



EUROPEAN COMMISSION

Brussels, 6.5.2011
SEC(2011) 567 final

COMMISSION STAFF WORKING PAPER

Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments

TABLE OF CONTENTS

COMMISSION STAFF WORKING PAPER Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments

Introduction	3
1. Key Context and Background	4
2. Operational Guidance: How to address fundamental rights step-by-step in Commission Impact Assessments	10
2.1. Procedural issues and consultation of interested parties	11
2.2. Problem definition.....	13
2.3. Objectives.....	15
2.4. Policy Options.....	16
2.5. Analysis of impacts	17
2.6. Comparing the options	20
2.7. Monitoring and evaluation	22
3. Executive Summary of the Impact Assessment.....	23
ANNEX I.....	25
Examples of online sources of information on fundamental rights relevant to Commission Impact Assessments	25
ANNEX II	28
Overview of the rights, freedoms and principles guaranteed by the Charter of Fundamental Rights	28

INTRODUCTION

This Operational Guidance on Fundamental Rights is one of the initiatives envisaged in the *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*¹ ('the Charter Strategy') adopted by the Commission on 19 October 2010. The objective of the Charter Strategy is to make the fundamental rights set out in the Charter as effective as possible and to ensure that the EU's approach to legislation is exemplary. In outlining the Charter Strategy, the Commission explained how it would reinforce the assessment of impacts which its legislative proposals may have on fundamental rights. It announced, in particular, its intention to provide guidance to its departments on how the impacts on fundamental rights should be assessed in practice. This guidance is also part of the Commission policy to promote *Smart Regulation in the European Union*². In its Smart Regulation Communication the Commission announced that to reflect the new legal status of the EU Charter of Fundamental Rights, the Commission would reinforce the assessment of impacts on fundamental rights, and would develop specific guidance on this.

Using the Operational Guidance on Fundamental Rights

The Operational Guidance on Fundamental Rights is for Commission staff preparing impact assessments and for impact assessment support units. It begins by describing the 'Key context and background', addressing a number of central questions on dealing with fundamental rights. The second section traces the methodological steps of standard impact assessments and, for each step, looks at how fundamental rights aspects should be taken into account. The guidance thus complements the Commission's Impact Assessment Guidelines by providing further explanations and concrete examples and is without prejudice to the *Guidance for assessing Social Impacts within the Commission Impact Assessment system* prepared by DG EMPL³. It will be regularly updated in light of the experience gained from its application, in particular by inserting new concrete examples. The annexes contain a number of online sources of information on fundamental rights as well as an overview of the rights, freedoms and principles guaranteed by the Charter of Fundamental Rights.

Further advice and support

DG JUSTICE, Unit C.1 'Fundamental Rights and Rights of the Child' can answer any questions on this guidance and on how to assess in concrete cases the impacts which a proposed initiative may have on fundamental rights. In addition, the unit can provide assistance on the interpretation of the provisions of the Charter and on where to find further specific information in that respect (see also Annex I). It is advisable to contact the unit as soon as possible when planning an Impact Assessment and preparing a Roadmap in order to get help in identifying whether initiatives are likely to raise questions on fundamental rights. If that is the case, the unit should also be invited to the Impact Assessment Steering Groups. The unit can be contacted directly by the responsible desk officers. It is recommended that you keep your impact assessment support unit informed. Contact person in DG JUSTICE, Unit C1: Florian Geyer (JUST-NOTIFICATIONS-C1@ec.europa.eu), ☎ - 56832.

¹ COM(2010) 573 final.

² COM(2010) 543 final.

³ <http://ec.europa.eu/social/main.jsp?catId=760&langId=en>. The Guidance on social impacts can be of relevance when dealing with the social rights contained in the Charter, notably Articles 12, 27, 28 and 31.

1. KEY CONTEXT AND BACKGROUND

Why is it necessary to assess the impacts on fundamental rights?

The provisions of the Charter of Fundamental Rights of the European Union⁴ ('the Charter') are addressed to all EU institutions, bodies, offices and agencies. Member States are bound by the Charter *only* when they are implementing Union law. The EU institutions and Member States are obliged to **respect the rights, observe the principles and promote the application** of the Charter in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it by the Treaties.

The Lisbon Treaty accorded the Charter the same legal value as the Treaties. The Charter is therefore legally binding. Fundamental rights enshrined in the Charter are not mere abstract values or ethical considerations. Respect for fundamental rights is a **legal requirement**, subject to the scrutiny of the European Court of Justice. Respect for fundamental rights is a **condition of the lawfulness** of EU acts. As highlighted by the example below, the Court of Justice can declare invalid a provision of EU legislation which does not comply with the Charter. The Court requires EU institutions to prove — in the light of the fundamental rights protected by the Charter — that they have carefully considered different policy options and have chosen the most proportionate response to a given problem.

Example: On 9 November 2010, the Court of Justice of the European Union⁵ declared invalid provisions of a Regulation obliging Member States to make publicly available the names of recipients of EU agricultural subsidies as regards natural persons. While recognising the principle of transparency, the Court considered that the contested provisions disproportionately interfered with the fundamental right to protection of personal data and to private life as provided for by Articles 7 and 8 of the Charter. Without the need to go into details for the purpose of this Operational Guidance, the Court criticised particularly the Council and Commission for having failed to ascertain – **ahead of adopting the contested Regulation** – whether in light of the fundamental rights protected by the Charter the chosen measure did not go beyond what was necessary for achieving the legitimate policy objective of increasing transparency in the management of EU agricultural funds. The Court explained: '81. **There is nothing to show that, when adopting Article 44a of Regulation No 1290/2005 and Regulation No 259/2008, the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular, such as limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received. (...)** 83. **The institutions ought thus to have examined [...], whether publication by name limited in the manner indicated in paragraph 81 above would have been sufficient to achieve the objectives of the European Union legislation at issue in the main proceedings. In particular, it does not appear that such a limitation, which would protect some of the beneficiaries concerned from interference with their private lives, would not provide citizens with a sufficiently accurate image of the aid granted by the EAGF and the EAFRD to achieve the objectives of that legislation.'**

⁴ OJ C 83, 30.03.2010, p. 389-403.

⁵ ECJ, Joined Cases C-92/09 and C-93/09 of 9 November 2010 (*Schecke and Eifert*).

The **Impact Assessment** is a valuable tool for examining different policy options, demonstrating that in proposing new EU legislation the Commission has taken full account of the fundamental rights protected by the Charter. Properly assessing any impact on fundamental rights in the preparatory stages of new legislation will therefore not only contribute to finding the most appropriate solution to a given problem, but will also strengthen the defence of EU legislation against legal challenges before the European Court of Justice.

In addition, the Union has signed and formally confirmed the **UN Convention on Rights of Persons with Disabilities**. This, the first legally binding human rights instrument to which the Union is a party, entered into force on 22 January 2011. The purpose of this Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. The Union is bound by the Convention to the extent of its area of competence specified in the ‘Declaration of Competence’ annexed to Council Decision 2010/48/EC, and this has to be taken into account in the Commission’s actions.

Is the Charter of Fundamental Rights relevant to all EU policies?

The Charter contains a number of rights, freedoms and principles recognised by the Union. It is divided into seven titles: ‘Dignity’, ‘Freedoms’, ‘Equality’, ‘Solidarity’, ‘Citizens’ Rights’, ‘Justice’ and ‘General provisions governing the interpretation and application of the Charter’. These rights, freedoms and principles can be of relevance to **all Commission activities and EU policies**. For example the Single Market Act Communication of 27 October 2010 emphasised how the Commission is committed to take social rights into account in its impact assessments. The Charter applies equally to the internal and external actions of the European Union. Annex II provides an overview of all rights, freedoms and principles guaranteed by the Charter.

Particular attention will need to be paid to sensitive proposals and acts, i.e. all legislative proposals and implementing acts (Article 291 TFEU) and delegated acts (Article 290 TFEU) which raise specific issues of compatibility with the Charter or which are designed to promote a specific fundamental right under the Charter.⁶

It is important to note that the Charter does not create any new powers of the Union and does not contain new legal bases. This is made clear in Article 51(2) of the Charter and in Article 6(1) of the Treaty on European Union (TEU).

What has the Commission decided in the Charter Strategy?

In its Communication of 19 October 2010 on a *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, the Commission committed itself to strengthening the ‘fundamental rights culture’ at all stages of the procedure leading to the adoption of legislation and other acts. This concerns in particular the preparatory phase of consultation, the preparation of Impact Assessments and the drafting of proposals.

- a) The Commission will maintain its general approach to carrying out **Impact Assessments**, whilst reinforcing the assessment of any impact on fundamental rights and giving it due prominence in the Impact Assessment report. This will help to strengthen the culture of respect for fundamental rights during the preparation of the draft act.

⁶ On criteria for defining the proportionate level of analysis for different types of initiatives, see Section 3 of the Impact Assessment Guidelines.

Impact Assessments should thus be used to identify fundamental rights liable to be affected, the degree of interference with the right in question and the necessity and proportionality of the interference in terms of policy options and objectives.

- b) The fundamental rights aspects of Impact Assessments will then have to be summarised in the Explanatory Memoranda of those legislative proposals that have a particular impact on fundamental rights.
- c) Legislative proposals that have a particular link with fundamental rights must also include recitals explaining how the proposals comply with the Charter. The purpose of recitals is to explain the reasoning behind the framing of the act in question and so enable and facilitate judicial review of its conformity with the Charter. The insertion of recitals is not a mere formality; it reflects in-depth monitoring of a proposal's compliance with the Charter. The recitals which refer to compliance with the Charter are to indicate exactly which fundamental rights are concerned. Such a recital can only be inserted in a proposal when it is properly justified in the Explanatory Memorandum. This justification depends on the work carried out in the Impact Assessment.

Example of summary of fundamental rights aspects in an Explanatory Memorandum – Proposal for a Directive on preventing and combating trafficking in human beings, and protecting victims - COM(2010) 95.

‘This proposal was made subject to in-depth scrutiny to make sure that its provisions are in full compatibility with fundamental rights and notably human dignity, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour, the rights of the child, right to liberty and security, freedom of expression and information, protection of personal data, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties. Particular attention was paid to Article 5(3) of the EU Charter which explicitly prohibits trafficking in human beings. In addition, Article 24 of the EU Charter was of importance, since many of the victims of trafficking in human beings are children. Provisions on protection and assistance to victims have a positive impact on fundamental rights. The right to be protected from slavery, forced labour and servitude has been acknowledged by the European Court of Human Rights. The right of the victim to accurate, impartial, effective, and quick investigation is also relevant here; it would be made effective by an increased recognition of the role of the victim in criminal proceedings. A possible negative impact deriving from the increased role of the victim in criminal proceedings could accrue, if this strengthened role were to endanger the defendant's procedural rights, in particular the right to a fair trial (Article 47 EU Charter) and the right of defence (Article 48 of EU Charter). However, the European Court of Human Rights has established clear principles to reconcile the respective rights of the defendant and the victim. Therefore full compatibility with defence rights has been ensured by a careful drafting of the legislative text, which is the basis for appropriate implementation by Member States.’

What is the ‘Fundamental Rights Check-List’?

The Charter Strategy introduces a ‘Fundamental Rights Check-list’ designed to make it easier to understand the methodology for addressing questions on fundamental rights, which should be used by all Commission departments.

Fundamental Rights ‘Check-List’

1. *What fundamental rights are affected?*
2. *Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?*
3. *What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?*
4. *Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?*
5. *Would any limitation of fundamental rights be formulated in a clear and predictable manner?*
6. *Would any limitation of fundamental rights:*
 - *be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)?*
 - *be proportionate to the desired aim?*
 - *preserve the essence of the fundamental rights concerned?*

The basics of this methodology are further explained in the following sections.

How to understand the substantive provisions of the Charter

When dealing with the substantive content of the Charter it is necessary to get a basic **understanding** of what the individual provisions actually mean. Not all are easily accessible and some might carry a different meaning than one would expect at first sight (see Annex II for an overview of the provisions of the Charter).

The ‘Explanations relating to the Charter of Fundamental Rights’⁷ provide guidance on the meaning of the provisions of the Charter. These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter. Although they do not as such have the status of law, they must be given due regard by the courts of the Union and of the Member States when interpreting the provisions of the Charter and are explicitly referred to in Article 6(1) of the Treaty on European Union. The Explanations can be found under this link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>

If it proves necessary in the course of your Impact Assessment to develop a deeper understanding of a certain fundamental right guaranteed by the Charter, you will need to consult the case law of the European Court of Justice, the European Court of Human Rights and in appropriate cases the opinions and general comments of the UN human rights monitoring committees. For relevant online sources, see Annex I. In addition, Unit C.1 of DG JUSTICE can provide further help and assistance (for contacts see above in the Introduction).

⁷ OJ C 303, 14.12.2007, p. 17-35.

Example: Article 6 of the Charter guarantees the ‘right to liberty and security of person’. It would be wrong, however, to understand this right as an abstract guarantee ‘to be protected’ by the state and as an alleged right to ‘public security’. Instead, Article 6 of the Charter guarantees the same rights as those guaranteed by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’) and has the same meaning and scope.⁸ As to the interpretation of Article 5 ECHR, the European Court of Human Rights has consistently held that ‘*Article 5 contemplates individual liberty in its classic sense, that is to say the physical liberty of the person (...). The phrase ‘security of the person’ must also be understood in the context of physical liberty rather than physical safety (...). The inclusion of the word ‘security’ simply serves to emphasise the requirement that detention may not be arbitrary (...).*’⁹

What is the difference between the Charter and the European Convention on Human Rights?

At the current stage of EU law, the European Convention on Human Rights is not *directly* binding on EU institutions, but it will be once the process of accession of the EU to the ECHR has been finalised. Article 6(2) of the TEU provides the legal base for this accession. However, both the ECHR and the constitutional traditions common to the Member States are a source from which the European Court of Justice deduces fundamental rights as general principles of the Union’s law (see Article 6(3) TEU). In addition, all EU Member States are directly bound by the ECHR. Therefore, all proposals for legal acts of the Union that need to be applied by Member States must fully respect the ECHR.

Many of the rights contained in the Charter correspond to rights guaranteed by the ECHR. The Charter explicitly provides that in these cases the meaning and scope of the Charter rights will be the same as those laid down in the ECHR. The protection granted by the Charter to certain rights can be more extensive than that granted by the ECHR. An answer to whether individual articles in the Charter correspond to rights in the ECHR can often be found in the ‘Explanations relating to the Charter’ (see above). The Charter also protects certain rights that are not covered by the ECHR.

What is the role of the United Nations core human rights conventions?

To understand the meaning and scope of the rights enshrined in the Charter in a given policy context, it is also important to look more closely at international human rights conventions to which either the Union is a contracting party - such as the **UN Convention on Rights of Persons with Disabilities** - or all Member States are contracting parties – namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination, the Convention against Torture and the **Convention on the Rights of the Child**.¹⁰ The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are also taken into account by the Court of Justice in applying the general principles of Union law.

⁸ See ‘Explanations relating to the Charter of Fundamental Rights’ on Article 6.

⁹ See, for instance, European Court of Human Rights, *Hajduová v. Slovakia*, Application no. 2660/03, Judgment of 30 November 2010 at paras. 54-56.

¹⁰ On the relationship between the Charter and international agreements to which the Union or the Member States are party, see Article 53 of the Charter.

Depending on your policy context, it may therefore be necessary to take such international human rights conventions into account when interpreting the rights set out in the Charter.

Example: When interpreting the right to vote and to stand as a candidate at elections to the European Parliament or at municipal elections (Articles 39 and 40 Charter), the relevant article of the UN Convention on Rights of Persons with Disabilities has to be taken into account. Similar considerations apply, for instance, in regard to the right to respect for private and family life, the freedom to choose an occupation and to engage in work, the right to education, etc.

What is the difference between ‘absolute’ rights and rights ‘subject to limitations’?

Some of the Charter’s fundamental rights are guaranteed in **absolute terms**, which means that they cannot be subject to ‘limitations’ or ‘restrictions’. Measures taken by public authorities that *interfere* with a right protected in absolute terms amount to a *violation* (an *infringement*) of this fundamental right. There are only a small number of fundamental rights which are guaranteed in absolute terms. The Charter itself does not explicitly list those rights, but in the light of the case law of the European Courts it can be said that the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 of the Charter) and the prohibition of slavery or servitude (Article 5 of the Charter) are protected in absolute terms.

Example: The prohibition of torture and inhuman or degrading treatment or punishment as enshrined in Article 4 of the Charter is absolute. It is therefore not possible to ‘balance’ this prohibition against interests of national security.¹¹

Other rights can be limited. Measures taken by public authorities that *interfere* with such a right can be *justified* under certain conditions. The *interference* will only amount to a *violation* of such a right when the justifying conditions cannot be fulfilled. The requirements for a justified limitation are set out in Article 52 of the Charter.

Article 52 Charter: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

When applying Article 52 of the Charter, it is necessary to address the following questions:

- a) Are the limitations provided for by law and formulated in a clear and predictable manner?
- b) Are the limitations necessary to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others (which)?
- c) Are the limitations proportionate, i.e. appropriate for attaining the objective pursued and not going beyond what is necessary to achieve it? Is there an equally effective but less intrusive measure available?

¹¹ Settled case law of the European Court of Human Rights, see e.g. ECtHR (Grand Chamber), *Saadi v. Italy*, Application no. 37201/06, Judgment of 28 February 2008 at para. 140.

- d) Do the limitations preserve the essence of the fundamental rights concerned?

The Charter does not explicitly define the term ‘limitation’ in the sense of Article 52. In general, any measure or conduct by public authorities, such as legislative acts, administrative decisions or state practice, which directly or indirectly affect in a negative way the exercise or enjoyment of the rights and freedoms guaranteed by the Charter, can be considered a ‘limitation’.

Example: The collection, use, or even mere storing¹² of information by public authorities about an individual is a limitation of the right to protection of personal data, guaranteed under Article 8 of the Charter, which requires justification. For instance, an official census which includes compulsory questions relating to the individual’s sex, marital status, place of birth and other personal details; the recording of fingerprinting, photography and other personal information by the police (even if the police register is secret); the collection of medical data and the maintenance of medical records; the compulsion by state authorities to reveal details of personal expenditure; records relating to past criminal cases; information relating to terrorist activity, or collecting personal information in order to protect national security.¹³

What is the difference between assessing the impact on fundamental rights and verifying compliance with fundamental rights?

The Impact Assessment should be used to identify fundamental rights liable to be affected, the degree of interference with the right(s) in question and the necessity and proportionality of the interference in terms of policy options and objectives. However, the Impact Assessment does not include examination of compliance with fundamental rights. This legal analysis is carried out at a later stage on the basis of an actual draft act which does not exist at the time of preparing an Impact Assessment. While the Impact Assessment serves as groundwork for a final legal analysis or ‘fundamental rights check’, it does not and cannot replace it.¹⁴

2. OPERATIONAL GUIDANCE: HOW TO ADDRESS FUNDAMENTAL RIGHTS STEP-BY-STEP IN COMMISSION IMPACT ASSESSMENTS

Respect for and promotion of the Charter requires that consideration be given to fundamental rights throughout the logical steps of an Impact Assessment. To facilitate the work of the responsible desk officers, **this guidance follows the recommended ‘Format of the IA Report’** as contained in Annex 3 to the Impact Assessment Guidelines and addresses in each section the fundamental rights aspects that should be taken into account.

Initial screening to establish whether fundamental rights could be affected

Particular care is needed for impact assessments for legislative proposals and implementing and delegated acts¹⁵ that may raise issues of compatibility with fundamental rights or that are

¹² See, for instance, European Court of Human Rights, *S. and Marper v. UK*, Applications nos. 30562/04 and 30566/04, Judgment of 4 December 2008 at para. 67.

¹³ On these examples, see U. Kilkelly, *The right to respect for private and family life, A guide to the implementation of Article 8 of the European Convention on Human Rights*, Human Rights Handbook No. 1, Council of Europe, 2003, p. 13.

¹⁴ It is for the lead DG to get in contact with the Legal Service.

¹⁵ On criteria for defining the proportionate level of analysis for different types of initiatives, see Section 3 of the Impact Assessment Guidelines.

designed to promote specific fundamental rights. Careful scrutiny is also needed of the possible impacts on fundamental rights of external agreements of the Union, e.g. in an impact assessment for a negotiating mandate concerning a trade and/or investment agreement.

An initial screening of fundamental rights aspects should first check whether absolute rights are likely to be affected, as any objectives or options that violate such rights should be avoided from the very beginning (see 2.2.b and 2.4.a below). The initial screening should next identify whether there are any non-absolute Charter rights which might be limited by the policy options. Through consultation and analysis, the extent to which potential limitations are necessary, proportionate and impossible to replace by a less intrusive alternative will then need to be assessed.

Ideally, such initial screening of possible fundamental rights implications should already be conducted at the stage of drafting your **Roadmaps**. In the Roadmap you could then signal which fundamental rights seem affected in preliminary problem definition and policy options. You could give a rough indication in which way different fundamental rights could be affected and identify possible objectives of general interest or the needs to protect the rights and freedoms of others that could be of relevance when analysing the impacts.

2.1. Procedural issues and consultation of interested parties

- a) If your policy options are likely to raise questions about fundamental rights, you should ensure that colleagues from DG JUSTICE are invited to the **Impact Assessment Steering Group**. DG JUSTICE has a Directorate on Fundamental Rights and Union Citizenship, within which the unit ‘Fundamental rights and rights of the child’ deals with the Charter.
- b) In the Charter Strategy, the Commission decided that questions on fundamental rights should be addressed during the early-stage preparatory consultations. This means that in consultation documents (green papers, communications, internet consultations, etc.) you should highlight any potential fundamental rights aspect in order to encourage relevant replies that can make a valuable contribution to the Impact Assessment.

Example of a Communication: *Communication on the Use of Security Scanners at EU airports - COM (2010) 311.*

‘15. Fundamental rights are protected by the Charter of Fundamental Rights of the European Union and by several acts of secondary EU legislation. In the context of Security Scanners in particular human dignity (Article 1), respect for private and family life (Article 7), protection of personal data (Article 8), freedom of thought, conscience and religion (Article 10), non-discrimination (Article 21), the rights of the child (Article 24) and ensuring a high level of human health protection in the definition and implementation of all Union’s policies and activities (Article 35) must be mentioned.

(...) **CONCLUSIONS**

83. Common EU standards for Security Scanners can ensure an equal level of protection of fundamental rights and health. A common level of protection for European citizens in this respect could be ensured by way of technical standards and operational conditions that would have to be laid down in EU legislation. Only a EU approach would legally guarantee uniform application of security rules and standards throughout all EU airports. This is essential to

ensure the highest level of aviation security as well as the best possible protection of EU citizens' fundamental rights and health. The deployment of any security scanner technology requires a rigorous scientific assessment of the potential health risks that such technology may pose for the population. Scientific evidence documents the health risks associated with exposure to ionising radiation. It justifies particular precaution in considering the use of such radiation in Security Scanners. (...)

88. The Commission invites the European Parliament and the Council to examine the present report, submitted in response to European Parliament Resolution No (2008)0521. Stakeholders will be asked to give their opinion at a second meeting of the Task Force shortly.

89. The Commission will decide on the next steps to take, including whether or not to propose an EU legal framework on the use of Security Scanners at EU airports and the conditions to be included in such a framework to ensure full respect of fundamental rights and to address health concerns. This will be done in the light of the outcome of the discussion with the European Parliament and the Council. As any legislative proposal would have to be accompanied by an Impact Assessment, the Commission would immediately start working on such an Impact Assessment to address the issues raised in this Report.'

Example of a Questionnaire: *The impact of the use of body scanners in the field of aviation security on human rights, privacy, personal dignity, health and data protection – Public consultation by DG MOVE, November 2008.*

'(...) III. Fundamental rights - general'

1. Respect for privacy, human dignity as well as protection of personal data are the fundamental rights most often discussed in relation to body scanners. Are there any other fundamental rights that in your opinion could be affected (either positively or negatively) by the use of body scanners?

2. If at an airport screening point body scanners are used, should the person to be screened be given the choice between a body scanner or other (existing) methods of screening?

Yes, the person to be screened should be given a choice (so, screening by body scanner on a voluntary, optional basis)

No, the person to be screened should not be given a choice (so, screening by body scanner on a mandatory basis)

3. If the use of body scanners is optional, what information should be given to persons to allow them to make a considered choice about being screened by a body scanner? (...)

7. If body scanners were allowed to be used as a means of screening persons, under what conditions should they in your opinion be used in order to address concerns related to fundamental rights? Please describe these conditions in detail, e.g. by describing the procedure to be followed. (...)

c) When an external contractor is involved in preparing an Impact Assessment, you should highlight in the Terms of Reference the fact that the contractor will need to take account of fundamental rights in the Impact Assessment.

d) There are a number of stakeholders working in the field of fundamental rights that can provide valuable input during the consultation phase, such as non-governmental organisations specialising on human rights, health, development, environmental and social issues more generally.¹⁶ Social partners and social dialogue committees can provide expertise on the impacts on the social rights guaranteed in the Charter. If your policy options are likely to affect the right to an effective remedy and to a fair trial, you should involve the associations representing the legal professions, such as judges, lawyers and prosecutors. Contact information for these associations can be found on the EU E-justice portal: <https://e-justice.europa.eu/>. In the consultation phase you can also make use of the expertise of the European Data Protection Supervisor (<http://www.edps.europa.eu>) and draw, in particular, on the data collected by the Fundamental Rights Agency (www.fra.europa.eu).

2.2. Problem definition

a) The problem definition should describe and provide evidence of the nature and scale of the problem. The Impact Assessment Guidelines emphasise in the section on ‘problem definition’ that the Charter of Fundamental Rights places legal limits on the Union’s right to act. For example, a requirement resulting from a fundamental right, e.g. prohibition of the death penalty, cannot be seen as a ‘problem’. In such circumstances, the Charter has the effect of preventing the Union from acting in a given policy context. Aspects of fundamental rights may be of relevance in the definition of the problem. This may be the case in particular where the Union intends to act in order to protect individuals against interferences with their fundamental rights or where an act is designed to promote specific fundamental rights ().

Example 1: Roadmap for an Impact Assessment accompanying the Communication on Privacy and Trust in digital Europe: ensuring citizens’ confidence in new services.

‘Privacy and personal data protection are fundamental rights enshrined in the legal framework of the Union and the constitutional regimes of Member States. Touching upon the personal sphere of an individual, they often evoke emotional reactions of citizens and policymakers alike. Indeed, there is a large potential for conflict between these concepts and technological developments and new business models appearing at ever faster pace in today’s world. This potential conflict appears particularly acute in the field of electronic communications, with its ability to create an ‘invisible trail’ of all human activities on-line (through traffic and location data left while surfing the Web, making phone calls or sending SMS/MMS). The growing ease with which such data can be correlated with information extracted from other sources (such as social networking services) can be used to create a detailed profile of an individual’s daily activities, interests and social interactions. Abundance of this kind of information and the growing ability to exploit it offers unprecedented commercial opportunities to businesses in various sectors. At the same time, however, it opens up the possibility of abuse against which citizens find it hard to protect themselves effectively, lacking user-friendly tools, awareness about their rights and how to assert them in the on-line world. While privacy and data protection are very important as rights which offer citizens protection from state intervention in their lives, they also protect individuals from abusive collection and use of data or intrusion into privacy by economic actors as well as from malicious activities such as stalking, identity theft or defamation.’

¹⁶ See, e.g. EU Civil Society Contact Group: <http://www.act4europe.org>.

Example 2: Impact Assessment accompanying the Proposal for a Directive on the right to information in criminal proceedings – SEC (2010) 907.

‘There is insufficient trust between judges and prosecutors of different Member States. Divergences in practice and a number of high profile cases have damaged the perception of justice in certain Member States. In practice this means that judges may hesitate to agree to judicial cooperation requests from other Member States. The situation will become exacerbated as more mutual recognition instruments become applicable in Member States, following on from the European Arrest Warrant. The effective application of mutual recognition requires mutual trust. The ECHR is not enough to redress the situation for various reasons set out in this Impact Assessment. One aspect of the problem is a failure on the part of Member States’ authorities to give adequate information to suspects and accused persons, and in particular information about what rights they have and what they are accused of. This information should be given to suspects and accused persons to ensure that they have a fair trial. The ECHR does not require this explicitly, but Commission research shows that it would make a considerable difference if information was given to all suspects and accused persons throughout the EU in a similar way. It would lead to greater trust between judges if they knew that other Member States observed the same practices as they did, but not only between judges since the impact would be felt by all citizens.’

Example 3: Impact Assessment on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws - SEC (2008) 2953.

2.2.4. Persons with disabilities and ageing population

‘In general, passengers using this type of transport tend to be ‘vulnerable’, i.e. on low income/geographically isolated. However, availability of bus and coach services for persons with disabilities and reduced mobility is limited, and this may hamper their integration into society. Persons with disabilities make up almost 10% of the population and persons with reduced mobility constitute an even larger percentage of existing or potential coach and bus users. Persons with reduced mobility include: persons with disabilities, the elderly, and persons with temporary disabilities. In spite of the progress achieved in many Member States, disabled persons and persons with reduced mobility are still not getting appropriate assistance when travelling or appropriate access to transport services. Furthermore, the Community and its Member States signed the **United Nations Convention on the Rights of Persons with Disabilities**, which provides for accessibility of, inter alia, transport facilities and non-discrimination on grounds of disability. Due to the ageing of the population and the large proportion of disabled persons, there is a need to ensure that bus and coach services are accessible to these groups. Currently, this mode of transport is not accessible enough, except for dedicated services. However, in the near future, more and more people will be affected by disabilities and reduced mobility. The need to ensure their mobility will increase significantly. (...)’

- b) The Charter as such does not establish any new power or task for the Union. Hence, it is always necessary to link the possible action of the Union which is intended to solve the problem at stake to a specific provision of the Treaties as a legal basis for the Union’s competence to act (principle of conferral).
- c) For those initiatives which can be expected to raise a number of fundamental rights questions, it is advisable to identify straight away the fundamental rights likely to be

affected in the ‘problem definition’. This will allow you to concentrate in the ‘analysis of impacts’ section on properly discussing the degree of interference with the rights in question and the principle of proportionality. You need to keep in mind, though, that the identification of affected fundamental rights might also depend on the concrete policy options and envisaged measures and may therefore vary from one policy option to another.

2.3. Objectives

Depending on the nature of the problem and the policy context, respect for fundamental rights may be presented as one of the general or specific/operational objectives. This will ensure that at every step of the Impact Assessment, the relevant aspects will be consistently addressed from the perspective of these objectives (link between objectives and problem analysis, identification of policy options, assessment and comparison of options, future monitoring and evaluation activities)¹⁷.

Example 1: *Impact Assessment accompanying the Proposal for a Regulation 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 (recast) - SEC (2008) 2962.*

‘The following operational objectives will contribute to achieving specific objective 5:

5a. To extend the right to family reunification;

5b. To further specify the rules applicable to unaccompanied minors, in particular to **better define the best interests of children** in accordance with their rights; (...)’

Example 2: *Impact Assessment concerning the rights of passengers travelling by sea and inland waterway - SEC (2008) 2950.*

‘3.1. General objective

The general objectives of establishing the rights of passengers are underpinned by the general objectives of the EU in terms of ensuring the movement of persons within the European Union, a high level of customer protection, better social and economic cohesion, and **social inclusion of different social groups**. (...)

3.1.5. Social inclusion

(...) The proposal regarding the rights of passengers in maritime services is consistent with the objectives of the OMC, as it establishes the principle of non-discrimination and assistance in respect of disabled persons. (...) The inclusion of **people with disabilities** builds on the citizen’s concept of disability as reflected in the **EU Charter of Fundamental Rights** and on the values inherent in the **UN Convention** on the protection and promotion of the rights and dignity of **persons with disabilities**.’

Example 3: *Roadmap for an Impact Assessment accompanying the Proposal for a new legal framework on the confiscation and recovery of criminal assets in the European Union.*

‘What are the main policy objectives? (...) To seize criminal assets in the most effective way **in full respect of fundamental rights** (on the basis of criminal law or other procedures having equivalent effects) and avoid that they are used to commit other serious crimes (including corruption) or re-invested in the legal economy. (...)’

¹⁷ See Impact Assessment Guidelines, p. 28.

Example 4: Roadmap for an Impact Assessment accompanying the Proposal on security scanners at airports.

‘(...) The specific objectives are: to allow the deployment of security scanners at airports to help them accommodate to the need to increase the number of passengers screened for non-metallic items, like it is the case today for metallic items, **while respecting sufficient detection performance and compliance with fundamental rights and health principles.**’

Example 5: Roadmap for an Impact Assessment accompanying the Initiative on European and Developing Countries Clinical Trials Partnership II.

‘(...) Within this broad political and strategic framework, the specific objectives of this initiative would be: to contribute to the development of more effective measures of prevention, control and treatment of these diseases at the EU and global level **in adherence to fundamental rights as laid down in the Charter of Fundamental Rights** of the EU and the Universal Declaration of Human Rights and ethical principles included in the revised Declaration of Helsinki.’

If the nature of the problem and the policy context do not require respect for fundamental rights to be included as one of the general or specific/operational objectives, it is nevertheless necessary to ensure that the defined objectives are consistent with other EU policies and horizontal objectives, such as respect for fundamental rights.¹⁸ If relevant in the specific policy context, it is recommended to provide an explanation on how this consistency is ensured.

2.4. Policy Options

- a) Not all policy options that might meet the objectives and tackle a given problem are acceptable under the Charter. As explained in the Impact Assessment Guidelines, a lack of consistency with other overarching EU policy objectives can justify discarding an option at this stage. Accordingly, policy options which would clearly violate fundamental rights should be discarded. See below for a concrete example in which a policy option was discarded due to its serious adverse impact on fundamental rights.

Example: Impact Assessment accompanying the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) – SEC (2010) 1547.

‘(...) Option 4B, the abolition of exequatur without establishing adequate safeguards, has equally been discarded because it would have fundamental rights implications in the exceptional case where a judgment to be recognised in another Member State does not comply with fundamental rights, such as the right to a fair trial. This option would entirely rely on national law to ensure compliance with the right to a fair trial or the rights of defence without any safeguards for situations where this protection at national level failed. **Even if such situations are exceptional, the serious adverse impact on fundamental rights in such a case justifies discarding this option.** In addition, the majority of stakeholders which replied to the public consultation on the Green Paper requested that the abolition be

¹⁸ See Impact Assessment Guidelines, p. 26.

accompanied by adequate safeguards. Option 4B would also go plainly against the conclusions of the European Council in December 2009 which emphasised the need for appropriate safeguards for the abolition of *exequatur*. Furthermore, this option would entirely rely on national law to ensure compliance with Article 47 of the EU Charter. (...)'

- b) If your policy options gather together a number of measures, it is necessary to assess the impact on fundamental rights of each relevant individual measure, with due regard to the principle of proportionate analysis as emphasised in the Impact Assessment Guidelines. It is also necessary to have a clear idea of these measures and to explain them in sufficient detail. Without a definite idea of the envisaged measures, it will not be possible to identify the key elements of the proportionality assessment and the most appropriate solution to a given problem will not be found.

Example: If your 'legislative option' consists of five amendments to an existing Directive, it is necessary to consider the fundamental rights impact for each of these five measures.

2.5. Analysis of impacts

- a) The analysis of the impacts on fundamental rights should not be done in a separate category apart from the economic, social and environmental impacts. As highlighted in the 'Key Questions' section in the Impact Assessment Guidelines, the fundamental rights of the Charter are diverse and cut across all sectors. An impact on the right to property, for instance, or the right to conduct a business is directly linked to the economic impact. Questions of social rights guaranteed by the Charter, notably in its articles 12, 27, 28 and 31 are directly linked to the social impact. Introducing a new, fourth category of 'fundamental rights' could lead to needless repetition. The 'Key Questions' section in the Impact Assessment Guidelines helps to identify which heading to use.
- b) Efforts to quantify any impact on fundamental rights are often very difficult to undertake, and sometimes impossible to achieve. The Impact Assessment Guidelines explicitly suggest that such impacts need to be assessed qualitatively. For example, it will not be possible to quantify/monetise the impact on the right of every child, enshrined in Article 24 of the Charter, to maintain on a regular basis a personal relationship and direct contact with both parents. However, in some limited cases quantification of impacts on fundamental rights might be possible. For example, an expected, quantified decrease in the "gender pay gap" can be presented as a positive impact on right to equality between women and men enshrined in Article 23 of the Charter. In the Impact Assessment Guidelines you can find further help on comparing and ranking options which have both quantifiable and non-quantifiable impacts.¹⁹
- c) When analysing the impact on fundamental rights of the different policy options you should be guided by the following considerations:
- Identify comprehensively the individual fundamental rights affected by each policy option.

¹⁹ See Impact Assessment Guidelines, p. 45 and 48 seq.

- Check whether the rights in question are absolute rights or whether they can be limited.
- Identify whether the impacts of the various policy options on the identified fundamental rights are beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights).
- Identify whether the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (e.g. negative impact on freedom of expression and beneficial impact on intellectual property — see the box below for handling such a situation).
- In the case of a negative impact, check whether this is necessary to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others (which?) and whether any limitation of the identified fundamental rights is proportionate, i.e. appropriate for attaining the objective pursued and not going beyond what is necessary to achieve it, and in particular is there an alternative that is equally effective but less intrusive?

Practical advice: In a situation in which your policy option impacts negatively on one fundamental right and beneficially on another, the usual methodological steps described in this Guidance should be followed just as in any other case. The point of departure always has to be the *concrete measure* envisaged in your policy option. It is this *concrete measure* which needs to be assessed vis-à-vis *each individual* fundamental right involved (there is no need to engage in an *abstract* discussion on ‘which fundamental right should prevail over another?’).

- If a policy option has a negative impact on fundamental rights, consider and identify which safeguards might be necessary to ensure that the negative impact would not amount to a violation of these fundamental rights. For instance, the requirement that any limitation of the identified fundamental right would need to be provided for by law (i.e. in the legislative proposal) and formulated in a clear and predictable manner as well as other effective safeguards. When considering effective safeguards that could mitigate the negative impact on a fundamental right of a given policy option, it is necessary to develop the type and content of these safeguards. In this way, the Impact Assessment will provide concrete elements to guide the drafting of the legislative proposal and the legal assessment of the proposal which will have to be made at a later stage. Merely referring to general safeguards is not sufficient.
- In the case of a negative impact, would it be possible to draft the provision limiting the fundamental rights in a clear and predictable manner? A limitation of a fundamental right would have to be sufficiently precise to avoid arbitrary decisions by public authorities when they implement it. Such a limitation has to be understandable and transparent for the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The legislative proposal will have to indicate with sufficient clarity the scope of any discretion granted to the authority and the modalities of exercising it. Even if at the stage of preparation of the Impact Assessment there is not yet a legal text, it is important when assessing the impact

of the options to consider whether it would effectively be feasible to include such a provision in the envisaged EU legislation.

Example of identification of affected fundamental rights – *Impact Assessment accompanying the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) – SEC (2010) 1547.*

‘(...) 1.6. Respect of Fundamental Rights

(...) The rights and principles of the Charter which may be affected by the revision of Regulation Brussels I vary depending on the specific amendment considered; the impact of the different aspects of the reform on these rights and principles is assessed in the following chapters. The content of the main provisions concerned is set out below:

1.6.1. Right to an effective remedy, Article 47 subparagraph 1:

According to Article 47 subparagraph 1, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. This provision is crucial to ensure access to justice in the European law context. The ECJ has emphasised that the exercise of the rights conferred by EU law must not be rendered ‘virtually impossible or excessively difficult’ by procedural rules. In line with the case law of the European Court of Human Rights, the right to an effective remedy also includes the right of the creditor to recover his claim within a reasonable period of time and on the basis of efficient procedures.

1.6.2. Right to a fair trial, Article 47 subparagraph 2

Article 47 subparagraph 2 stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and that everyone shall have the possibility of being advised, defended and represented. For disputes relating to civil law rights and obligations, this guarantee corresponds to Article 6(1) of the ECHR. Inherent in this provision is the right to defence which includes – in the area of civil law – the right to be heard and the right to make known its views on the truth and relevance of the facts, objections and circumstances put forward by the other party.

1.6.3. Respect for private and family life (Article 7); Protection of personal data (Article 8) Freedom of religion (Article 10)

Article 7 guarantees that everyone has the right to respect for his private and family life, home and communications; Article 10 provides that everyone has the right to freedom of thought, conscience and religion. These rights correspond to Articles 8 and 11 of the ECHR. Article 8 grants persons the right to the protection of personal data concerning them.

1.6.4. Freedom of expression and information (Article 11)

Article 11 guarantees that everyone has the right to freedom of expression and that the freedom and pluralism of the media shall be respected. The exercise of these freedoms may be subject to conditions or restrictions in particular for the protection of the reputation or the rights of others.

1.6.5. Freedom to conduct a business, Article 16

Article 16 recognises the freedom to conduct a business in accordance with Union law and national laws and practices. This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity and freedom of contract, and on Article 119(1) and (3) of the TFEU, which recognises free competition. Arguably, these rights encompass that the legal system gives effect to the will of the parties.

1.6.6. Consumer Protection, Article 38

Article 38 of the Charter stipulates that Union policies shall ensure a high level of consumer protection. The principle set out in this Article is based on Article 169 of the TFEU. It is also reflected in Article 12 TFEU, according to which consumer protection requirements have to be taken into account in defining and implementing other Union policies, and in Article 114 (3) TFEU, which requires Commission proposals to take as a base a high level of consumer protection.’

Example of beneficial impacts on fundamental rights and relations with other impacts – Impact Assessment accompanying the Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection – SEC (2009) 1376.

‘(...) Social effects and fundamental rights: Option 1 would enhance equal treatment of applicants, in particular due to the obligation to ensure the right to be heard for all applicants. The same applies to social protection and access to justice. Positive impacts on governance are less obvious, since the option lacks elements to ensure an adequate assessment of claims. Option 2 strikes a balance between the speed and the reliability of administrative procedures, thus bringing stronger positive impacts on good governance. This would also lead to better protection from discrimination and enhanced social protection. Option 1 would lead to better respect of Article 18 (Right to asylum), Article 19 (*non-refoulement*) and Article 47 (Right to effective remedy) of the EU Charter. The right to asylum and *non-refoulement* are however better promoted by option 2, since it implies a lesser margin for administrative error.

Preferred option: Option 2 is more prescriptive than option 1. Both options, however, leave to Member States a margin of institutional flexibility, since neither the length of accelerated/priority procedures nor the exhaustive lists of priority procedures are included in the options. Given the fact that Option 2 targets several operational objectives by improving fairness and reducing wide procedural disparity between Member States, an approximation of the grounds of accelerated and/or manifestly unfounded procedures is considered proportionate. It has stronger impacts on fundamental rights, while its possible financial impacts are mainly related to increased reception costs. The latter, however, should be off-set by the improved overall efficiency of asylum process. Option 2 is the preferred option. (...)’

2.6. Comparing the options

- a) When comparing the different options, it is necessary to take into account the special nature of the impacts on fundamental rights and to **avoid adding together impacts of various kinds**, which could lead to a distorting result. For example, if it has been established that a given policy option would have such a negative impact that it would *violate* (i.e. restrict without justification) the rights of the child (Article 24 Charter)²⁰, this negative impact cannot be counterbalanced by a positive impact regarding another fundamental right or other impacts. This is a legal consequence of the obligation to comply with fundamental rights.

Example of comparing different options, in particular in light of the rights of the child – Impact Assessment accompanying the Proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted – SEC (2009) 1373.

²⁰ Provided the option had not been discarded at an early stage, see on this Section 2.4.

‘All legislative options would have a positive effect on access to protection, as improved requirements would be put in place for defining whether an alternative location is safe and the risk of being sent back to the country of origin in violation of Article 3 ECHR would be significantly reduced. All options would also improve access to justice, as they would enhance the right to appeal. These effects would be higher under Options 2 and 3 than under Option 1, as they remove the possibility to return applicants despite temporary technical obstacles, and even higher under Option 3, as it imposes the burden of proof on Member States. The rights covered under Articles 18 and 19 of the Charter would be better respected under Option 2 than under Option 1 and even better under Option 3 as the latter would ensure improved access to protection and a lower risk of refoulement. Where the applicant concerned is an unaccompanied minor, all options would also **positively impact on the rights of the child** (Article 24) by providing better protection of children and their best interests, to the extent that they impose a careful consideration of the individual circumstances in view of clearer and stricter criteria.’ (...)

‘Overall assessment: Option 1 has a more limited scope than all other options; indeed, it does not go beyond what is necessary to ensure respect of the **primacy of the best interests of the child** in line with the **UN Convention on the Rights of the Child**. Inversely, all other options might be perceived as overly broad and thus find less support amongst Member States. On balance, option 1 therefore appears as the preferred legislative option in terms of raising standards, as well as in terms of feasibility and proportionality. Option 5 imposes no obligations on Member States, since they participate in cooperation activities on a voluntary basis; it should also form part of the preferred policy option. (...)

b) One of the elements that need to be taken into account when choosing a preferred option is the identification of those options which intrude less on fundamental rights. This does not mean that it would always be necessary to choose the policy option which has no or only positive impacts on fundamental rights. As explained above, legitimate objectives of general interest can justify limitations of fundamental rights. However, if it can be established that there are two policy options which are equally effective in achieving the objective but have different negative impacts on fundamental rights, then it is necessary to choose that option which is the least intrusive. Likewise, regarding proposals or acts aiming at promoting a specific fundamental right, it is advisable to choose the policy option with the highest positive impact on fundamental rights in those cases in which two policy options are potentially equal in terms of their general impacts.

Example of the summary assessment of the impact on fundamental rights of the preferred policy option – *Impact Assessment accompanying the Proposal for a Regulation on the marketing and use of explosives precursors – SEC (2010) 1040.*

‘(...) *Article 8 Protection of personal data*

The preferred policy option requires the processing of personal data and their further disclosure to third parties (association or law enforcement authorities) in case of suspicious transactions. This implies a potentially serious interference with private life and the right to the protection of personal data. (...) The processing of personal data must always be carried out in accordance with national data protection laws implementing EU data protection law, particularly Directive 95/46/EC. The processing of data is also subject to the requirements set out in the Directive including a clear and strict purpose limitation and security of transmissions, the conditions for the transmission by sellers to law enforcement authorities and precise obligations of controllers with regard to their processing activities, the personal

data that law enforcement authorities may retain from reported suspected transactions, clear retention periods for personal data stored, based on necessity to achieve the purpose, and the rights granted to data subjects for the protection of their personal data, including access and rectification rights. (...) Under these conditions, the processing of data for the purposes of the preferred policy option would be both legitimate and proportionate.

Article 16 Freedom to conduct a business

Businesses would still be able to trade all precursors, even though some limitations may apply as they would need to set up a new reporting system and carry out additional checks of exemption permits. It must be ensured that the additional requirements are designed in a way that will allow all businesses, independent of their size, to implement and apply them.

Article 17 Right to property

The right to property would not be affected, as businesses and members of the general public would continue to be able to use their lawfully acquired possessions.

Article 21 Non-discrimination

Since parts of the preferred policy option are built on a risk assessment of transactions performed by sellers, the proposal will establish guidelines relating to the criteria and elements that sellers should follow in order to assess the suspicious nature of a transaction. The system of reporting suspicious transactions should not lead to overzealous discriminatory reactions from businesses, for example based on physical features or foreign accents. This would be necessary to avoid a broad interpretation of this concept which would result in a general reporting of transactions and transmissions of personal data to law enforcement authorities and discriminatory practices, which would imply a breach of necessity and proportionality principles. Accompanying measures, including the voluntary actions included in the preferred policy option, could help to avoid such practices through education, training and awareness-raising.'

2.7. Monitoring and evaluation

In line with the Commission's strategy on Smart Regulation and the Charter Strategy, the Charter should be taken into account throughout the policy cycle. The actual impact on fundamental rights should therefore be considered also when monitoring and evaluating, in particular, those instruments likely to have a significant impact on fundamental rights. It is therefore necessary to consider already at the Impact Assessment stage what arrangements for monitoring and evaluating fundamental rights could be developed to match a given policy context. This includes careful planning of the data collection process, and defining possible indicators for monitoring and evaluating fundamental rights impacts.

Some of the indicators could, for instance, deal with the numbers of complaints claiming a violation of fundamental rights, lodged with the competent authorities, including the courts, and the outcome of these complaints. If your instrument aims at promoting a fundamental right, possible indicators could measure progress in achieving this positive impact, for instance, the lessening of inequality between women and men in different areas such as employment and pay²¹ or a decrease in people's perception of being discriminated against.²² In some cases, this will entail incorporating a specific obligation into the legislative proposal.

²¹ E.g. by identifying developments in the "gender pay gap".

Example: Impact Assessment accompanying the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) – SEC (2010) 1547.

‘(...) 6. MONITORING AND EVALUATION

(...) In most Member States, there is no systematic collection of statistical data on the application of the Regulation, making it very difficult to measure how the Regulation affects cross-border litigation. The Commission will therefore include in the proposed Regulation a requirement for Member States to provide information on the application of the Regulation in practice, **notably on the number of recourses to the special review procedures created to safeguard the defendant’s fundamental rights and on the outcome of these procedures.’**

3. EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

As the Explanatory Memorandum for legislative proposals that have an impact on fundamental rights must contain a summary explaining how fundamental rights obligations have been met, and specify in particular all the fundamental rights aspects covered by the Impact Assessment, it is highly recommended to present these aspects in the Executive Summary of the Impact Assessment. The Executive Summary is a good place to highlight, for instance, why limitations on fundamental rights in the preferred option are justified in terms of necessity and proportionality.

Example of excerpts from the Executive Summary – Impact Assessment accompanying the Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) – SEC (2010) 1548.

‘(...) 2.1.4. Analysis of Impacts of preferred Option 4A: Abolition of the *exequatur* procedure and introduction of necessary safeguards (...) (ii) **Fundamental rights:** The abolition of *exequatur* would be accompanied by procedural safeguards which would ensure that a judgment in breach of the right to a fair trial and the right of defence cannot be recognised and enforced. This option would therefore comply with the Charter, in particular its Article 47. Since the grounds which could be invoked against the enforcement of the foreign judgment largely correspond to those which can be invoked today in the context of the *exequatur* procedure, the level of judicial protection for cross-border proceedings would not be lowered compared to the status quo. (...)

2.4.4. Analysis of impacts of preferred Policy Option 3A: Enhance the effectiveness of arbitration agreements (...) (iii) **Fundamental Rights** Arbitration would become more effective and efficient than under both Options 1 and 2, thereby improving the parties’ access to alternative means of dispute resolution. In addition, the option would improve access to justice for companies wishing to challenge (in good faith) an arbitration agreement because it would establish a clear and transparent legal framework for such challenges while defining clear rules to improve legal certainty and avoiding dilatory tactics. The standards set in Article 47 of the EU Charter will be further strengthened under this option. Finally, it would be

²² On such data, see, for instance, the European Union Minorities and Discrimination Surveys, EU-MIDIS prepared by the Fundamental Rights Agency, http://www.fra.europa.eu/fraWebsite/eu-midis/index_en.htm.

ensured that throughout the Union, maximum effect is given to the will of the parties which enhances their freedom to contract and freedom to conduct a business as guaranteed in Article 16 of the Charter. (...)'

ANNEX I

EXAMPLES OF ONLINE SOURCES OF INFORMATION ON FUNDAMENTAL RIGHTS RELEVANT TO COMMISSION IMPACT ASSESSMENTS

The list should serve as a first entry-point of research. It is not exhaustive and contains just the main sources of information relevant to the EU context. Depending on the fundamental rights relevant to your Impact Assessment, there are a number of additional sources of information that you can consult. DG JUSTICE is available for further targeted searches.

Charter of Fundamental Rights of the European Union

Text of the Charter of Fundamental Rights of the European Union:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>

Explanations relating to the Charter of Fundamental Rights:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>

Search form for finding case-law of the European Court of Justice

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

‘DEC-NAT database’ on national case law regarding European Union law, provided by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso

‘Research & Analysis’ Section of the European Union Agency for Fundamental Rights

http://www.fra.europa.eu/fraWebsite/research/research_en.htm

Website of the European Data Protection Supervisor

<http://www.edps.europa.eu>

European Convention on Human Rights

Text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)

<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

Search form for finding case-law of the European Court of Human Rights

<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

Thematic list of Factsheets on the European Court of Human Rights’ case-law prepared by the Court’s Press Service:

<http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/>

Theseus Database: Case-law of the European Court of Human Rights relevant to Children

http://www.coe.int/t/transversalprojects/children/caselaw/CaseLawChild_en.asp

List of ‘Human Rights Handbooks’ on specific fundamental rights protected under the ECHR

http://www.coe.int/t/dghl/publications/hrhandbooks/index_handbooks_en.asp

European Social Charter

<http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>

UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities is the first international legally-binding human rights instrument that the European Union has signed and formally confirmed. For the Union, the Convention entered into force on 22 January 2011. The Union is bound by the Convention to the extent of its area of competence, listed in the ‘Declaration of Competence’ annexed to Council Decision 2010/48/EC, see below. All Member States have signed the UN Convention on the Rights of Persons with Disabilities and are in the process of ratification. The purpose of this Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.

Text of the UN Convention on the Rights of Persons with Disabilities

<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

Decision 2010/48/EC concerning the conclusion of the UN Convention on the Rights of Persons with Disabilities

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF>

Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities

<http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>

UN Convention on the Rights of the Child

Adopted in 1989, the UN Convention on the Rights of the Child has been ratified by all EU Member States. In line with the Commission’s Communication ‘An EU Agenda for the Rights of the Child’, all EU policies and actions having an impact on the rights of the child must be guided by the standards and principles of the UN Convention on the Rights of the Child. The four core principles of the Convention are non-discrimination; respect for the best interests of the child; the right to life, survival and development; and respect for the views of the child.

Text of the UN Convention on the Rights of the Child

<http://www2.ohchr.org/english/law/crc.htm>

General Comments by the UN Committee of the Rights of the Child on the interpretation of the UN Convention on the Rights of the Child

<http://www2.ohchr.org/english/bodies/crc/comments.htm>

UN International Covenant on Civil and Political Rights

<http://www2.ohchr.org/english/law/ccpr.htm>

UN International Covenant on Economic, Social and Cultural Rights

<http://www2.ohchr.org/english/law/cescr.htm>

UN Convention on the Elimination of all Forms of Discrimination against Women

<http://www2.ohchr.org/english/law/cedaw.htm>

UN Convention on the Elimination of Racial Discrimination

<http://www2.ohchr.org/english/law/cerd.htm>

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<http://www2.ohchr.org/english/law/cat.htm>

The International Labour Organisation's Fundamental Conventions:

Freedom of Association and Protection of the Right to Organise Convention (No. 87)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Right to Organise and Collective Bargaining Convention (No. 98)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Forced Labour Convention (No. 29)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Abolition of Forced Labour Convention (No. 105)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Minimum Age Convention (No. 138)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Worst Forms of Child Labour Convention (No. 182)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Equal Remuneration Convention (No. 100)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

Discrimination (Employment and Occupation) Convention (No. 111)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

ANNEX II

OVERVIEW OF THE RIGHTS, FREEDOMS AND PRINCIPLES GUARANTEED BY THE CHARTER OF FUNDAMENTAL RIGHTS

Title I - Dignity

Article 1 - Human dignity

Article 2 - Right to life

Article 3 - Right to the integrity of the person

Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment

Article 5 - Prohibition of slavery and forced labour

Title II - Freedoms

Article 6 - Right to liberty and security

Article 7 - Respect for private and family life

Article 8 - Protection of personal data

Article 9 - Right to marry and right to found a family

Article 10 - Freedom of thought, conscience and religion

Article 11 - Freedom of expression and information

Article 12 - Freedom of assembly and of association

Article 13 - Freedom of the arts and sciences

Article 14 - Right to education

Article 15 - Freedom to choose an occupation and right to engage in work

Article 16 - Freedom to conduct a business

Article 17 - Right to property

Article 18 - Right to asylum

Article 19 - Protection in the event of removal, expulsion or extradition

Title III - Equality

Article 20 - Equality before the law

Article 21 - Non-discrimination

Article 22 - Cultural, religious and linguistic diversity

Article 23 - Equality between women and men

Article 24 - The rights of the child

Article 25 - The rights of the elderly

Article 26 - Integration of persons with disabilities

Title IV - Solidarity

Article 27 - Workers' right to information and consultation within the undertaking

Article 28 - Right of collective bargaining and action

Article 29 - Right of access to placement services

Article 30 - Protection in the event of unjustified dismissal

Article 31 - Fair and just working conditions

Article 32 - Prohibition of child labour and protection of young people at work

Article 33 - Family and professional life

Article 34 - Social security and social assistance

Article 35 - Health care

Article 36 - Access to services of general economic interest

Article 37 - Environmental protection

Article 38 - Consumer protection

Title V - Citizens' Rights

Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament

Article 40 - Right to vote and to stand as a candidate at municipal elections

Article 41 - Right to good administration

Article 42 - Right of access to documents

Article 43 - European Ombudsman

Article 44 - Right to petition

Article 45 - Freedom of movement and of residence

Article 46 - Diplomatic and consular protection

Title VI - Justice

Article 47 - Right to an effective remedy and to a fair trial

Article 48 - Presumption of innocence and right of defence

Article 49 - Principles of legality and proportionality of criminal offences and penalties

Article 50 - Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Title VII - General Provisions concerning the interpretation and application of the Charter

Article 51 - Field of application

Article 52 - Scope and interpretation of rights and principles

Article 53 - Level of protection

Article 54 - Prohibition of abuse of rights