

**Ensuring Compliance with the Charter of
Fundamental Rights in Legislative Drafting: The
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By

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Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission

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Abstract

After the Charter of Fundamental Rights acquired legally binding status the European Commission published a Strategy Paper introducing measures to ensure that all legislative proposals were in conformity with the standards it contains. One of its stated goals was to bolster mutual trust between Member States to facilitate the operation of the area of freedom, security and justice. This article analyses the initiatives introduced by the Commission in light of existing practice to examine whether they have, or could in the future lead to, improved compliance of legislative proposals with the Charter and greater mutual trust in the European Union. It finds that the measures put forward, while a welcome step in the right direction, suffer from several shortcomings, and offers some suggestions on how they might be improved upon.

“The entry into force of the Lisbon Treaty has been a milestone for fundamental rights in the EU. The Charter of Fundamental Rights is now legally binding on the EU institutions when we make laws and on Member States when they implement EU law. But how can we make the Charter’s rights a reality for people in their everyday lives? The Commission has drafted a new ‘fundamental rights checklist’ that will make sure that all EU initiatives are systematically put to a ‘fundamental rights impact assessment’ before their adoption. All EU laws must be fundamental-rights proof.” European Commission Vice-President, Viviane Reding.¹

Introduction

Since the Charter of Fundamental Rights of the European Union (CFR)² acquired legally binding status it has occupied an increasingly prominent place in the law and policy-making process of the European

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¹ Interview with European Commission Vice-President Viviane Reding, responsible for Justice, Fundamental Rights and Citizenship (February 17, 2011), fra.europa.eu, http://fra.europa.eu/fraWebsite/news_and_events/news-archive/news-archive-2011/infocus11_1702_en.htm [Accessed July 13, 2012].

² [2010] OJ C83/389.

Union.³ The Council of the European Union,⁴ the European Commission⁵ and the European Parliament⁶ have all made adjustments to their procedures in order to enhance verification of compliance with the CFR during the drafting and negotiation of legislation and policy. Furthermore, reliance on (as opposed to mere reference to) the CFR by the Court of Justice of the European Union (CJEU) has become commonplace—it has now acquired the status once reserved only to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) in the CJEU’s case law.⁷

This article analyses the potential impact of the latest policies introduced by the European Commission (from 2009–2011) to ensure that legislative proposals are in compliance with the CFR. As early as in 2001 the Commission committed itself to ensuring the compatibility of all legislative proposals with the CFR.⁸ These checks were, and continue to be, carried out by the lead Commission department (DG) when it draws up legislative proposals, and the Commission’s Legal Service,⁹ as the latter must be consulted “on all drafts or proposals for legal instruments and on all documents which may have legal implications”, and must endorse these before they can be adopted by the Commission.¹⁰ In 2005 the Commission set out its “methodology for ensuring the Charter is properly implemented in Commission proposals”.¹¹ This was intended to reinforce the process of checking compliance of legislation with the CFR by introducing consideration of fundamental rights as part of impact assessments, and explaining how they have been complied with in the explanatory memorandum accompanying legislative proposals.¹² In 2010 the Commission launched its “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union”, which appears to strengthen the process introduced in 2005.¹³ In light of the fact that the reforms introduced by the Treaty of Lisbon confer legally binding status on the CFR, the Strategy Paper states that the strategy should lead to the creation of a “fundamental rights culture” at all stages of the procedure for drawing up new proposals.¹⁴ For the preparatory phase of legislation, the steps set out by the Commission’s Strategy Paper can broadly be divided into three stages. While these are not new of themselves, the Strategy Paper and Operational Guidance aim to integrate consideration of fundamental rights within them.

³ Consolidated Version of the Treaty on European Union [2010] OJ C83/13 art.6.

⁴ See Council of the European Union, *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council’s preparatory bodies*, Council Doc. No.10140/11.

⁵ To be considered in detail below.

⁶ See r.36 of the current Rules of Procedure, adopted September 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20110926+0+DOC+PDF+V0//EN&language=EN> [Accessed July 5, 2012].

⁷ Compare, for example: *Atxalandoabaso v European Parliament* (C-308/07 P) [2009] E.C.R. I-1059; [2009] 2 C.M.L.R. 48 and *Ordre des Barreaux Francophones et Germanophone v Conseil des Ministres* (C-305/05) [2007] E.C.R. I-5305; [2007] 3 C.M.L.R. 28 with *Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* (C-69/10) [2012] 1 C.M.L.R. 8 and *DEB v Germany* (C-279/09) [2011] 2 C.M.L.R. 21.

⁸ European Commission, *Memorandum from the President and Mr Vitorino, Application of the Charter of Fundamental Rights of the European Union* SEC(2001) 380/3; European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments* SEC(2011) 567 final, p.10 (Operational Guidance).

⁹ European Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals: Methodology for systematic and rigorous monitoring* COM(2005) 172, paras 7, 15 (Methodology Paper); Commission, *Operational Guidance* (2011), p.10.

¹⁰ Rules of Procedure of the Commission [2000] OJ L308/26 arts12 and 21.

¹¹ Commission, *Methodology Paper* (2005), para.5.

¹² Commission, *Methodology Paper* (2005), paras 6–10.

¹³ European Commission, “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union” COM(2010) 573 final (Strategy Paper).

¹⁴ Commission, *Strategy Paper* (2010), p.4.

First, Commission DGs are urged to engage in preparatory consultations on fundamental rights, either by highlighting fundamental rights issues in consultation documents, such as Green Papers, or directly with relevant stakeholders, such as specialist NGOs, or bodies with relevant expertise.¹⁵ Secondly, the impact on fundamental rights is to be assessed as part of the impact assessment. Accordingly, the revised “Impact Assessment Guidelines” of 2009¹⁶ include reference to fundamental rights, and this is complemented by a more recent and detailed document giving “Operational Guidance” on how fundamental rights should be treated as part of the impact assessment¹⁷ Thirdly, the explanatory memorandum accompanying a legislative proposal, together with the Recitals (preambular paragraphs) of the legislation, are to set out how and why the proposal or act is considered to be in conformity with the CFR.¹⁸

According to the Strategy Paper the objective behind these measures is to make “the Charter as effective as possible”, in order to “build mutual trust between the Member States and, more generally, public confidence in the Union’s policies”. It goes on to point out that mutual trust is needed because a,

“lack of confidence in the effectiveness of fundamental rights in the Member States when they implement Union law ... would hinder the operation and strengthening of cooperation machinery in the area of freedom, security and justice.”¹⁹

This article analyses the Commission’s new Strategy Paper and Operational Guidance against their two declared aims: first, to make “the Charter as effective as possible”; secondly, to “build mutual trust between the Member States”. The following section discusses the three steps put forward by the Strategy Paper, including the fundamental rights “check-list”. The article then addresses whether the initiatives introduced by the Strategy Paper are in fact capable of building mutual trust between Member States, before exploring how the Strategy Paper might be improved upon.

Making “the Charter as effective as possible”

This section will explain how fundamental rights have been integrated into the three preparatory stages set out by the Commission’s Strategy Paper and its Operational Guidance and analyse their potential for improving compliance with the CFR. Discussion will be informed by examples of Commission proposals to illustrate existing challenges and how the Strategy Paper and Operational Guidance are being applied in practice.

Preparatory consultations

Commission DGs are encouraged to consult with relevant stakeholders at an early stage, whether by inviting a response through the formal consultation process when issuing a Green Paper (an “open” consultation), or by actively approaching bodies with specialist knowledge, such as NGOs (a “targeted” consultation).²⁰ Adequate consultation in drawing up a proposal can increase the likelihood that potential problems, which may not have been spotted internally by the lead DG, are brought to light. This is particularly useful in relation to questions of compatibility with fundamental rights since expertise on this issue does not appear to be present in all DGs.²¹

¹⁵ Commission, *Strategy Paper* (2010), p.6; Commission, *Operational Guidance* (2011), pp.11, 13.

¹⁶ European Commission, *Impact Assessment Guidelines*, SEC(2009) 92.

¹⁷ Commission, *Operational Guidance* (2011).

¹⁸ Commission, *Strategy Paper* (2010), pp.7–8; Commission, *Operational Guidance* (2011), pp.6, 23.

¹⁹ Commission, *Strategy Paper* (2010), pp.3–4.

²⁰ Commission, *Strategy Paper* (2010), p.6; Commission, *Operational Guidance* (2011), pp.11, 13.

²¹ The Commission directs civil servants to “DG Justice, Unit C.1 ‘Fundamental Rights and the Rights of the Child’ for questions and guidance on ‘how to assess in concrete cases the impacts which a proposed initiative may have on fundamental rights’”: Commission, *Operational Guidance* (2011), p.3.

The risk associated with inadequate consultation

The importance of adequate consultation can be illustrated by reference to the legislative journey of the so-called Service Directive.²² This legislation was drafted with the aim of facilitating the free movement of services between Member States and, as part of this goal, contained a “State of origin” clause.²³ According to this provision, a service provider operating legally under the laws of one Member State would be free to offer services in any other Member State without needing to conform to additional, more rigorous, requirements in place in the destination Member State. The clause was drafted in general terms and in the original proposal as applicable to all services, including those of a social nature, such as care for the elderly, disabled or infirm. While the aim of the Directive was to increase competition among service providers and therefore benefit consumers, the impact on social services, where the ultimate recipients cannot be considered as consumers with purchasing power capable of exercising an effective choice (since such services would be purchased by national or local authorities), appears not to have received consideration.²⁴ This created the risk of a decline in the quality of social services because those services established in Member States with the lowest standards would be more likely to have a competitive advantage in the rest of the European Union—which could ultimately force a “race to the bottom”.

It was not until the proposal was transmitted to the European Parliament that, after a considerable amount of lobbying by NGOs of Members of European Parliament (MEPs), the Commission modified its proposal to exempt many areas of social services.²⁵ The omission was arguably due in part to the consultation habits of the DG for Internal Market and Services as, at the time it engaged predominantly with commercial enterprises since these were probably perceived as its primary stakeholders, but seems to have had little contact with NGOs working on socio-economic rights.²⁶ Arguably, adequate consideration for fundamental rights could have been guaranteed through proper consultation of organisations with expertise in this area.

A similar approach can be noted in relation to the original proposal of the Commission on aviation security, which would have authorised Member States to use body scanners in airports.²⁷ There was no

²² For the original proposal, see *Proposal for a directive of the European Parliament and of the Council on services in the internal market* COM(2004) 2 final/3. For further discussion see Butler, “NGO Participation in the EU Law-Making Process: the Example of Social NGOs at the Commission, Parliament and Council” (2008) 14 E.L.J. 558, 568–569. For the directive as adopted, see Directive 2006/123 on services in the internal market [2006] OJ L376/36.

²³ Articles 16 and 17 of the original proposal.

²⁴ It may be telling that the 60-page impact assessment of the Commission contains the words “social services” only three times. See Commission Staff Working Paper, *Extended impact assessment of proposal for a directive on services in the internal market* SEC(2004) 21.

²⁵ See research based on interviews with NGOs and MEPs in I. Butler, “NGO Participation in the EU Law-Making Process: the Example of Social NGOs at the Commission, Parliament and Council” (2008) 14 E.L.J. 558, 568–569. Compare, for example the original Commission proposal (*Proposal for a directive of the European Parliament and of the Council on services in the internal market* COM(2004) 2 final/3), with the suggested amendments of the European Parliament, which included exemptions covering social services (European Parliament legislative resolution on the *Proposal for a directive of the European Parliament and of the Council on services in the internal market*, P6_TA(2006)0061) and the Commission’s revised proposal, which incorporated many of these alterations (*Amended proposal for a directive of the European Parliament and of the Council on services in the internal market* COM(2006) 0160 final).

²⁶ The (now replaced) CONECCS database of the Commission which formerly listed those organisations with which particular DGs routinely consulted suggest that at the time these were almost exclusively representative of commercial interests. See Butler, “NGO Participation in the EU Law-Making Process” (2008) 14 E.L.J. 558, 568–569. The Registry that has come to replace the database, however, does not show the links between organisations and particular DGs. See <https://webgate.ec.europa.eu/transparency/regryn/welcome.do#> [Accessed July 5, 2012].

²⁷ Draft Commission Regulation supplementing the common basic standards on civil aviation security laid down in the Annex to Regulation 300/2008, Doc. No. D001258/02, <http://www.statewatch.org/news/2008/sep/eu-com>

accompanying impact assessment for the original proposal, which was to be adopted through the comitology procedure. The European Parliament reacted with a resolution highlighting the serious impact of body scanners on the right to privacy, data protection and personal dignity. It also considered that the Commission was required (under the terms of its own 2005 Methodology Paper on ensuring compliance with the CFR) to carry out a fundamental rights impact assessment, and requested it to consult the Article 29 Working Party,²⁸ the European Union Agency for Fundamental Rights (FRA) and the European Data Protection Supervisor (EDPS).²⁹ The opinion of the EDPS and the feedback of the FRA subsequently confirmed the existence of several potential threats to fundamental rights.³⁰ The benefit of adequate consultation can be seen in the fact that the subsequent Regulation on Security Scanners introduced a number of safeguards to minimise the risk to data protection or the right to privacy, such as the right of passengers to opt for an alternative screening procedure.³¹

Limitations on the potential benefit of consultation

In view of the dangers of inadequate consultation, urging Commission DGs to consult properly on fundamental rights is a positive step. This by itself is not enough, however, to maximise the full benefit of adequate consultation in improving fundamental rights compliance. The example of the Service Directive and the Regulation on Security Scanners illustrates the first challenge: the potential for “targeted” consultation to improve the implementation of the CFR is contingent on the Commission recognising that there is a fundamental rights issue in the first place, and then approaching organisations that can provide some useful input.

The second challenge lies in the Commission then taking on board and following up on the feedback that it receives. The example of legislation on the collection and use of passenger name record (PNR) data illustrates that the Commission may well be unwilling to act on the views expressed to it, even by other EU bodies with expertise in the field of fundamental rights. The impact assessment drawn up as part of the process of formulating the Commission’s 2007 proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes³² states that consultations were carried out with: “associations of air carriers and representatives of computer reservations systems”,

-aviation-security.pdf [Accessed July 5, 2012] or via the Register of documents of the European Parliament, <http://www.europarl.europa.eu/RegistreWeb/search/simple.htm?language=en> [Accessed July 5, 2012].

²⁸The Article 29 Working Party, or the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, was established under arts 29 and 30 of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31. It is composed of representatives of national data protection authorities, is intended to act independently, and has advisory status. Its secretariat is provided by the Commission, and it is obliged to “advise the Commission ... on any ... proposed Community measures affecting’ the right to data protection”.

²⁹Resolution of the European Parliament on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection (P6_TA(2008)0521). See *The Use of Security Scanners at EU Airports* COM(2010) 311, paras 28–31, for an explanation of the chronology of the legislative proposal on body scanners.

³⁰See FRA, “The use of body scanners: 10 questions and answers” (July 2010), [fra.europa.eu, http://fra.europa.eu/fraWebsite/attachments/FRA_Opinions_Bodyscanners.pdf](http://fra.europa.eu/fraWebsite/attachments/FRA_Opinions_Bodyscanners.pdf) [Accessed July 5, 2012]; EDPS, *Comments of July 1, 2010 on the Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU airports*, EDPS, http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2010/10-07-01_Security_scanners_EN.pdf [Accessed July 5, 2012].

³¹Commission implementing Regulation 1147/2011, amending Regulation 185/2010 implementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports [2011] OJ L 294/7. Although, in the opinion of the EDPS there still remained other shortcomings. See EDPS, *Comments on civil aviation security* (2010), EDPS, http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2010/10-07-01_Security_scanners_EN.pdf [Accessed July 5, 2012].

³²COM(2007) 654 final.

stakeholders involved in “the prevention of organised crime”, border control and law enforcement authorities, Member States’ ministries of justice or of the interior, national data protection authorities, and the EDPS.³³ However, strong criticism by the EDPS and the Article 29 Working Party (reflecting the views of national data protection authorities) of the proposal were largely ignored.³⁴ Subsequently, an opinion issued by the FRA, at the request of the Presidency of the Council in 2008, also echoed these concerns.³⁵

Thus, by the time that the Commission came to revisit the proposal in 2011, it had been put on notice that the proposal was unlikely to be consistent with the CFR.³⁶ While considered to be an improvement, the second proposal did not address many of the concerns raised by these bodies—which is apparent from the opinions on the new proposal issued by the Article 29 Working Party, the EDPS and the FRA (the latter at the request of the European Parliament).³⁷

Perhaps the failure to reflect the concerns of the EDPS or the Article 29 Working Group can be explained by the fact that the Commission is under a legal obligation to consult the EDPS on any proposals that may have an impact on data protection.³⁸ Similarly (as noted above) the Article 29 Working Party is under an obligation to advise the Commission on such questions. That is, the Commission did not “choose” to consult with these actors, while it did choose to consult with aviation authorities and law enforcement and security agencies. This suggests that a given DG is foremost interested in the views of stakeholders working squarely within its policy area. Even creating a legal obligation on the Commission to consult bodies responsible for fundamental rights protection (as is the case with the EDPS), will not necessarily increase the likelihood of compliance with the CFR.

³³ *Commission Staff Working Document accompanying document to the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, Impact Assessment SEC(2007) 1453*, pp.3–4.

³⁴ EDPS, *Opinion on the draft Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes* [2008] OJ C110/1; for commentary see: “EDPS criticizes planned PNR measure” (2008) 233 *EU Focus* 7. See also Article 29 Data Protection Working Part and Working Party on Police and Justice, *Joint opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes*, presented by the Commission on November 6, 2007, 02422/07/EN, Art 29 WP re: WP 145, WPPJ ref: 01/07. For further information on the Article 29 Working Party see http://ec.europa.eu/justice/policies/privacy/workinggroup/index_en.htm [Accessed July 5, 2012].

³⁵ See FRA, *Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes* (October 2008), http://www.fra.europa.eu/fraWebsite/research/opinions/opn-passenger-name-record_en.htm [Accessed May 22, 2012].

³⁶ The original proposal became obsolete with the entry into force of the Treaty of Lisbon and was subsequently replaced. *Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime* COM(2011) 32 final.

³⁷ Article 29 Working Party, *Opinion 10/2011 on the proposal for a Directive of the European Parliament and of the Council on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorism offences and serious crime*, 0664/11/EN, WP 181, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp181_en.pdf [Accessed July 5, 2012]; EDPS, *Opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime* (March 2011), EDPS, http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf [Accessed July 5, 2012]; FRA, *Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime* (COM(2011) 32 final), FRA Opinion 1/2011 (Vienna: FRA, 2011), <http://www.fra.europa.eu/fraWebsite/attachments/FRA-PNR-Opinion-June2011.pdf> [Accessed July 5, 2012].

³⁸ It should be noted that there is a legal obligation on the Commission to consult the EDPS where legislation may have an impact on data protection: art.28(2) Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L8/1.

What is required, then, is a shift in attitude surrounding consultation, so that DGs come to regard entities with specialist knowledge or experience in fundamental rights as stakeholders relevant to all policy areas, reflecting the fact that fundamental rights issues cut across all fields. However, the Strategy Paper gives no concrete guidance on which entities could be approached for consultation. The Operational Guidance refers staff to the EU Civil Society Contact Group (an association of NGOs), thereby requiring civil servants responsible for drafting legislation to invest considerable time in identifying exactly which member organisations would be in a position to provide specialist advice.³⁹ The Commission's e-Justice portal is suggested as a source of information on legal practitioners' organisations for consultation on matters relating to the right to a fair trial or effective remedy, and drafters are also directed to the social partners and social dialogue committees in respect of social rights.⁴⁰ The Operational Guidance also directs civil servants to "make use of the expertise of the European Data Protection Supervisor, and draw, in particular, on the data collected by the Fundamental Rights Agency".⁴¹ It is extremely curious that there is no encouragement to actually consult the FRA, but only to draw on the data that it collects (especially given that direct consultation of the EDPS is encouraged). How approaching static data, which cannot actively respond to the particularities of a consultation on legislation, makes a more effective contribution to the protection of fundamental rights than actual consultation of the agency itself is not explained by the Operational Guidelines.⁴² Thus the guidance issued on whom to consult can be considered as far from adequate.

The Strategy Paper also states the Commission's intention to "step up internal training on fundamental rights ... to reinforce and further promote a culture of respect for fundamental rights".⁴³ This could help to raise awareness of, first, the fact that a fundamental rights issue may arise under proposed legislation, and secondly, which specialised bodies it would be appropriate to contact. Increased levels of understanding across Commission DGs that their respective policy areas may have an impact on fundamental rights, even where there is no superficial link, is essential to triggering a consultation process and including bodies with relevant expertise. However, this can only make a difference if awareness-raising on human rights is truly horizontal and targets those DGs with a policy brief that is not obviously connected to fundamental rights, since it is here that issues are more likely to be missed (as can be seen from the Service Directive as well as examples discussed below).

Some of the limitations on the potential for consultation to improve the effectiveness of the CFR may not apply when consultations are "open" (as opposed to "targeted"), since in this situation, bodies with expertise in fundamental rights which the Commission might not consult under a targeted consultation are in a position to offer their views. However, this is only effective insofar as open consultation is used. While it appears that the number of consultations open to the public has been increasing over the years,⁴⁴ it should be noted that there was no such consultation in relation to the Service Directive, the PNR legislation or legislation on body scanners.⁴⁵

³⁹ EU Civil Society Contact Group official webpage, <http://www.act4europe.org> [Accessed July 5, 2012]; see Commission, *Operational Guidance* (2011), p.13.

⁴⁰ See <https://e-justice.europa.eu/home.do> [Accessed July 5, 2012]; Commission, *Operational Guidance* (2011), p.13.

⁴¹ Commission, *Operational Guidance* (2011), p.13.

⁴² It also ignores the Stockholm Programme which states that the "European Council invites the Union institutions to: make full use of the expertise of the ... Agency ... and to consult, where appropriate, with the Agency, in line with its mandate, on the development of policies and legislation with implications for fundamental rights". The Stockholm Programme, *An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1, p.8.

⁴³ See Commission, *Strategy Paper* (2010), p.5.

⁴⁴ Compare numbers of public consultations on an annual basis over the preceding decade via http://ec.europa.eu/yourvoice/consultations/index_en.htm [Accessed July 5, 2012].

⁴⁵ Rules on consultation do not set criteria for when "open" or "targeted" consultation should be used: Commission, *Towards a reinforced culture of consultation and dialogue — General principles and minimum standards for consultation*

The above suggests that, while the encouragement to consult adequately put forward by the Strategy Paper must be welcomed, of itself this is likely to have minimal impact on improving the effectiveness of the CFR. Not only is little guidance offered to DGs over whom to consult, but the process leading to the elaboration of both the 2007 and 2011 PNR proposals suggests that even where a legal obligation exists on the Commission to engage in consultation (with the EDPS) or on a body to advise the Commission (the Article 29 Working Party), and even when the concerns expressed by these bodies are reiterated by the European Union's dedicated fundamental rights body (the FRA), the DG responsible for drafting the proposal may well simply ignore their concerns.

The Impact Assessment

The second stage at which the Commission's Strategy Paper plans for fundamental rights compliance to be reinforced is through impact assessments. As noted above, this had already been stipulated by the Commission in its Methodology Paper in 2005, and the Impact Assessment Guidelines were themselves updated in 2009 to reflect this. The major development in this area, as indicated earlier, is a more detailed document on how fundamental rights are to feature as part of impact assessments: the Operational Guidance of 2011. Impact assessments allow the Commission to examine the potential economic, social and environmental impacts of legislative proposals. The Operational Guidance has not actually altered these three headings under which impacts are examined. According to this document, adding a new heading specifically dedicated to fundamental rights would create "needless repetition" because they can be considered under the three pre-existing headings.⁴⁶ At the heart of the assessment of the impact on fundamental rights lies what the Commission labels the "fundamental rights check-list" which is meant to give drafters the tools needed to verify whether a proposal has the potential to interfere with a right and whether the interference is justifiable.⁴⁷ Draft impact assessments are then to be checked by the Impact Assessment Board which operates under the Commission President and is independent of the department that develops the proposal. According to the Strategy Paper, the Board "systematically checks the fundamental rights aspects of draft impact assessments submitted to it and will issue an opinion on them where necessary".⁴⁸

Fitting fundamental rights into the economic-social-environmental structure

According to the Operational Guidance the "Key Questions section in the Impact Assessment Guidelines helps to identify which headings to use" when particular rights are being examined.⁴⁹ The "Key Questions" offers a list of the main considerations under each of the three areas (economic, social, environmental), which are further broken down into detailed questions. Some of these questions expressly mention rights (e.g. "are property rights affected ...?").

of interested parties by the Commission COM(2001) 704 final, p.16, http://ec.europa.eu/civil_society/consultation_standards/index_en.htm [Accessed July 5, 2012].

⁴⁶ See Commission, *Operational Guidance* (2011), pp.3, 17. A resolution of the European Parliament (based on a report of the Committee on Civil Liberties, Justice and Home Affairs), had previously called for a separate heading of "fundamental rights" to be included. *Report on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring* (2005/2169(INI)), A6-0034/2007, p.8; *Resolution of the European Parliament on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring*, P6_TA(2007)0078.

⁴⁷ Commission, *Operational Guidance* (2011), p.7. A slightly more detailed version of this is given at pp.17–18.

⁴⁸ Commission, *Strategy Paper* (2010), p.7.

⁴⁹ Commission, *Operational Guidance* (2011), p.17. These can be found at Commission, *Impact Assessment Guidelines* (2009), pp.33–38.

Not all rights find a place, however, and, aside from giving occasional examples, there is no explanation as to how the rights in the CFR can be categorised under these three areas. The right to property (physical and intellectual) is highlighted under the “Economic Impacts” heading. Rights relating to the sphere of employment, such as collective bargaining and collective action (elements of the right to freedom of association), non-discrimination, freedom of expression, the right to privacy (including data protection) and family life, liberty, free movement, the rights of the child, are highlighted under “Social Impacts”.⁵⁰ It is also possible to read certain rights into some of the “Key Questions” listed under the headings. For instance “Key Questions” relating to the effect of measures on public health or education obviously implicate the right to health care and the right to education.⁵¹ However, it cannot necessarily be expected that a civil servant without specialist training would make the connection between the two, and the examples discussed below confirm this.

Clearly, there are more than a few rights missing from the “Key Questions”. This could be interpreted as demonstrating that it was not in fact possible to divide the contents of the CFR across the economic-social-environmental headings. If this is the case it suggests that maintaining the structure of the Impact Assessment Guidelines was seen as more important than redesigning the system to properly reflect the CFR. This itself suggests either a lack-lustre approach to fundamental rights protection, or unequal commitment between those Commission DGs responsible for the drawing up the Commission’s Impact Assessment Guidelines and the Strategy Paper. On the other hand if civil servants are simply expected to “work it out for themselves” this is most probably an over-estimation of internal familiarity with rights standards.

A further disadvantage of maintaining the economic-social-environmental divide is that consideration of the impact on rights becomes unfocussed. If discussion of different impacts is divided over several parts of the impact assessment report this may prevent proper weight being given to the overall impact on fundamental rights and whether a proposal’s potential interference with rights can be considered as proportionate. Considering these issues the potential for the Operational Guidance to improve the quality of the fundamental rights check is severely hampered by the fact that the Impact Assessment Guidelines themselves have not been revised to incorporate fundamental rights standards properly.

The fundamental rights check-list

The Strategy Paper and the Operational Guidance set out a “fundamental rights check-list” that “should be used by all Commission departments” when conducting an impact assessment.⁵² The check-list is “designed to make it easier to understand the methodology for addressing questions on fundamental rights”.⁵³ Over the course of 14 pages instructions are given on how to implement the check-list in the context of the impact assessment. The check-list is as follows:

- “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)?

⁵⁰These rights are also highlighted in the *Commission’s Guidance for assessing Social Impacts within the Commission Impact Assessment system* (Ref. Ares(2009)326974), though again there is not always a great deal of detail: typically rights are referred to simply by their title or their article number in the Charter without further explanation.

⁵¹Commission, *Impact Assessment Guidelines* (2009), pp.33–38.

⁵²Commission, *Operational Guidance* (2001), pp.6–7; *Commission Strategy Paper* (2010), pp.5–7.

⁵³Commission, *Operational Guidance* (2011), p.7.

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?⁵⁴

Given that specialist knowledge on fundamental rights is not to be expected from proposal drafters, some basic guidance is given. In order to work out whether a right is affected, the list of rights contained in the CFR is provided in a two-page annex. This is supplemented by a three-page annex which lists websites from the European Union, the ECHR, the United Nations and the International Labour Organisation that may be consulted. For instance, in order to understand the CFR users are directed to the “Explanations relating to the Charter of Fundamental Rights”, which offers a (rather modest) commentary on the meaning and origin of individual rights in the CFR.⁵⁵ Drafters are also directed to DG Justice for further advice on understanding and interpreting the CFR.⁵⁶ On the one hand, the fact that this basic information is provided is extremely welcome as an important starting point. On the other hand, the fact that the information is indeed so basic is a cause for concern at the very outset, since it gives an indication of the low level of knowledge of fundamental rights that is presumed of those who will be performing the impact assessment.

Little guidance is actually given on how to ensure that any interferences with fundamental rights conform with the requirements of necessity or proportionality. Drafters are instructed to formulate a range of policy options which should then either be modified or discarded in order to comply with the CFR.⁵⁷ In relation to proportionality and necessity, essentially two instructions are given.

First, the drafter must examine whether it is “possible to draft the provision limiting the fundamental rights in a clear and predictable manner”. This is unobjectionable and follows the requirement under the ECHR that all limitations of a right must be “in accordance with the law”.⁵⁸ Secondly, as set out in step 6 of the “fundamental rights check”, drafters are instructed to examine,

“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?”⁵⁹

⁵⁴ Commission, *Operational Guidance* (2011), p.7. A slightly more detailed version of this is given at pp.17–18. See also Commission, *Strategy Paper* (2010), p.5.

⁵⁵ Council of the European Union, *Note from the Praesidium, Explanations Relating to the Charter of Fundamental Rights of the European Union as set out in CHARTE 4487/00 CONVENT 50, Convent 49, CHARTER 4473/00*, http://www.europarl.europa.eu/charter/pdf/04473_en.pdf [Accessed July 5, 2012]. For instance, the explanation relating to art.24 CFR on the rights of the child merely states: “This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.”

⁵⁶ Commission, *Operational Guidance* (2011), p.3.

⁵⁷ Commission, *Operational Guidance* (2011), p.16.

⁵⁸ See, e.g. European Court of Human Rights (ECtHR): *Malone v United Kingdom* (8691/79) August 2, 1984 at [65]–[79].

⁵⁹ Commission, *Operational Guidance* (2011), p.18.

The check-list in practice

This section will now consider how the check-list has been applied with reference to three impact assessments relating to: state aid, credit rating agencies, and the use of PNR data. These have been chosen on the basis that they are recent enough to have applied the Operational Guidance and the check-list, and that by virtue of their subject-matter they have the potential to interfere with fundamental rights.

A Commission Impact Assessment of 2011 considers reform of EU rules relating to state aid in the form of public compensation. Legislation in this area in effect regulates the degree to which the State may subsidise services that provide an essential public service and would not be able to operate without state support under normal market conditions.⁶⁰ It appears that no clear definition of services of a general economic interest (SGEI) has been provided by the Commission, but that the concept does encompass “a wide range of health and social services [such as] ... care services for elderly and disabled persons”.⁶¹ Accordingly, regulation of SGEI will inevitably have an impact on delivery of a range of human rights of a social or economic nature, which are guaranteed in the CFR. These would probably include: the rights of the elderly (art.25), the integration of persons with disabilities (art.26), the right to health care (art.35), the right to freedom of movement (art.45),⁶² the right to social security and social assistance (art.34), and the rights of the child (art.24).⁶³ Nevertheless, the term “fundamental rights” does not appear in the document, despite the fact that the CFR actually contains an express right of “access to services of general economic interest” (art.36). The project is led by the DG for Competition, which is perhaps less likely to realise the relevance of its initiatives to fundamental rights than other DGs working in policy areas that are more obviously connected to fundamental rights, such as social affairs. What is worrying, however, is that despite representatives from a range of DGs being present on the Steering Group of the project (including the DG for Employment, Social Affairs and Inclusion, the DG for Health and Consumers, and the Commission’s Legal Service), consideration of the impact on fundamental rights received no discussion in the document.⁶⁴

A 2011 Commission impact assessment regarding the regulation of credit rating agencies considers various options and finds that, among other things, “providing for powers to temporarily restrict or ban sovereign debt ratings in clearly defined exceptional circumstances” to be a preferred option.⁶⁵ The impact assessment discusses the potential impact of this on the right to freedom of expression. It finds, rather summarily, that a “prohibition to issue sovereign ratings or review of existing ones are covered by the concept of prevention of disorder referred to in Article 10(2) of the ECHR”.⁶⁶ There are several difficulties with this assessment. First, no consideration is given to the meaning of public disorder which, in the case law of the ECHR, appears to relate (at least impliedly) almost entirely to acts of violent social unrest and

⁶⁰ Reform of the EU rules applicable to State aid in the form of public service compensation, Impact Assessment SEC(2011) 1581 final, p.11.

⁶¹ See above. The Commission does draw a distinction at a theoretical level, between services of a social general interest (SSGI) and SGEI, saying that social services can only be considered as SGEI where their delivery constitutes an economic activity. At the same time, it suggests that this distinction is in fact artificial, stating that “the Treaty does not require the service to be paid for directly by those benefiting from it. It therefore follows that almost all services offered in the social field can be considered ‘economic activities’”. See Implementing the Community Lisbon programme: Social services of general interest in the European Union COM(2006) 177 final, p.7.

⁶² To the extent that public transport can be considered as an SGEI.

⁶³ Such as the provision of care services for vulnerable children.

⁶⁴ Reform of the EU rules applicable to State aid in the form of public service compensation, Impact Assessment SEC(2011) 1581 final, p.8.

⁶⁵ Impact Assessment accompanying the Proposal for a Regulation amending Regulation 1060/2009 on credit rating agencies and a Proposal for a Directive amending Directive 2009/65 on co-ordination on laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61 on Alternative Investment Fund Managers SEC(2011) 1354 final, p.59.

⁶⁶ See above.

criminal activity.⁶⁷ While issuing ratings on sovereign debts may cause unrest in the financial markets and among the political elite of a given State, it is difficult to see how this could amount to “public disorder” within the conventionally used meaning of the term. Secondly, even if public disorder may occur as a later event it is difficult to say that there is a direct causal link: public unrest is rather the result of job losses, cuts in public spending and economic collapse. Thirdly, the case law of the ECtHR suggests that it is particularly difficult to restrict freedom of expression in relation to questions of public interest, which arguably includes information on the state of a country’s economy.⁶⁸ Fourthly, the Commission fails to take into account that the right to freedom of expression also entails a right to receive information, which could mean that the authorities actually have an obligation to refrain from blocking public access to reviews by credit ratings agencies.⁶⁹

The Commission’s Impact Assessment on the Proposal for a Directive on the use of PNR data of 2011 features a relatively cursory examination of the question of whether collecting and handling passenger data can be justified as a proportionate interference with the right to data protection. It begins by acknowledging the interference with the right to privacy and data protection, but notes that this may be justified in order to fulfil certain legitimate aims, such as preserving national security. It then states that because,

“the proposed actions would be for the purpose of combating terrorism and other serious crime ... they would clearly comply with such requirements provided they are ‘necessary in a democratic society’ and comply with the principle of proportionality.”

However, there is no explanation of how the preferred policy option actually complies with the principle of proportionality.⁷⁰

The impact assessment merely states that legislation should ensure that,

“the use of PNR data is clearly defined, that processing of personal data is secure, that the right of individuals to information, access, rectification, reassurance and blocking are respected, and that Member States impose liability, appropriate sanctions and remedies.”

In addition it is stipulated that data protection authorities should be able to “supervise the application of these rules”.⁷¹ However, this goes more to securing legal certainty (i.e. that the interference is provided for by law) than ensuring that the interference is proportionate.

⁶⁷ See, e.g. *Kandzhov v Bulgaria* (2011) 52 E.H.R.R. 14 at [73], where the ECtHR appears to adopt the view that public “disorder” refers to events involving violence. This also appears to be, at least impliedly, accepted in other cases, e.g. *Arslan v Turkey* (2001) 31 E.H.R.R. 9; *Baskaya and Okçuoğlu v Turkey* (2001) 31 E.H.R.R. 9; *Lehideux and Isorni v France* (2000) 30 E.H.R.R. 665; *Rekvényi v Hungary* (2000) 30 E.H.R.R. 519.

⁶⁸ *Wingrove v United Kingdom* (1997) 24 E.H.R.R. 1: “there is little scope under Article 10 para. 2 of the Convention ... for restrictions on political speech or on debate of questions of public interest”.

⁶⁹ The ECtHR has stated that “the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him”: *Leander v Sweden* (1987) 9 E.H.R.R. 433 at [74].

⁷⁰ This is also pointed out in the opinion of the EDPS, para.14. EDPS, *Opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf [Accessed July 5, 2012]

⁷¹ Commission, Impact Assessment accompanying the Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime SEC(2011) 132 final, pp.19–20. Approximately one page of the 47-page impact assessment is dedicated to fundamental rights, and two paragraphs to the question of proportionality.

While there are several critiques of the proposal,⁷² the two principal challenges appear to be the following. First, there is no convincing evidence put forward by the Commission to demonstrate that use of PNR data is more effective in preventing, detecting or punishing serious crime or terrorism than other less intrusive measures.⁷³ Secondly, interference with a right on the basis of the prevention of crime or public safety needs to be based on a specific perceived or existing threat or actual serious crime or act of terrorism. However, the PNR system covers all passengers indiscriminately—which could only be justified if there is evidence to suggest that all passengers in fact pose a risk.⁷⁴ These broad objections to the proposed PNR system would effectively mean that in order to conform with the requirement of proportionality or necessity it should be much more limited in scope and only permit the collection of data in relation to specific risks (and presumably, to specific suspects). This was the case, for instance, in relation to the European Union’s earlier PNR agreement with Australia, to which the Article 29 Working Party⁷⁵ and the EDPS did not seem to object.⁷⁶

Does the Impact Assessment Board make a difference?

In a sense, this question has already been answered since the impact assessments discussed had all been adopted after the Impact Assessment Board had adopted its opinion. Nevertheless, the statement in the Strategy Paper that the Board “systematically checks the fundamental rights aspects” merits evaluation. The opinions of the Board on the proposals relating to credit rating agencies and State aid make no mention at all of fundamental rights. In relation to the 2011 PNR proposal, the Board simply states that the impact assessment should reconsider whether an appropriate balance is struck between data protection (in particular, the period for which data is kept) and security concerns.⁷⁷ However, it suggests that this should be done “on the basis of international experience”, rather than by reference to interpretations relating to human rights law.⁷⁸

The above suggests that the introduction of fundamental rights considerations into the impact assessment, including the fundamental rights check-list, does have the potential to improve compliance with the CFR. However, the substance of the guidance offered is relatively brief and superficial in nature—in particular in relation to the actual content of rights, how rights fit in to the existing economic-social-environmental headings and the actual application of the proportionality test. The examples discussed above suggest that much more work on improving expertise on fundamental rights within the Commission is necessary if the check-list is to become anything more than a glorified box-ticking exercise. Furthermore, improvement

⁷² Noted in the following footnotes.

⁷³ *Article 29 Working Party Opinion on PNR* (2011), pp.7–8; See EDPS, *Opinion on PNR* (2011), paras 11–13, 56; FRA, *Opinion on PNR* (2011), pp.15–16. This point is also made by C. Murphy, “Fundamental Rights and Security: the Difficult Position of the European Judiciary” (2010) 16 *European Public Law* 289, 296.

⁷⁴ *Article 29 Working Party Opinion on PNR* (2011), pp.4–5; EDPS, *Opinion on PNR* (2011), paras 17, 31, 55. FRA, *Opinion on PNR* (2011), pp.17–18. This point is also made (regarding the original proposal) by E. Brouwer, “The EU Passenger Name Record System and Human Rights: Transferring passenger data or passenger freedom?”, CEPS working document 320 (September 2009), p.17.

⁷⁵ Article 29 Working Party, *Opinion 1/2004 on the level of protection ensured in Australia for the transmission of Passenger Name Record data from airlines* (January 16, 2004), 10031/03/EN, WP 85, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2004/wp85_en.pdf [Accessed July 6, 2012].

⁷⁶ See EDPS, *Opinion on PNR* (2011), para. 16.

⁷⁷ Impact Assessment Board Opinion on the Impact Assessment on reform of the EU rules applicable to State aid in the form of public service compensation (draft version of October 13, 2011), November 11, 2011; Impact Assessment Board Opinion on the Impact Assessment on a proposal for a regulation on credit rating agencies (CRA III) (draft version of September 7, 2011), October 7, 2011.

⁷⁸ Impact Assessment Board Opinion on the Impact Assessment accompanying the proposal for a Directive on a Common Approach to the Use of Passenger Name Records (PNR) Data (draft version of August 23, 2010), September 10, 2010, p.2.

of this expertise is also required in the Impact Assessment Board, if it is to truly systematically check fundamental rights aspects of legislation.

The Explanatory Memorandum

According to the Strategy Paper, the explanatory memorandum that accompanies a legislative proposal “must contain a summary explaining how fundamental rights obligations have been met.”⁷⁹ Of itself, this is not really aimed at making the CFR more effective, but rather at making it clear that the CFR has been adequately considered.⁸⁰ The explanatory memorandum is based on the impact assessment, but also on input from the Legal Service.⁸¹ Given the potential shortcomings of the Commission’s analysis of fundamental rights in the impact assessment, the involvement of the Legal Service is potentially a crucial safeguard.

However, this is contingent on, first, whether the Legal Service itself is able to identify fundamental rights issues and perform an adequate check for compatibility with the CFR and secondly, whether the lead DG adequately incorporates the opinion of the Legal Service into the explanatory memorandum and the proposal. Since the opinions of the Legal Service are not published, it is difficult to judge how adequately they address fundamental rights or whether they are fully taken into account by the lead DG.

It might be possible to find indirect evidence of the Legal Service opinion, to the extent that the content of the “preferred option” indicated in the impact assessment differs from the proposal that is actually adopted. In relation to the 2011 PNR proposal discussed above, there does appear to be at least one difference relevant to fundamental rights between the “preferred option” put forward in the impact assessment and the end proposal that was adopted. While the impact assessment on the 2011 proposal on PNR data provided for a data retention period of one year plus five years in an anonymised database, the final proposal provides for 30 days, plus five years.⁸² However, fundamental rights considerations in the other two pieces of legislation discussed above (in relation to state aid and credit rating agencies) do not appear to have evolved between the impact assessment and the adoption of the final proposal: the explanatory memorandum of the proposals does not actually discuss fundamental rights at all.

This could be taken to indicate either that the Legal Service did not identify or did not adequately address fundamental rights issues relating to these proposals. This may be implied from the fact that the concerns raised by the Article 29 Working Party, the EDPS and the FRA were not addressed in the final PNR proposal, but also from the fact that fundamental rights appear to have been considered of such little relevance to the legislation on state aid and credit rating agencies that there was not even an explanation of how the legislation conforms to the CFR in the explanatory memorandum. Alternatively, the shortcomings in the proposals could indicate that even if fundamental rights issues were raised by the Legal Service, they were ignored by the Commission DG responsible for the proposal.

There is some evidence to suggest that both of these propositions are correct. This comes in the form of a note (exceptionally, in the public domain) of the Legal Service relating to a draft proposal for a PNR Agreement between the European Union and the United States.⁸³ In this note the Legal Service points to

⁷⁹ See Commission, *Strategy Paper* (2010), p. 8.

⁸⁰ Something that is expressly acknowledged by the *Strategy Paper* (2010), p.8.

⁸¹ The *Commission Methodology Paper* (2005) states that: “The Legal Service will have to pay particular attention to this part of the explanatory memorandum [which summarises how fundamental rights have been complied with] and provide all the assistance needed for the final version”: at para.24.

⁸² See *Impact Assessment on PNR* (2011), p.24; art.9, Proposal on PNR.

⁸³ Note of May 18, 2011 from the Commission Legal Service for the attention of Mr Stefano Manservigi, Director General, DG Home, <http://www.statewatch.org/news/2011/jun/eu-usa-pnr-com-ls-opinion-11.pdf> [Accessed July 6, 2012]. *Proposal for a Council Decision on the conclusion of the Agreement between the USA and the EU on the use and transfer of Passenger Name Records to the United States Department of Homeland Security* COM(2011) 807 final.

several elements of the draft proposal where it considers “that there are grave doubts as to its compatibility with the fundamental right to data protection”. Some of these concerns appear to have been addressed since they do not feature in the final proposal.⁸⁴ Others, however, appear to have been ignored, such as the Legal Service’s objection to a data retention period of 15 years, the lack of effective redress for individuals, and the lack of an independent oversight mechanism.⁸⁵ Unfortunately there is no explanatory memorandum accompanying this proposal and so no suggestion as to how the diverging views of DG Home and the Legal Service were (or were not) reconciled.

If this example is a reflection of general practice then it shows that the Legal Service does play an active role in checking proposals for compliance with fundamental rights. It also shows that the rest of the Commission may choose to ignore the concerns of the Legal Service. Given that this is the point at which the formal legal check of compliance with the CFR is made within the Commission, it is extremely worrying.⁸⁶ This suggests, in turn, that the conclusion reached by the Commission during its impact assessment may well carry more weight than the assessment of the Legal Service—even though the impact assessment is expressly stated not to constitute a formal legal check of compliance with the CFR.⁸⁷ Since the impact assessments discussed above appear to be inadequate, this is also a reason for concern. Finally, this example also suggests that, given that the Legal Service raises no objections along the lines discussed above in relation to the EU PNR legislation (put forward by the EDPS, the Article 29 Working Party, and the FRA), there is good cause to also question the expertise of the Legal Service itself in relation to fundamental rights.

Can the Strategy Paper create “mutual trust” between Member States?

From the above discussion, it can clearly be seen that there are several limitations on the potential of the Strategy Paper to increase the effectiveness of the CFR. These shortcomings aside, this section will address whether the Strategy Paper could, nevertheless, achieve the Commission’s stated end goal to “build mutual trust between the Member States”. The Strategy Paper states that making the Charter “as effective as possible” is important because,

“lack of confidence in the effectiveness of fundamental rights in the Member States when they implement Union law ... would hinder the operation and strengthening of cooperation machinery in the area of freedom, security and justice.”⁸⁸

While the meaning of this does not receive further elaboration in the text, the shape of the problem faced by the Commission can be gleaned from documents relating to policy on cooperation in criminal matters.

The issue of “mutual trust” arises in the specific context of mutual recognition between Member States. While one approach of the European Union has been to establish uniform rules across the Member States to facilitate co-operation or free movement of persons, services and goods, where such harmonisation is not politically feasible the European Union has instead favoured introducing rules of mutual recognition.

⁸⁴ Such as the fact that (according to the note) “serious crimes” was formerly defined by reference to what constitutes an “extraditable offence” under the EU-US extradition Agreement, which would have included crimes punishable by maximum period of one year. The final proposal (art.4), in contrast, covers only crimes related to terrorism or serious transnational crimes, which are punishable by a sentence of three years or more.

⁸⁵ See *Proposal on EU-US PNR* (2011), arts 8, 13 and 14.

⁸⁶ Commission, *Methodology Paper* (2005), paras 7, 12, 15; Commission, *Strategy Paper* (2010), pp.7–8; Commission, *Operational Guidance* (2011), pp.23–24.

⁸⁷ Commission, *Operational Guidance* (2011), pp.10, 18. Similarly: Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights* COM(2009) 295 final, p.7; Commission, *Methodology Paper* (2005), para.13.

⁸⁸ Commission, *Strategy Paper* (2010), pp.3–4.

This obliges the authorities of one Member State to recognise the validity of official acts in another, such as court orders or administrative decisions.

This poses a difficulty in the context of fundamental rights because if the practices of any one Member State fail to conform to fundamental rights standards, then this failure can make its effects felt in any other Member State that co-operates with it on this issue.⁸⁹ In the context of criminal law, the introduction of the European arrest warrant (EAW) allows one Member State's judicial authority to issue a decision to be executed in another Member State procuring the arrest or surrender of a suspect with a view to prosecution or imposing a sentence.⁹⁰ While the Decision on the EAW does not of itself mandate Member States to breach human rights standards, it does rest on the assumption that all the procedural safeguards regarding freedom from arbitrary detention, the right to a fair trial, and adequate conditions of detention are complied with by the Member States.⁹¹ Where this is not the case, the European Union's mutual recognition approach actually creates a risk that individuals in one Member State will have their rights violated by other Member States. Put otherwise, mutual recognition can give rise to "freedom of movement" for fundamental rights violations.⁹² This has the effect of causing Member States to place individuals in a situation where their rights will be violated by another Member State—something which is prohibited under both the ECHR and UN human rights treaties, such as the International Covenant on Civil and Political Rights 1966.⁹³ In practice certain national courts have in fact resisted giving effect to the EAW because of doubts over human rights standards in other Member States.⁹⁴ Similar concerns have also been raised more recently in relation to the European evidence warrant (or European investigation order).⁹⁵

Because human rights concerns were leading some national courts to refuse to implement the EAW, the Council requested the Commission to draw up a series of proposals based on a "Roadmap for

⁸⁹ For a discussion of the principle of mutual recognition in the context of EU criminal law see V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009), Ch.3; I. Bantekas, "The principle of mutual recognition in EU criminal law" (2007) 32 E.L. Rev. 365, 365; S. Peers, "Mutual recognition and criminal law in the European Union: has the Council got it wrong?" (2004) 41 C.M.L. Rev. 5.

⁹⁰ Article 1(1), Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/4.

⁹¹ A recent surveys of procedural rights across EU Member States reveals varying levels of conformity with human rights standards see: E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2010).

⁹² Möstl neatly contrasts free movement of persons or goods with the "free movement ... of judicial decisions" that occurs with mutual recognition in the criminal sphere: "State powers (and not people) are to be freed from their traditional territorial restrictions; the individuals are to be subjected to (typically) disadvantageous or even coercive measures of a foreign country (arrest warrant, evidence warrant, etc.), which interfere with their rights and liberties. Mutual recognition thus threatens freedom." M. Möstl, "Preconditions and limits of mutual recognition" (2010) 47 C.M.L. Rev. 405, 409.

⁹³ ECtHR: *Soering v United Kingdom* (A/161) (1989) 11 E.H.R.R. 439; UN Human Rights Committee: *Judge v Canada* Comm No.829/1998, August 5, 2002.

⁹⁴ See M. Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?" (2009) 15 E.L.J. 70, 81–84; J. Komárek, "European Constitutionalism and the European Arrest Warrant: in Search of the Limits of 'Contrapunctual Principles'" (2007) 44 C.M.L. Rev.16; T. Konstadinides, "The Europeanization of extradition: how many light years away to mutual confidence?" in C. Eckes and T. Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: a European Public Order* (Cambridge: Cambridge University Press, 2011), Ch.7; L. Marin, "The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case" (2008) 15 *Maastricht Journal of European and Comparative Law* 473.

⁹⁵ See C. Murphy, "The European evidence warrant: mutual recognition and mutual (dis)trust?" in *Crime within the Area of Freedom, Security and Justice* (2011), Ch.8; FRA, *Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order* (February 2011), <http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf> [Accessed July 6, 2012].

strengthening procedural rights of suspected or accused persons in criminal proceedings” in 2009.⁹⁶ To date a Directive on the right to interpretation and translation in criminal proceedings,⁹⁷ and a Directive on the right to information in criminal proceedings (otherwise known as a “Letter of Rights”) have been adopted.⁹⁸ The Roadmap also provides specifically for a proposal on “special safeguards for suspected or accused persons who are vulnerable”, which is intended to ensure that,

“special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.”⁹⁹

This shows that the problem with mutual trust was created by the Member States’ desire to introduce mutual recognition into co-operation on criminal justice without including any safeguards.¹⁰⁰ This is currently permissible under EU law since the CJEU has established that while the European Union is under a duty to “respect” fundamental rights, it is not under a duty to “protect” them. That is, the European Union will be in compliance with its obligation to respect fundamental rights so long as EU law does not mandate Member States to breach them.¹⁰¹ In a situation where EU law creates an increased risk that Member States might violate fundamental rights, there is no obligation on the legislator to step in and close the gap it has opened by narrowing the discretion given to Member States.¹⁰²

Even if the legislation establishing the EAW in itself “respected” fundamental rights, because it did not require Member States to breach them, it did not “protect” fundamental rights—it did not contain express

⁹⁶ Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C295/01 ([2009] OJ C295/1).

⁹⁷ Directive 2010/64 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

⁹⁸ *Commission Proposal for a Directive on the right to information in criminal proceedings* COM(2010) 392/3, http://ec.europa.eu/justice_home/news/intro/doc/com_2010_392_3_en.pdf [Accessed July, 2012]. Commission, “Fair trial rights: Suspects to receive a ‘letter of rights’ in criminal proceedings following European Parliament vote”, IP/11/1534, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1534&format=HTML&aged=0&lg=en&guiLanguage=en> [Accessed July 6, 2012].

⁹⁹ Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01, Annex, Measure E [2009] OJ C295/1.

¹⁰⁰ In this sense it should be noted that the opposition of some Member States to the Commission’s 2004 proposal to introduce safeguards for suspects was justified by the fact that all Member States were already bound by the ECHR, and that therefore such safeguards within EU law were not necessary. In practice, the difficulties that some Member States’ courts have had in implementing the EAW show that this is not actually the case. See *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union* COM(2004) 328 final; S. Douglas-Scott, “The rule of law in the European Union — putting the security into the area of freedom, security and justice” (2004) 29 E.L.Rev. 219, 225–228; M. Jimeno-Bulnes, *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?* (Brussels: Centre for European Policy Studies, 2010), p.4, <http://www.ceps.be/ceps/download/3000> [Accessed May 22, 2012].

¹⁰¹ *Parliament v Council* (C-540/03) [2006] E.C.R. I-5769; [2006] 3 C.M.L.R. 28. The CJEU itself has not accepted the argument that the European Union has a duty to “protect” rights. As long as a legislative provision does not mandate action that conflicts with fundamental rights, and is capable of being interpreted consistently with fundamental rights, the European Union has discharged its obligations. There is no need to protect rights actively by specifying that provisions must be interpreted in line with fundamental rights standards, or introduce those standards expressly. For discussion of this case and the implications flowing from it see I. Butler and O. De Schutter, “Binding the EU to International Human Rights Law” (2009) 27 *Yearbook of European Law* 277, 294–295.

¹⁰² In the case of *Parliament v Council* it was argued that certain parts of the Family Reunification Directive failed to conform to fundamental rights standards. In examining the Directive the ECJ stated that it: “cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way. In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive’s rules in a manner consistent with the requirements flowing from the protection of fundamental rights”: *Parliament v Council* (C-540/03) [2006] E.C.R. I-5769 at [103]–[104].

provisions (or minimum standards) that would prevent the Member States from applying it in a way that fails to comply with the CFR.¹⁰³ The problem of mutual trust did not arise from failure to “respect” the CFR, it arose from the failure to recognise a duty to protect, and not merely respect, the rights it contains—and this is not something that the Strategy Paper alters. As such, the Strategy Paper is unlikely to achieve its ultimate goal.

What more could be done?

This section will put forward suggestions as to how the measures presented in the Strategy Paper might be improved upon, and how the Commission could contribute to building mutual trust between the Member States.

In relation to consultation, it has been shown that even creating a legal obligation to consult (which exists in relation to the EDPS on questions of data protection), cannot itself guarantee more effective implementation of the CFR. Thus the introduction of hard law measures are less likely to be effective than well-thought-through soft measures. One possibility for making consultation more effective would be to promote face-to-face contact with outside organisations that have expertise in fundamental rights, in view of the fact that many consultation practices develop through regular, informal contact.¹⁰⁴ While it is not uncommon for Commission DGs to speak to stakeholders, including NGOs, that appear to be obviously connected to their field of work, creating a “culture” of fundamental rights requires those DGs that do not currently engage with actors in the fundamental rights field to begin doing so. Development of these informal relations could be nurtured, for instance, by setting up secondments or exchanges of staff between DGs that have no regular contact with stakeholders working in fundamental rights, and DGs that do work closely with these organisations. This would allow experienced staff to bring their knowledge of fundamental rights networks with them and transplant this in “inexperienced” DGs, while allowing staff with no experience of fundamental rights stakeholders to pick up contacts in the “experienced” host DGs which can be taken back into their DG upon return.

The training and awareness raising among Commission staff envisaged by the Strategy Paper, while welcome, can only be expected to lead to a relatively rudimentary understanding of fundamental rights. This is unlikely to allow policy drafters to understand how fundamental rights might apply to their particular field of work—the manner in which fundamental rights feature in the sphere of agricultural policy, is rather different from policy on the free movement of services, or policy on structural funds. Without this specific understanding of how fundamental rights might be relevant to specific policy contexts, staff are less likely to recognise that they may benefit from consulting outside expertise, or that they may need to engage with fundamental rights more thoroughly when formulating proposals.

To bridge this gap the Strategy Paper could have set out more concrete measures. For example, the use of “fundamental rights guidance” that is specifically adapted to the policy fields of different DGs could serve as a regular point of reference for staff.¹⁰⁵ Such guidance would transpose the language and content of fundamental rights into the day-to-day practical scenarios and situations that drafters encounter and be

¹⁰³ Pointing out that in the context of the internal market, mutual recognition has generally been accompanied by harmonisation of measures designed to protect public safety and well-being, Möstl asks: “to what extent can it ... be justified to expose citizens to disadvantageous or coercive acts of foreign States without there being at least some minimum approximation of standards as to the protection of the rights and freedoms of citizens?” Möstl, “Preconditions and limits of mutual recognition” (2010) 47 C.M.L. Rev. 405, 408.

¹⁰⁴ See Butler, “NGO Participation in the EU Law-Making Process” (2008) 14 E.L.J. 558.

¹⁰⁵ See for example, Department of Health, *Human Rights in Health Care: a Framework for Local Action* (Department of Health, 2008) which is specifically tailored to those delivering health services at the local level, http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_088972.pdf [Accessed July 6, 2012].

tailored to the remit and work plan of their particular DG, allowing them to recognise where rights issues might arise without the need for deep personal expertise. In the alternative, the FRA could be requested to screen the Commission's annual work programme to flag where fundamental rights issues are likely to arise and where further consultation would be advisable.¹⁰⁶

Neither training nor awareness raising can deliver the level of expertise required to perform meaningful compatibility checks during the impact assessment exercise—as is reflected by the examples discussed above. Remedying this through developing in-house expertise could appear wasteful and unnecessary given the role that the Legal Service is meant to play in performing a formal check of compatibility with the final proposal. Thus it is suggested that rather than investing in deep expertise in fundamental rights across the Commission, it may be more cost effective to reinforce the formal compliance check by the Legal Service. That is, to ensure that the Legal Service has adequate expertise on fundamental rights, and to ensure that Commission DGs leading on a proposal actually follow changes suggested by the Legal Service. One way to secure this is to ensure that the opinions of the Legal Service are publicly available. This acts as an incentive for the Legal Service to perform an adequate check, and it also places pressure on the lead DG to justify itself whenever the concerns of the Legal Service are not addressed.¹⁰⁷

A further means of improving the effectiveness of the CFR would be to ensure that a compatibility check is carried out not just in relation to the original proposal, but also at other stages in the life of the policy and legislation. One obvious point at which to re-check for compatibility would be once a final text has been adopted by the Council and the Parliament—since the text may change during the course of negotiations. The need to ensure that texts are compatible with the CFR throughout the process of negotiations (and not merely in relation to the initial proposal) is acknowledged by the Commission in its Strategy Paper. However, the latter document does little more than state that each institution is responsible for conducting its own impact assessments of their amendments; that the Legal Services of the three institutions should be fully involved in this and that the Commission will oppose amendments that reduce fundamental rights protection (and ultimately withdraw a proposal or seek annulment of offending provisions).¹⁰⁸ Surely what is called for, rather, are concrete steps setting out a process through which the final text will be assessed before its adoption.

A further point at which compatibility could be reviewed is after the legislation or policy has actually entered into force. Even if legislation may appear to respect fundamental rights in the abstract, in practice it may not do so—either because of some unforeseen application of the legislation, or because of the way that the text is interpreted or applied by the Member States. Some pieces of legislation do require the Commission to review implementation after a certain period.¹⁰⁹ However, this is primarily geared towards examining how the legislation has been transposed and whether it is achieving its intended effect. The Strategy Paper states that the “Commission will check that the Charter is taken into account in the ex post

¹⁰⁶ Arguably this could be done within the agency's existing mandate given that it would not be performing compatibility checks with concrete proposals. Regulation 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1 art.4(2).

¹⁰⁷ Although it could be objected that the Legal Service would not wish to potentially set its future legal position in stone, separately from the specific facts of a future case before the CJEU, it can be countered that if a sufficiently well-thought-through and rigorous analysis is carried out of the proposal, it should not be necessary to alter this position in future. Furthermore, if a future case before the CJEU were to relate to the legislation as subsequently modified in negotiations by the Parliament or the Council, or related to the interpretation given to legislation by a Member State, then this would still give the Legal Service room to distinguish the original opinion from any new position.

¹⁰⁸ Commission, *Strategy Paper* (2010), pp.8–9.

¹⁰⁹ Article 17 of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/12, for instance, requires the Commission to draw up a report for the Council and the Parliament every five years “on the application of this Directive”, which should include “if necessary, proposals to revise and update” it.

evaluation of Union instruments”.¹¹⁰ However, the Commission’s latest *Annual Report on Monitoring the Application of EU Law* (published almost one year after the Strategy Paper) does not include consideration of the CFR.¹¹¹

Finally, as noted above, to achieve the ultimate goal behind the Strategy Paper of building mutual trust between Member States, the Commission (and the CJEU) need to abandon their current stance that fundamental rights need only be respected by the European Union, and acknowledge that there also exists an obligation to ensure protection of human rights where its legislation creates an increased risk of fundamental rights violations. More concretely, wherever a system based on mutual recognition is created, concrete minimum standards of fundamental rights must also be introduced, i.e. a degree of fundamental rights harmonisation.

There are signs that the Commission may be open to this approach. First, the Commission did originally put forward a proposal for a Council Framework Decision on procedural rights for suspects and defendants in criminal proceedings in 2004, which was subsequently abandoned—apparently owing to a lack of political will among the Member States.¹¹² Secondly, in the context of asylum policy the Commission introduced a proposal which would allow for the temporary suspension of transfers to those Member States unable to guarantee minimum standards of reception.¹¹³

The “Dublin II” Regulation contains rules to decide which EU Member State shall be responsible for determining an asylum seeker’s application.¹¹⁴ Broadly speaking, this permits a Member State to send an individual applying for asylum in their territory to another Member State under certain circumstances, such as where the applicant first arrived into the European Union via that Member State’s territory. This can present problems where the Member State that eventually determines the claim does not observe human rights standards.¹¹⁵ That is, there is nothing in the Regulation that expressly obliges Member States to refrain from using the transfer system even where the transferee will have their rights violated by the receiving State. Like the EAW, Member States in practice operate under a presumption that other asylum

¹¹⁰ Commission, *Strategy Paper* (2010), p.6.

¹¹¹ See, e.g. *28th Annual Report on Monitoring the Application of EU Law* (2010) COM(2011) 588 final, http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_28/com_2011_588_en.pdf [Accessed July 6, 2012]. While the purpose of this report seems to be to give a broad overview of the state of infringement proceedings, petitions received and preventive mechanisms, the fact that the CFR is not even mentioned could imply that it will be difficult to ensure that the CFR is taken into account by all DGs when evaluating specific pieces of legislation.

¹¹² Jimeno-Bulnes, *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?* (2010), p.4, <http://www.ceps.be/ceps/download/3000> [Accessed July 6, 2012]. See also *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union* COM(2004) 328 final, para.28. The proposal originally related to a range of issues: access to legal advice, access to free interpretation and translation, giving “appropriate attention” to those who are “not capable of understanding or following” proceedings, the right to communicate with consular authorities and the right for suspects to be notified of their rights.

¹¹³ Article 31 *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) COM(2008) 820 final.

¹¹⁴ Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

¹¹⁵ In this sense Belgium and Greece were recently found in violation of their obligations under the ECHR owing to the transferral of the applicant, who was an asylum seeker, to Greece under the Dublin II Regulation. Greece was found to have violated art.3 (prohibiting inhuman or degrading treatment) of the ECHR because of the conditions of detention and living conditions for asylum seekers, and art.13 (the right to an effective remedy) because of the risk of the applicant’s expulsion back to Afghanistan without adequate examination of the merits of his claim. In addition Belgium was found in violation of the same provisions because the decision to transfer the applicant to Greece exposed him to these violations. *MSS v Belgium and Greece* (2011) 53 E.H.R.R. 2 ECtHR (GC).

systems in the European Union are compliant with human rights standards.¹¹⁶ In addition it is clear that the transfer system in practice does expose an asylum seeker to the risk of violations by other Member States.¹¹⁷ The Commission's proposal could address the risk created by the Dublin II transfer system because it allows for the Commission to temporarily suspend these where the receiving State is unable to comply with minimum standards. However, there would appear to be little political will among the Member States to adopt this proposal, which underlines that even if the Commission were to adopt a systematic approach to ensuring protection for rights where its proposals increase the risk of violations, these efforts may still be frustrated by the Member States.¹¹⁸

The fact that the Commission has drawn up these kinds of proposals that introduce some fundamental rights harmonisation in order to safeguard against the dangers of co-operation based on mutual recognition is promising. Once the European Union accedes to the ECHR, it may find itself legally obliged to "protect" rather than merely "respect" rights (according to the way that the Convention is interpreted by the case law of the European Court of Human Rights), and this in itself might address the political opposition of the Member States to the incorporation of accepted fundamental rights standards.¹¹⁹

Conclusion

The Strategy Paper is valuable because it shows that the Commission is beginning to take fundamental rights seriously. However, it will require substantial rethinking before it is capable of having a significant impact, owing to several shortcomings. First, the Commission cannot reap the benefits of consultation of bodies with expertise in fundamental rights where particular DGs fail to realise that there is a rights issue at stake. Secondly, even where consultation is imposed as a legal obligation, this cannot guarantee that problems with CFR compliance will actually be acted upon. Thirdly, the fact that the Impact Assessment Guidelines have not been adapted to reflect the binding nature of the CFR and the Operational Guidance, hinders the potential benefit of the fundamental rights check-list. Fourthly, the impact assessment is conducted far too superficially in practice to deliver any real safeguards for fundamental rights. Fifthly, there are no promising signs that the inadequacy of the impact assessment will be corrected by consultation of the Legal Service, which may itself either not address fundamental rights adequately, or which may be ignored when it does. Clearly, there is some way to go before Commissioner Reding's ambition, that all EU law is "fundamental rights proof", can be realised.

Ultimately there is nothing in the Strategy Paper that would actually serve to achieve the Commission's end goal of creating mutual trust, since the lack of mutual trust has arisen not because of a failure in EU law to respect the rights in the CFR, but rather because the European Union itself does not accept that it has an obligation to go further than this and protect those rights. In the long term, the resistance of the Member States to harmonisation of fundamental rights standards as an integral element of regimes built

¹¹⁶The CJEU has now affirmed that this presumption is rebuttable. Where "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision". Accordingly the relevant Member States must either identify an alternative Member State with responsibility to examine the claim or exercise its right to examine the claim itself. See *NS v Secretary of State for the Home Department* (C-411/10) [2012] 2 C.M.L.R. 9 at [86], [106]–[108].

¹¹⁷As shown by *NS* [2012] 2 C.M.L.R. 9.

¹¹⁸See, for example, background note produced by the Polish Presidency of the European Union, for the Informal meeting of the Justice and Home Affairs Ministers, Sopot, July 18–19, 2011, "Moving ahead in the negotiations on the Common European Asylum System", <http://www.statewatch.org/news/2011/jul/eu-council-informal-jha-comm-asyl.pdf> [Accessed July 6, 2012].

¹¹⁹See further, A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

on mutual recognition may be overtaken by EU accession to the ECHR, since the ECtHR should hold the European Union accountable for failure to “protect” the rights in the Convention. This will require the European Union to close gaps in fundamental rights protection that it creates through regimes based on mutual recognition, such as in the areas of criminal justice or asylum, thereby diffusing the source of mistrust between Member States.