



Council of the  
European Union

Brussels, 16 December 2014  
(OR. en)

16957/14

FREMP 228  
JAI 1018  
COHOM 182  
JURINFO 58  
JUSTCIV 327

**NOTE**

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From:	Presidency
To:	Delegations
No. prev. doc.:	13390/14 FREMP 158 JAI 691 COHOM 132 JURINFO 33 JUSTCIV 226
Subject:	Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies

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On the basis of document 13390/14, the Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) examined the above mentioned Guidelines during its meeting on 3 October 2014. Subsequently, the Member States submitted written comments (14573/14).

The final text of the draft Guidelines is set out in the Annex. Changes made to document 13390/14 are highlighted as follows: deletions by ~~strike throughs~~ and additions are underlined.

## GUIDELINES

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

#### PURPOSE

The aim of these ~~revised~~ guidelines<sup>1</sup>, which should be considered as non-binding advice, is to help the Council preparatory bodies to take the methodological steps necessary to identify and deal with fundamental rights issues arising in connection with the proposals under discussion at the given Council preparatory bodies. They provide context and guidance on the process of checking compliance with fundamental rights and, in addition, they also provide a "fundamental rights checklist" (see Annex V), which is a tool to facilitate the assessment of the compatibility with fundamental rights.

These guidelines also aim at raising the general awareness regarding fundamental rights matters in the Council preparatory bodies. To this end:

- the Council Secretariat will include these ~~revised~~ guidelines in the general training which is provided to incoming Presidencies of the Council of the EU
- the Chairpersons of the Council preparatory bodies are invited to circulate these Guidelines on a six-monthly basis to experts in the relevant preparatory bodies.

These Guidelines may be subject to revision whenever it is necessary and are without prejudice to the responsibility of Coreper and the Council.

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<sup>1</sup> In light of the recent case-law the Court of Justice of the EU, the guidelines, originally endorsed by Coreper in May 2011 (doc. 10140/11), have been updated.

## **BACKGROUND**

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

In the course of the legislative and non-legislative procedure the three main players, the Commission, the Council and the European Parliament as well as other relevant institutions or, as the case may be, a group of Member States which has submitted an initiative (Article 76 TFEU) are all responsible for ensuring that their original proposals and amendments are in line with rights, freedoms and principles in the Charter.

Any limitation on the exercise of the rights and freedoms laid down in the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. How the Court approaches this assessment is set out in more detail in Annex IV<sup>2</sup>. The Council and the Council preparatory bodies shall carefully consider any possible interference with fundamental rights and freedoms and shall be able to demonstrate that they have explored alternative ways to attain the pursued objective which would be less restrictive of the right or freedom in question<sup>3</sup>.

~~The recent case law of the European Court of Justice<sup>4</sup> confirms that the Court will not satisfy itself with anything less than a strict assessment of the proportionality and necessity of measures that constitute serious restrictions to fundamental rights, however legitimate the objectives pursued by the EU legislature. It also indicates that such measures do not stand a serious chance of passing the legality test unless they are accompanied by adequate safeguards in order to ensure that any serious restriction of fundamental rights is circumscribed to what is strictly necessary and is decided in the framework of guarantees forming part of Union legislation instead of being left to the legislation of Member States.~~

~~Moreover, the legislator should be able to demonstrate that it has explored alternative ways to attain the objectives pursued which would be less restrictive of the rights of the individuals concerned.<sup>5</sup>~~

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<sup>2</sup> The recent case law of the European Court of Justice (See Judgment of 8 April 2014, Cases C-293/12 and C-594/12, *Digital Rights Ireland* and the information note by the Council Legal Service in doc. 9009/14) confirms that the Court will not satisfy itself with anything less than a strict assessment of the proportionality of measures that constitute serious restrictions to fundamental rights, however legitimate the objectives pursued by the EU legislature. It also indicates that such measures do not stand a serious chance of passing the legality test unless they are accompanied by adequate safeguards in order to ensure that any serious restriction of fundamental rights is circumscribed to what is strictly necessary and is decided in the framework of guarantees forming part of Union legislation instead of being left to the legislation of Member States.

<sup>3</sup> See Judgment of 9 November 2010, Cases C-92/09 and C-93/09, *Schecke*.

<sup>4</sup> See Judgment of 8 April 2014, Cases C 293/12 and C 594/12, *Digital Rights Ireland* (information note by the Council Legal Service in doc. 9009/14).

<sup>5</sup> See point 33 of CLS Opinion, doc. 6196/13.

For taking measures to fulfill this obligation from its side, the Council considered in its conclusions<sup>6</sup> that the Council's preparatory bodies should dispose of short but pragmatic and methodological guidelines, prepared by the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (hereinafter 'the FREMP Working Party') in close cooperation with the Council Legal Service, on how to identify and solve problems raised during the negotiation in particular by their own proposals for amendments to the original proposal or by an initiative of a group of Member States.

## **GUIDELINES** (summary [Index](#))

I. When to use these guidelines

II. Identify the general link with fundamental rights.

1. Check whether the proposal interferes with fundamental rights; think from a fundamental rights perspective.
2. Check the recitals of the original proposal and the attached impact assessment.

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

1. Check the exact content of relevant fundamental rights with the help of the following methods:
  - a) Check the Charter, the explanations relating to the Charter, the case-law of the Court of Justice of the European Union and other relevant sources for understanding the Charter ([see Annex II](#)).
  - b) Check also the thematic fundamental rights reports, publications, handbooks made by the institutions, bodies, offices and agencies of the European Union and by the Council of Europe and make use of the expertise of the European Union Agency for Fundamental Rights.
  - c) Consult the Council Legal Service.

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<sup>6</sup> The Justice and Home Affairs Council at its meeting of 24-25 February 2011 adopted Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union.

2. Check the proposal to assess whether it limits fundamental rights and whether this limitation is in compliance with the Charter (see Annex IV).
  - a) May fundamental rights at issue be subject to limitations? Is this limitation provided for by law?
  - b) Does it respect the essence of the rights and freedoms?
  - c) Does it genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others?
  - d) Subject to the principle of proportionality, are the limitations necessary? ~~is it limited to what is strictly necessary?~~

#### IV. In case of doubt

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

#### **Annexes:**

Annex I. The Rights, Freedoms and Principles guaranteed by the Charter of Fundamental Rights

Annex II. Charter and Tools for its Interpretation

Annex III. Useful Links

Annex IV. Examination of the Limitations on the Exercise of the Fundamental Rights

Annex V. Fundamental Rights 'Check-list'

## **GUIDELINES (in detail)**

### **I. When to use these Guidelines**

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

### **II. Identify the general link with fundamental rights**

- 1. Check whether the proposal interferes with fundamental rights; think from a fundamental rights perspective.*

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

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

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

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

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

a) Check the Charter, the explanations relating to the Charter, the case-law of the Court of Justice of the European Union as well as the case-law of European Court of Human Rights, for example through its ECHR factsheets, and other relevant sources for understanding the Charter (see Annex II and III).

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

The legislator ~~should~~ shall be able to demonstrate that it has explored alternative ways to attain the objectives pursued which would be less restrictive of the rights or freedoms in question ~~of the individuals concerned.~~

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

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



Reports and publications of the European Union Agency for Fundamental Rights, European Data Protection Supervisor or the Commission's annual reports on the application of the Charter, for example, as well as human rights handbooks of the Council of Europe can be of help to understand the content of the relevant fundamental rights (see Annex III). The European Union Agency for Fundamental Rights may, in line with its mandate, formulate and publish conclusions and opinions on specific thematic topics, at the request of the Council. The Council preparatory bodies should bear in mind this possibility and the invitation set out in the Stockholm Programme and reiterated in the strategic guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice<sup>7</sup> to the EU institutions to make full use of the expertise of the Agency.

*c) Consult the Council Legal Service.*

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

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

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

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

*Is this limitation provided for by law?*

*b) Does it respect the essence of the rights and freedoms?*

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<sup>7</sup> EUCO 79/14, 27 June 2014, point 11.

c) *Does it genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others?*

d) *Subject to the principle of proportionality, are the limitations necessary? ~~is it limited to what is strictly necessary?~~*

#### **IV. In case of doubt**

1. *Consult the Council Legal Service.*

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

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

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

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

Delegations within the Council working parties are invited to inform their colleagues within the FREMP Working Party or other preparatory body specialising in a specific fundamental right (e.g. Working Group on Data Protection and Information Exchange) about their fundamental rights-related discussions and possible doubts. The exchange of available information and expertise could help to find the best solution which is in accordance with fundamental rights ~~most fundamental rights friendly solution~~, avoid duplication of discussions and increase the coherence in the application of the Charter.

The acronym FREMP should be inserted in notes, opinions and contributions from the Council Legal service where they contain legal assessments and advice on matters relevant for fundamental rights. This will also ensure that the FREMP Working Party is kept systematically informed.

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

(For the full content of the Charter see

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

### **Title I - Dignity**

Article 1 - Human dignity

Article 2 - Right to life

Article 3 - Right to the integrity of the person

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

Article 5 - Prohibition of slavery and forced labour

### **Title II - Freedoms**

Article 6 - Right to liberty and security

Article 7 - Respect for private and family life

Article 8 - Protection of personal data

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

Article 10 - Freedom of thought, conscience and religion

Article 11 - Freedom of expression and information

Article 12 - Freedom of assembly and of association

Article 13 - Freedom of the arts and sciences

Article 14 - Right to education

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

Article 16 - Freedom to conduct a business

Article 17 - Right to property

Article 18 - Right to asylum

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

### **Title III - Equality**

Article 20 - Equality before the law

Article 21 - Non-discrimination

Article 22 - Cultural, religious and linguistic diversity

Article 23 - Equality between women and men

Article 24 - The rights of the child

Article 25 - The rights of the elderly

Article 26 - Integration of persons with disabilities

### **Title IV - Solidarity**

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

Article 28 - Right of collective bargaining and action

Article 29 - Right of access to placement services

Article 30 - Protection in the event of unjustified dismissal

Article 31 - Fair and just working conditions

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

Article 33 - Family and professional life

Article 34 - Social security and social assistance

Article 35 - Health care

Article 36 - Access to services of general economic interest

Article 37 - Environmental protection

Article 38 - Consumer Protection

## **Title V - Citizens' Rights**

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

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

Article 41 - Right to good administration

Article 42 - Right of access to documents

Article 43 - European Ombudsman

Article 44 - Right to petition

Article 45 - Freedom of movement and of residence

Article 46 - Diplomatic and consular protection

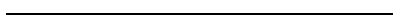
## **Title VI - Justice**

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

Article 48 - Presumption of innocence and right of defence

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

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



## **CHARTER AND THE TOOLS FOR ITS INTERPRETATION**

### **1. Charter of Fundamental Rights of the European Union**

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

### **2. Explanations relating to the Charter**

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

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

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

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

[http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/)

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

### **4. Other sources of interpretation:**

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

As Article 52(3) of the Charter states, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of corresponding rights shall be the same as those laid down by the Convention. This provision shall not prevent Union law providing more extensive protection.

[http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf)

## **Case law of the European Court of Human Rights**

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

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

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

Thematic list of Factsheets on the European Court of Human Right's case-law prepared by the Court's Press Service

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

## **Constitutional traditions common to the Member States**

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

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

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

1. Universal Declaration of Human Rights – see explanation on Article 1 of the Charter
2. Council of Europe Convention on Human Rights and Biomedicine (ETS 164 and additional protocol ETS 168) – see explanation on Articles 3 and 21 of the Charter
3. Statute of the International Criminal Court – see explanation on Article 3 of the Charter
4. Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108) – see explanation on Article 8 of the Charter
5. Community Charter of the Fundamental Social Rights of Workers – see explanation on Articles 12, 14, 15, 23, 25, 26, 27, 28, 29, 31, 32, 34 of the Charter



6. European Social Charter (ETS 035) – see explanation on Articles 14, 15, 26, 28, 29, 31, 32, 33, 34, 35 of the Charter
7. Revised European Social Charter (ETS 163) – see explanation on Articles 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 of the Charter
8. Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees – see Articles 18 of the Charter and the explanation thereto
9. International Covenant on Civil and Political Rights – see explanation on Articles 19 and 49 of the Charter
10. UN Convention on the Rights of the Child – see explanation on Article 24 of the Charter

Other international conventions could also be relevant, in particular:

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

### **Relevant national laws**

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

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

[http://www.fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/publications\\_per\\_year\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/publications/publications_per_year/publications_per_year_en.htm)

**Charterpedia**

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

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

**European Institute for Gender Equality**

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

**Publications of the European Data Protection Supervisor**

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

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

[http://www.coe.int/t/dghl/publications/hrhandbooks/index\\_handbooks\\_en.asp](http://www.coe.int/t/dghl/publications/hrhandbooks/index_handbooks_en.asp)

**EXAMINATION OF LIMITATIONS ON THE EXERCISE OF FUNDAMENTAL RIGHTS**

According to the Explanations to the Charter<sup>8</sup>, with due regard to which the Charter should be interpreted (Article 6(1), third subparagraph, TEU), the purpose of Article 52 of the Charter is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights.

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

The Court of Justice of the European Union ("the Court") has established a line of reasoning which applies when examining whether certain provisions of EU law interfere with fundamental rights and if so, whether that interference is or not justified in accordance with the conditions set out in Article 52(1) of the Charter<sup>9</sup>.

On the basis of this line of reasoning, the first element to verify is whether a provision interfere with the rights and freedoms recognised by the Charter. Where such an interference exists, the provision concerned has to, in order to comply with Article 52(1) of the Charter as interpreted by the Court:

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<sup>8</sup> Published in OJ C 303, 14.12.2007, p. 17-35.

<sup>9</sup> See for instance Judgment of 9 November 2010, Cases C-92/09 and C-93/09, *Schecke*, (information note by the Council Legal Service in doc. 6196/13) or Judgment of 8 April 2014, Cases C-293/12 and C-594/12, *Digital Rights Ireland* (information note by the Council Legal Service in doc. 9009/14).

1. be provided for by law;

This means that the limitation must be provided for in one of the Union binding legal acts referred to in Article 288 TFEU adopted in accordance with the relevant Treaty provisions. In addition, following the case law of the Court regarding the essential/non-essential elements of a legislative act, the direct involvement of the Union legislature may be required, depending on the seriousness of an the interference with the fundamental rights,<sup>10</sup> ~~may require the direct involvement of the Union legislature, i.e. that~~ In such a case, the rules on the limitation of the fundamental rights at stake should be set out in the legislative act itself (or basic act) and not left for adoption through a delegated or an implementing act.

2. respect the essence of the rights and freedoms;

The limitation should not be such as to empty the fundamental right in question from any content.

3. genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others;

The reference to general interests recognised by the Union covers the general objectives mentioned in Article 3 of the TEU, which are further developed by other provisions of the Treaties, which may be found in general at the beginning of the relevant Titles or Chapters (for instance Article 21 TEU with regards to Union's External Action or Article 67 TFEU with regards to the Area of Freedom, Security and Justice) as well as the provisions having general application laid down in Title II of Part I of the TFEU.

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<sup>10</sup> See point 77 of the Judgment of 5 September 2012, Case C-355/10, *European Parliament vs Council*, ~~point 77~~ (see also, information note by the Council Legal Service in doc. 14236/12).

4. subject to the principle of proportionality, ~~be necessary~~

According to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives.<sup>11</sup>

The first element of the proportionality test is to assess the appropriateness of the provision for attaining the objective pursued. Whatever the extent of the EU legislature's discretion, the proportionality principle requires the measure to have a direct and logical link with the purpose of achieving the objective pursued.<sup>12</sup>

The second element of the test, i.e. the necessity test, requires that derogations and limitations in relation to the protection of a fundamental right may apply only in so far as is ~~strictly~~ necessary.<sup>13</sup> As for the question of whether an interference is limited to what is ~~strictly~~ necessary, several elements may be examined : the magnitude of the interference (the number of people concerned), the scope and the duration of the interference, the objective criterion on which the interference may be based, the existence of limitations or exceptions to the interference, etc.

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<sup>11</sup> ~~In point 47 of the above mentioned *Digital Rights Ireland* Judgment, the Court underlined that "where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference". The assessment of the principle of proportionality under Article 52(1) of the Charter is therefore more strict than the one under the general principle of proportionality set out in Article 5(4) TEU.~~

<sup>12</sup> See for instance Judgment of 12 November 1996, Case C-84/94, *UK vs Council*: "So far as concerns the first condition, it is sufficient that [...] the measures on the organization of working time which form the subject-matter of the directive, save for that contained in the second sentence of Article 5, contribute directly to the improvement of health and safety protection for workers within the meaning of Article 118a, and cannot therefore be regarded as unsuited to the purpose of achieving the objective pursued" (point 59, ~~emphasis added~~) (See also information note by the Council Legal Service in doc. 5600/97).

<sup>13</sup> While Article 52(1) TFEU only refers to the word 'necessary', it must be noted that the Court considers that certain derogations and limitations in relation to fundamental rights must apply only in so far as they are 'strictly necessary' (for instance with regards to the protection of personal data as mentioned in Judgement of 16 December 2008, *Tietosujavaluutettu*, Case C-73/07, para. 56, or Judgement of 7 November 2013, *IPI*, case C-473/12, para. 39).

~~It is crucial to make a strict assessment of~~ When assessing the proportionality and necessity of a measure, s that constitute serious restrictions to fundamental rights, however legitimate the objectives pursued by the EU legislature. This entails that the Union legislature must perform a proper balance between the various interests<sup>14</sup> involved, i.e. the general interests recognised by the Union against the interference with the rights or freedoms recognised by the Charter. On this basis, the legislature should examine whether there is an effective but less intrusive measure available.

When considering whether a proposal is a proportionate interference with fundamental rights, the Council should consider the extent of its discretion. That depends on several factors such as the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference.<sup>15</sup> The narrower the EU legislature's discretion, the stricter the Court will review its exercise.

The Court has held that certain derogations and limitations in relation to a fundamental right must apply in so far as is strictly necessary.<sup>16</sup> Consequently,~~Where there is a serious interference to a fundamental right,~~ the Court found that the Union legislature must lay down clear and precise rules governing the scope and application of the provision in question and imposing minimum safeguards and cannot limit itself to leave those elements to the legislation of the Member States.

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<sup>14</sup> See points 52-53 of the above-mentioned *Tietosujavaltuutettu* Judgment on the balancing of rights: "52. In that regard, it is not in dispute that, as is apparent from Article 1 of the directive, its objective is that the Member States should, while permitting the free flow of personal data, protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy, with respect to the processing of personal data. 53. That objective cannot, however, be pursued without having regard to the fact that those fundamental rights must, to some degree, be reconciled with the fundamental right to freedom of expression."

<sup>15</sup> See point 47 of the above-mentioned *Digital Rights Ireland* Judgment.

<sup>16</sup> See point 52 and 54 of the above-mentioned *Digital Rights Ireland* Judgment.

This examination of acceptable limitations on fundamental rights will be based on the case law of the Court as well as, ~~in many cases~~ where relevant, on the case law of the European Court of Human Rights. Indeed, Article 52(3) of the Charter provides that: *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."* As a result, the Union legislature, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, within the meaning of the Art. 52(3) of the Charter.<sup>17</sup>

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<sup>17</sup> Those ECHR standards are made applicable for the rights covered by the Charter, *"without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union"*, as explained in the Explanations relating to the Charter. See the list, in pages 33 and 34 of the Explanations, of the rights which may, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the Art. 52(3) of the Charter.

FUNDAMENTAL RIGHTS ‘CHECK-LIST’

A tool to facilitate the assessment of the compatibility with fundamental rights

1. What fundamental rights are affected?

(for more details see section II and the list in Annex I)

2. Are the rights in question absolute rights (which may not be subject to limitations, examples being, the ban on torture and the prohibition of slavery or servitude)?

(for more details see section III)

3. Would any limitation of/negative impact on fundamental rights be formulated in law, in a clear and predictable (foreseeable) manner?

(for more details see Annex IV points 1 and 4)

4. Would any such limitation/negative impact:

– preserve the essence of the fundamental rights concerned?

(for more details see Annex IV point 2)

– be necessary to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others?

(for more details see Annex IV point 3)

– be proportionate to the desired aim? That is, would they be appropriate for attaining the objective pursued without going beyond what is necessary to achieve it? Why is no equally effective but less intrusive measure available?

(for more details see Annex IV point 4)

– If applicable: Consider and identify which safeguards might be necessary to ensure that the negative impact would not amount to a violation of the fundamental right in question (that is, restrict it without justification).