

# ***A New Fundamental Rights Strategy for the EU: Recommendations from Liberties***

## **Key points**

When adopting its first strategy on the implementation of the EU Charter of Fundamental Rights in 2010, the European Commission committed to using its powers to make sure that the EU would lead by example in promoting, respecting and protecting fundamental rights enshrined in the Charter. Although the Commission did take a number of steps in that direction, developments over the last ten years show that, overall, commitments have often failed to be matched by concrete actions.

As the Commission starts working on a renewed strategy on the Charter, Liberties illustrates in this policy brief the main shortfalls affecting the current framework and puts forward ideas on concrete tools and practices the European Commission could set in place in order to address these gaps. Here are Liberties' key points:

1. The EU has not used its competences to their full potential to promote fundamental rights enshrined in the Charter. With a view to a more effective implementation of this positive obligation, the Commission could:
  - Integrate independent fundamental rights expertise to enhance the quality and the accountability of its mainstreaming efforts
  - Ensure fundamental rights expertise across all Commission services
  - Develop an annual strategic Charter mainstreaming workplan
  - Turn the Charter annual reports into a tool to enhance accountability, transparency and participation
  - Use communication channels more effectively
  
2. The institutions do not have sufficient procedures in place to minimise the risk that they themselves violate the Charter. To better prevent EU actions that fail to comply with fundamental rights from emerging, the Commission could:
  - Improve the quality of fundamental rights impact assessments
  - Make use of existing powers to avoid the backsliding of fundamental rights during negotiations of proposals

- Ensure systematic monitoring and evaluation of EU legislation and policy from a fundamental rights perspective
  - Carry out a closer and more transparent monitoring of agencies' and bodies' activities
3. The Commission does not take swift and effective action to protect fundamental rights whenever Member States, acting within the scope of EU law, violate them. The Commission could:
- Provide guidance on fundamental rights driven transposition and application of EU legislation to help prevent breaches
  - Develop a strategic approach to Charter based enforcement action
  - Provide enhanced support to actors that promote the protection of fundamental rights and values at national level

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## Introduction

10 years have passed since the EU Charter of Fundamental Rights (“the Charter”) became an instrument of EU primary law and an **initial strategy** on its effective application was adopted by the European Commission. The idea that the EU would set an example to ensure that the fundamental rights provided for in the Charter become reality was at the core of the 2010 strategy, which was meant to be implemented in a continuous, determined and transparent manner and with the involvement of all interested parties.

Indeed, many steps were taken to achieve that objective. The EU made use of its competences and came up with new standards binding on the Member States in areas relevant to fundamental rights, such as data protection, human trafficking, fair criminal trials, child friendly justice, rights of victims of crime and the protection of whistle-blowers. It also acceded for the first time to a human rights treaty – the **UN Convention on the Rights of Persons with Disabilities (UNCPRD)**, and signed up to another one – the **Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence**. The European Commission strived to strengthen the assessment of the impact of its legislative proposals on fundamental rights, with **general** and **targeted** operational guidance. The Council and the European Parliament also committed to ensuring consistent checks on negotiated legislation throughout the legislative process. The Commission initiated some ground-breaking legal action against Member States violating their fundamental rights obligations, including on the right to independent courts, the right to asylum and freedom of association of civil society organizations. It also put forward some important policy initiatives relevant to fundamental rights, including on tackling disinformation, countering hate speech online, protecting children in migration, promoting equality, and fighting discrimination. The **EU Agency for Fundamental Rights (FRA)** gained increasing resources and prominence. The 2014-2019 Commission held **annual Colloquiums on Fundamental Rights** to raise awareness and create opportunities for discussion on what it considered key fundamental rights issues.

Yet, efforts have been piecemeal. And three broad shortfalls remain. First, the EU has not used its competences to their full potential to promote fundamental rights enshrined in the Charter.

Independent watchdogs like media actors and civil society organizations across the EU continue to be subjected to abusive lawsuits. These are brought forward by public or private entities affected by these watchdogs’ legitimate monitoring and advocacy work. This practice, known as strategic lawsuits against public participation (SLAPP) aim to discredit, intimidate, and silence watchdogs by burdening them with the cost of pointless legal proceedings (using, for example, rules on defamation or non-contractual liability) until they abandon their criticism or opposition. The impact of these abusive lawsuits on the independent media landscape and on the civil society space in EU Member States is

severe. Media and civil society organizations have been raising concerns on this issue for many years – as also shown by the information provided in the [report](#) Liberties sent in response to the European Commission’s 2020 consultation on the rule of law. They made repeated calls on the EU to come up with harmonised anti-SLAPP rules, which have also been [echoed](#) by the European Parliament.

There are many reasons for the European Commission to act on this: besides representing an attack on the essential components of any well-functioning democracy built on the rule of law, SLAPPs also hinder EU efforts to empower and protect whistle-blowers. In addition, SLAPPs overburden national justice systems, which could impact cross-border judicial cooperation. But the Commission has so far been reluctant to use its right of initiative to address the issue.

Second, the institutions do not have sufficient procedures in place to minimise the risk that they themselves violate the Charter. This has been established by inquiries of the EU Ombudswoman (for example as regards alleged misconduct by Frontex and misuse of ESIFs in breach of the Charter) and rulings of the EU Court of Justice (such as the many cases decided by the Court on incompatibility with the Charter of EU decisions on terrorist listings of individuals).

Following an inquiry [prompted](#) by civil society organizations including the Hungarian Civil Liberties Union, Liberties’ Hungarian member, a recent [report](#) by the UN Committee on the Rights of Persons with Disabilities drew attention to how ESIF funds disbursed to Hungary by the European Commission contributed to grave and systematic violations of disability rights. The Committee recommended that the EU ensure that these funds stop being allocated in a way which facilitates or maintains the segregation of persons with disabilities in the country, which is contrary to the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is party.

The issue was also [taken up](#) by the EU Ombudswoman who expressed her concern over the European Commission’s interpretation of a key provision of the CRPD, which she considered at odds with that of the UN committee. She urged the Commission to take concrete steps to ensure that EU funds are not used to maintain existing institutions. While the Ombudswoman accepted that the Commission did not have a legal basis to recover EU funds from the social care institution, she prompted the Commission to address this legal gap and urged a thorough monitoring of the ‘deinstitutionalisation’ process in Hungary. The Commission’s [response](#) to the Ombudsman acknowledges that EU funds should not be used to maintain institutions and should instead be used to support deinstitutionalisation. However, it remains obscure on the concrete steps which will be put forward to effectively prevent similar situations in the future.

Third, the European Commission is not taking swift and effective action to protect fundamental rights whenever Member States, acting within the scope of EU law, violate them.

Severe restrictions on access to education for Roma children, including instructions and practices of segregation in special schools or special classes, have been reported for years in several EU Member States. These restrictions have been noted by Liberties' members in the [Czech Republic](#), [Hungary](#) and [Italy](#).

Non-discrimination, access to education and the rights of the child are fundamental rights enshrined in the Charter. These fundamental rights are given expression in EU secondary law (the so-called Race Equality Directive 2000/43/EC), which oblige Member States to eliminate all forms of discrimination based on race or ethnic origin including in the field of education. A consistent [body of case-law](#) of the European Court of Human Rights (ECtHR) exists, which makes it clear that the placement of Roma children in special classes or special schools is contrary to the prohibition of discrimination and to the right to education. The EU Member States concerned have largely failed to implement their obligations in this area as they derive from EU law and the ECtHR rulings.

While the European Commission at some point initiated infringements to prompt some of these EU Member States to address the issue, it has not to date brought any of the countries to the EU Court of Justice, despite the vast evidence of persistent and flagrant violations of the Charter and the Race Equality Directive.

The 2010 strategy on the Charter and the policy measures subsequently adopted to implement it set out all relevant key commitments: from strengthening a fundamental rights culture within the EU institutional framework, through ensuring that EU law and policy making promotes and respects the Charter, ensuring that Member States comply with fundamental rights when they implement EU law, to guidance and enforcement. What is lacking, are concrete tools and practices to make sure these commitments are properly implemented.

In response to the Commission's targeted consultation aimed at informing work on a new strategy on the Charter, which has been [announced](#) for 2020, this brief puts forward some ideas on what these concrete tools and practices could look like, with a focus on the European Commission – in the light of its key role as promoter of EU legislation and policy, and as guardian of the Treaties.

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## ***Promoting fundamental rights***

All EU institutions must aim to promote the EU's foundational values (Article 3(1) and 13 TEU), including respect for fundamental rights (Article 2 TEU), as enshrined in the Charter (Article 6(1) TEU). EU institutions must respect and promote the application of the rights and principles set out in the Charter in accordance with their respective powers (Article 51(1) of the Charter). This is known as mainstreaming: EU institutions, including the European Commission, must exercise their competences in a way that contributes to the preservation and the development of fundamental rights (see also the preamble to the Charter).

The new strategy on the Charter could provide a strategic framework to better support all Commission services in the implementation of this positive obligation. The following suggestions could help the Commission achieve this.

### ***Integrating independent fundamental rights expertise***

Ensuring the mainstreaming of fundamental rights in all Commission's activities across all policy areas is a huge task. It requires specific fundamental rights expertise and needs to be supported by objective and independent expert advice. Using independent fundamental rights expertise would bring clear added value to the Commission in terms of ensuring quality and the accountability of its mainstreaming efforts.

To this end, the Commission should consider establishing a permanent network of independent fundamental rights experts. Such a network could be composed of a variety of members including seconded fundamental rights experts from Member States, the FRA, international human rights bodies (Council of Europe, UN) and civil society. It could be tasked with advising the Commission on how to promote fundamental rights in key areas of EU competence, on the assessment of the impact of EU law and policy measures on fundamental rights, on Member States' compliance with the Charter in areas covered by EU law and on the relevance of national and European jurisprudence to the interpretation and application of the Charter. It could also support the Commission in the drafting of its annual reports on the Charter of Fundamental Rights.

The network's contribution to the work of the Commission could be operationalised through the establishment of sectoral fundamental rights consultative forums providing advice to the Commission's services in the assigned policy areas. Minimum rules could be set to ensure sustainable, regular and meaningful involvement and consultation of the fundamental rights forums in the services' work, as well as a regular reporting by services of how the advice and opinions of the forums are taken into account. In turn, services could be asked to assess the performance of the fundamental rights



forums and the value they add, to allow for a regular evaluation of the network's contribution to the Commission's mainstreaming efforts.

The European Commission created a **Network of Independent Experts on Fundamental Rights** in response to a recommendation in the European Parliament's **report** on the state of fundamental rights in the European Union in 2000. The Network was formally established in September 2002 and produced four Annual Reports covering the period 2002-2005, as well a number of thematic comments and opinions on a variety of issues. The Network's **final report** was critical of the fact that its potential had not been fully realised by the Commission, including because its services did not ensure a genuine follow up of the Network's opinions and recommendations. The Network was disbanded in 2006 to make way for the establishment of the FRA, whose mandate was more restricted in scope and primarily devoted to collecting and analysing data.

### ***Ensuring fundamental rights expertise throughout the Commission***

Every Commission service has the responsibility to ensure the mainstreaming of fundamental rights in the assigned policy area. The Fundamental Rights Policy unit of the Directorate-General (DG) for Justice is meant to serve as a pool of fundamental rights experts providing advice on the interpretation and application of the Charter to other Commission services. However, this unit does not have the capacity to respond to all possible requests. In addition, its involvement depends on the other services' sensitivity to and awareness of fundamental rights issues. A number of practical arrangements could be put in place to ensure that all Commission services enjoy a basic minimum level of fundamental rights expertise:

- Create a post for at least one fundamental rights focal point in each Commission service, who could report directly to the deputy Directors-General and be tasked to:
  - screen the service's legislative and policy initiatives from a fundamental rights perspective,
  - regularly map and monitor fundamental rights issues in the assigned policy area,
  - act as point of contact for DG Justice's Fundamental Rights Policy unit,
  - be responsible for the service's fundamental rights consultative forum, if established as suggested above;

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- Ensure regular fundamental rights training tailored to each Commission service. Training programmes could be designed and delivered by DG Justice's Fundamental Rights Policy unit with the support of the DG's fundamental rights focal points and the logistical support of the Secretariat General. FRA staff as well as external experts, including from relevant international human rights bodies (Council of Europe, UN) and civil society could be contracted to support delivery of trainings – or this could be one of the tasks of the network of independent fundamental rights experts, if established as suggested above. Participation in each training session should be ensured for at least one official from each directorate of every service;
  - Increase capacity of the mainstreaming team in DG Justice's Fundamental Rights Policy unit, including through long-term secondments of national experts, long-term staff exchanges between the Commission and the Council of Europe, and ensuring turnover between the unit and the services' fundamental rights focal points;
  - Increase capacity of the fundamental rights team in the Legal Service, including through long-term secondments of national experts and long-term staff exchanges between Commission Legal Service lawyers and legal experts from the Council of Europe.

### ***An annual strategic Charter mainstreaming workplan***

Every Commission service is supposed to anticipate, assess and plan how existing and upcoming legislation and policies under their portfolios can better contribute to the respect and promotion of fundamental rights. But in reality services do not engage systematically in such an exercise, and aspects relating to fundamental rights are often spotted at the end of the process – sometimes just before the adoption of the legislative or policy initiative – when it is too late to properly consider and address them. A regular upstream planning exercise could be used to ensure the systematic and regular mainstreaming of fundamental rights across all policy areas, as well as an efficient and transparent exchange of information and cooperation between services on fundamental rights issues.

The Commission could draw up an annual staff working document mapping, for each policy area, key existing instruments, or planned initiatives potentially impacting – positively and negatively – fundamental rights. Such a document could also identify actions needed to address fundamental rights issues arising in the area concerned, including law and policy making, guidance, enforcement, data collection, evaluations and establishment of funding priorities.

This mapping and action plan could be based on inputs resulting from an internal audit and assessment conducted by each service for the assigned policy area. This audit could be similar to those already carried out by services as their contribution to the Commission's Annual Reports on the Charter

(with the difference that this would be ex-ante rather than ex-post). Services could take into account jurisprudence, complaints and petitions but also reports by and targeted consultations with external stakeholders with fundamental rights expertise. Such stakeholders could include relevant regional and international human rights bodies, the FRA, civil society organisations and national human rights institutions. The fundamental rights consultative forums, if established as suggested above, could provide meaningful support to this exercise.

Several challenges are affecting media pluralism and freedom across the EU, as shown in the [report](#) Liberties sent in response to the European Commission's 2020 consultation on the rule of law. These include excessive media concentration, non-transparent allocation of funding to media outlets, government interference in media ownership, legal harassment, hate speech, abusive criminalisation of speech (for example through defamation laws, counterterrorism laws and hate speech laws), corruption of media authorities, restrictions on access to and disclosure of public interest information, inadequate protection of journalists and other media actors.

A free and independent media is essential to any healthy democracy and to preserve a strong rule of law environment. The media is also an important part of the EU internal market. It is therefore in the European Commission's interest to use all the tools it has available to promote and protect a free and independent media landscape in all EU Member States. The Commission has many tools at its disposal, including: the strategic enforcement of EU rules that can help protect media pluralism in areas such as competition, internal market freedoms, whistle-blower protection, public procurement; the adoption of guidance to prevent the misuse of EU rules that can affect free speech, including rules on incitement to terrorism or hate speech, and the provision of funding for balanced and high-quality private media across the EU.

However, efforts by the Commission have been very scattered and mostly ineffective. A strategic audit of initiatives that the Commission's various services could take in order to address the identified challenges affecting media pluralism and freedom across the EU would contribute to ensuring more comprehensive, coordinated and effective EU action in this area, as well as its visibility.

As part of its mainstreaming support role, DG Justice's Fundamental Rights Policy unit could coordinate and supervise this exercise and ensure regular monitoring of its implementation at technical level, through the existing Inter-Service Group on the Charter.

To ensure meaningful and open discussions on fundamental rights issues at political level, the Secretariat-General could include the implementation of the workplan as regular item of Heads of Cabinet's

“Hebdo” meetings and of the College’s weekly meetings, based on reporting by the Vice-President on Values and Transparency, as part of her fundamental rights portfolio.

***Turning the Charter annual reports into a tool to ensure accountability, promote transparency and enable participation***

In their current format, the Annual Reports on the Charter adopted by the Commission are a source of information which can be useful to academics, legal professionals and some civil society organizations and stakeholders active at the EU level. The reports offer interesting statistics on fundamental rights issues raised by the general public through letters and petitions and by the European Parliament. They also offer a useful overview of most relevant cases concerning the Charter decided by the EU Court of Justice and of EU legislative and policy initiatives related to fundamental rights. However, the reports have a number of limitations. Most importantly, the information they provide on action by the various EU institutions is often anecdotal and scattered. Burning fundamental rights issues falling squarely within the scope of EU competence are often not mentioned - and when they are, there is no indication of the course of action the EU intends to take.

Saving the lives of people attempting to cross the Mediterranean to reach European shores is one of the direct human rights challenges affecting the EU today. According to the [UN Refugee Agency \(UNHCR\)](#), in 2018 six lives were lost at sea every day. An estimated 2,275 died or went missing crossing the Mediterranean in 2018, despite a major drop in the number of arrivals reaching European shores.

External border control and migration management, including legal migration avenues and irregular entry in the EU territory, are at the core of EU home affairs competences. DG Home Affairs’ website [states](#) that “the loss of lives in the Mediterranean Sea demonstrates the need for an assertive and urgent response from the EU”.

Yet, the 2018 Annual Report on the Charter published by the European Commission winds up the issue with a one line sentence put under Article 2 of the Charter on the right to life, stating that “preventing loss of lives is also one of the main challenges facing the EU in managing irregular migration.”

The new Charter strategy is a good opportunity to rethink the Annual Reports on the Charter and turn them into a more helpful tool. The reports could, for example, give an account of what action

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the Commission takes each year to implement the above-suggested annual strategic Charter mainstreaming workplan. This could include an account of what the Commission has done to implement the Charter across the different policy areas, explain persisting gaps and concerns and future action.

Such an exercise would make the Commission more accountable and would allow stakeholders, such as civil society organisations, to become more aware of the Commission's activities. This in turn would allow organisations to better target their efforts and contributions to prompt and support progress in the areas they work on.

The reports could also be used as a basis for a regular and structured dialogue with key organisations with fundamental rights expertise. A dialogue with organisations like the FRA, civil society organisations, the Council of Europe, UN human rights mechanisms, and national human rights institutions, would allow the Commission to seek their opinion and assistance on existing issues and possible actions to be taken. Following up on the report in this way could be the responsibility of each of the lead services according to their areas of competence, with the support of DG Justice's Fundamental Rights Policy unit if needed. Use could be made of existing forums such as expert groups. Any horizontal fundamental rights issues that touch on multiple policy areas across DGs could be the object of debates open to broader participation. For example, the FRA could be tasked with incorporating debates on these issues during its biannual Fundamental Rights Forum.

The reports could also be used to trigger a regular interinstitutional discussion on those fundamental rights issues that are most urgent to address. This discussion could involve the EU Ombudsman and relevant EU agencies, leading to joint conclusions that outline concrete commitments on the part of the different EU institutions and bodies in a spirit of sincere cooperation.

### ***Using communication channels effectively***

The Commission has stated that raising awareness about the Charter is one of its priorities for the new Charter strategy. This was also reiterated by the Commission following the results of the recent [Eurobarometer on Charter awareness](#).

Campaigns, if framed well, can help to make the Charter better known among policymakers, professionals and the general public. The new Charter strategy could also be an opportunity for all Commission services to reflect on how to better communicate about the Charter. In particular, for the Commission to explain to the public how it uses its powers to promote fundamental rights, and to convey the importance of this for the everyday lives of people in the EU. This would also increase transparency and visibility of EU action on fundamental rights and increase public support for the EU's role in promoting their respect and protection, increasing its legitimacy and its standing against

populist attacks. To better connect fundamental rights with peoples' lived experiences and underlying values, the Commission could adopt a communication method known as values-based framing (of which this Liberties' [guide](#) provides an illustration).

## ***Ensuring respect for fundamental rights in law and policy making***

All EU institutions and bodies have a duty to respect the rights and observe the principles enshrined in the Charter (Article 51(1) of the Charter). This means they must refrain from adopting measures that unduly interfere with fundamental rights.

The EU Court of Justice is tasked with ensuring judicial review of the validity of EU measures including their compliance with fundamental rights. However, the Court can only review binding acts. And restrictive rules on legal standing make it difficult for a case to actually reach the Court. In addition, the Court can take a considerable time to deliver its decision, by which time the contested measure will normally already have started producing effects.

Harmonised EU rules on data retention were adopted in 2006 (Data Retention Directive 2006/24/EC), as part of EU efforts to facilitate the investigation and prosecution of serious crimes such as, in particular, organized crime and terrorism, in the aftermath of the terrorist attacks in Madrid in 2004 and in London in 2005. Five years later, in 2011, the Commission presented an [evaluation report](#) on these EU rules, which Member States were obliged to transpose into national law by 2007. The Commission concluded that the Directive, adopted at a time of heightened alert of imminent terrorist attacks, required a careful scrutiny against the tests of necessity and proportionality, including as regards respect of fundamental rights standards on privacy and protection of personal data. But three passed before the Directive ceased to apply, after being declared invalid by the EU Court of Justice in its 2014 Digital Rights Ireland [judgment](#), which concluded that its provisions were contrary to the fundamental rights to respect for private life and to the protection of personal data enshrined in the Charter.

The suggestions on strengthening the way the Commission promotes the mainstreaming of fundamental rights internally to its own work, set out above, would represent a significant step forward. But

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the Commission could take other measures internally to prevent EU action that fails to comply with fundamental rights from emerging to begin with.

### ***Improving the quality of fundamental rights impact assessments***

The Commission has long realised that it is essential to check the compatibility of EU measures with fundamental rights before they are adopted. To this effect, it has committed itself to following a set of guidelines to assess the impact on fundamental rights of new legislative proposals. As of 2015, a specific tool and checklist for fundamental rights impact assessments have been included in the better regulation package. However, there are a number of issues that hinder the effectiveness of this process, and thus hamper better regulation efforts.

First, there is a lack of awareness and expertise of officials conducting the impact assessments on fundamental rights standards. Ideally, as suggested above, fundamental rights focal points would be appointed in all services. Failing that, a member of DG Justice's Fundamental Rights Policy unit could join the teams in charge of impact assessments from the outset. As well as providing their own expertise, focal points could also ensure meaningful and timely upstream consultations, as appropriate. For example, with DG Justice's Fundamental Rights Policy unit (which may also convene special meetings of the Inter-Service Group on the Charter), the fundamental rights team in the Legal Service and relevant external stakeholders. Such stakeholders could include regional and international human rights bodies, the FRA and civil society organisations. Such consultations could be facilitated by the establishment of fundamental rights consultative forums, as suggested above.

Second, there is no independent expert check on the results of the fundamental rights impact assessment. Assessing the impact of a proposal on fundamental rights is unlike assessing its social, economic or environmental impact. The Charter is a binding legal instrument, which sets standards that must be interpreted in the light of existing jurisprudence and other relevant human rights instruments. The discretion the Commission has in the choice of the policy option and the identification of necessary mitigating measures is constrained by these binding legal standards. In addition, the choice of the policy option should also duly take into account the potential positive impact on fundamental rights, in accordance with the EU's obligation to promote and not only respect, fundamental rights.

While DG Justice's Fundamental Rights Policy unit and the fundamental rights team in the Legal Service are tasked with checking draft impact assessments from a fundamental rights perspective, these services are not, as such, independent from the Commission's political level. It is thus reasonable to expect additional screening by an external consultative committee of independent fundamental rights experts. This could, for example, take the form of a permanent fundamental rights consultative forum, as suggested above. This body could be tasked with:



- delivering its opinion on the policy options from a fundamental rights point of view, including considerations on both a potential negative and positive impact;
- making recommendations on safeguards and mitigating measures;
- providing guidance on the monitoring framework needed to assess the impact on fundamental rights of the initiative once adopted.

The responsible service should: take due account of the forum's opinion when drafting the impact assessment and explain its reasons for any deviation from this opinion. This should be performed before the impact assessment is submitted to the Commission's Impact Assessment Board (IAB), and before the actual proposal is drafted. In addition, the IAB should always include one member with a demonstrated record of fundamental rights expertise.

The new EU copyright rules (Copyright Directive 2019/790) are a good example of how a proper fundamental rights impact assessment, involving independent and specialised fundamental rights experts from the outset, could have ensured better compliance with the Charter, thus avoiding future issues. While modernisation of EU copyright legislation was inevitable and needed, after the Commission's proposal was adopted, many stakeholders, including academics, the European Copyright Society, human rights organisations including Liberties, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, individual users, and various prominent associations representing the interests of the creative sector expressed concern about the impact that certain proposed measures, in particular the Directive's Article 17, could have on freedom of expression.

Strong criticism, including by copyright experts, continued after the Directive's formal adoption, with the Commission having to eventually commit to working together with stakeholders on guidelines aimed at ensuring a fundamental rights compliant implementation of Article 17. Liberties has closely engaged in this process and recently shared with the Commission its recommendations on the basic safeguards and principles for the implementation of the Copyright Directive to ensure free speech and privacy for users. Liberties' position on this EU legislation, which broadly reflect that of a range of other stakeholders, show that the adopted rules leave unresolved many fundamental rights issues which will need to be addressed through additional safeguards and further harmonisation. This is not ideal from a better regulation perspective.



Third, impact assessments are not routinely carried out for policy initiatives. However, policy initiatives setting out guidance or recommendations to Member States and announcing legislative proposals can have a significant impact on fundamental rights. For example, the 2017 Commission Communication on the EU Action Plan on Returns. Similar proposals should be subject to an impact assessment, all the more because they are not subsequently screened by other institutions, nor they are amenable to judicial review. The Secretariat General could play a role in evaluating whether draft policy measures need to undergo a fundamental rights impact assessment.

The [2017 EU Action Plan on Returns](#) paved the way for a number of initiatives intended to tighten the EU's returns policy. The Action Plan announced the adoption of a new [Return Handbook](#), which was presented a few months later. The Handbook put forward restrictive interpretations of existing EU provisions amounting to significant interferences with fundamental rights protected by the Charter, including the right to liberty, the rights of the child, the right to respect for family life, the prohibition of *refoulement*, the rights to privacy and data protection, the right to an effective remedy. Neither the Action Plan nor the Handbook were submitted to a fundamental rights impact assessment. Yet these policy initiatives paved the way for the presentation by the Commission of a [proposal](#) to recast the Return Directive, put forward the following year, which integrated into law most of those restrictive interpretations. That proposal, still under discussion before the European Parliament and the Council, was not supported by a fundamental rights impact assessment either.

### **Avoiding backsliding on fundamental rights during negotiations of proposals**

The Council and the European Parliament committed to improving checks on compliance with fundamental rights of legislative proposals during negotiations, and especially to systematically verify that amendments are in line with the Charter. The Council even adopted [guidelines](#) to that effect. However, these commitments have not yet been put into practice. Until an effective screening system is put in place by the co-legislators, there are a number of measures that the Commission can take to avoid backsliding on fundamental rights during negotiations within and between the Council and European Parliament.

The Commission could, for example, recommend that the co-legislators ask the FRA to provide an opinion on single amendments or on the text of the proposal as provisionally agreed (Article 4 of the FRA's founding Regulation). It could also make use of this possibility itself, since the proposal as a whole remains a Commission proposal. This would ensure a more efficient use of the FRA's mandate and resources and avoid an embarrassing situation in which the FRA is asked an opinion on the Commission's proposal itself by one of the co-legislators. The European Parliament has done this on

various occasions, including, recently, the proposed recast Return Directive and the Regulation on preventing dissemination of terrorist content online.

The Commission could also make strategic use of its power to modify or withdraw legislative proposals where amendments proposed during negotiations raise fundamental rights concerns, in line with recent guidance provided by the EU Court of Justice. Indeed, amendments raising fundamental rights concerns are always to be deemed contrary to Commission's proposals, which should all respect and promote fundamental rights enshrined in the Charter.

The scope of the Commission's power to withdraw proposals during the legislative procedure has been usefully clarified in a landmark judgment of the EU Court of Justice. The Court ruled that the right of the Commission to withdraw legislative proposals is inseparable from its right of initiative. The Commission's role within the ordinary legislative procedure is not limited to the role of honest broker: "where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d'être*, the Commission is entitled to withdraw it". Withdrawal is thus not only reserved to cases where the proposal is no longer considered to have a value added, or where proposals made by a previous Commission are withdrawn in virtue of the principle of 'political discontinuity', as it was the Commission's practice in the past. If duly reasoned, withdrawal by the Commission will be legitimate where during negotiations its proposal is amended in a way which hinders promotion and respect for fundamental rights, which should be part of the objectives of every Commission's proposal.

### ***Ensuring systematic monitoring and evaluation of EU legislation and policy from a fundamental rights perspective***

Monitoring and evaluation of the impact of EU initiatives is an integral part of the better regulation principles. As with economic, social and environmental impacts, assessing the impact on fundamental rights should be an integral part of all monitoring and evaluation exercises.

To that effect, standard clauses making reference to fundamental rights could be included in all legislative proposals that provide for a monitoring and evaluation exercise (similar to the reporting provision included in the 2017 EU Directive on combating terrorism).

The [EU Directive on combating terrorism](#) (Directive 2017/541) contains a reporting clause which obliges the Commission to give account of the impact of the Directive on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism. The clause also provides that, in order to carry out such an evaluation, the Commission shall take into account any relevant information regarding the exercise of powers under counter-terrorism laws related to the transposition and implementation of the Directive. The clause was not present in the Commission's proposal but was included during negotiations, building on an amendment proposed by the European Parliament. If properly implemented, this reporting obligation will provide an opportunity for fundamental rights experts, including from international bodies, the FRA and civil society, to provide information and evidence on the Directive's impact on fundamental rights, which should feature in the Commission's assessment and influence decisions on follow-up actions. This is relevant because concerns have been voiced over the impact of the implementation of the Directive's provisions, for example, on free speech. Liberties member Rights International Spain also mentioned this in the [report](#) Liberties sent in response to the European Commission's 2020 consultation on the rule of law.

Such a fundamental rights-based approach to the Commission's evaluation should be considered good practice and integrated by the Commission as part of standard reporting clauses in all legislative proposals – or at least, proposals whose impact assessment points to a fundamental rights impact (either in terms of promotion or of possible limitations, both of which should be addressed in evaluations). The Commission, however, does not seem keen to take this opportunity. It is striking, for example, that the [proposed Regulation on preventing dissemination of terrorist content online](#), presented by the Commission following the adoption of the Directive on combating terrorism, does not contain such a clause. Yet, the introduction of such a reporting obligation would have been *a fortiori* necessary given that this Regulation's objective is to actually enforce the Directive's provisions, by devolving to hosting service providers the duty to detect and remove content corresponding to the definitions contained in the Directive, raising further concerns among fundamental rights experts, including [Liberties](#).

As regards evaluation, fundamental rights expertise could be ensured as a rule within the interservice steering groups. For example, the suggested fundamental rights focal point of the leading service, or a member of DG Justice's Fundamental Rights Policy unit.

Meaningful cooperation could be ensured, beyond public consultations, with stakeholders with fundamental rights expertise, such as the FRA, civil society organizations, and national human rights bodies. These bodies could help the Commission gather evidence in the monitoring phase, to feed into the evaluation and to provide advice on appropriate follow up. Regional and international monitoring

bodies could also be consulted as part of monitoring and evaluation exercises, with a view to assess the impact of EU law on Member States' fundamental rights obligations under international agreements. The establishment of sectorial fundamental rights consultative forums, as suggested, could facilitate such cooperation.

### ***Closer and more transparent monitoring of agencies' and bodies' activities***

Several EU agencies and bodies are tasked with a number of operational duties which may give rise to fundamental rights concerns. The Commission has a general responsibility to supervise agencies and bodies. It could systematically include a section on fundamental rights screening and addressing relevant issues in its regular opinions on agencies' work programmes.

The revised regulation on the European Border and Coast Guard (Frontex) provided the Agency with a stronger and broader mandate to operationally support Member States' activities on border control, return and cooperation with third countries. Progress was made within the Agency's institutional framework to ensure that additional powers came with a strengthened protection of fundamental rights. However, important challenges remain surrounding the effective use of these fundamental rights safeguarding mechanisms, as **reported** by the Agency's Fundamental Rights Consultative Forum.

The European Commission could make use of its oversight power and routinely include a comprehensive fundamental rights section in its opinions on the Agency's work programmes. This could set out targeted recommendations based on a thorough assessment of the work of the Agency's Fundamental Rights Officer, the effectiveness of the complaint mechanism and the follow-up given by the Agency to the findings and recommendations of its Fundamental Rights Consultative Forum.

## **Protecting fundamental rights**

The duty to protect fundamental rights is a positive obligation requiring the EU to take all measures in its power to prevent the Member States from, and to sanction them for, violating the Charter when acting within the scope of EU law. The Commission, as guardian of the Treaties, already has all the tools it needs in order to effectively carry out this duty, they just need to be used to their full potential.

### **Providing guidance to Member States on fundamental rights driven transposition and application of EU legislation**

When fundamental rights concerns arise about the transposition or application of EU legislation, the Commission has various tools at its disposal to guide Member States and help avoid violations. These tools could be used more systematically, in particular:

- transposition workshops, which could include one or more sessions that discuss fundamental rights issues and involve external fundamental rights experts. For example from the FRA, international and regional human right bodies, civil society organizations and national human rights institutions;

Ahead of the deadline for the transposition of the Directive on combating terrorism, the Commission organised transposition workshops aimed at providing guidance to Member States on the correct implementation of the Directive's provisions. The Commission dedicated some of these workshops to the Directive's fundamental rights implications, inviting experts from **civil society organizations** and the **FRA**. This experience could be assessed and built on to make sure this becomes a consistent practice across different policy areas.

- the adoption of targeted guidance in the form of recommendations, framing the relevant EU law provisions in the light of fundamental rights standards. The implementation of recommendations could be monitored and reported on through existing or ad hoc expert groups;

The **European Arrest Warrant** (EAW) has been the object of fierce criticism by fundamental rights experts due to the lack of explicit fundamental rights and proportionality safeguards. These issues have been also exposed by several judgments of the EU Court of Justice. While discussions on the **possible revision** of the EAW have been ongoing for years, in 2017 the European Commission published a **Handbook** which is meant to provide guidance to Member States, among other things on

the execution of warrants in cases in which the fundamental rights of the wanted person are at risk. However, there is no information of a thorough monitoring being conducted by the Commission on the implementation of this guidance by Member States.

- tailored training of public authorities and operational support, to be offered at national level through the deployment of fundamental rights experts from the Commission itself, the FRA and/or external independent experts contracted for that purpose;
- closer and more structured cooperation with relevant regional and international human rights bodies on fundamental rights issues that have a connection with both EU and international law.

The Commission's [refit evaluation](#) of EU rules on the facilitation of irregular migration pointed to a general agreement on the need for non-legislative measures to avoid the criminalisation of those providing genuine humanitarian assistance to migrants. The issue was recently brought to the forefront in particular in connection to [legal actions initiated against activists and organizations involved in search and rescue \(SAR\) at sea](#), where the application of relevant EU and national rules must be reconciled not only with human rights law but also with international obligations for rescue at sea. The non-criminalisation of humanitarian assistance was also addressed in a [UNHCR guidance document](#). The European Commission could build on the expertise of UNHCR and other relevant UN bodies to respond to the many calls, including by the [European Parliament](#) and the [FRA](#), to prevent the EU legal framework from being used to criminalise humanitarian assistance provided in particular in the context of SAR operations at sea.

### ***A strategic approach to Charter based enforcement action***

The Commission could pursue more effective and strategic enforcement action to ensure that Member States implement fundamental rights standards in areas of EU competence. This would require:

- timely and vigorous enforcement of EU rules implementing fundamental rights standards;
- a proactive and systematic use of infringement powers to tackle violations of fundamental rights falling within the scope of EU law. This could be facilitated by:

- the creation of a ‘fundamental rights index’ of EU law to identify where any EU law that appears superficially unrelated to fundamental rights could actually be used to enforce these standards. The audit of EU legislation based on this ‘fundamental rights index’ should be accompanied by a strategic enforcement strategy. The establishment of an annual strategic Charter mainstreaming workplan, as suggested above, would provide a good basis for this;
- a systematic requirement on Member States to provide, as part of their duty to inform the Commission about measures adopted to implement EU law, an explanation as to how fundamental rights were taken into account. The strengthening of fundamental rights impact assessments, as suggested above, would help framing such a requirement in relation to the piece of EU legislation concerned;
- regular reporting, which could be commissioned to the FRA, illustrating the fundamental rights impact of measures adopted by the Member States in the field of application of EU law.
- better considering and exploring the possible relevance of horizontal EU provisions such as the duty of sincere cooperation (Article 4(3) TEU), where Member States act in a way which is liable to jeopardize the achievements of the objectives pursued by the EU – including respect of fundamental rights and the other founding values enshrined in Article 2 TEU. The Commission could rely on the duty of sincere cooperation to take a broader approach to enforcement action – i.e., to go against national measures that, although they may not violate specific obligations under EU law, have the effect of depriving EU law of its effectiveness. Such a general principle could also be used as a legal basis to cut off EU funds to Member States that engage in repeated violations of EU fundamental rights and values and refuse to engage constructively.

A strategic approach to Charter based enforcement actions could be instrumental to tackling worrying trends affecting civil society space across the EU, which continue to be documented, including in the [report](#) Liberties sent in response to the European Commission’s 2020 consultation on the rule of law. For example, restrictions deriving from regulatory frameworks including registration requirements and access to funding could be tackled through better enforcement of EU internal market and competition rules, as exemplified by the [case](#) the Commission took against Hungary in relation to its anti-NGO law. The strategic enforcement of EU rules implementing fundamental rights standards, for example in the area of data protection, access to information and whistle-blower protection, would also help address a number of challenges facing civil society organizations. Closer monitoring of the impact on civic society of the implementation of certain EU rules – such as rules on terrorist financing – would help prevent and, where needed, sanction Member States’ abusive practices.



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The Commission could further reinforce the impact of enforcement actions by cooperating more closely with organizations monitoring respect for fundamental rights at national level. Cooperation with regional and international monitoring bodies, civil society organisations and national human rights institutions, would make it easier for the Commission to:

- gather evidence (including through country visits);
- seek advice on applicable fundamental rights standards;
- ensure a continuous monitoring of action taken by Member States to remedy the violation.

The Commission could also increase the transparency and accountability of how it applies its margin of discretion on enforcement actions. This would help to implement the principle of good administration (Article 41 of the Charter). The Commission could do this by:

- publishing clear and comprehensive data on Charter based enforcement actions, including information on their outcomes – this could be included in annual Charter Reports and/or the Annual Reports on monitoring the application of EU law;
- broadening its interpretation of the rules on access to documents in the context of Charter based infringement proceedings, in particular when the request comes from an organisation monitoring the respect of fundamental rights at national level;
- making use of easily trackable communication channels – such as webpages, press statements and press releases - to provide transparent and comprehensive information to the public on Charter based enforcement action. This information should include the grounds on which infringements are taken forward but also the reasons why a decision is made not to pursue a case.

Illegal pushbacks of asylum seekers continue to be documented at the EU's external borders, information on which has been included in **regular reporting** by the FRA. The Commission has recently **reiterated** that “pushbacks are not acceptable” and that “access to asylum procedures and respect for the principle of non-refoulement, in line with the EU Charter, must always be guaranteed”. The Commission has on various occasions stated that it is closely monitoring the situation and is in contact with Member States regarding allegations of non-compliance with EU law at the external borders. Yet, there is no publicly available information on the concrete steps taken by the Commission to address these violations and on the reasons why no infringement proceedings have been initiated to date to stop and sanction these persisting violations.



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### ***Promoting the protection of fundamental rights and values at national level***

Under the future EU Justice, Rights and Values Fund and related programmes to be adopted as part of the next Multiannual Financial Framework, the Commission could better target funding to support actors that can play a role at national level to help protect fundamental rights and enforce the Charter. The Commission could especially give priority to supporting organisations that are in a position to:

- litigate on fundamental rights in particular in areas covered by EU law;
- provide training to other relevant organizations, legal professionals and public authorities on how to use EU law to protect fundamental rights;
- communicate effectively with the public with a view to increasing grassroots support for fundamental rights, rule of law and democracy in the Member States.

Effective financial support would obviously presuppose an adequate budget envelope to be dedicated to these priorities.

The Commission has on many occasions acknowledged the role played by civil society organizations in promoting, strengthening and defending justice, fundamental rights and EU values. However, this still needs to be reflected in concrete investments to build a healthy civil society sector within the EU that is strong enough to hold governments accountable to their legal obligations and help create grassroots support among the public for these values. As already **suggested** by Liberties, this would require the Commission to back the European Parliament's proposal to substantively increase the budget envelope of the **proposed EU Justice, Rights and Values Fund** for the 2020-2027 period, and to establish rules on disbursement which can make sure that funding can effectively benefit organisations working at national and local level, beyond short term project grants.

## **Conclusion**

In the past 10 years since the Charter became a legally binding instrument, the importance of making fundamental rights the guiding light and compass of EU action had achieved greater prominence. The European Commission strived to reflect this in its institutional framework, processes and actions. A number of good practices were put in place, but its efforts remain scattered and its commitments are overall not effectively put into practice.

The forthcoming adoption of a new strategy on the effective application of the Charter is a great opportunity for the Commission to learn from the past and secure for itself new concrete tools and practices which will help ensure the EU can really lead by example when it comes to the promotion, respect and protection of fundamental rights.

Only if it succeeds in creating a real fundamental rights culture driving EU action, will the new Charter strategy be able to achieve tangible progress on fundamental rights on the ground. And only if people can begin to appreciate the contribution of the EU in putting in practice their rights, will they acknowledge the EU's legitimacy and be more inclined to support its efforts and defend it against nationalist and populist attacks.

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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