



OFFICE OF THE COMMISSIONER
FOR HUMAN RIGHTS

BUREAU DU COMMISSAIRE
AUX DROITS DE L'HOMME



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OPINION 2/2002
OF THE COMMISSIONER FOR HUMAN RIGHTS,
Mr. ALVARO GIL-ROBLES

on certain aspects of the review of powers
of the Northern Ireland Human Rights Commission

1. Introduction

1. The Northern Ireland Human Rights Commission (the Commission) was established on 1 March 1999 under the Good Friday Agreement and the Northern Ireland Act of 1998. The Act made a provision for the Commission to report on, inter alia, the adequacy and effectiveness of the functions conferred on it within two years of its establishment.
2. The Commission submitted the required report in February 2001, providing 25 recommendations to this effect. In May 2002, the Government of the United Kingdom (the Government) published a consultation paper on its response to the Commission's report which presented the Government's draft response to the Commission's recommendations (the Consultation Paper). The Northern Ireland Office of the Government noted that before finalising decisions and taking action, where necessary, to give effect to these, it wished to hear other's views on the subject. The Northern Ireland Office invited comments by 16 August 2002 to the Consultation Paper.
3. By letter of 26 July 2002, the Chief Commissioner of the Northern Ireland Human Rights Commission invited the Commissioner for Human Rights of the Council of Europe (the Commissioner) to submit a response to the Consultation Paper.
4. The Commissioner submits this opinion in accordance with Articles 5 (1) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights. Article 5(1) states that "the Commissioner may act on any information relevant to the Commissioner's functions", including "information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations." In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports." The Commissioner is required by Article 3(d) to "facilitate the activities of national ombudsmen or similar institutions in the field of human rights".

II. International instruments on national human rights institutions

5. The significant role of human rights institutions in the protection and promotion of human rights has been underlined in a number of international instruments. The Committee of Ministers of the Council of Europe adopted a recommendation on the Establishment of Independent National Human Rights Institutions in 1997 (Rec. No R (97) 14) in which it recommended the establishment of effective national human rights institutions and recalled the "Principles relating to the status and functioning of national institutions for the protection and promotion of human rights" (the Paris Principles¹). The Paris Principles, which were endorsed by the General Assembly of the United Nations in its Resolution 48/134 of 1993, represent internationally accepted minimum standards in relation to national human rights institutions.
6. The World Conference on Human Rights in 1993 reaffirmed the important and constructive role played by national institutions for the promotion and protection of human

¹ The Paris Principles were formulated at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris in 1991. Participants included representatives of national institutions, States, the United Nations, its specialised agencies, intergovernmental and non-governmental organisations.

rights, and encouraged the establishment and strengthening of such institutions, having regard to the Paris Principles².

7. The United Nations Commission on Human Rights and the General Assembly have adopted annual resolutions to support the establishment and strengthening of national human rights institutions. In its latest resolution on this issue (A/56/158), the General Assembly reaffirmed the importance of the development of effective, independent and pluralistic national institutions. It welcomed the rapidly growing interest throughout the world in the creation and strengthening of national institutions and encouraged member States to strengthen such institutions. The General Assembly noted with satisfaction the efforts of those States that had provided their national institutions with more autonomy and independence, including by giving them an investigative role or enhancing this role, and encouraged other States to consider taking similar steps.
8. In its latest resolution on this issue (2002/83)³, the United Nations Human Rights Commission reiterated the continued importance of the Paris Principles, recognized the value of further strengthening their application and encourages States, national institutions and other interested parties to consider ways to achieve this. It also expressed its appreciation to those Governments that had committed additional resources for the purpose of the establishment and strengthening of national human rights institutions.

III. Preliminary considerations

9. The 1993 World Conference on Human Rights recognized that it is the right of each State to choose the framework for the national institution that is best suited to its particular needs at the national level in order to promote human rights in accordance with international human rights standards. At the same time, in referring to the Paris Principles, the World Conference recognised the minimum standards to be applied with regard to the competences and responsibilities of national human rights institutions. The Paris Principles also stipulate the minimum standards for the institutions' methods of work, seeking to ensure that the institutions have the necessary powers to fulfil their responsibilities.
10. While there are significant variations with regard to national human rights institutions' mandates and roles, the Paris Principles stipulate that 'a national institution shall be given as broad mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.'
11. Such variations will reflect the differences in the judicial and administrative structures in place at the local and national levels in different countries. Care must notably be taken when establishing a national or regional human rights institution to ensure coherence between existing or projected non-judicial, or quasi-judicial [human rights] protection mechanisms, such as Ombudsmen or specific issue Commissions (such as Equality Commissions). It is also important to ensure that, where a multiplicity of roles is foreseen for a human rights institution, the powers enjoyed in virtue of one of its functions do not adversely affect, or undermine, the effective fulfilment of a different one.

² Para. 36, Part I of the Vienna Declaration and Programme of Action (A/CONF.157/23).

³ This resolution, as well as the General Assembly resolution (A/56/158), was co-sponsored by the United Kingdom.

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12. Having established, with due regard to the above considerations, the kind of institution desired, it is self-evidently crucial for the resulting institution's effectiveness that its terms of reference provide, for each function, matching duties and powers.

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13. This opinion will focus on the following issues raised by the Commission in its report:

- 1) The Commission's financial independence (recommendations 5 and 6);
- 2) Investigative powers (recommendations 22 and 24);
- 3) The referral of draft laws and policies (recommendation 11);
- 4) The Commission's power to bring proceedings in its own name (recommendation 17).

14. In formulating this opinion, the Commissioner was guided by the above-mentioned international instruments as well as the Good Friday/Belfast Agreement, which outlined the main functions and powers to be conferred to the Commission.⁴ The Commissioner has also had regard to the powers and practices of human rights institutions in Council of Europe member States and other Common Law countries.

IV. Detailed considerations

Independence, financial autonomy and level of funding of the Commission

Recommendation 5⁵: A new section 68(3B) should be inserted into the Northern Ireland Act 1998 which reads: 'The Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively'.

Recommendation 6: A new paragraph 6A should be inserted into Schedule 7 to the Northern Ireland Act 1998 which reads 'Subject to the duties imposed by section 68(3A), and in order to further its activities for the promotion and protection of human rights in Northern Ireland, the Commission may from time to time apply for or accept grants from lawfully constituted bodies or raise funds through the provision of services or other lawful activities'.

Further recommendation: The governing legislation should assert the principle that Government will not interfere in the Commission's spending once an adequate overall budget for the Commission has been agreed.

15. Independence is an indispensable characteristic of an effective human rights institution. Financial autonomy and an adequate level of funding are among the means to guarantee such independence. According to the Paris Principles, human rights institutions should enjoy a level of funding that allows the institution "to be independent of the Government and not [to] be subject to financial control which might affect its independence"⁶. It is

⁴ The Belfast Agreement provided that "A new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so."

⁵ For ease of reference, the relevant recommendations of the Northern Ireland Human Rights Commission are reproduced here, following the numbering in its original report of 2001.

⁶ See paragraph 4 of the Paris Principles.

obvious that a human rights institution should have its own budget which is sufficient for the fulfilment of its tasks. Apart from the regular financial scrutiny through review and the evaluation of financial reports, other bodies, such as the Government or individual ministries should not interfere in the use of the institution's resources.

16. The Commission noted that it had not been as effective as it might have been because of the lack of resources available to it and listed in its report a number of activities that had therefore been curtailed. The Commission's current ordinary budget barely covers basic staffing and accommodation costs, leaving little for its actual activities. The Commission is consequently obliged to submit additional bids during the budget year for further resources in order to carry out specific tasks related to its mandate. Under this system the Secretary of State for Northern Ireland, to whom such bids are made, is unduly able to influence the Commission's priorities. It is clear that such a system significantly reduces the financial autonomy, and hence the independence, of the Commission. A clear statement in the law on the need for sufficient resources and on the principle of financial autonomy would address these concerns.
17. Accountability for the use of public funds is certainly important. It cannot, however, be the role of the Secretary of State to operate as a financial watchdog through the granting or withholding of necessary funds. Schedule 7 of the Northern Ireland Act provides for the annual forwarding by the Commission of a statement of accounts to the Secretary of State. In addition, the Comptroller and Auditor General are required to examine and certify the statement and prepare a report for the consideration of Parliament. These provisions would appear to be adequate for ensuring the necessary accountability.
18. The Government agreed that the Commission should be able to accept funding from other sources, and committed itself to ensuring that the arrangements under which the Commission may accept funding from outside sources will be clearly set out in a Memorandum of Understanding to be signed between the Commission and the Northern Ireland Office. The Government was not, however, convinced of the need to include a specific provision in the law on this matter.
19. In the Commissioner's view, such a provision would, however, be important in terms of avoiding any uncertainties as to whether the Commission is in principle entitled to accept such funds. More detailed arrangements could be set out in the Memorandum of Understanding, which the Commissioner hopes will soon be signed between the Commission and the Northern Ireland Office.
20. However, any additional funding, regardless of its source, ought to be complementary, to which end it is essential that the ordinary budget creates a solid basis for the regular functions of the Commission. The Commission should not be in a position where it has to apply for additional funding from the Government or other sources to carry out its statutory duties.

Investigations and access to documentation

Recommendation 22: A new section 69(8A) should be inserted into the Act which reads: ‘The Commission shall, in order to assure itself that human rights are being protected or to investigate any alleged violation of human rights, have access to all places of detention in Northern Ireland and to all places where persons are in the care of a public authority or of a person or body exercising functions of a public nature.’

Recommendation 24: A new section 69(8C) should be inserted to the Northern Ireland Act 1998 which reads: ‘For the purposes of conducting investigations under section 69(8), the Commission may require a person whom the Commission reasonably believes to be in possession or control of any information, document or thing that is relevant to an investigation being conducted by the Commission, (a) to furnish that information, document or thing to the Commission and (b), where appropriate, to attend before the Commission to answer fully and truthfully any question put to him or her by the Commission (other than a question the answer to which might incriminate the person) and (c), if so requested by the Commission to sign a declaration of the truth of his or her answers to any questions put to him or her under paragraph (b).’

21. As it currently stands, section 69(8) of The Northern Ireland Act 1998 (the Act) enables the Commission to conduct such investigations as it considers necessary or expedient for the purposes of exercising the functions specified elsewhere in the same section. No further indications are given regarding the extent of the Commission’s investigative powers, nor as to their relation to its different functions. The Commission has, however, reported significant difficulties in carrying out investigations and has consequently suggested the insertion of the above provisions.
22. In order to establish the investigative powers appropriate for any human rights commission it is necessary to be clear about the functions the powers are required for. It cannot but be observed that the failure of the Northern Ireland Act to clearly delineate the Commission’s investigative powers reflects a certain ambiguity over the precise nature and scope of the Commission’s functions. Consequently, certain concerns arise relating to the potential overlapping of functions between the Commission and other institutions and the potentially problematic combination of extensive investigative powers and the right subsequently to bring proceedings.
23. In general, investigations conducted by human rights institutions can be divided into the following categories:
 - 1) Investigations of a general nature. Such investigations would typically be conducted for the purposes of identifying patterns of abuse and for recommending to the Government or other state bodies measures of a general nature, such as changes in legislation or prevailing practises.
 - 2) Investigations of individual cases.
 - a. Investigations as part of an individual complaints procedure. There are many variations in complaints procedures, but the majority could be characterized as quasi-judicial in that they seek to reach a settlement of the case through mediation, conciliation or the subsequent referral of the case to another body. Since such procedures are quasi-judicial, the institutions are normally granted powers to demand the disclosure of information that are similar to those of a court.

- b. Investigations of an individual case or related group of cases involving an alleged human rights violation made upon the institution's own initiative.
24. The first function outlined above clearly falls within the competences of the Commission. In contrast, the mediation functions outlined in 2a and b, are not clearly stated in the Northern Ireland Act (and find no mention in the Good Friday/Belfast Agreement), but might be deduced from the combination of section 69(5)a, which provides that the Commission may give assistance to individuals in accordance with sections 70, and 70(3)c, which states that the Commission may provide any other assistance [than assistance in respect of legal proceedings] that it thinks appropriate.
25. It is clear that the effective fulfilment of both these functions would require significant powers of investigation with respect both to access to places of detention, or other sites where there is a risk of human rights violations, and to the disclosure of information relevant to the matters it is examining.

Access to places of detention and other places

26. Whilst the Commission has in the past had access to places of detention it wished to visit (though not always to individual detainees it wished to question), it recommended that a specific provision be inserted in the law on this matter so as to avoid any future doubt over the Commission's visiting powers. In response, the Government noted that there were other bodies who already had important statutory roles in protecting detainees from violations of their human rights. The Government believed that it would confuse the issue if the Commission were to seek to take on board or duplicate these functions.
27. The Commissioner would like to note that the existence of other bodies with overlapping mandates does nothing to remove the existing statutory duty on the Commission to promote the protection of human rights, wherever it believes there to be a risk of violations. Nor will the concerns or investigations of different bodies with overlapping competences necessarily coincide. Furthermore, the duplication of activities can be avoided by arrangements between the various bodies with visiting powers. The Commission has, for instance, already signed Memoranda of Understanding with the Equality Commission and the Police Ombudsman, in which the Commission has committed itself to referring individual complaints falling within the competences of more specialised institutions to those institutions.
28. It is only logical that a body with a broad human rights mandate be given the same statutory powers to visit places of detention and other places where persons are held as the other bodies referred to by the Government, whose mandates are more limited. Access to such places is instrumental for conducting investigations and should therefore be ensured by the law. In addition, the Commission should be able to freely interview any person within such places without obstruction by the authorities.

Power to obtain documents, information or things

29. The Paris Principles recommend that a national institution should be able to ‘hear any person and obtain any information and any documents necessary for assessing situations falling within its competence’. The United Nations Handbook on National Institutions⁷ lists in greater detail powers that are fundamental for conducting effective investigations, such as the free access to all documents, including public records, which, in the opinion of the investigative body, are necessary for a proper investigation of the complaint, and the power to compel the production of relevant information.
30. It is clear that the Commission would need the power to obtain documents and information from all official institutions and from any person exercising a function of a public nature in order to establish the necessary facts for the purposes of elaborating general recommendations or mediating in respect of an individual case. The obligation of public officials to cooperate with the Commission’s investigations would, therefore, need to be clearly stated in the law.
31. The absence of an explicit legal provision relating to the disclosure of information or documentation for the purposes of such investigations risks creating uncertainty among those who have been requested to provide information. It might be unclear for them whether they have a duty to do so, or whether they even have the right to do so. A specific provision on the power to obtain information would create an important element of legal certainty.
32. The Commissioner fails to be convinced by the Government’s suggestion that the Commission could resort to judicial review to enforce the disclosure of the information it requires. Judicial review should be the last resort – an exception rather than the rule. It would be strange for any institution to require a court order to fulfil its mandated functions.
33. In its recommendations, the Commission does not explicitly request a provision imposing sanctions, subject to the decision of a court, on officials who refuse to attend hearings, answer questions or who deliberately mislead the Commission. They would, however, be a logical corollary of the powers the Commission is requesting and are, indeed, typically associated with the investigative powers of similar institutions in other countries.
34. The powers of investigation desired by the Commission and examined above are, it must be emphasised, those that would usually be related to the functions of mediation or the preparation of general recommendations to different State authorities. Indeed, the Commission refers to the comparable powers enjoyed by other investigative bodies in Northern Ireland, such as the Assembly Ombudsman and the Police Ombudsman, in its report.
35. However, it would appear from the Northern Ireland Act, and the Commission’s report and the Government’s response, that the Commission’s primary role in respect of individual applications is rather to provide assistance in adversarial proceedings before the courts. As

⁷ National Human Rights Institutions : A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights.

the power to bring proceedings before the courts is provided for in section 69(5)b, and section 69(8) relates the Commission's investigative powers to all the powers listed in section 69, the impression is certainly given that the Commission enjoys powers to investigate for the purposes of court proceedings it may wish to bring in its own name or assist an individual in preparing.

36. The considerations raised by the Government in its response to the Commission's report concerning a confusion of roles are not without foundation here and there are legitimate concerns that the combination of the Commission's investigative powers and its ability to bring proceedings before the courts would confer powers that would exceed those typically enjoyed by public prosecutors.
37. In short, whilst the Commission is arguing that it does not enjoy investigative powers commensurate with its functions, the Government is arguing the reverse - namely that it does not have the functions requiring the powers it is requesting. The precise nature and scope of the Commission's powers and functions needs to be determined:
38. Does the Commission enjoy, in addition to its advisory role, a mediatory role vis-à-vis the bodies it might wish to investigate, or an exclusively adversarial role, or, as would appear to be the case, some combination of the two?
39. Whilst the Commission would, in the latter case, require significant investigative powers, great care would have to be taken to ensure that the rights of persons appearing before the Commission and the principle of the equality of arm are respected at all times. The Commission, itself, acknowledges that persons appearing before it ought not to be obliged to reply to questions the answers to which might incriminate themselves. An additional guarantee for those appearing before the Commission would be that any information obtained during such proceedings could not subsequently be used in court. Indeed such a limitation exists in respect of the Irish Human Rights Commission⁸, which enjoys a similar combination of roles. The rights of those appearing before the Commission to legal representation would need to be considered. Care would also need to be taken to clearly define the Commission's investigative powers vis-à-vis different actors, including both different types of public official (one might think, for instance, of Prosecutors, Ombudsmen, Parliamentarians and military personnel, all of whom may have, for different reasons, certain immunities or secrecy obligations⁹) and private individuals, whether acting in a purely private capacity, or assuming typically public functions, and who might, again, have professional secrecy obligations, such as lawyers, doctors, priests, or journalists.

⁸ See the Human Rights Commission Act of the Republic of Ireland, which addresses such situations in Paragraph 16 of section 9: 'if a person furnishes any information, document or thing to the Commission ... the furnishing of that information, document or thing shall not give rise to any civil liability in contract, tort or otherwise and nor shall the information, document or thing be admissible as evidence against that person in any civil or criminal proceedings.'

⁹ See, for instance, Section 14(5) of the Australian Human Rights and Equal Opportunity Commission Act 1986, and Section 128 of the Human Rights Act 1993 of New Zealand.

Referral of draft laws and policies

Recommendation 11: “A new section 69(3A) should be inserted to the Act which reads : ‘The Secretary of State and the Executive Committee shall refer to the Commission all draft laws and policies proposed for Northern Ireland as early as practicable and before they are introduced to Parliament or the Assembly or made available to the general public’.”

40. The Commission was entrusted with important advisory duties vis-à-vis the Secretary of State and the Northern Ireland Assembly, including the Executive Committee of the Assembly in the Northern Ireland Act. Under section 69(3), “the Commission shall advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures that ought to be taken to protect human rights...”. Under section 69(4), “the Commission shall advise the Assembly whether a Bill is compatible with human rights...”. Moreover, the Commission has a general duty under section 69(1) to “keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of Human Rights”.
41. The Commission has reported difficulties in proofing proposed legislation due to the lack of early access to proposed Bills and Orders, which has meant that the Commission’s views were frequently not heard in the preparation process of Bills. The Commission consequently made the above recommendation to insert a new subparagraph 69 (3A).
42. In its Consultation Paper, the Government reiterated the principle that the Commission should have the opportunity to comment on draft legislation and changes to existing practice as they relate to human rights protection. The Government did not, however, endorse the Commission’s specific recommendation in this regard, particularly on the grounds that there are also other bodies charged with proofing legislation to ensure compliance with human rights. Such duties have been entrusted with the Ministers, the Departments and the Parliamentary Committee on Human Rights. The Government also noted that there are other parties who have a legitimate interest in scrutinizing new legislation and practice and that it would not be right to afford the Human Rights Commission a unique role in this regard. These arguments are not without force.
43. The Commissioner would, however, like to underline that the role of a human rights institution is not to replace the responsibilities of the Parliament, Government or other bodies to ensure that legislation is consistent with human rights. The role of a human rights institution is to complement the work of these bodies by providing its specific expertise gained through the performance of its other functions, such as investigations, which place the institution very close to the concrete human rights concerns. A human rights institution is therefore particularly well placed to assess the practical implication of proposed legislation for possible human rights concerns and might advantageously contribute to the elimination of potential difficulties at an early preparatory stage. It would consequently be beneficial if those drafting legislation were to receive the advice of the Commission on a proposed bill as early as possible.

44. In the opinion of the Commissioner, regular access to draft legislation and information on plans relating to legislation and policies affecting the respect for human rights in Northern Ireland would greatly enhance the ability of the Commission to perform its advisory duties. The Commission would, moreover, need to be informed of such legislative initiatives at an early stage if it is to offer considered advice in a timely manner.
45. The Commissioner was pleased to learn that discussions are under way between the Commission and the Northern Ireland Government departments on a Protocol regarding the granting of early access to the Commission of planned legislation. The Commissioner would like to encourage the Northern Ireland Office and other UK Government departments to consider favourably the adoption of a similar protocol.

Power to bring proceedings in its own name

Recommendation 17: 'In section 71(1) of the Northern Ireland Act 1998, the reference to section 69(5)(b) of the same Act should be deleted - so that the Commission will then have the power to bring proceedings in its own name and when doing so rely on Convention rights'.

46. At present, the power of the Commission to bring proceedings involving law or practice relating to the protection of human rights is limited so that it cannot rely on the Convention rights when bringing proceedings in its own name.¹⁰ This limitation reproduces the victim requirement set out in the European Convention on Human Rights in respect of the European Court.¹¹ The victim requirement was introduced to the European Convention in order to prevent abstract cases being brought before the European Court and to avoid the proliferation of cases brought by unrelated third parties.
47. The latter concern would evidently not arise in respect of a clearly defined exception for the Commission. As the Commission has noted, member States of the Council of Europe have a discretion to go beyond what is strictly required by the European Convention and similar exceptions to the victim requirement at the national level already exist in other countries for bodies set up to promote and protect human rights and fundamental freedoms. It is, moreover, most incongruous that the Commission should be mandated to "bring proceedings [...] relating to the protection of human rights", but be effectively able to do so only if it is able to find existing provisions of UK law on which to base its case.
48. The main difficulty would appear to arise rather in respect of powers that would enable the Commission to bring cases that would result in abstract rulings on the human rights compatibility of legislation. Whilst such a power would enable potential incompatibilities to be identified, as it were, preventively, the Commissioner understands that the resemblance of such proceedings to abstract constitutional challenges would significantly alter current judicial practise in the United Kingdom, and in a way that its current judicial structure is, perhaps, ill-equipped to deal with.

¹⁰ Section 71 (1) of the Northern Ireland Act provides that:

"Nothing in section 6(2)(c), 24(1)(a) or 69(5)(b) shall enable a person –

(a) to bring proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or
 (b) to rely on any of the Convention rights in any such proceedings,

unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights".

¹¹ It is to be noted that the European Court allows also indirect victims or potential victims to initiate proceedings before it.

49. It ought, however, to be possible to allow the Commission to challenge legislation on the ground of incompatibility with the Convention rights, if, though not a victim itself, it has brought proceedings in its own name in the place of an identifiable victim (whether potential or indirect¹²) or class of victims. Such a provision would keep human rights rulings tied to the protection of a given individual's or set of individuals' rights, without unduly limiting the Commission's ability to raise compatibility issues.

Alvaro GIL-ROBLES
Commissioner for Human Rights

¹² As these terms are understood in the jurisprudence of the European Court of Human Rights.