



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 May 2011

10140/11

**FREMP 54
JAI 319
COHOM 132
JURINFO 31
JUSTCIV 129**

"I" ITEM NOTE

from: General Secretariat of the Council
to: COREPER
Subject: Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies

The Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons examined the above mentioned Guidelines during three of its meetings and lastly on 12.5.2011 on the basis of Document 9009/2/2011 REV 2 FREMP 35 JAI 240 COHOM 107.

The text of the draft Guidelines as it arose from the discussions of the Working Party is set out in the Annex.

COREPER is invited to endorse the Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies as set out in the Annex to this Note.

GUIDELINES
ON METHODOLOGICAL STEPS TO BE TAKEN TO CHECK FUNDAMENTAL RIGHTS
COMPATIBILITY AT THE COUNCIL’S PREPARATORY BODIES

PURPOSE

The aim of these Guidelines, which should be considered as non-binding advice, is to help the Council preparatory bodies to take the methodological steps necessary to identify and deal with fundamental rights issues arising in connection with the proposals under discussion at the given Council preparatory bodies. They also aim at raising the general awareness regarding fundamental rights matters in the Council preparatory bodies.

To this end the Chairpersons of the Council preparatory bodies are invited to circulate these Guidelines on a six-monthly basis to experts in the relevant preparatory bodies. These Guidelines may be subject to revision whenever it is necessary and are without prejudice to the responsibility of Coreper and the Council.

BACKGROUND

The Lisbon Treaty has made the Charter of Fundamental Rights of the European Union (hereinafter ‘Charter’) a legally binding document that has to be respected equally by all institutions, bodies, offices and agencies of the Union as well as by the Member States, when they are implementing Union law. Article 6 of the Treaty on European Union (hereinafter: ‘TEU’) lays down that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ‘Convention’) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

In the course of the legislative and non-legislative procedure the three main players, the Commission, the Council and the European Parliament as well as other relevant institutions or a group of Member States are all responsible for ensuring that their original proposals and amendments are in line with rights, freedoms and principles in the Charter.

For taking measures to fulfill this obligation from its side, the Council considered in its conclusions¹ that the Council's preparatory bodies should dispose of short but pragmatic and methodological guidelines, prepared by the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (hereinafter 'the FREMP Working Party') in close cooperation with the Council Legal Service, on how to identify and solve problems raised during the negotiation in particular by their own proposals for amendments to the original proposal or by an initiative of a group of Member States.

GUIDELINES (summary)

- I. When to use these guidelines
- II. Identify the general link with fundamental rights.
 1. Check whether the proposal affects fundamental rights at all; think from a fundamental rights perspective.
 2. Check the recitals of the original proposal and the attached impact assessment.
- III. Examine whether the proposal is in line with the Charter.
 1. Check the exact content of relevant fundamental rights with the help of the following methods:
 - a) Check the Charter, the explanations relating to the Charter, the case-law of the Court of Justice of the European Union and other relevant sources for understanding the Charter (Annex II).
 - b) Check also the thematic fundamental rights reports, publications, handbooks made by the institutions, bodies, offices and agencies of the European Union and by the Council of Europe and make use of the expertise of the European Union Agency for Fundamental Rights.
 - c) Consult the Council Legal Service.

¹ The Justice and Home Affairs Council at its meeting of 24-25 February 2011 adopted Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union.

2. Check the proposal to assess whether it limits fundamental rights and whether this limitation is in compliance with the Charter (Annex IV).
 - a) May fundamental rights at issue be subject to limitations?
 - b) Are the limitations provided by law; are they adequately accessible and foreseeable?
 - c) Are the limitations necessary and proportionate to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others?

IV. In case of doubt

1. Consult the Council Legal Service.
2. Use the expertise of national experts in the capitals.
3. Ask the FREMP Working Party or other preparatory body specialising in a specific fundamental right.

GUIDELINES (in detail)

I. When to use these Guidelines

It is advisable to use these Guidelines to make a fundamental rights check at the beginning of the first reading of any proposal, in particular any proposal for amendment to the original proposal or of any initiative of a group of Member States (hereinafter together referred to as ‘proposals’) by a preparatory body. However, it is also necessary to make further checks on the compliance with fundamental rights for every compromise proposal the preparatory body reaches agreement on. That might be the version even after a triilogue with the European Parliament.

II. Identify the general link with fundamental rights

1. *Check whether the proposal affects fundamental rights at all; think from a fundamental rights perspective.*

Fundamental rights questions may be present, to differing extents, in every kind of EU policy including the EU external policy. That is why, as a first step, it is indispensable to start thinking from a fundamental rights and citizen-orientated perspective (see list of fundamental rights, freedoms and principles as set out in the Charter in Annex I).

2. *Check the recitals of the original proposal and the attached impact assessment.*

The impact assessment and recitals drawn up by the author of the original proposal are useful indications for which provisions of the proposals may be relevant from a fundamental rights aspect. Therefore checking the impact assessment documentation and the recitals can help identify such provisions in the text of the proposal that are related to or affected by fundamental rights.

III. Examine whether the proposal is in line with the Charter

1. *Check the exact content of relevant fundamental rights with the help of the following methods:*

- a) *Check the Charter, the explanations relating to the Charter, the case-law of the Court of Justice of the European Union and other relevant sources for understanding the Charter.*

After having identified what fundamental rights may be affected in general, the next step is to ascertain the exact content of those fundamental rights. The content of fundamental rights should be identified first of all on the basis of the Charter and the explanations relating to the Charter. The Charter contains rights, principles and freedoms: EU legislation must respect rights but observe principles, and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. Article 52 (5) of the Charter sets out how principles should be observed.

Besides, there are some other sources of understanding the Charter (*see Annex II*).

- b) *Check also the thematic fundamental rights reports, publications and handbooks produced by the institutions, bodies, offices and agencies of the European Union and by the Council of Europe and make use of the expertise of the European Union Agency for Fundamental Rights.*

Reports and publications of the European Union Agency for Fundamental Rights, European Data Protection Supervisor or the Commission's annual reports on the application of the Charter, for example, as well as human rights handbooks of Council of Europe can be of help to understand the content of the relevant fundamental rights (see Annex III). The European Union Agency for Fundamental Rights may, in line with its mandate, formulate and publish conclusions and opinions on specific thematic topics, at the request of the Council. The Council preparatory bodies should bear in mind this possibility and the invitation set out in the Stockholm Programme to the EU institutions to make full use of the expertise of the Agency.

c) Consult the Council Legal Service.

The Council Legal Service, assisting all preparatory instances of the Council, is at the Council's disposal and carries out outstanding work by providing for legal opinions and assessing the compliance of legislative and non-legislative proposals, as well as proposals for amendments, with primary law including fundamental rights requirements.

2. Check the proposal to assess whether it limits fundamental rights and whether this limitation is in compliance with the Charter.

After having assessed the content of fundamental right, it can be identified whether the proposal limits the fundamental right concerned. For that purpose it may be useful to highlight the *basic questions* on the limitation of fundamental rights (*see Annex IV*).

a) May the fundamental rights at issue be subject to limitations?

b) The limitations provided by law, are they adequately accessible and foreseeable?

c) Are the limitations necessary and proportionate to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others?

IV. In case of doubt

1. Consult the Council Legal Service.

The Council Legal Service will provide legal opinion at any stage of the negotiation.

2. Use the expertise of national experts in the capital.

It is important to make full use of the expertise, knowledge and experience of experts working in the Member State. Contact national experts to clarify outstanding concerns or questions and to gain a better understanding of related national or EU level legislation.

3. Ask the FREMP Working Party or other preparatory body specialising in a specific fundamental right.

If the working party is unable to resolve the issues arising on the compatibility of a particular proposal with the fundamental rights, on a limited case by case basis, it should seek the advice of the FREMP Working Party. Furthermore, where the Council has a separate preparatory body specialising in a specific fundamental right, it should be consulted, e.g. Working Group on Data Protection and Information Exchange.

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

(For the full content of the Charter see

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

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

CHARTER AND THE TOOLS FOR ITS INTERPRETATION

1. 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>

2. Explanations relating to the Charter

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

Although the explanations do not as such have the status of law, they are a valuable tool of interpretation, recognised also by the TEU and the Charter, which intends to clarify the provisions of the Charter and the sources thereof.

The explanations set out the sources of the provisions in the Charter, explaining which individual articles in the Charter derive from rights in the Convention, the EU's own legislation, the case law of the Court of Justice of the European Union, the common constitutional traditions of the Member States and other international treaties.

3. Case law of the Court of Justice of the European Union

http://curia.europa.eu/jcms/jcms/j_6/

<http://eur-lex.europa.eu/JURISIndex.do?ihmlang=en>

4. Other sources of interpretation

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

As Article 52(3) of the Charter states, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of corresponding rights shall be the same as those laid down by the Convention.

http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

Case law of the European Court of Human Rights

For understanding provisions in the Charter that correspond to rights guaranteed by the Convention it is indispensable to consult the case law of the European Court of Human Rights.

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 Right's case-law prepared by the Court's Press Service

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

Constitutional traditions common to the Member States

Article 52(4) of the Charter makes clear that in so far as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, the rights in the Charter shall be interpreted in harmony with those traditions.

Relevant thematic sources of international law (other than the Convention)

Both the Charter and its explanations mention some international law instruments which have relevance for the interpretation of the Charter.

1. Universal Declaration of Human Rights – see explanation on Article 1 of the Charter
2. Council of Europe Convention on Human Rights and Biomedicine (ETS 164 and additional protocol ETS 168) – see explanation on Articles 3 and 21 of the Charter
3. Statute of the International Criminal Court – see explanation on Article 3 of the Charter
4. Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108) – see explanation on Article 8 of the Charter
5. Community Charter of the Fundamental Social Rights of Workers – see explanation on Articles 12, 14, 15, 23, 25, 26, 27, 28, 29, 31, 32, 34 of the Charter
6. European Social Charter (ETS 035) – see explanation on Articles 14, 15, 26, 28, 29, 31, 32, 33, 34, 35 of the Charter
7. Revised European Social Charter (ETS 163) – see explanation on Articles 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 of the Charter
8. Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees – see Articles 18 of the Charter and the explanation thereto
9. International Covenant on Civil and Political Rights – see explanation on Articles 19 and 49 of the Charter
10. UN Convention on the Rights of the Child – see explanation on Article 24 of the Charter

Other international conventions could also be relevant, in particular:

1. UN Convention on Rights of Persons with Disabilities (UNCRPD)
2. International Covenant on Economic, Social and Cultural Rights (ICESCR),
3. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
4. Convention on the Elimination of Racial Discrimination (CERD)

Relevant national laws

In some cases the content of the Charter is filled by national laws as referred to in the Charter. See Article 9, Article 10 (2), Article 14 (3), Articles 16, 27-28, 30, 34-36 of the Charter.

USEFUL LINKS**Reports and publications of the European Union Agency for Fundamental Rights**

http://www.fra.europa.eu/fraWebsite/research/publications/publications_per_year/publications_per_year_en.htm

Charterpedia

Charterpedia is an online compilation created by the Civil Liberties Committee of the European Parliament (LIBE) and taken over by the European Union Agency for Fundamental Rights in 2008. It contains a compilation of international, European Union and national constitutional law in the area of fundamental rights, linked to the topics, chapters and articles of the Charter.

<http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do>

European Institute for Gender Equality

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

Publications of the European Data Protection Supervisor

<http://www.edps.europa.eu/EDPSWEB/edps/cache/off/EDPS/Publications>

Human Rights Handbooks on specific fundamental rights protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms

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

EXAMINATION OF LIMITATION OF FUNDAMENTAL RIGHTS

As a first step in examining the questions of limitations it is indispensable to examine if it is legally possible to restrict the fundamental right in question at all, namely whether the fundamental right should be regarded as an absolute right or not.

The explanations relating to the Charter set out the original source of the rights and limitations. By examining the explanations and the original source it will be possible to identify whether limitations are permitted and in what circumstances.

Most of the fundamental rights reaffirmed in the Charter can be limited, if the justifying conditions laid down in Article 52 (1) of the Charter are fulfilled.

By virtue of Article 52 of the Charter any limitation on the exercise of the rights and freedoms recognised by the Charter must

- a) be *provided for by law*,
- b) *respect the essence of those rights and freedoms*,
- c) be subject to the *principle of proportionality*,
- e) be *necessary* and
- f) *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:

Are the limitations provided by law?

Following the well-established case-law of the European Court of Human Rights regarding the meaning of ‘prescribed by law’ in the Convention², the following can be stated:

The Charter not only requires that the limitation of rights should have some basis in the Union – or where relevant in domestic – law, but also refers to the quality of the law in question, which should be adequately accessible and foreseeable.

- a) *Accessibility* is a formal requirement that as regards Union law is fulfilled by the publishing the legal act in the Official Journal of the European Union.
- b) *Foreseeability* is a substantial requirement which should be taken into account when drafting a legal act. A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. The citizen must be able – 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. However, those consequences do not need to be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it should not mean excessive rigidity and the law must also be able to keep pace with changing circumstances. Notwithstanding, the law must in any case afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Charter. It would be contrary to the rule of law for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.

² See *Sunday Times v. United Kingdom* (Application no. 6538/74), Judgement of 26 April 1979, para 49.; *Malone v. United Kingdom* (Application no. 8691/79), Judgement of 2 August 1984, para 68.

/Both criteria have been endorsed by the Court of First Instance for the purpose of the analysis of the fulfilment of the principle of legality by a legislative provision³./

Are the limitations necessary and proportionate to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others?

- a) Objective of general interest recognised by the Union: see e.g. Title I of TEU, Title II of the Treaty on the functioning of the European Union

- b) Protection of the rights and freedoms of others: see in particular rights and freedoms in the Charter

It is settled case-law of the Court of Justice of the European Union that the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it. Furthermore, the necessary and proportionate limitation must respect the essence of the fundamental rights concerned.

So the questions to be addressed are whether the limitation is appropriate for attaining the objective pursued and not going beyond what is necessary to achieve it? Are the limitations preserving the essence of the fundamental rights concerned? Is there an equally effective but less intrusive measure available?

As it follows from Article 52(3) of the Charter, in the case of rights corresponding to rights guaranteed by the Convention, the level of protection cannot be lower in any case than that of the Convention. This provision shall not prevent Union law providing more extensive protection. That is why the case-law of the European Court of Human Rights and the Court of Justice of the European Union must be reviewed to understand where the limits of the restriction of the fundamental rights concerned are.

³ See case T-43/02, *Jungbunzlauer AG v. Commission of the European Communities*, Judgement of 27 September 2006, para. 80.