

Using EU Funds while Upholding and Advancing Fundamental Rights: A Guide to Applying the New Obligatory Charter Conditionality

Practical Policy Guidance Note



35 YEARS
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FOR HUMAN RIGHTS**
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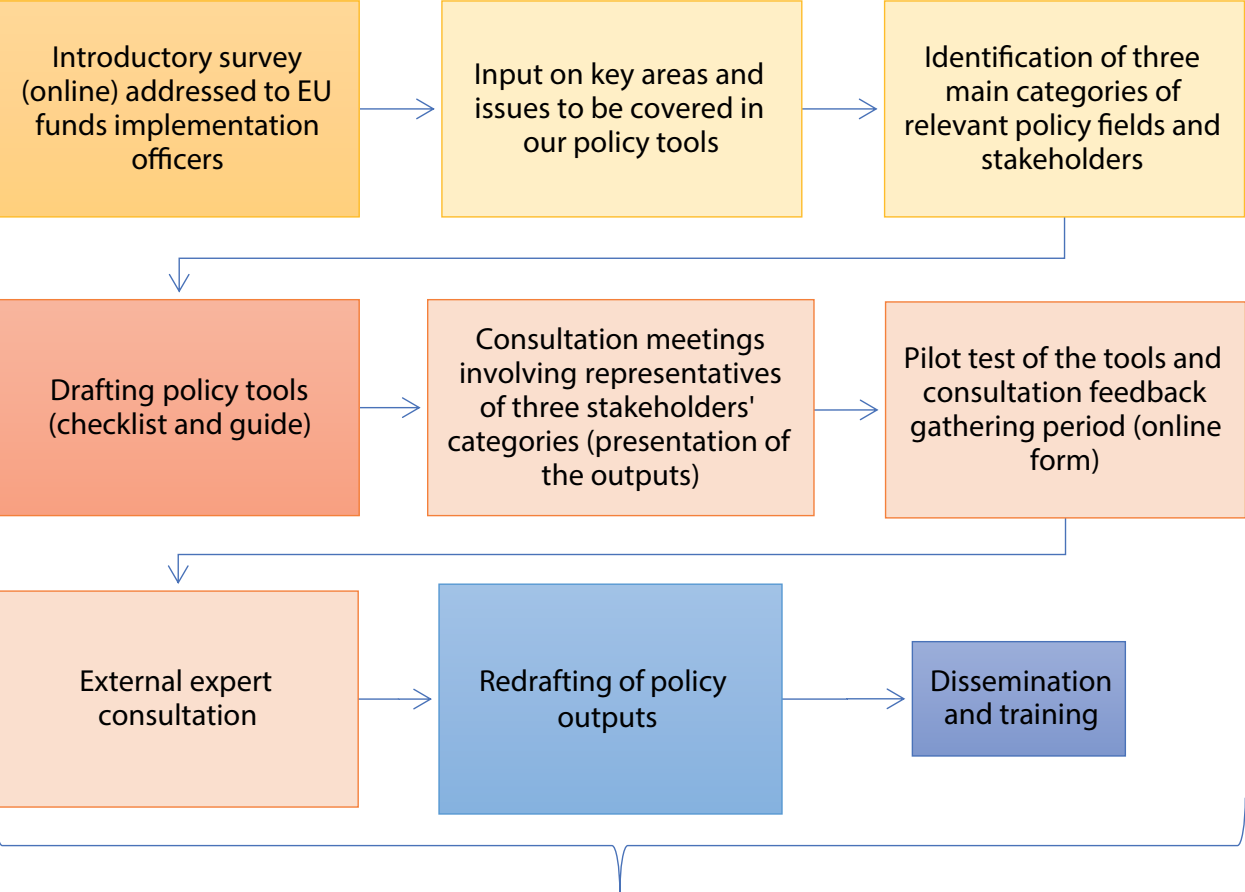
Introductory remarks

This guidance note “Using EU Funds while Upholding and Advancing Fundamental Rights: A Guide to Applying the New Obligatory Charter Conditionality” outlines the process of development of the tools prepared by the Office of the Polish Commissioner for Human Rights within the project aiming at strengthening Charter of Fundamental Rights of the EU compliance mechanisms within the implementation of EU funds at national level, namely the national guide entitled “Application of the Charter of Fundamental Rights when spending EU funds – practical tips for national authorities” and a checklist of compliance with the Charter, which is an essential part of the guide. The present guidance note presents some key design and executive observations and recommendations that may serve as an example for other policymakers interested at aiming at enhancing international and EU law implementation at the national level.

The purpose of this guidance note is to present avenues of developing specific tools that were codesigned in consultation with the representatives of legislative bodies and central executive institutions and local administration ones. These avenues describe how managing authorities, public authorities, NHRIs, CSOs and other relevant actors can act jointly to ensure that the Charter enabling condition is met and Charter compliance mechanism is enhanced in a sustainable way, which is not reduced to administrative ticking box exercise but is unfolding a fully human rights-oriented national funding cycle. The guidance follows the new Charter conditionality rules introduced by the Common Provisions Regulation requiring a joined-up effort at the national level by many actors in order to make sure that the use of EU funds does not contribute to possible violations of fundamental rights and, on the contrary, that fundamental rights are promoted across all activities which are co-funded by EU funds so to avoid State responsibility and possible sanctions under EU law.

This guidance note describes the design process of the national guide and the checklist in three main stages, corresponding to our chronological work on these tools as they were designed at the beginning of the project. Therefore, the guidance note presents, firstly, the online survey on the application of the Charter by EU funds implementation bodies, which was conducted in order to access information allowing for a better understanding of the level of awareness of the Charter and of its application nationally. The section presents the questions asked in the survey (with a full list of the questions in Appendix 1) as well as analyses its selected results. Secondly, the guidance

note explains the drafting process, methodology and envisaged use of the national guide “Application of the Charter of Fundamental Rights when spending EU funds – practical tips for national authorities” and the checklist of compliance with the Charter in the implementation of EU funds. Thirdly, the guidance note outlines the consultation process of the guide and the checklist as well as the following capacity building activities regarding its use by the EU funds addressed to legislative and administration bodies implementing these funds.



Policy tools development chart

Online survey on the application of the Charter by EU funds implementation bodies

The online survey was designed and conducted by the Office of the Commissioner for Human Rights in order to map certain key points and issues within the EU funds implementation process from the point of view of necessary fundamental rights compliance checks. The survey was conducted anonymously among representatives of various authorities related to the implementation of EU funds. The questionnaire was divided into three parts (for the entire list of questions see Appendix 1):

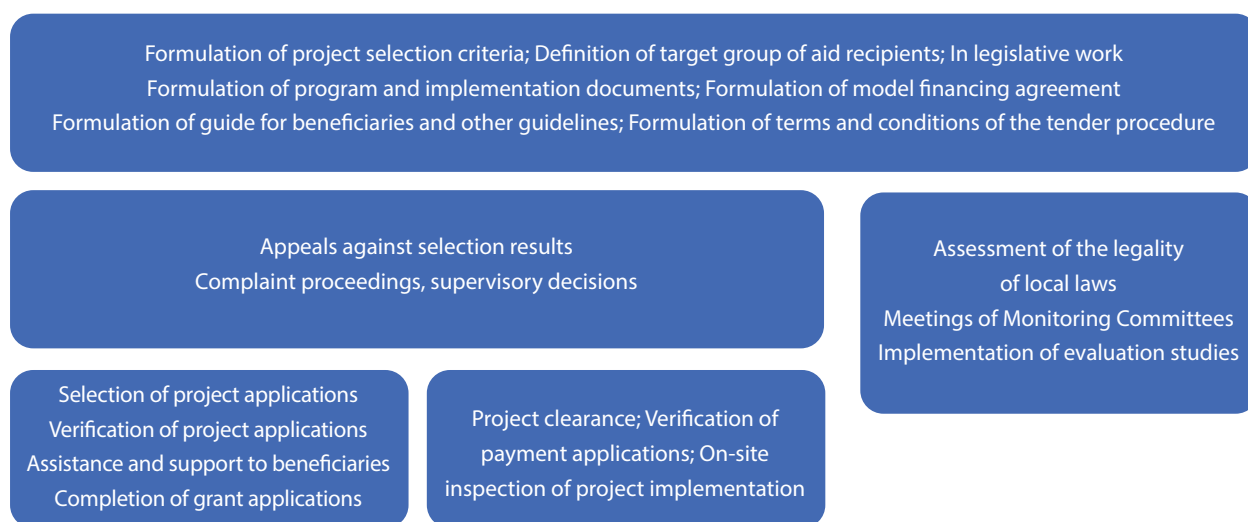
1. preliminary questions, which were meant to classify respondents according to relevant categories of bodies and tasks relating to EU funds implementation cycle;
2. part one of the questionnaire, which was meant to map the state of compliance with the Charter of Fundamental Rights by asking about the practice and level of the application of the Charter in the daily practice of concerned civil servants;
3. part two of the questionnaire, which was meant to map the state of knowledge and awareness concerning the content and scope of application of the Charter of Fundamental Rights.

The online survey was conducted between 12th July 2023 and 31st July 2023. The Office of the Commissioner for Human Rights reached out to several public authorities requesting their participation in the survey. Furthermore, on request of the Commissioner for Human Rights, the Ministry of Development Funds and Regional Policy used their contacts network including managing, intermediate and implementing authorities to share the survey among their employees and encourage participation in the questionnaire. The respondents were guaranteed that the survey would be anonymous both in terms of their personal information and the body they represented.

By 10th August 2023, the Commissioner for Human Rights closed the survey for the collection of results. **The total number of responses collected was 900.** The majority of the respondents represented managing or intermediate authorities (698) and, besides this category, coordinating authorities (72), implementing authorities (69), controlling authorities (15) and other bodies (45). The list of the bodies represented a balanced group in terms of their official responsibilities in the funds cycle, with only a significant decrease in the number of respondents dealing with the control of implementation of a specific program in comparison to the other options.

A large majority (594) of the respondents said they had not applied the EU Charter of Fundamental Rights nor the CJEU case law relating to it in their office practice, with only 1/3 respondents (305) stating they had done so. Out of the latter, they have either done so rarely (105) or often (109), with only 47 respondents declaring to use the Charter or related case law in their practice very often. Moreover, 372 respondents stated that in performing their official duties they had never or very rarely considered the EU Charter of Fundamental Rights or its application to cases which they were handling.

Below are the situations most frequently listed in the survey, in which the Charter was applied:



These groups of responses have allowed to determine what the key areas to be covered in our guide and checklist should be. As per the gathered insights we have therefore decided to focus on the following three areas and respective sub-areas:

- General regulatory design, including defining objectives and main rules of programs as well as drafting specific project documentation with special focus on:
 - establishment of criteria for project selection procedures;
 - formulation of guidelines, requirements and drafting of templates for contracts with programme beneficiaries;
- Individual decision-making within programme and project implementation framework with special focus on:
 - Control decisions;
 - Final clearance of projects;
 - Evaluation and monitoring of projects and programs.

Last but not least, the third part of the survey demonstrated, based on the questions formulated in it, which regarded the awareness of the scope of obligation to apply the Charter as well as the competence to enforce it, that the general state of knowledge on the Charter application is lower than desired and, arguably, constitutes one of the main limitations for successful Charter implementation. It further pointed out the gaps of the state of knowledge and underlined the importance of conducting specific capacity building activities. These aspects have been taken into account in the design process of the guide and checklist, as well as training activities.

Drafting the guide “Application of the Charter of Fundamental Rights when spending EU funds – practical tips for national authorities” and checklist of compliance with the Charter of Fundamental Rights of the EU in the implementation of EU funds

Two major outputs have been developed within our policy and capacity-building activities:

- 1) Guide “Application of the Charter of Fundamental Rights when spending EU funds – practical tips for national authorities” and
- 2) Checklist of compliance with the Charter of Fundamental Rights of the EU in the implementation of EU funds.

The idea of the checklist is that it should serve as a hands-on, practical and operational tool for administrative employees of the coordinating authorities, managing or intermediate authorities, implementing authorities or controlling authorities in the process of implementing EU funds. The checklist is meant to help gain a better understanding of whether certain action or inaction of the authority may constitute a violation of the fundamental right or freedom guaranteed by the EU Charter of Fundamental Rights. While it forms an integral part of the guide, it may be used on its own once someone is provided with the explanation on how to use it. The output is intended to have, therefore, a two-fold possible application, i.e. in general rule-making processes (programme design and programme or project documentation drafting) and in individual decision-making (project selection, project control and clearance).

As far as the guide is concerned, its purpose is to explain the broader theory and basic knowledge behind the checklist, regarding the application of the Charter, the substance of the rights and freedoms protected therein and possible restrictions as well as to provide examples on the aspects which may require further clarification. The guide does not only explain how to identify possible risks of violation of the Charter in the EU funds implementation in general but also how to establish such violations with the assistance of the checklist more specifically in individual cases. It also contains references to external sources, allowing the reader to deepen the analysis or clarify possible questions or doubts.

When drafting the content of the guide and the checklist we conducted doctrinal legal research and desk research in the field of EU law and human rights law and were also relying on previous experiences of the Office of the Commissioner for Human Rights concerning individual complaints handling in EU funds implementation. The research relied also on reports published by the Fundamental Rights Agency of the EU (FRA), the European Commission and the Court of Justice of the European Union (CJEU). It describes the scope of application of the Charter by referring to the case law of the CJEU. In outlining the substance of the rights outlined in the Charter we sought out the relevant case-law of the CJEU but also the European Court of Human Rights (ECHR) and national constitutional and supreme courts, together with basic publications from the legal scholarship network, such as Commentary on the Charter or ECHR guidebooks on given rights and freedoms.


Consultation process and training on using the project outputs by EU funds implementation bodies in practice

The draft of the checklist and the outline of the guide were put forward for discussion during three consultation meetings. As for the methodology, each of the meetings was aimed to address the key actors from each of the three identified key categories of implementation activities (regulatory and design activities, administrative implementation and decision-making, control, oversight and evaluation):

- two meetings with representatives of EU funds coordinating authorities (Ministry), managing or intermediate authorities and implementing authorities (5th September 2023) (representing, in general, the first two categories);
- one meeting with representatives of CSOs and NGOs involved in the EU funds monitoring (25th September 2023) (as representatives of the social partners' monitoring committees' members);

Each meeting took around 3 hours. It consisted of a detailed presentation of the drafted checklist and the outline of the guide. Alongside the presentation, the participants were given explanation on how the checklist is meant to be used. They were also allowed to ask questions, which led to vivid discussions. The discussions allowed us to map the gaps in our outputs that needed to be further clarified and to pin down what aspects of the tools, in general, needed to be further developed.

Following the consultation meetings, the participants received copies of the drafted checklist and the outline of the guide for a pilot test of the materials. They were asked to try to make a pilot use of the tools in their official practice in order to gather insight on its possible use and problems related to it. Together with the tools, the participants of the consultation received a feedback form to be filled out, wherein they could share their comments and criticism within a one-month period. During the feedback process, we received 22 responses from participants and their coworkers filed via feedback form as well as 2 e-mails with some more elaborate comments. They related to specific questions and parts of the checklist as well as to the general outline of the guide, with suggestions to include problems and questions that had not been covered in the initial draft of the outputs. Almost all the suggestions and comments were followed and contributed to some minor and major changes in the next version of the outputs. Following a few comments, the language of the documents was further simplified and accompanied with some additional examples and descriptions. At



that stage of drafting, we also reached out for consultation of an external academic expert in order to proceed to a detailed scrutiny of the checklist and guide drafts for their accuracy and correctness from the legal point of view.

An additional discussion on the outputs took place during two trainings sessions held in Gdańsk on 14th November 2023 and in Katowice on 21st November 2023, where – with participation of larger groups of practitioners from implementing bodies – their clarity and usefulness was further assessed from user experience perspective.

The final versions of the outputs will be translated and published in two language versions (Polish and English) after their final substantive and formal editing.

APPENDIX 1 - LIST OF QUESTIONS ASKED IN THE SURVEY

Preliminary questions

What type of body do you represent?

- A. Coordinating authority (Ministry)
- B. Managing or intermediate authority
- C. Implementing authority
- D. Controlling authority

Your official tasks are related to:

- A. Planning or coordination of programs financed by EU funds
- B. Managing the implementation of a specific program
- C. Implementing a specific program
- D. Accounting for or controlling the execution of individual projects
- E. Controlling the implementation of a specific program

Part one - Mapping the state of compliance with the CFR

Have you ever applied the EU Charter of Fundamental Rights, i.e. used the Charter or the related CJEU case law in your office practice?

- A. Yes
- B. No

If you have applied the Charter of Fundamental Rights, how often have you done it?

- A. Several times
- B. Rarely
- C. Often
- D. Very often

In performing your official duties, do you take into account the Charter of Fundamental Rights and its potential application to a given case?

- A. Never or very rarely
- B. Always or very often (any case could potentially involve a Charter violation)
- C. If the case involves a question/objection regarding Charter compliance
- D. If the case raises a question/objection regarding compatibility with individual rights and freedoms

Given that the Charter of Fundamental Rights is one of the many legal acts that are sources of fundamental rights and freedoms, the Charter is applied by you:

- A. Always, alongside other acts such as the Constitution and acts of international law
- B. Only in a subsidiary manner; usually a reference to the Constitution or to a specific act of international law is sufficient
- C. Only in cases relating to Union law but governed by Polish law
- D. Only in so-called purely European cases involving a problem with interpretation of provisions of Union law

If you have applied the Charter of Fundamental Rights, for what reason have you applied the Charter?

- A. Because it is a legal obligation
- B. Because such recommendations were formulated internally
- C. Because the Charter was invoked by a party to the proceedings
- D. Because of the need to protect individual rights

In what situations have you applied the Charter of Fundamental Rights, i.e. used the Charter or the related CJEU case law in your office practice? (please give examples):

...

What rights or freedoms set forth in the Charter have you ever applied? (please mention some of them in order of prevalence)

...

Part Two - Mapping the state of knowledge of the CFR

Please tick the answer you consider to be correct. Please note: it is possible to mark more than one answer to these questions.

The Charter of Fundamental Rights of the European Union

- A. is a “soft law” act - it contains non-binding guidelines
- B. is a binding act of primary Union law, alongside the EU Treaties
- C. is part of the Polish legal order and takes precedence over national law
- D. takes precedence over EU regulations and directives

The most significant contribution to the development of the protection of fundamental rights in the European Union and the interpretation of the Charter of Fundamental Rights of the European Union has been made by:

- A. the European Court of Human Rights
- B. the Court of Justice of the European Union
- C. the Constitutional Court
- D. national courts (including the Supreme Court and the Supreme Administrative Court)

The Charter’s provisions apply:

- A. To the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law
- B. Only to the institutions, bodies, offices and agencies of the Union
- C. To the institutions, bodies, offices and agencies of the Union and to the Member States, whatever their field of action
- D. To the Union institutions, bodies, offices and agencies and to the Member States, depending on whether or not the action was has been financed from the EU budget in a particular case

When implementing European funds, is an institution obliged to comply with the provisions of the Charter of Fundamental Rights of the European Union and to take account of any violation thereof?

- A. Yes, if the case raises such a question
- B. Yes, also of its own motion
- C. No, or only if there are doubts about the content of EU law

D. No - only the courts have this competence

Who can rule on violations of the Charter (including subordinate legislation) by national institutions, bodies, offices and agencies?

- A. Only the Court of Justice of the European Union
- B. Primarily the national courts, assisted by the Court of Justice of the European Union
- C. Only the Constitutional Court
- D. Any public authority

If you have any observations or comments that relate to the application of the Charter of Fundamental Rights and would like to share them with us, please post them below. Your response is voluntary:



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