



Amnesty International's Comments on the European Commission's Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573, 19 October 2010

On 19 October 2010 the Commission announced a new strategy for the effective implementation of the Charter of Fundamental Rights of the European Union, a year after the Lisbon Treaty made it a legally binding EU legal instrument with the same value as the founding Treaties of the EU (see Article 6 TEU). The strategy is set out in a Communication to provide guidance on EU human right policy.

Positive points – innovations

- The new element which the Strategy introduces is the firm commitment of the Commission to invoke the Charter *at all the stages of the legislative procedure* (Point 1.1). The Strategy clearly states that a compatibility check of the legislation with the Charter will take place from the conception of a proposal to the impact analysis and the final control of the text's legality.
- Moreover, the Strategy refers for the first time in an explicit way to the use of the *proportionality check* to justify any limitations of fundamental rights. This endorses and builds on the approach of the Court of Justice of the EU.(Point 1.1)
- The systematic inclusion of targeted recitals (“considerants ciblés”) and statements of reason, indicating exactly which fundamental rights are affected by a legislative proposal and how, is welcome (Point 1.1.3.1). However, this should not serve as a way to avoid including necessary safeguards in the body of the legislation when relevant.
- Amnesty International (AI) welcomes the Commission's strong commitment, under Point 1.2.1, to defend its position before the co-legislators (Council and EP) when during the negotiations human rights protection is not upheld. AI expects from the Commission to indeed use all the tools available (ask for adoption of the legislative act with unanimity or even withdraw its proposal) in such cases.
- We also welcome the commitment to continue the human rights monitoring of legislation beyond the negotiation process by way of *ex post* evaluation of the Union instruments (end Point 1.1).
- Other new points included in the Strategy consist in better access to information regarding legal remedies in all member states (MS) through the Commission's new e-Justice portal which will be launched in 2011, as well as the publication of an Annual Report on the application of the Charter. The report will monitor the progress of the Charter's application in the areas where the EU has power to act.(Points 2.2 and 3).

Unclear points

- **Commission's priorities regarding human rights impact assessments throughout the legislative process:**

It is mentioned that the Commission will supervise in particular that the Charter is taken into account when evaluating the “sensitive” legislative instruments of the EU (Point 1.1 end). It is specified that the legislative instruments which are considered “sensitive” are all the legislative

proposals, the delegated acts (Art. 290 TFEU) and the executive acts (Art. 291 TFEU) which raise compatibility questions with the Charter or aim to promote one of the Charter's rights. Given the indivisibility of human rights and the fact that the latter are in great extent present in various forms and intensities in *all* legislative instruments, the issue of what constitutes a "sensitive" legislative instrument should be further examined.

- **How will the impact analysis affect EU proposals in the external field?**

It is unclear if the impact assessment will be carried out in relation to the EU action in the external field. While there is a reference in the Strategy to both internal and external EU action (introductory chapter), there are no further explanations on how this compatibility check of external action shall be made or whether the same mechanism used for internal action will be used also for the external field.

Problematic points

- **Human rights compliance in the implementation and enforcement of EU law**

- While the Commission elaborates in some detail on the impact assessment, the Strategy is laconic on the monitoring of Member States' transposition and implementation of EU law.
- Under Point 1.3.1, the Strategy describes its preventive approach to Charter violations (by MS when applying EU law) as consisting in "reminding" MS to respect the Charter when transposing Directives. While it mentions possible assistance and guidance, it gives no detail or concrete information on how this would work, apart from mentioning some ad hoc examples of expert-groups in some specific cases.
- Under Point 1.3.2, the Commission considers the infringement procedure in cases of non conformity with EU law by Member States. The clear commitment to use the infringement procedure to ensure compliance with the Charter (by MS when applying EU law) is welcome. The Strategy also mentions possible accelerated procedure (*traitement prioritaire*) in cases which "raise a question of principle or that have particularly important negative implications for the citizens". These criteria will need to be refined for reasons of legal clarity and certainty. One also notes that the French Roma case has already put into question this commitment. Despite the fact that the situation fell into the scope defined by the Strategy, the Commission chose not to engage - or even threaten to engage - into infringement proceedings against France for non compliance with the Charter in applying the Free Movement Directive.

- **The Strategy is based on a strict interpretation of Article 51, par. 1 of the Charter:**

The Commission's Strategy reiterates that, according to Article 51 par. 1 of the Charter, the latter is upheld by MS only when they apply EU law and cannot be invoked in situations which present no link to EU law. Under Point 1.3.2 of the Strategy, it is further clearly stated that the Commission has the power to intervene as "guardian of the Treaties" only when the situation in question presents a link to EU law. This approach leaves the existing gaps in human rights protection at the EU level untouched. Within this "grey zone" serious human rights violations are detected, such as lack of EU accountability for torture. This illustrates the limits of an approach to human rights based exclusively on lines of competence between the EU and MS.

- **Reluctance to refer to Article 7 TEU:**

The strategy appears like a setback compared to the policy presented by former Vice- President Jacques Barrot in response to the EP report on the situation of fundamental rights in the EU

(December 2008). His intervention, entitled *“Une politique visant à assurer l’effectivité des droits fondamentaux sur le terrain”*, identified the need for the EU to intervene in some cases that go “beyond community competence”. It called for a future communication to define a transparent and coherent way to approach these situations, including the use of diplomatic means and of article 7 TEU.

In contrast with this policy, the Strategy characterizes Article 7 TEU as a political mechanism of last resort, which falls outside the remit of the Charter and of the EU Commission’s monitoring (Point 1.3.3). However by recalling the situations in which Article 7 TEU can be activated (“clear risk” or “existence of a serious and persistent breach by MS of the values referred to in Article 2 TEU [including respect for human rights] ”), the Commission sends out a mixed message about its role as guardian of the Treaties [including the Charter]. It should also be reminded that the Commission in its Communication on Article 7 TEU of 15 October 2003 stated that “if a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs”. If the EU is not ready to address these issues, it is hard to be considered as an “example” in the human rights area, which is precisely the objective of the Strategy. This causes concern on the real value of the Charter and on whether the EU is moving forward in strengthening its human rights protection mechanisms.

- **No consideration of the wider international human rights framework**

The Strategy fails to look at the role of the EU in the wider regional and international human rights legal and institutional framework. The Strategy only contains a formal reference to EU accession to the European Convention on Human Rights (ECHR) (introductory chapter). It does not explore the impact that accession will have for accountability at EU level nor considers the wider issue of coordination between the EU and the Council of Europe.

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