might usefully be able to report perhaps annually on the Commission's own implementation of this Communication, ie, as to how successful it is itself in screening its proposed legislation for human rights or fundamental rights and also, possibly, to see how, when legislation is taken forward to the Parliament or the Council, human rights continue to be given proper consideration as the legislation is amended or developed?

*Baroness Ashton of Upholland:* It is possible for it to play a role. In fact, I would hope that it would have some role within the Commission. Whether that is looking at proposals the Commission itself asks it to I do not know, but, again, I think we have got to be perhaps a little bit cautious about assuming that it can take on an overview role with all of the work of the Commission because that would mean it could do very little else in terms of the amount of work that would entail. We will have to see how our colleagues in Member States respond to the initial proposals and see whether this is an area they think that the Agency should focus its attention on or whether they would like to see it having a more strategic overview, as I have indicated, perhaps an analysis of what is actually happening in terms of data collection and so on.

**Q130 Chairman:** Do you welcome contributions from the NGOs, from people like ILPA, JUSTICE, Statewatch, yourself? Does Government like to be communicated with and to have communicated to it the concerns of these various bodies as European legislation is conceived, proposed and developed?

*Baroness Ashton of Upholland:* Indeed, and in some of the work I have been doing, particularly around the Presidency, I do have groups of (I call them "stakeholders" because I cannot think of a better word) people who are particularly interested in the work that we are doing coming together, so, for example, on some of the work we are doing around the small claims or order for payment, working with the National Consumer Council and other bodies is very important to me in order that we make sure that what we are proposing benefits our citizens, which is, after all, a critical part of being part of the European Union.

**Q131 Chairman:** The Select Committee in its 2002 report on the review of scrutiny of EU legislation recommended that the Government's Explanatory Memoranda should include "a section on any potential human rights issues. The Government should consider making a formal statement as is now issued on primary legislation, that, in the view of the Minister signing the explanatory memoranda, the proposal is compatible with the provisions of the Human Rights Act 1998." And the Government's response to that report was: "Where human rights issues arise, the explanatory memoranda will of course draw attention to them in the section on legal implication", and essentially would offer a preliminary view on the compatibility with the 1998 Act. Has the Government's view developed as a result of recent experience and having regard to the volume of work in the area of justice and home affairs (I think an area which is going to grow under the Hague Programme) and if the Commission's

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“verification” of legislative proposals extends to the Charter, why should not the Government’s preliminary view on compatibility also encompass the Charter and not simply the Convention? It is rather a long question.

*Baroness Ashton of Upholland:* It is long.

**Q132 Chairman:** But at least you had some forewarning of it.

*Baroness Ashton of Upholland:* No, I have not actually. I have not seen any of the questions.

**Q133 Chairman:** Have you not?

*Baroness Ashton of Upholland:* No, I am sorry, I have not. That may be a fault at my end. I hope I am answering them satisfactorily despite that. I realised you were reading a question to me as though I had already seen it but I have not seen any of the questions, But that is fine and I hope, nonetheless, that you are getting the answers that you hoped to get. As it was rather a long question I would just say the way in which the Government has approached the legislation at present is on the basis of what we have incorporated into our own law, and that is right and proper. The Fundamental Rights Charter is not in the same vein as that and therefore I think we would have to look very carefully about trying to assume it was an equivalent in terms of our own domestic legislation, which I think partly answers your question. I suspect there is more to it but I am not sure I got all of that.

**Q134 Chairman:** Is the Government on the whole resistant to recognising that the rights to be observed are those in the Fundamental Charter as well as in the Human Rights Convention?

*Baroness Ashton of Upholland:* It is not a question of being resistant. If you look at the Fundamental Rights Charter it is quite different in many ways. It encompasses a number of different elements.

**Q135 Chairman:** It extends into other reaches of life, not least the economic sphere?

*Baroness Ashton of Upholland:* Quite so, so it is a different animal, if I might describe it as such, and therefore has to be treated differently. There are lots of aspirations within the Fundamental Charter that are different to what we have put in legislation in terms of the Human Rights Act. I would not wish to suggest it is not incredibly important because it is but it is different. We would have to be very cautious about trying to equate the two in terms of the way we approach domestic legislation in particular.

Having said that, of course it is very important and it is important in the context of the Fundamental Rights Agency as well.

**Q136 Chairman:** When the Commission express a view on compatibility with the Charter, is the Government going to feel able to react to that and if it takes a different view to indicate that it takes a different view?

*Baroness Ashton of Upholland:* We have never been shy in expressing our views on proposals that have come from the Commission, either ones with which we are in full agreement or others perhaps where we take a slightly different view. Certainly we would expect in the course of looking at the proposals that come forward to take note of what has been said in this context and to look at that in the context both of our own legislation and also in terms of the human rights legislation and also in terms of the Charter. If we felt there was something where we had a difference of opinion I think we would say so.

**Q137 Chairman:** Do we occasionally propose legislation ourselves under the third pillar? I rather suppose we do?

*Baroness Ashton of Upholland:* Yes, if you are going to ask me for an example, of course my mind will be completely unable to give you one.

**Q138 Chairman:** I am just wondering do we in doing that go at least as far as the Commission? Do we have an Explanatory Memorandum which sets out our views on any human rights implications in the proposal?

*Baroness Ashton of Upholland:* I cannot tell you the answer to that question. I will let you know the answer to it but it would be my expectation that we would behave in the context of the proposals in Europe in exactly the same way as we behave in the context of our proposals on domestic legislation. We have as a Government taken a view about the importance of human rights and I expect that to continue in our attitude towards Europe.

**Q139 Chairman:** Domestically all we have is the bald Section 19 assertion of compliance.

*Baroness Ashton of Upholland:* Indeed.

**Q140 Chairman:** It rather looks as if the Commission for their part in the legislation which they propose would go rather further than that and would to a degree argue the case in the Explanatory Memorandum with regard to the human rights implications. Would we be sympathetic at least to going that far?

*Baroness Ashton of Upholland:* I think again we will have to see how this actually works out when the Commission starts to do what it is proposing to do.

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I understand the point you make, Chairman, about the bald statement that accompanies our legislation here. As I have already indicated, I think that may be how it begins but certainly in my experience of taking legislation through the House of Lords, there is no question but that everything is queried and the report of the Joint Committee on Human Rights is taken extremely seriously by Ministers who recognise its importance and value, both in responding to the Committee and responding on the floor of the House. So I think that is an important part of it. Quite how that applies in terms of what we do with our own proposals to Brussels, we will have to see what the Commission's look like first and then take a view ourselves.

**Q141 Lord Borrie:** I think the Minister may have just answered the question that was immediately in my mind, bearing in mind a number of debates in the House where, true, we have, as my Lord Chairman indicated, a bare statement of compliance with the Convention, but constantly you as Minister or other Ministers are asked by such noble friends as Lord Lester of Herne Hill and others "what lies behind this?" and "what about article so-and-so?" and the Minister has to respond, so that surely there must be many many examples—I cannot think of them off my head—where *Hansard* will reveal that behind the bare explanatory recital certain explanations have been I will not say forced from Ministers, but voluntarily given by Ministers in answer to questions?

*Baroness Ashton of Upholland:* Indeed. The noble Lord, Lord Lester of Herne Hill—who is not here this afternoon and I know he could not be at the Committee—is a prime example that there is never a possibility if he were in the Chamber that he would not, quite rightly, raise these issues. I think also my experience as a Minister is that in debate it is not just the kind of straightforward answer to a question that matters. It is also the process which the Government has gone through in determining compatibility with human rights and the opportunity to debate what are often very differing views in the House about how human rights are taken forward and what the issues are involved, and so on. There is not always a unanimity of view. I think the opportunity to debate that is absolutely critical and sometimes the Government will take a different view to other members and sometimes my noble Lords will take different views from each other. You cannot really do better than that with anything that you might add on to the front of a Bill when it is published. I think the question of what is published on the front of the Bill is simply to say we have considered it. Certainly I have signed Bills and I know a lot work goes into considering it. The

really critical part is where you have the opportunity to debate why you believe that it is compatible, what you are doing about it, what the issues are, and so on.

**Q142 Lord Borrie:** I just wondered if you had the same degree of persistent questioning of the bare statements in the European Parliament as undoubtedly one has in Parliament, and not least in the House of Lords here?

*Baroness Ashton of Upholland:* Certainly the LIBE Committee takes its responsibilities extremely seriously and having watched them at work last week one is very easily impressed with how much work goes into tackling issues where they believe there are serious questions of compatibility. I have not looked at their work in more general terms yet, but it does seem to me that there we have a really good opportunity as a committee to challenge proposals and to extract from either the Commission, or the Presidency, or whoever, exactly the same degree of detail that happens in the House of Lords or indeed in another place when those debates take place.

**Chairman:** That is helpful, thank you. Lord Norton?

**Q143 Lord Norton of Louth:** Since you do not have a list of questions I feel slightly more emboldened in asking one that is not actually on the list. My interest is normally in the role of parliaments and I accept the Government does not have responsibility for how parliaments organise themselves. Can I put a question. One slight concern I had arising from the Explanatory Memorandum which recounts what it is in the Communication itself is that in paragraph 5 it lists the objectives, which is fine, but in paragraph 8 it lists what are the aims of internal monitoring, and I was slightly concerned if you look at the list because the first one says reinforcing the credibility of the Commission. I raised a slight eyebrow at that being an aim. You can argue it may be a beneficial consequence of the activity itself. I am slightly worried it being listed as an aim because it rather implies that the Commission is looking round for ways of reinforcing its credibility and hitting upon that as a way of doing it rather than being driven by the fact that first and foremost it should be there to ensure that fundamental rights are protected. It just raised a slight concern about the way in which it was being presented. Would that be a concern that you would share?

*Baroness Ashton of Upholland:* It is not a concern I share, but I suspect probably what is wrong is that we put it number one in the list, and as we wrote that I think that is probably down to us not the Commission because of course it stands out.

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**Q144 Lord Norton of Louth:** Yes.

*Baroness Ashton of Upholland:* All I would say is I think one of the things that is very, very important—and I speak as someone who has only recently been involved in looking at our relationship with Europe and the way in which Europe relates to us—that we do as much as we possibly can for people to understand the Commission and to understand the work that it is doing and to see it as an important part of how we develop whatever we want Europe to be, and so I think, particularly in the light perhaps of the referenda that have taken place that this is a very good opportunity for the Commission to say, “Here is something that we are doing that is addressing in part (though not top of the list) how people view the Commission and how people feel the Commission takes seriously its responsibilities in terms of fundamental rights and also interaction with other bodies.”

**Q145 Lord Norton of Louth:** But would you accept there is a counter-argument that in effect that should almost speak for itself and that there are certain dangers in enumerating it because it then looks as if it is being rather defensive?

*Baroness Ashton of Upholland:* Yes or you could argue it is being completely honest about what it is trying to achieve. My view is that any institution anywhere in government is always seeking to make sure that people recognise what it is doing, to feel they can interact with it appropriately and properly, and to develop a good rapport. I think that is a worthy thing for any institution to do and for the Commission to do, too. Writing it down simply says, “Yes we accept it,” and perhaps if they did not write it down the question we might be asking is do they understand that this is important in terms of how serious the Commission is taken and so on. I think it is in the wrong order, which I suspect is us.

**Q146 Lord Borrie:** Minister, we have had some criticism from others about this Communication in that it involves only internal monitoring by the Commission and therefore it is not independent, even if, as critics may admit, the legal service will be involved and that has a degree of independence. We have had some criticism of the lack of independence of what is being proposed here and linked with that the idea that there is a lack of democratic legitimacy because Parliament is not involved. I think in some of your answers you have indicated that Parliament is involved in various ways, so could you say something to the effect where this proposal we are considering today fits into the larger scene of independent bodies, possibly the Fundamental Rights Agency, the European Parliament itself, and so on, because I had the feeling that maybe some of this criticism from the

NGOs of this particular proposal was unduly sceptical, it was not taking into account this larger context?

*Baroness Ashton of Upholland:* I think the proposal is only seeking to do what it is seeking to do, which is saying that the Commission will look at it internally, just as government here looks internally at its proposals, in order to see whether there are issues around, in our case, the Human Rights Act, in their case, the Charter, and it is not seeking to do anything more than that, so the criticism in a way is about something else, it is not about this in that this has never pretended to be ultimately external scrutiny. It is simply saying one of the things they are going to do in future on major proposals is look at it in that context, and that I think is and should be welcomed. There is nothing wrong with it.

**Q147 Lord Borrie:** It could assist external scrutiny, could it not, in so far as if the impact assessments and the Explanatory Memoranda do what they are supposed to do, others will have a larger knowledge from which they can criticise?

*Baroness Ashton of Upholland:* Indeed, and of course also being involved in dialogue when the proposals are being worked out or when the proposals are first published will also have the opportunity to find out more about the background perhaps because they can think about what else they want to say about that. It is a very, very different proposal to the work of the LIBE Committee which we have already discussed in the context of the potential for it to be similar to the joint Committee on Human Rights in our Parliament nor indeed for the work of the Parliament as a whole nor indeed for the work of the Member States involved through the Council. I think they are very different and all that this proposal is seeking to do is to demonstrate that there is a willingness to look internally at whether the proposals are compatible or not. It is not going to address the questions that NGOs have about whether they believe this affects internal scrutiny, nor was it ever intended to.

**Q148 Chairman:** Paragraph 17 of your own explanatory memorandum makes that pretty plain where it says the Communication is focused on the way in which the Commission monitors its own compliance with fundamental rights.

*Baroness Ashton of Upholland:* That is right.

**Q149 Chairman:** You see it as a relatively limited proposal or decision on the part of the Commission and in the scale of things it does not loom large but you welcome it as far as it goes. Is that a fair assessment of your view?

*Baroness Ashton of Upholland:* Yes, that is an extremely good assessment of my view.

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**Q150 Chairman:** And that you see it as early days to judge whether it will usefully carry the process further than under the 2001 decision, or whether it will seriously improve the quality of monitoring of human rights compliance?

*Baroness Ashton of Upholland:* Indeed, precisely so. This is a useful addition to the work that is going on around these very important issues. It is to be welcomed in my view. The Commission will have to see how it actually works in practice and we will have to review how that is working in progress. We will all have to see whether there are implications for the way in which we operate, but on the basis

of what they propose so far my view is it is to be welcomed and they are to be congratulated on doing it.

**Q151 Chairman:** Unless any members of the Committee have any further questions, that concludes the questions that we wanted to ask you and I am very grateful to you indeed for coming. As I say, we are conscious of the tight schedule you are under so we will release you without more ado with our thanks.

*Baroness Ashton of Upholland:* That is very kind of you, thank you very much indeed.

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**Letter from Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, to Lord Grenfell, Chairman of The European Union Committee**

At the meeting of Sub-Committee E on 19 July, at which I gave evidence on the Commission's Communication on Compliance with the Charter of Fundamental Rights, you asked whether the UK proposes legislation under the third pillar, and if it does, how it explains its views on human rights implications in the proposals.

It is normally the role of the Commission to present proposals, but Member States also have the right to propose legislation under the third pillar, and do so from time to time. There is no uniform method for Member States to explain the human rights compliance of their proposals, but it is the responsibility of each Member State to review the consistency of their proposals with human rights standards, and to ensure that their proposals are in line with the principles of subsidiarity and proportionality.

Once a Member State proposal goes to a working group for negotiation, human rights compliance (and especially compliance with Article 6 TEU), is a key issue for discussion.

25 October 2005

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# Written Evidence

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## Memorandum by Fair Trials Abroad

### INTRODUCTION

1. Fair Trials Abroad welcomes the opportunity to comment on the communication from the Commission concerning the monitoring of compliance with the charter of fundamental rights in Commission legislative proposals as provided by this House of Lords enquiry. In view of the time limits imposed a broad brush approach is necessarily adopted.

2. FTA is a non-governmental organisation working on behalf of the individual to ensure access to criminal justice via a fair trial. In particular, FTA works on behalf of the individual's rights to justice when outside their own country. The bases of these rights are for the purposes of this memorandum Chapter VI (Justice) of the Charter Articles 47–50. We should emphasise here that our observations are only directly applicable to our sphere of competence though in this particular memorandum we consider that they are of more general importance.

### OBSERVATIONS

3. The title for the communication includes the phrase “Methodology for systematic and rigorous monitoring.” As we understand the monitoring system that we are invited to endorse it is a Commission exercise in internal housekeeping that is to say a methodology to ensure that on paper some legislative proposals, but not all<sup>1</sup> will have two documents submitted with them. An impact assessment and an explanatory memorandum. The Impact assessment is our primary concern.

#### *Impact assessment*

4. The impact assessment is intended to be incorporated right from the start of the drafting process, with a complete picture of the various groups whose rights may be involved.<sup>2</sup> We are informed that the Commission has been using this instrument since 2002.<sup>3</sup> Further there is an impacts Checklist, with additional questions specifically for fundamental rights, in course of preparation. It will be important to scrutinize the revised checklist when it becomes available for the questions relating to Justice.

#### *The utility of the Commission model in monitoring*

5. A recent Commission “Disaster” in establishing impact of proposed legislation on citizens demonstrates the limit of paperwork systems without essential fundamental quantitative research. Draft framework proposals for a European Supervision order were placed before a hastily convened experts meeting in April 2005. The proposals had, presumably, gone through the impact procedure and had been a considerable time in gestation. It was clear at the meeting that no quantitative research had been done on the number of citizens likely to be affected. As a consequence a number of governmental representatives denied that the problem existed in their countries. The result is that there will be considerable delay in desirable legislation whilst research, which should have been undertaken as a preliminary to the proposals, is now commissioned.

### CONCLUSIONS

6. It is somewhat astonishing that the Commission is proposing a system, as a novelty, that has been incorporated into every UK government Bill for many decades.

7. The severe limitation of this housekeeping arrangement is its lack of emphasis on the “practical and real” as opposed to the “theoretical and illusory.”<sup>4</sup> There is nowhere in this document a commitment to conduct any form of fundamental research or investigation when the so called “systematic and vigorous monitoring”

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<sup>1</sup> Clause 14 consultation document.

<sup>2</sup> Clause 11 op cit.

<sup>3</sup> Clause 17.

<sup>4</sup> Artico Judgement 1980 ECtHR.



might require it. It does not really incorporate any real advance in practical compliance by the Member States of their obligations under the Fair trial provisions of the Charter.

*June 2005*

### **Letter from the Law Society of England and Wales**

1. The Law Society is the regulatory body for more than 116,000 solicitors in England and Wales. It also represents the views and interests of solicitors in commenting on proposals for better law and law making procedures in both the domestic and European arenas. The Law Society welcomes this opportunity to submit comments to Sub-Committee E (Law and Institutions) of the House of Lords Select Committee on the European Union on the European Commission's Communication of 27 April 2005, "Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals—Methodology for Systematic and Rigorous Monitoring" (COM(2005)172). The Law Society also recently responded to the House of Lords European Union Select Committee Inquiry on ensuring effective regulation in the EU.

2. The Law Society welcomes legislative and non-legislative initiatives to promote fundamental rights in the European Union. The Communication is a welcome expression of the Commission's commitment to embedding a culture of fundamental rights in its working methods. International human rights standards should underpin all drafting and implementation of EU legislative and non-legislative measures.

3. Commission proposals should always be in line with all Member States' obligations under international law, the European Convention on Human Rights as well as existing EU law. The Charter of Fundamental Rights is an important source of rights, agreed by all Member States and solemnly proclaimed by the European Parliament, Council and Commission on 7 December 2000 in Nice, but remains non-binding. It is worth recalling that the Constitutional Treaty incorporates the Charter, thereby making it legally binding for the EU institutions and the Member States when they are implementing EU law. It also facilitates accession of the EU to the European Convention on Human Rights. Although entry into force of the Constitution is uncertain, the Charter is nevertheless largely based on pre-existing fundamental rights guaranteed in conventions, treaties or jurisprudence, in particular the case law of the European Court of Human Rights. The legally binding obligations which all EU members have voluntarily accepted under the Council of Europe and the United Nations human rights treaty system should be placed on an equal footing in the work methods of all the EU institutions.

4. Any new fundamental rights checks at EU level must be conducive to an effective and efficient overall approach to fundamental rights protection through EU law. They must fit into existing structures for pre-legislative scrutiny and stakeholder consultation. A number of initiatives are currently on the EU agenda—in addition to this Communication, notably the establishment of an EU Fundamental Rights Agency and an EU Gender Institute—and any changes that are introduced should be coordinated, workable and avoid duplication.

5. The methodology set out by the Commission in its Communication would appear to have few implications in terms of procedures for preparing legislation compared to those already in place. It is already practice in Commission interdepartmental consultations for the Legal Service to check compliance with the fundamental rights guaranteed in the Charter. The Commission Communication on the application of the Charter of Fundamental Rights of March 2001 required all Commission services to take the Charter into account in the preparation of any proposal for legislative or regulatory act. Those legislative or regulatory proposals which present a specific link with fundamental rights contain a formal compatibility statement in the form of a recital. The Commission's Communication states that the existing system will be reinforced through the impact assessment and the explanatory memorandum (paragraph 9). The Communication does not seem to add any requirements in relation to either, however.

6. The guidelines for impact assessments, carried out in the preparation of policy proposals since 2002, were recently revised.<sup>5</sup> Impact assessments are required for all items on the Commission's Work Programme, but the Commission may additionally decide to carry out an impact assessment on an item which does not appear on the Work Programme. The Communication on fundamental rights proofing does not demand more than this, although it does open the door for impact assessments of regulations or decisions which the Commission itself adopts directly under the Treaty, by virtue of its implementing powers or in accordance with a committee procedure. The revised guidelines require policy makers to consider whether the EU has a right to act in terms of Treaty base, necessity (subsidiarity) and fundamental rights limits. The Law Society welcomes the integration of examinations of compatibility with the Fundamental Rights Charter into the impact assessment. Commission officials should consider the potential compatibility of all policy options with the Charter of Fundamental Rights. Questions relating to fundamental rights are listed among the economic,

<sup>5</sup> Impact Assessment Guidelines, 15 June 2005, SEC (2005) 791.

environmental and social impacts to be considered. The aim of these questions is to aid policy makers to develop their thinking about impacts; they are not to be treated as a checklist. It is important that Commission officials consider the Charter as a whole irrespective of the specific questions in the impact assessment guidelines, as not all rights in the Charter are referred to in the questions and not all fit easily into economic, environmental or social impacts.

7. While the Communication seems to encourage greater use of the explanatory memorandum for scrutiny of fundamental rights compliance, in effect it does little more than provide new guidelines for deciding which legislative proposals should contain the Charter recital. These will not necessarily increase the instances in which the recital is inserted, but simply “guide current practice” (paragraph 22). The Law Society would welcome the introduction of a rule, as the Communication suggests, that whenever a legislative proposal contains this recital, the explanatory memorandum must include a section briefly summarising the reasons pointing to the conclusion that fundamental rights have been respected (paragraph 23). We agree that this would amount to a public account of the Commission’s legal scrutiny, make departments more aware of fundamental rights matters and provide a better basis for the formal legal review during the interdepartmental consultation. The impact assessment guidelines already demand that the explanatory memorandum accompanying draft proposals briefly set out the options considered in the impact assessment and their potential economic, social and environmental impacts.

8. We welcome the responsibility of the lead department to involve DG Justice, Freedom and Security in consultations which affect fundamental rights and the relevant external relations DG in consultations which involve the fundamental rights of third country nationals, eg proposals relating to asylum and immigration.

9. The Commission’s Communication states that the activities and work of the Fundamental Rights Agency should be used as an input for the methodology (paragraph 26). The Law Society would like to see the Fundamental Rights Agency given a role in pre-legislative scrutiny. Use of its expertise should not be limited to formal consultations undertaken by the Commission but should be sought during preparations of any proposal affecting fundamental rights. Our response to the Commission’s consultation on the Agency suggested that it could be charged with providing policy advice as to whether proposals are in line with the Charter. The expertise and data collected by the Fundamental Rights Agency, as an independent body, should feed into the Commission’s impact assessments and its legal analysis of compatibility with the Charter.

10. The Law Society welcomes the stated intention of the Commission to ensure the two branches of legislative authority respect fundamental rights and its willingness to initiate, as a tool of last resort, annulment proceedings. This is already the responsibility of the Commission to the extent that fundamental rights form part of the general principles of Community law.

11. The role of the Group of Commissioners on fundamental rights, anti-discrimination and equal opportunities in monitoring compliance, and the role of the Legal Service in keeping them informed of significant cases in which fundamental rights have been subject to internal monitoring, should raise the profile of fundamental rights issues. In our view it will be helpful for the Group of Commissioners to produce policy guidelines where fundamental rights have to be weighed up against each other. Such guidelines must be drawn up with reference to the case law of European Court of Human Rights, which often has to balance competing rights.

12. The strength of the Communication lies in its potential to make the Commission more accountable for its respect for fundamental rights and to raise awareness of fundamental rights among Commission officials and the general public. Enhanced visibility and publicity of the Commission’s fundamental rights checks is a key objective of the Communication and will be central to holding the Commission to account. We welcome in particular the Commission’s resolve to draw attention to the Charter rights when it is consulting the public and civil society.

*27 June 2005*

#### **Memorandum by Statewatch**

1. Statewatch welcomes the opportunity to comment on this important communication from the Commission.

#### **SCOPE**

2. It is relevant to open with a comment on the scope of this communication. First, the Commission’s communication is limited to its own activity. But no system of ensuring that EU measures are compatible with fundamental rights will be effective unless the Council and the EP also ensure, throughout their role in the EU decision-making process, that the final texts of these proposals remain compatible with fundamental rights.

Furthermore, it should not be forgotten that Member States retain a role making proposals within the context of the EU's third pillar, where there are often disputes about the compatibility of their proposals with fundamental rights (for example, as regards the proposed Framework Decision on the retention of telecommunications data). It is therefore unfortunate that the Commission communication does not seek to engage the Council and EP, as well as the Member States to the extent that they retain a power of legislative initiative, into holding a discussion about the need for the other institutions and, where relevant, the Member States, to establish parallel systems for ensuring the compatibility of EU measures with fundamental rights throughout the decision-making process. An inter-institutional agreement on this subject should be drawn up between the Council, Commission and EP, and some form of similar methodology should be agreed for Member States' proposals.

3. Secondly, the Commission's communication only refers to the Charter. But the Charter is non-binding and, at the moment, seems set to remain so for the indefinite future. On the other hand, the EU is bound by fundamental rights as general principles of law (Article 6(2) of the EU Treaty). Their sources are the European Convention of Human Rights, national constitutional traditions and (according to the case law of the Court of Justice) other international treaties upon which Member States have collaborated. It should be emphasised that at least the international treaties, and probably also the national traditions, include some rights which are not set out in the Charter (for example, procedural rights for lawful migrants facing expulsion). So any fundamental rights monitoring process also needs to consider the impact of these binding principles, as well as the need to ensure that EU rules do not have the effect that Member States are compelled to violate their obligations pursuant to international human rights treaties (see the judgment of the European Court of Human Rights in *Matthews v UK*).

4. Thirdly, the Commission does not examine the issue of the need to ensure protection of human rights in the process of national implementation and application of EU measures, as well as derogation from EU measures, an issue which falls within the scope of the general principles of EU (see the case law of the Court of Justice) and, at least to some extent, the Charter (see Article 51 of the current Charter). Obviously, ensuring the protection of fundamental rights in this context would entail a different process. But given the critical practical importance of the implementation of EU law by Member States, the Commission should also be urged to consider reflecting upon whether it needs to develop such a process. One element of this could be the issue of interpretative communications by the Commission, suggesting interpretations of relevant EU measures that would ensure the full compatibility of those measures with human rights obligations. Another could be reflecting on the use of the infringement procedure to ensure that Member States' obligations in relation to fundamental rights within the scope of EU law are upheld.

#### SYSTEMATIC CHECKING

5. The proposal to beef up the systematic checking of legislative proposals for compatibility with fundamental rights is welcome. However, it should be pointed out that only a small percentage of Commission proposals is at present subject to impact assessment, and that in recent months some proposals have lacked a detailed explanatory memorandum. For example, the recent proposals for the next generation of the Schengen Information System, which were released over a month after this fundamental rights communication, were not subjected to an impact assessment, and there is no explanation of the individual articles of the proposals. Also, it should be reiterated that there is no process of impact assessment applied to Member States' third pillar proposals, whereas some should clearly have been subjected to such an assessment, for instance the proposed Framework Decision on data retention.

6. Having said that this commitment is welcome in principle, it is not very clear from Part II of the Communication what new steps the Commission will be taking in concrete terms.

#### IMPACT ASSESSMENT

7. It would have been useful if the Commission spelt out more fully what new guidelines it intends to apply.

8. While it may not be necessary, for the reasons the Commission sets out in point 19 of its Communication, to create a new category of analysis for fundamental rights as far as economic rights and social rights issues are concerned, it should be recalled that many EU measures, particularly in the field of justice and home affairs, also touch on civil rights (civil liberties). Those rights would not be clearly measured within the heads of "economic" or "social" impact. So where civil rights are involved, it would seem necessary to develop a specific category of analysis within impact assessments.

There is a risk that Impact Assessments (IAs) will simply re-assert planned policies and rarely consider "Options" in any real detail. IAs are useful for instilling, in this instance, a culture of considering fundamental

rights in bureaucracies but should not be confused with ensuring compliance either in the legislation or the implementation (see below).

#### EXPLANATORY MEMORANDUM

9. Part IV of the Communication sets out a welcome commitment to give the reasons in an explanatory memorandum for considering that a proposal is compatible with fundamental rights, particularly where a limitation of rights is involved or the proposal seeks to ensure application for rights. It must be ensured that these commitments are carried out in sufficient detail. As pointed out above, this commitment has already been flouted in the recent SIS II proposals, there is need to justify the interference with the right to private life, and the Charter's separate provisions on data protection, entailed by those proposals.

#### FOLLOW-UP

10. The measures in the Communication concerning follow-up are rather vague. It is unfortunate that the Commission does not spell out the important role that could be played by the planned Fundamental Rights Agency, or consider the role that could be played by the existing Network of independent experts on fundamental rights.

#### MONITORING COMMITMENT IN THE DECISION-MAKING PROCESS

11. For the reasons set out above, the Commission should have sought to go beyond a commitment to engage with the Council and the EP in specific situations, and sought to encourage those institutions to begin to establish parallel processes of ensuring compatibility of EU measures with fundamental rights.

12. There is a danger that this procedure will be "self-regulating" (the Commission monitoring itself) without proper external scrutiny. This could be overcome by:

- (i) ensuring that all the documentation leading to compliance, eg: inter-departmental consultation and legal opinions are available on the Commission's register; and
- (ii) that national and European parliaments create committees (or sub-committees of policy-making ones) empowered to scrutinise implementation and practice and make proposals for amendment—the UK being an honourable exception.

13. It is encouraging to see that the Commission commits itself to begin annulment proceedings if necessary against EU measures which infringe fundamental rights. But these are empty words if the Commission does not take the opportunity to bring proceedings against acts which deserve to be challenged on such grounds—in particular the asylum procedures directive and Framework Decision on data retention, which are due to be adopted shortly.

#### PUBLICATION

14. The Commission's intention to publicise its actions is welcome. However the specific process described in the communication may be too disparate to have the full effect. In addition to communicating its fundamental rights analysis in specific cases, the Commission should be encouraged to draw up regular reports, perhaps annually, on the application of the principles set out in this Communication, and perhaps more broadly on the effective enforcement of fundamental rights within the scope of EU law and policy. The other institutions should be encouraged to draw up parallel reports (although the Council and EP currently draw up annual human rights reports, these reports do not examine the adequacy of EU law and policy).

4 July 2005

