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REPORT

**ON THE PRACTICAL OPERATION OF THE METHODOLOGY FOR A
SYSTEMATIC AND RIGOROUS MONITORING OF COMPLIANCE WITH THE
CHARTER OF FUNDAMENTAL RIGHTS**

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1. INTRODUCTION

In presenting the 2005 Communication on a methodology for systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights¹, the President of the Commission underlined the institution's determination to "*lock in a culture of Fundamental Rights in EU legislation*". The methodology, along with the establishment of the Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in December 2004, was one of the flagships of this Commission's commitment to taking Fundamental Rights seriously. By setting up the methodology, designed to ensure that Commission departments check systematically and thoroughly that all the fundamental rights concerned have been respected in all draft proposals², the 2005 Communication enshrined the practical means by which intentions would be matched by concrete performance.

The Commission undertook to prepare an appraisal of the internal monitoring in 2007. This is the purpose of the present report, the elaboration of which was delayed in order to take into account two new elements: the coming into being of the Fundamental Rights Agency and the 2009 revision of the Commission's Impact Assessment Guidelines.

2. FUNDAMENTAL RIGHTS PROOFING IN PRACTICE

2.1. General Overview

Experience over the years since the adoption of the 2005 Communication has demonstrated that fundamental rights issues can arise in many disparate areas. A few examples can be mentioned to show the diversity of topics.

In the Reach Regulation³, an obligation of data sharing among registrants raised issues regarding the right to property. The obligation was considered acceptable in that it was necessary for the protection of the environment and, in particular, designed to avoid repeated testing on animals. These considerations were recorded in the recitals of the regulation.

In the area of agricultural policy, the question of imposing an obligation on Member States to publish a list of beneficiaries of rural development funding was examined. This raised the issue of data protection. Examined against the test of necessity, it was concluded that any

¹ COM(2005)172 final of 27.4.2005.

² The 2005 Communication and this report deal with compliance with the Charter; however, the Commission must ensure that its proposals comply not only with the Charter and the European Convention on Human Rights but also with United Nations human rights conventions which all the Member States have ratified.

³ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

interference with data protection was justified by the need to improve the transparency of the Community's action in the area of rural development, to enhance the sound financial management of the public funds involved and to avoid distortion of competition between beneficiaries of rural development measures. These considerations were recorded in the recitals to the Commission act⁴.

A last example comes from the customs area. In the framework of the revision of the Customs Code⁵, a question arose as to giving operators the right to be heard by the customs authorities in procedures relating to the application of customs legislation. It was considered that such a right to be heard was an obligation flowing from the Charter and it is now to be found in Article 16 of the Code.

It is, however, the ever growing importance, in terms of legislative activity, of the area of Justice, Freedom and Security which has, inevitably, brought into sharp focus that the Community and Union are increasingly touching on areas which, very directly, raise fundamental rights issues. In this area, more than any other, the Commission is required to confront delicate and controversial issues pertaining to the necessity and proportionality of possible limitations to fundamental rights.

Given the types of matters covered by the area of Justice, Freedom and Security - the fight against criminality, in particular terrorism, immigration, asylum, border control, to name but a few - it is unsurprising that this policy occupies a pre-eminent place in terms of monitoring the respect for fundamental rights in the Commission's legislative proposals. Citing, only as an example, immigration and asylum policy, a number of delicate questions of respect for fundamental rights can be identified as arising over and over again – the most common being the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the Charter), the right to liberty and security (Article 6 of the Charter), the right to respect for family life (Article 7 of the Charter), data protection (Article 8 of the Charter), the right to asylum (Article 18 of the Charter), protection in the event of removal, expulsion or extradition (Article 19 of the Charter), non discrimination (Article 21 of the Charter), the rights of the child (Article 24 of the Charter), the right to an effective remedy and to a fair trial (Article 47 of the Charter).

2.2. A case study – the Asylum Package

Many of the above issues were reflected in the "asylum package"⁶, adopted by the Commission in December 2008. This package provides a particularly suitable "case-study" to

⁴ Recital 42 of Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).

⁵ Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code.

⁶ Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers COM/2008/0815 final/2 ("Reception Conditions Directive").

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person COM/2008/0820 final/2 – ("Dublin regulation")

Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] [establishing the criteria and mechanisms for determining the Member State responsible for

demonstrate how the Commission's internal fundamental rights monitoring is applied in practice.

As regards the proposal amending the Reception Conditions Directive, the most sensitive issues raised in terms of respect for fundamental rights were those of the detention of asylum seekers, the right to an effective remedy and the rights of the child. In examining these issues, it was sought to ensure compliance not only with the Charter of Fundamental Rights but also with relevant international standards, in particular the European Convention on Human Rights, the Geneva Convention and the United Nations Convention on the Rights of the Child.

As regards detention, it was considered essential in terms of respect for fundamental rights that the proposal reconfirmed the principle⁷ that a person should not be detained solely because he/she is an applicant for international protection. Thereafter, the proposal sets clear parameters for the use of detention in derogation from that principle; in this respect, the proposal takes, as its standard, guidelines from the United Nations High Commissioner for Refugees (UNHCR) on applicable criteria and standards relating to the detention of asylum seekers and Recommendation (2003) 5 of the Council of Europe Committee of Ministers on measures of detention of asylum seekers. Based on these texts, the proposal provides that detention should only be used in exceptional cases and for a limited number of reasons as prescribed by the guidelines. Again, in line with the UNHCR guidelines and the Council of Europe recommendation, the proposal also introduces conditions for detention in order to ensure respect for human dignity in the treatment of detained asylum seekers, and in particular of vulnerable persons. Principally, in this respect, the proposal provides that asylum seekers should not be kept in prison accommodation but in specialized detention facilities, which take into account gender considerations.

In order to ensure compliance with the right to an effective remedy, the proposal introduces a number of procedural guarantees as regards detention. Thus, detention can only be ordered by judicial authorities; where in urgent cases, it is ordered by administrative authorities it must be confirmed by judicial authorities within 72 hours. Further, detention should be only for the shortest possible time and, in particular, no longer than is necessary to fulfill administrative procedures. Continued detention has to be reviewed periodically by a judge. A detained asylum seeker is also to be given access to legal assistance or representation which is to be free where the person cannot afford the costs involved. These provisions are essential in ensuring an effective remedy in cases of detention.

As regards the rights of the child, the concern was to ensure that the best interests of the child were an underlying principle. As regards the possible detention of minors, the proposal makes a clear link with the elements which must ground an assessment of the best interests of the child in this respect. In addition, in order to comply with Article 37 of Convention on the Rights of the Child, the proposal provides that the detention of a minor should only be used as a measure of last resort and for the shortest appropriate period of time. Finally, it is forbidden to detain unaccompanied minors.

examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] COM/2008/0825 final ("Eurodac Regulation").

⁷ Already laid down in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive").

The proposal to amend the Dublin Regulation also raised issues in relation to detention, effective remedy and the rights of the child. Solutions similar to those in the Reception Conditions proposal were applied. As regards detention, an issue reflecting the specificities of the Dublin system deserves to be underlined, namely, the detention of an asylum-seeker before transfer to another Member State under the Dublin procedure. The proposal envisages that detention can take place where there is a risk of the person absconding and after notification of transfer decisions. This issue required an assessment of necessity and proportionality. Clear parameters have been provided as to when recourse to this possibility was appropriate. These include that the detention decision is based on an individual assessment of each case and that the possibility of alternative less coercive measures such as regular reporting to the authorities, the deposit of a financial guarantee or an obligation to reside at a designated place have to be examined. Further, as regards the decision to detain, procedural safeguards are ensured in terms of a reasoned decision and effective remedies before a judge.

In addition, the right of family unity has been strengthened. Thus, the proposal obliges the reunification of dependent relatives and extends the definition of "family members" as far as minors are concerned, in order to ensure better protection of the "best interests of the child". In addition, asylum seekers will be reunited with family members who have been granted subsidiary protection.

The main concerns, in terms of compliance with fundamental rights, raised by the proposal to amend the Eurodac Regulation, focussed on data protection. In this respect, the proposal aims to ensure better management of the deletion of data from the system and more effective monitoring by the Commission and the European Data Protection Supervisor of access to data in EURODAC by national authorities.

The experience of the asylum package demonstrates that the methodology to monitor the respect of fundamental rights implies not only a procedural element but also a substantive element. The methodology is not an end in itself. Respect for fundamental rights is not simply a mechanism or a procedural obligation; it is a substantive obligation. In underlining its respect for fundamental rights, the Commission has undertaken a substantive adherence. This implies as far as fundamental rights are concerned that the Union must be irreproachable in its legislative activity. In the asylum package, the Commission has sought to deliver on substantive obligations; it has sought to ensure that the starting point is the affirmation of the relevant fundamental right and that, thereafter, any eventual limitation is subject not only to the tests of necessity and proportionality but is also surrounded by safeguards in terms, particularly, of procedures and judicial review.

2.3. A stock-taking

Experience over the years since the adoption of the 2005 Communication has demonstrated that the Commission has had to make difficult judgments of necessity and proportionality and that the methodology has had to confront delicate questions as to whether the solutions arrived at meet the required standards, as set by the case law of the European Court of Human Rights Court ("the Strasbourg Court") and by the Court of Justice of the European Communities ("the Court of Justice"). The Commission believes that the standards of necessity and proportionality have been met in its proposals; its commitment to a culture of fundamental rights respect is real and of substance.

Finally, it should be noted, in relation to both the quantitative and qualitative analysis of the monitoring of the respect for fundamental rights, that often the positive results of such monitoring remain unknown to the outside audience, precisely because the monitoring exercise has eliminated any problem in this regard. An example can be cited from the asylum area. In the Procedures Directive, a legal base was provided for the establishment of a list of third countries considered as safe for the purposes of the examination of an asylum application. Following an application of the methodology, it was considered that such a list would raise serious concerns judged against the “*non-refoulement*” principle under both the Geneva Convention and Article 3 of the European Convention of Human Rights. The Commission considered it, thus, inappropriate to table a proposal in this sense.⁸

3. IMPROVING THE MONITORING MECHANISM

3.1. Impact Assessment

The Commission's Impact Assessment Guidelines have recently undergone a revision process⁹ which involved a public consultation. One matter which came up in several of the contributions to that consultation and, indeed, had been an issue included in the Voggenhuber report¹⁰ was the greater visibility for fundamental rights within the Impact Assessment process. As a response to this, the revised version of the Impact Assessment Guidelines has sought to reinforce more clearly than the 2005 version, on the one hand, that ensuring respect for fundamental rights, as defined in the Charter, is an overarching objective of the Union and, on the other hand, that fundamental rights place limitations on the activity of the Union. Further, the guidelines specifically recall that certain fundamental rights are absolute and cannot be limited and that the others can only be limited subject to a demonstration of necessity and proportionality. This serves as a clear statement of the constraints in this respect in terms of policy options. Lastly, the guidelines contain a list of all the fundamental rights enshrined in the Charter. This will allow a direct correlation between the Charter and the questions under the three categories of impacts, economic, social and environmental. This correlation will serve to underline that the questions have real substance and are linked to concrete rights.

In the Voggenhuber report, the Commission has been asked to provide, within the Impact Assessment guidelines, a separate section on fundamental rights impacts in addition to the three existing categories. In the 2005 Communication, the Commission explained its position on the maintenance of the three categories. As stressed in paragraphs 12 to 15 of the Communication, the underlying reason pleading for a certain caution as to how fundamental rights issues are treated within the Impact Assessment process is that the Impact Assessment does not, and cannot, operate as the fundamental rights check. It cannot be a substitute for legal control. In the end result, fundamental rights proofing can only be performed via a legal assessment based on a crystallised draft legislative text. However, while not being, in itself, the legal control for fundamental rights compliance, the Commission recognises that the Impact Assessment can do some of the groundwork to prepare for the fundamental rights proofing of legislative proposals. It should serve to identify what rights in terms of the Charter

⁸ The Court of Justice subsequently found the legal base provided in the Directive to be incompatible with the Treaty, see judgment of 6 May 2008 in case C-133/06 Parliament v Council.

⁹ The new Guidelines were adopted on 28 January 2009 and are available on (http://ec.europa.eu/governance/impact/docs_en.htm).

¹⁰ Voggenhuber Report of the European Parliament of 12.2.2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals.

are potentially concerned or affected by the relevant initiative; thereafter, in identifying the options for action, the Impact Assessment must describe the degree of interference with the right¹¹ and the necessity of such interference in terms of the options for action and the policy objectives sought to be attained. In this way, the Impact Assessment will provide analysis for the later legal control and it is that legal control of a concrete text which will examine whether the interference can be permissible in terms of necessity and proportionality, the standards set in the case law of the Strasbourg Court and of the Court of Justice when examining the legality of limitations to fundamental rights.

While not creating, as favoured by the Voggenhuber report, a separate category within the Impact Assessment Guidelines on fundamental rights impacts, the Commission has ensured, in the revised guidelines, a greater visibility for issues of fundamental rights and impacts thereon. This greater visibility will better trigger and, thereafter, reinforce, the fundamental rights reflex at an early stage of Commission policy making.

Another matter singled out for attention in the Voggenhuber report was that of measures adopted in comitology. As paragraph 16 of the 2005 Communication demonstrated, the Commission was aware that the acts which it adopts in comitology could also have impacts on fundamental rights and, indeed, one of the examples cited above of fundamental rights proofing in practice concerned a comitology act¹². However, the Commission is, also, mindful that this is an area where the fundamental rights reflex needs to be better attuned. In the revised guidelines, unlike the previous version, comitology acts are specifically mentioned and the need for thorough assessment of impacts is underlined. This will help to ensure that comitology measures, which have significant impacts, including impacts on fundamental rights, are, from now on, subject to scrutiny at an early stage and, thus, do not escape monitoring under the methodology.

3.2. Explanatory Memorandum and Recitals

The package on asylum presents an example of the better targeting of recitals in terms of specifically addressing the rights which are directly concerned by the proposal. This example will become the norm¹³; the drafting of recitals must be better targeted to indicate exactly what rights are impacted by the relevant proposal and how the solutions found in the proposal serve to respect fundamental rights obligations. A more specific motivation in this sense would better serve to demonstrate compliance with fundamental rights. In practical terms, this will imply that the Commission will be more selective in including recitals on the Charter in its legislative proposals. Such recitals will be included where a proposal has serious fundamental rights implications. In such cases, not only would there be the "standard" recital which confirms compliance with the Charter but also individualised and specific recitals on particular rights.

The Explanatory Memoranda of the proposals in the asylum package also present specific explanations as to the fundamental rights implications of the proposals and thereby demonstrate how respect for fundamental rights has been achieved. The 2005 Communication had, indeed, foreseen that, whenever a legislative proposal contained the Charter recital, the Explanatory Memorandum would include a section corresponding to that recital which would

¹¹ It being understood that certain rights, such as the interdiction of torture, are absolute and cannot be limited.

¹² Commission Regulation (EC) No 1974/2006 of 15 December 2006 cited earlier at footnote 3.

¹³ This was also a matter raised specifically by the Voggenhuber Report.

summarize the reasons for concluding that the proposal was compatible with fundamental rights. The treatment of fundamental rights compatibility as a separate heading within the Explanatory Memorandum has not, perhaps, been as consistent as had been envisaged by the 2005 Communication¹⁴. However, it will now become the norm that where the legislative proposal does, indeed, have an impact on fundamental rights, as witnessed by its recitals, the Explanatory Memorandum must include a section justifying succinctly how fundamental rights obligations have been respected.

3.3. The Fundamental Rights Agency

On 1 March 2007, the Agency for Fundamental Rights officially commenced its activities. The Commission is determined to harness the expertise of the Agency in order to support, and, indeed, reinforce, the methodology. This could be achieved in a number of ways.

The reports and surveys of the Agency could be used as input in the preparation of Commission initiatives and actions. This is already the case. Currently, for example, the Agency is working on a study on the impact on the ground of the Race Equality Directive¹⁵ which will be a contribution to the Commission's report on the application of this directive. In 2009, a study on the promotion of the rights of irregular immigrants in voluntary and involuntary return procedures will be a contribution for the smooth implementation of the Return Directive¹⁶. The Agency should also be invited to participate in the consultation process which is normally launched for new possible initiatives (Green papers, communications, questionnaires, etc.). For example, recently, the Agency has been consulted on the future priorities in the area of Freedom, Security and Justice in the context of the preparation of the next multi-annual programme in this area.

The Commission¹⁷ can request the Agency to carry out research, exploratory studies or to formulate opinions on specific thematic topics. Already, the Commission has taken advantage of this to request from the Agency a study on indicators for the implementation of the rights of the child. This will be used as input to the strategy on the rights of the child, which the Commission has scheduled for presentation in 2010.

In these various ways, the Commission can, indeed, harness the expertise of the Agency, while at the same time respecting the parameters of the relationship between it and the Commission. In this sense, it is to be recalled that the scrutiny of conformity of proposals with fundamental rights is not within the mandate of the Agency.

3.4. Monitoring during the Legislative Process

The 2005 Communication stressed the Commission's responsibility to defend, during the legislative procedure, the fundamental rights standards laid down in its proposal. To this end, the Communication stated that, as a last resort, the Commission would reserve the right to bring annulment proceedings against an act which it considered incompatible with fundamental rights. The Voggenhuber report strongly supported the bringing of annulment

¹⁴ Paragraph 23.

¹⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹⁷ And also the Parliament and the Council.

proceedings for fundamental rights violations; in addition, it underlined the Commission's right to withdraw its proposal if changes are made, during the legislative procedure, which violate a fundamental right.

The Commission recognises its responsibilities in this respect but it must also underline the concomitant obligations of the co-legislators. They are equally bound by the obligation to respect fundamental rights.

During the legislative process, the Commission will robustly defend its position as regards the fundamental rights standards of its proposal and will equally robustly signal to the co-legislators its opposition where they would seek to fall below such standards. The Commission will use all means at its disposal to this effect, including requiring the act to be adopted at unanimity.

As a last resort, as it already indicated in the 2005 Communication, the Commission is ready to contemplate an annulment action: strategically, the best utilisation of the annulment action would be where the legislator has made specific amendments to the Commission's proposal, which the Commission considers clearly violate fundamental rights. In the case of such specific amendments, where they can be separated from the rest of the instrument, an annulment action is the better course. The offending provisions can be singled out, while preserving from attack the other provisions of the legislative act which might represent valuable progress that the Commission would not wish to sacrifice.

Where, on the other hand, the legislator has departed significantly from the Commission proposal in terms of fundamental rights protection so that the centre of gravity of the proposal as far as that protection is concerned has shifted, the withdrawal of the proposal could be the preferred option. The long standing position of the Commission has been that its right of initiative also implies the right to withdraw its proposal and, this, in cases where amendments made by the legislator to the Commission's proposal lead either to a manifest illegality or to a serious distortion of the Commission proposal.

4. CONCLUSION

Experience since 2005 has shown that the methodology is well conceived as regards the objective sought but that its practical application needs to be reinforced. The elements outlined in this report, the revision of the Impact Assessment Guidelines, the better targeting of recitals and the harnessing of the Agency, all have their role to play in the better application of the methodology. However, perhaps the most important element which needs to be worked upon is the human element. The fundamental rights reflex has to be promoted in the services of the Commission where proposals and initiatives are created and a "fundamental rights culture" fostered from the earliest stages of the conception of a Commission proposal.

Lastly, the commitment to the respect for fundamental rights must be a common goal of all the Institutions involved in the legislative process.