



Statewatch submission to the European Union Committee of the House of Lords on Communication on methodology for ensuring compliance with the EU Charter of Fundamental Rights COM (2005) 172

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 to 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: 1) ensuring that all the documentation leading to compliance, eg: inter-departmental consultation and legal opinions are available on the Commission's register and 2) 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).

**Statewatch,
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