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COMMUNICATION FROM THE COMMISSION

Compliance with the Charter of Fundamental Rights in Commission legislative proposals

Methodology for systematic and rigorous monitoring

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I. Introduction

1. On 13 March 2001 the Commission decided[1] that any proposal for legislation and any draft instrument to be adopted by it would, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter of Fundamental Rights of the European Union[2]. It also decided that legislative proposals and draft instruments having a specific link to fundamental rights would incorporate a recital as a formal statement of compatibility. The legislature now automatically inserts this recital[3].

2. It has since become current practice to refer to the fundamental rights secured by the Charter in interdepartmental consultations. The Commission has in certain cases referred to compatibility with the Charter in the explanatory memoranda to its legislative proposals (notably in the area of freedom, security and justice). In many other cases, however, the recital has been the only evidence of respect for fundamental rights.

3. The Commission has meanwhile equipped itself with new horizontal policy programming instruments, notably the impact assessment form. All major Commission initiatives, especially legislative initiatives, must be accompanied by an integrated assessment of their probable impact. The Commission has decided that, with effect from 2005, all legislative and major policy-defining proposals contained in its annual Legislative and Work Programme will be subject to impact assessment[4].

4. Lastly, the Charter was incorporated into the Treaty establishing a Constitution for Europe, signed on 29 October 2004.

5. On the basis of the foregoing factors, this document sets out a *methodology* for ensuring the Charter is properly implemented in Commission proposals. The methodology has a threefold objective:

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1 SEC(2001) 380/3.

2 The Charter was solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission on 7 December 2000 (OJ C 364, 18.12.2000, p. 1). It was incorporated with minor changes as Part II of the Treaty establishing a Constitution for Europe, signed on 29 October 2004 (OJ C 310, 16.12.2004, p. 1). Although it is not, therefore, legally binding, it contains the fundamental principles which have been held to be binding in case-law as general principles of Community law.

3 The recital is worded as follows (SEC(2001) 380/3): "This [act] respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". In appropriate cases 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)."

4 See the Commission work programme for 2005 - COM(2005) 15 final.

– to allow Commission departments to check systematically and thoroughly that all the fundamental rights concerned have been respected in all draft proposals;

– to enable Members of the Commission, and the Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in particular, to follow the results of the scrutiny and to promote a "fundamental rights culture";

– to make the results of the Commission's monitoring of fundamental rights more visible to other institutions and to the general public. The Commission should be seen to set an example, which will also give it credibility and authority in monitoring respect for fundamental rights in the activities of the two branches of the legislature.

II. Systematic departmental monitoring of respect for fundamental rights at the preparatory and interdepartmental consultation stages

6. The main aim of the methodology is to allow Commission services to check all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision-making procedures.

7. These checks are already carried out when the lead department (*service chef de file*) draws up the draft and, in particular, during the interdepartmental consultation where the Legal Service checks for compliance as an integral part of its verification of legality. This matches the approach taken in the Commission's decision of 13 March 2001, whereby Commission proposals for legislation must be scrutinised for compatibility with the Charter in the course of normal decision-making procedures.

8. This approach will be retained in principle. The conformity of Commission actions with fundamental rights is a primary aspect of their constitutional legality; it must remain an integral part of the verification of legality. It seems neither necessary nor appropriate to create new specific administrative structures or procedures for this aspect of verification of legality.

9. However, to further reinforce and systematise the practical aspects of scrutiny at the interdepartmental consultation stage, fundamental rights will be brought into even sharper focus in two key documents submitted together with the draft legislative proposal:

– the impact assessment, which should include as full and precise a picture as possible of the different impacts on individual rights (see Section III below);

– the explanatory memorandum, which for certain legislative proposals should contain a section on the legal basis for compliance with fundamental rights (see Section IV below).

10. The two documents are mutually complementary in this methodology.

11. The impact assessment provides the Commission, right from the start of the drafting process, with a complete picture of the various impacts which the process can have

on the individuals and groups whose rights may be involved, depending on the different options envisaged.

12. On the other hand, an impact assessment cannot be used to contain the legal scrutiny, i.e. the *legal definition* of the impacts identified in the light of the provisions of the Charter and the European Convention on Human Rights, and the case-law. The legal scrutiny calls for specific expertise and should concern an advanced draft proposal. It should as far as possible be initiated within the lead department itself and then continued during the interdepartmental consultation procedure through the formal involvement of the Legal Service; it should if necessary be summarised in the explanatory memorandum, in the manner described below in Section IV, and thus be made publicly visible.

13. The impact assessment will in this way become an essential tool in preparing for the definitive legal verification of compliance with the Charter, as it provides the basic information without thereby taking the place of verification[5]. If serious questions are raised in the conclusions following the legal verification, those conclusions should be included in the explanatory memorandum.

14. This approach is all the more justified as impact assessments will not be carried out for all legislative proposals[6], and because fundamental rights problems sometimes arise only with the detailed implementing provisions or with very specific elements of a legal instrument which an impact assessment could not forecast.

15. The lead department will also ensure that the Directorate-General for Justice, Freedom and Security is involved in the interdepartmental consultation when a proposal is liable to raise issues relating to fundamental rights, notably in the light of the impact assessment. Likewise it will ensure that the relevant external relations Directorate-General is associated where a proposal might affect the fundamental rights of third-country nationals outside the Union.

16. The legislative provisions or decisions which the Commission itself adopts directly under the Treaty or by virtue of its implementing powers and in accordance with a committee procedure can also be sensitive as regards fundamental rights. The preparation of these instruments is also subject to the interdepartmental consultation procedure, which enables them to be checked for compliance with the Charter in accordance with the principles set out above. Unlike legislative proposals, Commission regulations or decisions are not, however, accompanied by an explanatory memorandum or by an impact assessment. By way of exception, however, an assessment may be conducted when the lead department considers it justified by the scale of the foreseeable impact of a regulation and the legal framework allows it.

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5 The Commission has already pointed out that impact assessment is only a tool to aid decision-making and is not a substitute for political judgment (see COM(2002) 276 final, 5.6.2002, p. 3). Similarly, it should be regarded as an essential aid to the legal analysis carried out by Commission departments, in particular at the interdepartmental consultation stage.

6 Even legislative initiatives which are not included in the Commission's legislative and work programme may, however, be included among the initiatives for which an impact assessment is required.

III. Taking fundamental rights into account in impact assessments

17. Impact assessment is an instrument which the Commission has been using since 2002[7]. The basic idea is to replace the existing practice of conducting impact assessments for individual sectors by integrating the impact assessments into a single comprehensive instrument applying to all sectors and covering economic, social and environmental impacts. In October 2004, the Commission adopted a report[8] assessing the initial findings and outlining the steps for further improvement of this instrument. On the basis of this report, Revised Impact Assessment Guidelines are being prepared and will be applied in the near future. These guidelines contain a revised detailed checklist of the impacts to be considered in Impact Assessment[9].

18. In order to take the fundamental rights dimension more fully into consideration, a number of additional questions specifically on fundamental rights have been introduced into the impacts checklist contained in the Revised Impact Assessment Guidelines. 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.

19. The checklist will continue to be divided into three categories, namely economic, social and environmental impacts. Rather than creating a fourth, separate category for fundamental rights, or a sub-heading within the section on social impacts, the additional questions on fundamental rights have been incorporated within the existing three headings according to their links to the items already listed there. The reason for this approach is that the fundamental rights of the Charter are diverse and cut across all sectors. Thus, impacts on, say, rights of ownership, on the freedom to run a business, or on 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". Introducing a new fourth heading "fundamental rights" could lead to needless repetition by the assessing services instead of sharpening their focus on the practical impacts which might be relevant to those rights. The creation of a sub-heading in the chapter on "social impacts" would not adequately reflect the variety of, and balance between, the social, economic and political rights in the Charter.

IV. Taking fundamental rights into account in the explanatory memorandum

20. Some recent Commission proposals already contain a relatively detailed scrutiny of respect for fundamental rights in their explanatory memoranda. This is not, however, a systematic practice applicable to all proposals that have raised questions connected with fundamental rights dealt with by the Commission in the standard Charter compliance recital provided for in the Commission's decision of 13 March 2001. At the same time, guidelines seem to be needed to answer the question *which legislative proposals* should contain the Charter recital.

21. The Commission's decision of 13 March 2001 provided for the insertion of a recital in *"legislative proposals or draft instruments which have a specific link with*

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7 Commission Communication on impact assessment - COM(2002) 276 final, 5.6.2002.

8 SEC(2004) 1377.

9 This checklist will expand on the list contained in Annex II to document SEC(2004) 1377.

fundamental rights". Unlike the recital on the principle of subsidiarity it was thus rightly decided not to apply it systematically. It does not seem possible or desirable to give detailed instructions in this respect. The departments have to find a proper balance between the risk of trivialising the recital by using it extensively and the vigilance needed to ensure that all serious questions concerning respect for a fundamental right are dealt with.

22. It is, however, possible to apply two mutually compatible criteria to guide current practice. The Charter recital will accordingly be used where:

- it is clear that, particularly in the light of information provided by the impact assessment, a legislative proposal includes a *limitation* of a fundamental right which must be justified under Article 52 of the Charter[10]; or where there is a direct or indirect difference in treatment that must be justified in relation to the general principles of equality before the law and non-discrimination;

- a legislative proposal is aimed at *implementing* or *promoting* a particular fundamental right.

23. It is also desirable to introduce the rule that, in future, whenever a legislative proposal contains this standard Charter recital, the explanatory memorandum must include a section briefly summarising the reasons pointing to the conclusion that fundamental rights have been respected.

24. This rule has a twofold purpose:

- on the one hand the Commission will thus be giving a public account of its legal scrutiny of respect for the fundamental rights secured by the Charter in relation to any proposal for legislation raising serious fundamental rights questions. It would thereby avoid the criticism sometimes made in the past that it merely affirms conformity with the Charter by incorporating the standard recital without giving any reasons for its conclusions;

- on the other hand, this rule is aimed, as is the incorporation of fundamental rights in the impact assessment, at enhancing the effectiveness of the internal scrutiny. The requirement that lead departments include a summary on respect for fundamental rights in their draft explanatory memorandum will make the departments more aware of these matters and provide a better basis for the formal legal review during the interdepartmental consultation. The Legal Service will have to pay particular attention to this part of the explanatory memorandum and provide all the assistance needed for the final version.

V. Follow-up by the Group of Commissioners of the internal monitoring of respect for fundamental rights

25. Although internal monitoring of compliance with the Charter must essentially be carried out by the departments, it is nonetheless important that Members of the Commission, especially those in the Group on Fundamental Rights, Anti-discrimination and Equal Opportunities, keep a close eye on its operation and

[10] = Article II-112 of the Constitution.

the main results. The Legal Service will keep the Group of Commissioners regularly informed of significant cases where fundamental rights have been subject to internal monitoring. In very special cases where proposals require a careful balance between several opposing fundamental rights, the Group may also produce policy guidelines, within the margins for political discretion afforded by the provisions of the Charter.

26. Lastly, a general appraisal of internal monitoring, prepared by the Legal Service in agreement with the Justice, Freedom and Security DG and the Secretariat-General, will be submitted to the Group in 2007 − accompanied, if necessary, by proposals to amend or supplement this methodology in the light of experience. In addition, when the Fundamental Rights Agency becomes operational, which is scheduled for January 2007, its activities and work, being an extension of the work done by the Vienna-based European Monitoring Centre on Racism and Xenophobia, should be used as input for the methodology.

VI. Monitoring respect for fundamental rights in the work of the legislature

27. The Commission's responsibility as guardian of the Treaties and hence of fundamental rights does not end when it presents a proposal to the legislature.

28. The Commission, and especially the Group of Commissioners, will also monitor the work of the two branches of the legislative authority in order to determine compliance with fundamental rights, in particular in very sensitive cases involving such rights or where fundamental rights arguments are raised in the legislative process. 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.

29. As a last resort, the Commission will reserve the right, on the basis of a case-by-case political scrutiny, to initiate annulment proceedings in the event of an infringement of fundamental rights where it considers a breach has occurred but there is no possibility of interpreting the act adopted as being compatible with fundamental rights.

VII. Publicising internal monitoring of fundamental rights

30. Internal monitoring of respect for fundamental rights in the Commission's own legislative proposals should form the subject of an appropriate communication *targeted at European citizens.*

31. The purpose of increasing publicity in this way will be threefold:

- the Commission will demonstrate its own efforts to secure compliance with fundamental rights, which will reinforce the credibility of its initiatives;
- the publicity will also promote the image of the Charter as an essential vehicle of a European civic identity based on common values;
- lastly, public awareness will encourage citizens and civil society to assert their fundamental rights in the consultations held by the Commission, which will in turn help fundamental rights to be taken more fully into account and better promoted in EU policies.

32. The public will be informed about this Commission programme at three levels:

– first, this communication will inform the other institutions and the public of the principles guiding the internal scrutiny of Commission proposals for compliance with fundamental rights;

– second, publicising the impact assessments and the section on fundamental rights in explanatory memorandums will allow the other institutions and the public to follow individual legislative initiatives being scrutinised under the Charter;

– lastly, whenever the Commission consults the parties concerned, civil society and the general public when preparing its initiatives, especially as regards the impact assessment, it will draw attention to the rights set out in the Charter and its own internal monitoring of respect for those rights by inviting the parties consulted to assert their fundamental rights. This is a crucial step in ensuring that impact assessments are complete and balanced and, more generally, in promoting a real "fundamental rights culture" within the European Union.