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**COMMISSION STAFF WORKING DOCUMENT**

**Staff Working Document on the application of the EU Charter of Fundamental rights in  
2014**

*Accompanying the document*

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE  
COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE  
COMMITTEE OF THE REGIONS**

**2014 Report on the Application of the EU Charter of Fundamental Rights**

{COM(2015) 191 final}

# Staff Working Document on the application of the EU Charter of Fundamental rights in 2014

## Introduction

After the entry into force of the **EU Charter of Fundamental Rights**<sup>1</sup> (the Charter), in December 2009, the Commission adopted a **Strategy on the effective implementation of the Charter**<sup>2</sup> setting as an objective that the EU is beyond reproach as regard the respect of fundamental rights, in particular when it legislates. The Commission further committed to preparing Annual Reports to better inform citizens on the application of the Charter and to measure progress in its implementation. The reports are intended to serve as a factual basis for the continuing informed dialogue between all EU institutions and Member States on the implementation of the Charter.

This Report covers the year 2014 and informs the public about situations in which they can rely on the Charter and on the role of the European Union in the field of fundamental rights. In covering the full range of Charter provisions on an annual basis, the Annual Report aims to track where progress is being made, where further efforts are still necessary and where new concerns are arising.

The Annual Report is based on the actions taken by the EU institutions, on the analysis of letters and petitions from the general public and questions from the European Parliament. In addition, the report covers key developments as regards the jurisprudence of the Court of Justice of the European Union (CJEU), and provides information on the case law of national courts on the Charter, based on the contributions received from Member States and further analysis carried out by the EU Agency for Fundamental Rights (FRA).

## *Protection of Fundamental Rights in the EU*

In the European Union, the protection of fundamental rights is guaranteed both at national level by Member States' constitutional systems and at EU level by the Charter.

**The Charter applies to all actions taken by the EU institutions.** The Commission ensures that all its acts and proposals respect the Charter. All EU institutions (including the European Parliament and the Council) must respect the Charter, in particular throughout the legislative process.

**The Charter applies to Member States only when they implement EU law.** Hence it does not replace national fundamental rights systems but complements them. The concept of "implementation" implies a connecting factor between a **Member State's** action and a provision of EU law. That connecting factor will depend on the situation in question. For example, a connecting factor exists:

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<sup>1</sup> Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>.

<sup>2</sup> Available at: [http://ec.europa.eu/justice/news/intro/doc/com\\_2010\\_573\\_en.pdf](http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf).

when national legislation transposes an EU Directive, when an administrative authority takes a measure it is required to take under EU law, or when a national court affords judicial protection regarding a claim based on a right conferred on an individual or business by EU law.

If a national authority (legislative, administrative or judicial) violates fundamental rights set out in the Charter when implementing EU law, the Commission can launch an infringement procedure against the Member State in question and, ultimately, take that Member State to the CJEU. The Commission is not a judicial body or a court of appeal against the decisions of national or international courts. Nor does it, as a matter of principle, examine the merits of an individual case, except if this is relevant to carry out its task of ensuring that the Member States apply EU law correctly. Therefore, regarding administrative or judicial decisions, an infringement procedure will normally be launched only if the Commission detects a wider, e.g. structural, problem. The objective of the infringement procedure is to ensure that the national law in question - or a practice by national administrations or courts - is aligned with the requirements of EU law. The Commission will therefore normally start by contacting the Member State informally, to have the problem solved consensually, before launching the formal stages of the infringement procedure.

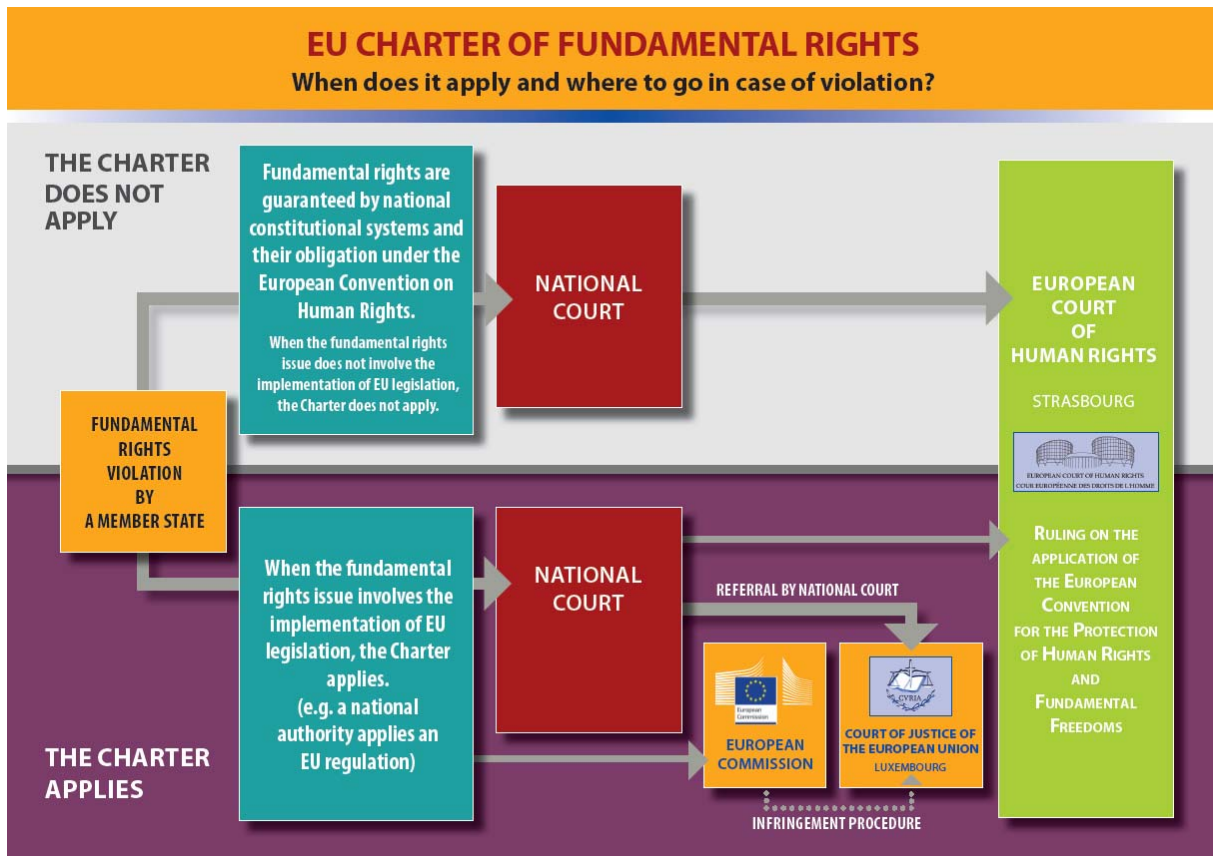
Where individuals or businesses consider that an act of the EU institutions directly affecting them violates their fundamental rights as enshrined in the Charter, they can bring their case before the CJEU, which, subject to certain conditions, has the power to annul the act in question.

**The Commission cannot pursue complaints which concern situations outside the implementation of EU Law.** In those situations, it is for the Member States alone to ensure that their obligations regarding fundamental rights are respected. Member States have domestic guarantees of fundamental rights, normally at constitutional level. These guarantees are protected by national judges and, as the case may be, constitutional courts. Accordingly, complaints in this context need to be directed to the national level.

In addition, all EU Member States are bound by the commitments they have made under **the European Convention on Human Rights (ECHR)**, independent of their obligations under EU law. Therefore, as a last resort and after having exhausted all legal remedies available at national level, individuals may bring an action before the European Court of Human Rights in Strasbourg for a violation by a Member State of a right guaranteed by the ECHR. The European Court of Human Rights (ECtHR) has designed an admissibility checklist in order to help potential applicants work out for themselves whether there may be obstacles to their complaints being examined by the ECtHR<sup>3</sup>.

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<sup>3</sup> Available at: [http://appform.echr.coe.int/echrappchecklist/?cookieCheck=true\\_](http://appform.echr.coe.int/echrappchecklist/?cookieCheck=true_)



## *The European Convention of Human Rights (ECHR)*

Therefore, even where the Charter is not applicable to a given situation within an EU Member State, two other sources of protection for fundamental rights exist: Individuals may have recourse to **national remedies** and, after having exhausted them, they can lodge an **application to the ECHR**, in conformity with that convention.

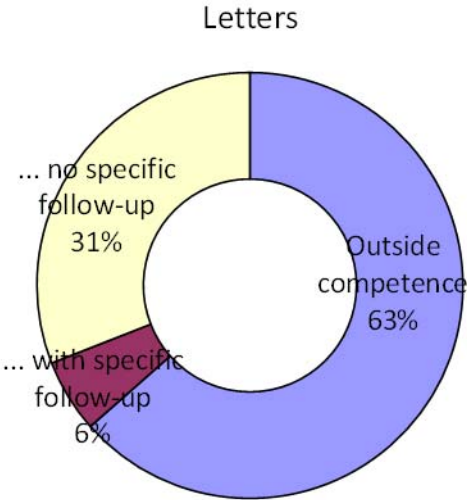
The Treaty of Lisbon has imposed an obligation on the EU to accede to the ECHR. In April 2013, the draft agreement on accession of the EU to the ECHR was finalized. On 18 December 2014 **the CJEU delivered its opinion on the draft agreement**. Although the Court identified problems with regard to its compatibility with EU law and declared the draft accession agreement not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) TEU. The opinion will determine the Commission's position in the pursuit of the negotiations with the Contracting Parties to the ECHR. These negotiations will continue, as accession to the ECHR is a priority for the *Juncker* Commission.

Furthermore, the interpretation of the Charter rights which correspond to rights guaranteed by the ECHR must correspond to the interpretation of the latter, by the ECtHR.

# Overview of the letters and questions to the Commission on fundamental rights

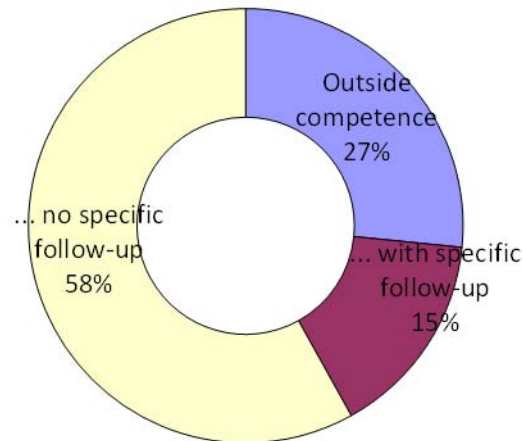
During 2014, the Commission received over 3000 letters from the general public concerning fundamental rights issues as well as over 600 questions from the European Parliament. It has received almost 200 petitions regarding fundamental rights issues.

Among the letters from the general public on fundamental rights issues received by the Commission in 2014, 37% concerned situations where the Charter could apply. In a number of cases, the Commission requested information from the Member States concerned or explained to the complainant the applicable EU rules. In other cases, the complaints should in fact have been addressed to the national authorities or to the ECtHR. Where possible, complainants were redirected to other bodies for more information (such as national data protection authorities). Given that almost two thirds of the letters fell outside the scope of EU competence, there still seems to be a need for a better understanding of when the Charter applies and when it does not apply.



Source: European Commission

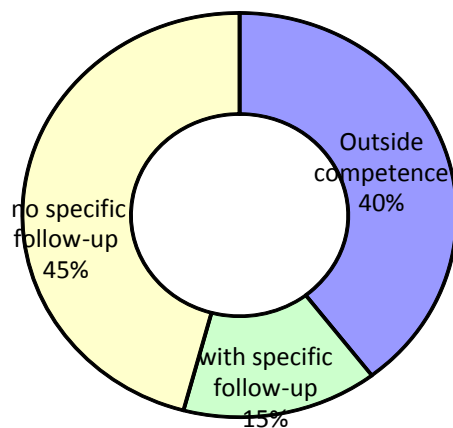
### Questions



Source: European Commission

Important to note is that two third of the letters from the general public concerning fundamental rights issues concerned questions which fell outside the scope of EU competence. This shows that there still is a need for a better understanding of when the Charter applies and when it does not. Among the questions from the European Parliament, 464 concerned issues within EU competence (compared to 168 outside the scope of EU competence). Among the fundamental rights related petitions received by the European Parliament on which the Commission was questioned, 116 concerned issues within EU competence whereas 76 concerned issues outside EU competence.

### Petitions

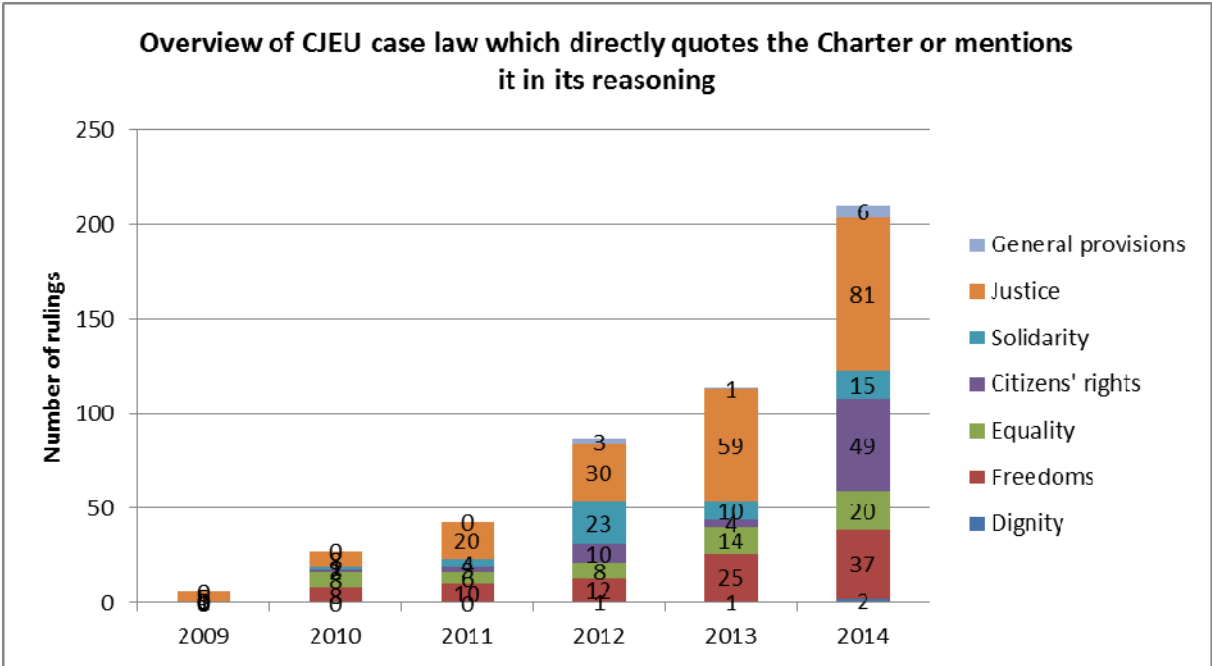


Source: European Commission

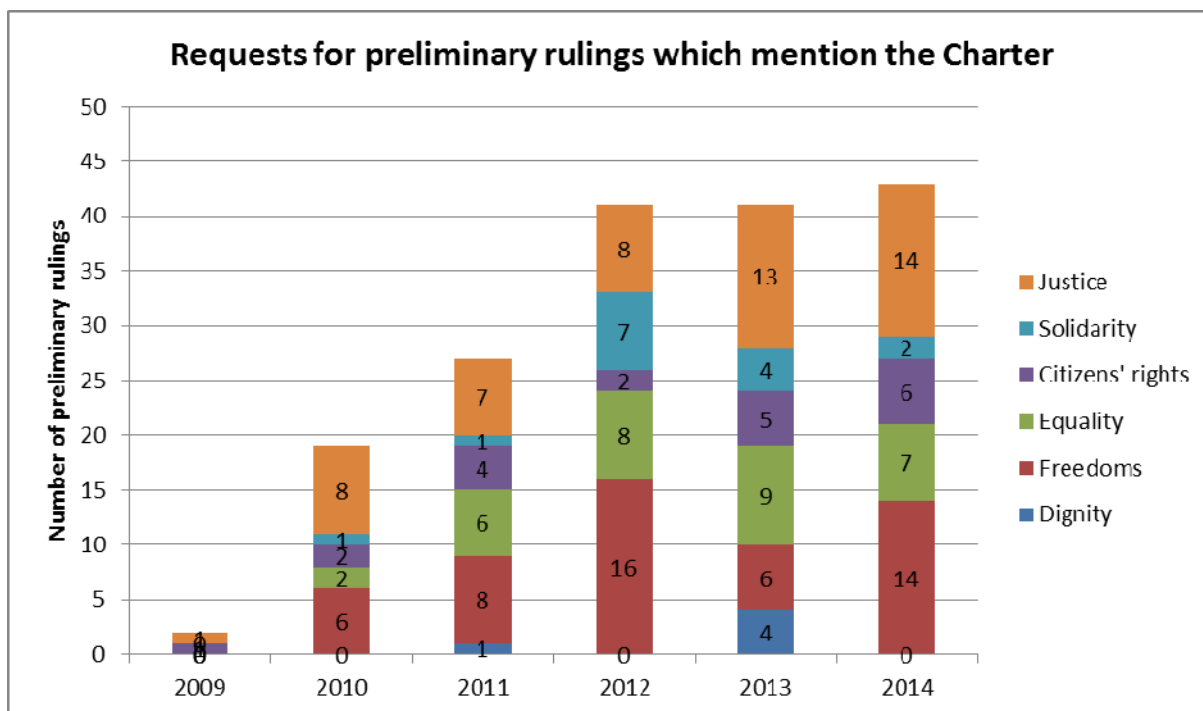
In 15% of all cases for the questions and the petitions, the Commission contacted the Member States to obtain clarifications on alleged violations. The replies given by the Commission explained or clarified the relevant policies and on-going initiatives.

***Overview of the decisions of the Court of Justice of the European Union (Court of Justice, General Court and Civil Service Tribunal) referring to the Charter***

The European Union Courts have increasingly referred to the Charter in their decisions. The number of decisions of these Courts quoting the Charter in their reasoning developed from 43 in 2011 to 87 in 2012. In 2013, the number of these decisions quoting the Charter amounted to 113, which is almost a triple of the number of cases of 2011. In 2014, this number rose even higher to 210 cases (see Appendix I for an overview of all relevant rulings).



National courts when addressing questions to the CJEU (preliminary rulings) are often referring to the Charter. Regarding applications for preliminary rulings submitted by national judges to the CJEU in 2014, 43 of the requests submitted contained a reference to the Charter, slightly more than in 2013, when 41 requests contained a reference to the Charter (See Appendix II for an overview of the applications for preliminary rulings submitted in 2014 which refer to the Charter).

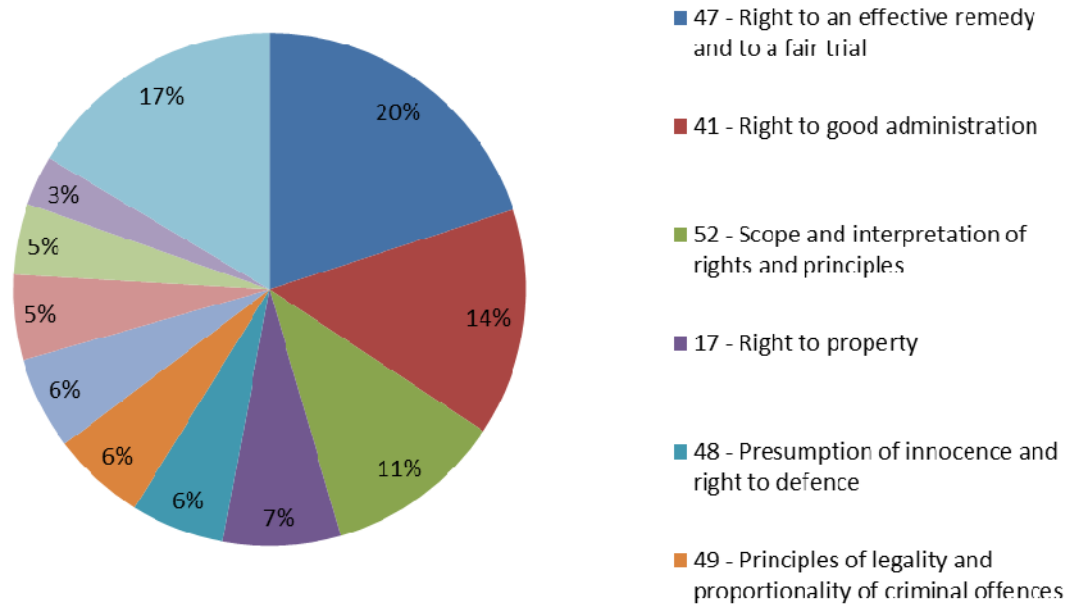


***References to Charter rights in decisions of the Court of Justice of the European Union and of national courts***

When focusing on the different articles of the Charter referred to in cases before the EU Courts and before national courts the following articles featured prominently in both scenarios: the right to an effective remedy and to a fair trial, and the scope and interpretation of rights and principles. However, the right to good administration and the right to property were more often referred to in the jurisprudence of the EU Courts, whereas the right to respect for private and family life played a more important role before national courts.



## Percentage of references to particular rights of the Charter in decisions of the Court of Justice of the European Union 2014

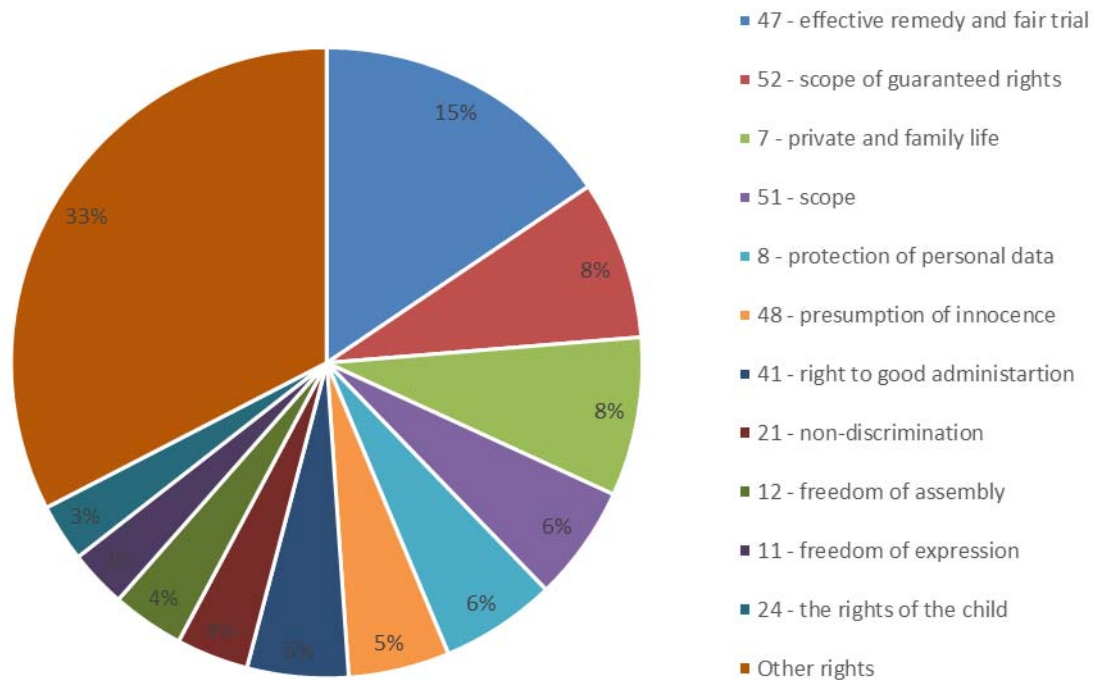


*Source:* European Commission

Note: The basis for this pie chart is the case law as referred to in Appendix I. The total number of judgments analysed therefore amounted to 210, and the total number of references to different Charter articles amounted to 446, as several judgments referred to more than one article. The percentages were calculated on the basis of these 446 references. The category 'Other rights' refers to all rights for which the percentage amounts to less than 3 %.

The rights mostly referred to in decisions of **national courts in 2014** were the right to an effective remedy and to a fair trial, the respect for private and family life, the scope and interpretation of rights and principles and the field of application. Please note that the chart below only takes into account those decisions where the Charter was referred to in the reasoning of the court.

**References to Charter articles in national courts' decisions, by article (% of total Charter references in decisions analysed), 2014**

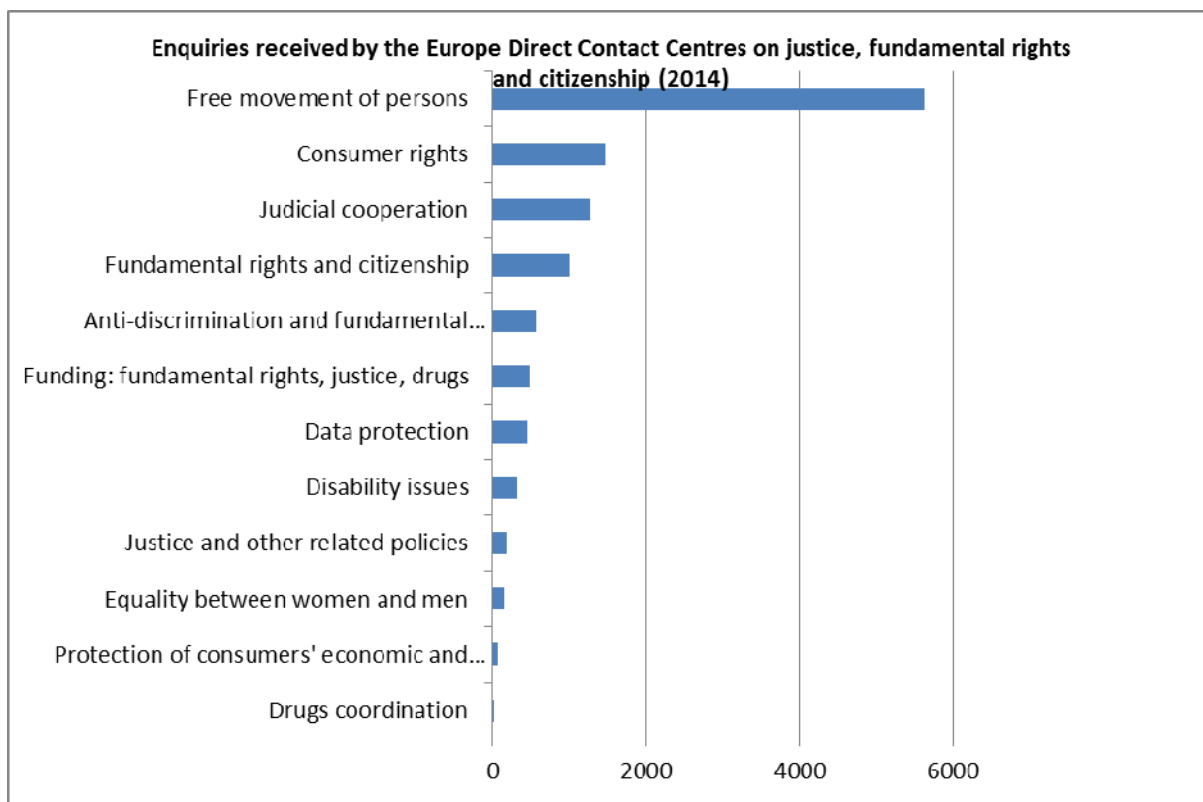


Source: European Union Agency for Fundamental Rights (FRA)

Note: Only decisions where the Charter was referred to in the reasoning of the courts were taken into account, and only up to five judgments per Member State were considered. The category 'Other Rights' refers to all rights for which the percentage amounts to less than 3 %.

***Overview of enquiries with the Europe Direct Contact Centres***

The figures collected by the Europe Direct Contact Centres (EDCC) confirm that there is a high degree of interest among citizens on justice, citizenship and fundamental rights. In 2014, the EDCC replied to 11608 enquiries from citizens on topics such as free movement of persons (48.5 % of the total number of enquiries), consumer rights (12.7 %) and judicial cooperation (11%).



Source: European Commission

## ***Methodology and Structure of the Staff Working Document***

The Staff Working Document annexed to the Annual Report does not look at the Charter only as a legally binding source of law. It rather aims also to render account, from a broader perspective, of the different ways the Charter was invoked and contributed to the progress made in respecting and promoting fundamental rights in a number of areas during 2014. As a consequence, the Staff Working Document refers to the Charter as a legally binding instrument as well as a policy objective depending on the areas concerned. Furthermore, accounts given under the different chapters of the report vary in breadth as well depth.

Hence, some chapters may show how certain legislative measures are interacting with fundamental rights by promoting them or by finding the right balance in complying with them, including references to the relevant case law of the CJEU. Other chapters contain little of both and/or may concentrate on policy rather than legislative measures. To illustrate the growing impact of the Charter, the Staff Working Document - on the margins of the page where relevant - includes national court decisions which refer to the Charter, irrespective of whether EU law in those national cases was applicable or not.

Some measures and cases may have an impact on different articles of the Charter. Hence, while a measure and/or case are explained in a more detailed manner under one chapter (the heading of one article) it may be referred to under a different one as well.

The structure of the Staff Working Document follows the seven titles of the Charter itself: Dignity, Freedoms, Equality, Solidarity, Citizens' rights, Justice and General provisions governing the interpretation and application of the Charter. Each of the seven chapters of the Staff Working Document contains the following information on the application of the Charter, where available and relevant:

- Legislation:
  - Examples of EU institutions (proposed or adopted) legislation promoting the Charter rights;
  - Examples of how the EU institutions and the Member States ensured compliance with and have applied the Charter in 2014 within other (proposed or adopted) legislation;
- Policy:
  - Examples of how the EU institutions and the Member States ensured compliance with and have applied the Charter in 2014 within policy areas, e.g. through recommendations and guidelines and best practices;
- Case law:
  - Relevant jurisprudence of the CJEU;
  - Case-law of national courts referring to the Charter (be it within or outside the scope of EU law);
- Application by Member States:
  - Follow-up: infringement procedures launched by the Commission against Member States for not or wrongly implementing relevant legislation;
- An overview of questions and petitions from the European Parliament, and letters from the general public received in 2014 focusing on main fundamental rights issues;
- Data gathered by the EU Agency for Fundamental Rights throughout 2014.

# Dignity

In 2014, the European Commission further promoted the prohibition of **trafficking in human beings** by taking stock of the actions taken in recent years and identifying needs for further improvement. In order to help more civil society organisations to engage with the Commission and exchange information on actions against human trafficking, the European Commission has launched the EU Civil Society e-Platform.

The **Regulation establishing rules for the surveillance of the external sea borders** in the context of operational cooperation coordinated by **Frontex** was adopted by the Parliament and the Council on 15 May 2014, based on a proposal from the European Commission. This Regulation provides for clear rules on interception applicable to sea-border surveillance operations coordinated by Frontex and improves measures of coordination in search and rescue situations that arise during these operations, so as to ensure the protection and safety of lives. It strengthens the protection of fundamental rights, in particular the principle of *non-refoulement* by establishing a procedure for the principle's implementation.

Human Dignity also played an important role in several judgments of the CJEU. In case *A, B, C v Staatssecretaris van Veiligheid en Justitie*<sup>4</sup> the court made it clear that, while Member States are entitled to assess the **credibility of the statements of an applicant regarding his/her sexual orientation** in asylum proceedings, the methods used by the competent national authorities to assess the credibility of those statements must ensure the respect of fundamental rights, such as the right to respect for human dignity. In the case *Saciri and Others*<sup>5</sup>, the CJEU emphasised that the question of what constitutes **minimum standards for housing of asylum applicants** must be interpreted in light of fundamental rights and in particular Article 1 of the Charter.

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<sup>4</sup> CJEU judgment of 2 December 2014 in Joined Cases C-148/13, C-140/13 and C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie*, see also Articles 7, 18 and 21.

<sup>5</sup> CJEU Judgment of 27 February 2014 in Case C-79/13 *Saciri and Others*, see also Article 24.

# Title I

## Dignity

### *Article 1 – Human Dignity*

Human dignity, as protected in Article 1 of the Charter, is the basis of all fundamental rights. It guarantees the protection of human beings from being treated as mere objects by the State or by his/her fellow citizens. It is not only a right in its own but also part of the very substance of each right. Thus it needs to be respected when any of these rights are restricted. All subsequent rights and freedoms under the title Dignity, such as the right to life, and the prohibition of torture and slavery add specific protection against infringements of dignity. They must equally be respected in order to allow enjoyment of other rights and freedoms in the Charter, for example freedom of expression and freedom of association. None of the rights laid down in the Charter may be used to harm the dignity of another person.

#### *Legislation*

Human Dignity issues arose in a few instances in 2014. The European Commission took the right to human dignity into account when preparing a legislative proposal<sup>6</sup> for amendment of Regulation (EC) No 1236/2005 concerning **trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment**. This proposal was adopted by the European Commission on 14 January 2014 and should in particular improve the export controls on certain medicinal products to prevent the use of such products for capital punishment. In addition, in July 2014, the European Commission published new lists of goods subject to the trade restrictions of Regulation (EC) No 1236/2005<sup>7</sup>.

#### *Policy*

Both the European Parliament<sup>8</sup> and the Committee of the Regions<sup>9</sup> recalled that **homelessness** is a violation of human dignity and of human rights. The European Commission confirmed that confronting homelessness remains a priority and that the EU will continue efforts to reduce homelessness and housing exclusion through the implementation of the Social Investment Package<sup>10</sup>.

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<sup>6</sup> Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, COM(2014)1, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014PC0001&from=EN>.

<sup>7</sup> European Commission Implementing Regulation (EU) No 775/2014, OJ L 210, 17.7.2014, p. 1. The new lists replace those found in European Commission Implementing Regulation (EU) No 1352/2011, OJ L 338, 21.12.2011, p. 31.

<sup>8</sup> European Parliament resolution of 16 January 2014 on an EU homelessness strategy (2013/2994(RSP)).

<sup>9</sup> Opinion of the Committee of the Regions — A European homelessness strategy, OJ C 271, 19.8.2014, p. 36.

<sup>10</sup> For more details see Article 34.

## Case law

On 2 December 2014, the CJEU ruled on preliminary questions referred to it by the Dutch Council of State in the case *A, B, C v Staatssecretaris van Veiligheid en Justitie*<sup>11</sup> concerning the interpretation of EU provisions on asylum in relation to the methods by which national authorities may assess the **credibility of the declared sexual orientation of applicants for asylum**. The applicants in the three joined cases brought an appeal against a decision of the Staatssecretaris in which their application for a temporary residence permit (asylum) in the Netherlands was rejected. The applicants claimed that they feared persecution in their countries of origin on account of their homosexuality. The national court asked the CJEU whether there are any limits imposed by EU law as regards the verification of the sexual orientation of applicants for asylum. In its ruling the Court underlined that the Asylum Qualification Directive 2004/83/EC [as repealed and replaced by Directive 2011/95/EU] and the EU Charter impose certain limits as regards the verification of the sexual orientation of applicants for asylum. The judgment makes it clear that, while Member States are entitled to assess the credibility of the statements of an applicant regarding his/her sexual orientation, the methods used by the competent national authorities to assess the credibility of those statements must ensure the respect of fundamental rights, such as the right to respect for human dignity and the right to respect for private and family life. In this regard, nothing can be required of applicants that would undermine their human dignity or personal integrity, which may be the case in particular for intrusive and humiliating medical/ pseudo-medical tests; the same applies for intrusive questioning, or requiring/accepting photographic or video evidence of sexual practices. The assessment cannot be based on stereotyped notions and should always take full account of the individual situation and personal circumstances of the applicant. These clarifications provided by the CJEU will enable the competent national authorities to assess applications based on the sexual orientation of the applicant in a more convergent manner, while ensuring the full respect of fundamental rights.

In *Saciri and Others*<sup>12</sup> the CJEU clarified the minimum standards Member States must observe to ensure that **asylum applicants** are **housed** adequately. The CJEU emphasised that the question of what constitutes **minimum standards** must be interpreted in light of fundamental rights and in particular Article 1 of the Charter, under which human dignity must be respected and protected. The CJEU therefore held that where a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers, the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs. The amount of those allowances must also be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers may be maintained.

## Article 2 – Right to life

According to Article 2 everyone has the right to life and no one shall be condemned to the death penalty, or executed.

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<sup>11</sup> CJEU judgment of 2 December 2014 in Joined Cases C-148/13, C-140/13 and C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie*, see also Articles 7, 18 and 21.

<sup>12</sup> CJEU Judgment of 27 February 2014 in Case C-79/13 *Saciri and Others*, see also Article 24.

### ***Article 3 – Right to the integrity of the person***

The right to physical and mental integrity of the person (Article 3 (1) of the Charter) on the one hand protects against interferences by public authorities. On the other hand it also puts them under an obligation to promote such protection, e.g. by concrete legislation.

#### *Policy*

The European Commission supports Member States in related key policy areas, such as policies putting an end to gender-based violence. Gender-based violence constitutes a breach of the fundamental right to dignity and physical and mental integrity of a person, as well as the rights to life, liberty, security, equality between women and men and the principle of non-discrimination.

In 2014, the European Commission pursued its efforts to improve knowledge on **gender-based violence** and raise awareness on the prevalence of this violation of fundamental rights. In cooperation with national statistical offices, Eurostat started to collect more detailed crime data recorded by the police and justice systems and disaggregated by sex. The European Commission supported awareness-raising by Member States, including targeted campaigns on sexual harassment among young people, the role of men in combating violence against women, or the role of health professionals in detecting violence and supporting its victims. The European Commission funded grassroots projects aimed at preventing violence against women, including harmful practices (female genital mutilation, forced marriage and ‘honour crimes’), supporting victims and training relevant professionals.<sup>13</sup>

The Commission also implemented the concrete actions announced in the Communication "Towards the **elimination of female genital mutilation**"<sup>14</sup>, adopted in November 2013 and promoting Article 3 of the Charter.<sup>15</sup> For example, it supported the development of a web-based knowledge platform on female genital mutilation, which will train and support professionals who can help women and girls living with or at risk of female genital mutilation.

#### *Application by Member States*

In 2014, the European Commission launched infringement proceedings against 11 Member States for the non-communication of measures transposing **Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography**<sup>16</sup>. The deadline for the Member States to transpose this directive into national law was on 18 December 2013.<sup>17</sup>

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<sup>13</sup> See also Articles 23 and 24.

<sup>14</sup> Communication from the European Commission to the European Parliament and the Council "Towards the elimination of female genital mutilation" of 25.11.2013, COM(2013) 833 final, available at: [http://ec.europa.eu/justice/gender-equality/files/gender\\_based\\_violence/131125\\_fgm\\_communication\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf).

<sup>15</sup> See also Articles 23 and 24.

<sup>16</sup> Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1.

<sup>17</sup> See also Article 24.



## ***Article 4 – Prohibition of torture and inhuman or degrading treatment or punishment***

Article 4 of the Charter provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The respect of fundamental rights requires particular vigilance in the field of border controls, immigration and asylum issues.

### *Legislation*

With a view to the judgment of the CJEU in the case *Parliament v Council*<sup>18</sup>, Regulation (EU) 656/2014 establishing rules for the **surveillance of the external sea borders** in the context of operational cooperation coordinated by **Frontex**<sup>19</sup> was adopted by the Parliament and the Council on 15 May 2014, based on a proposal from the European Commission. This Regulation provides for clear rules on interception applicable to sea-border surveillance operations coordinated by Frontex and improves measures of coordination in search and rescue situations that arise during these operations, so as to ensure the protection and safety of lives. It strengthens the protection of fundamental rights, in particular the principle of *non-refoulement* by establishing a procedure for the principle's implementation. The Regulation requires that after a rescue operation persons are disembarked in a place of safety, which is defined as a place where not only the safety of life is no longer threatened but also takes into account the protection of fundamental rights in compliance with the principle of *non-refoulement*.<sup>20</sup>

### *Policy*

In 2014, Frontex has produced a **Handbook for trainers on fundamental rights for border guards**<sup>21</sup> in consultation with the Fundamental Rights Agency and UN bodies. Fundamental rights are a prominent aspect during the briefing provided to border guards before the start of joint operations. The fundamental rights challenges at the external borders remain significant and Frontex is committed to ensuring that fundamental rights are respected during joint operations under its coordination.

At the end of 2014, **the European Ombudsman** started on her own initiative an inquiry<sup>22</sup> concerning the means through which Frontex ensures respect for fundamental rights of the persons who are subject to forced returns in joint return operations (JRO). The ombudsman noted in the inquiry that, by their very nature, forced return operations have the potential to involve serious violations of fundamental rights. The ombudsman stressed that it is important for the public to know how Frontex is equipped to deal with any violations that may take place and what steps it takes to minimise the

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<sup>18</sup> CJEU judgment of 5 September 2012 in Case C-355/10 *Parliament v Council*, for more details on this case and the response to the judgment see Article 4 of the 2013 Report on the application of the EU Charter of Fundamental Rights.

<sup>19</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27.6.2014, p. 93-107.

<sup>20</sup> See also Article 19.

<sup>21</sup> Available at:

[http://frontex.europa.eu/assets/Publications/Training/Fundamental\\_Rights\\_Training\\_for\\_Border\\_Guards.pdf](http://frontex.europa.eu/assets/Publications/Training/Fundamental_Rights_Training_for_Border_Guards.pdf).

<sup>22</sup> OI/9/2014/MHZ, available at:

<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58135/html.bookmark>.

risk of such violations occurring. The inquiry also includes Frontex's cooperation with the national monitoring bodies.

A number of detailed questions<sup>23</sup> were asked, to which Frontex has submitted a reply on 5 February 2015.<sup>24</sup> Frontex stresses in its reply that the Fundamental Rights Officer (FRO) has never received a complaint or a serious incident report alleging violations of fundamental rights during a JRO coordinated by Frontex since her appointment. Therefore, participation in JROs has so far served the purpose of learning how JROs are organised and carried out, as well as identifying potential critical issues and best practices during the operations from the perspective of the Frontex mandate. In this sense, for instance, the participation of children in JROs is of crucial interest and concern. The upcoming revision of the Best Practices for JROs represents an excellent opportunity to provide more fundamental rights guidance in this respect. For instance, the FRO has observed a variety of embarkation and boarding methods among MSs of families with children and has discussed ways to minimise the risk of impact of the operations and avoid any potential exposure to use of force during JROs. Frontex has so far not allowed participation of unaccompanied minors in JROs, even before FRO's appointment, and the FRO supports this approach in light of the best interests of the child.<sup>25</sup>

#### *Case law*

Two important judgments concerning the obligations for the sending and receiving Member States under the Dublin procedure, also to be read in light of relevant new obligations for Member States set out in the Dublin III Regulation<sup>26</sup>, were issued by the European Court of Human Rights. On 4 November 2014 in the case **Tarakhel v Switzerland**<sup>27</sup>, the European Court of Human Rights issued a judgment on whether a Dublin transfer of a family with children by Switzerland to Italy would violate Articles 3, 13 and 8 of the European Convention of Human Rights. The ECtHR did not consider that there are systemic deficiencies in the Italian asylum system such as would justify a systematic suspension of Dublin transfers to Italy, stressing that the situation in Italy is not comparable to the situation in Greece which led to the ECtHR *M.S.S.*<sup>28</sup> judgment. However, the Court pointed out that in view of the current situation as regards the reception system in Italy, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in over-crowded facilities without any privacy, or even in insalubrious conditions or violent conditions is not unfounded. Therefore, in view of complying with Article 3 of the ECHR, Switzerland should seek individual guarantees from Italy "that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together" before sending the applicants to Italy.<sup>29</sup>

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<sup>23</sup> <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58135/html.bookmark>

<sup>24</sup> <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59007/html.bookmark>

<sup>25</sup> For more information on the best interests of the child, see below under Article 24.

<sup>26</sup> Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180, 29.06.2013, p. 31.

<sup>27</sup> ECtHR, *Tarakhel v Switzerland* (GC), No 29217/12, 04.11.2014.

<sup>28</sup> ECtHR, *M.S.S. v Belgium and Greece* (GC), No 30696/09, 21.01.2011.

<sup>29</sup> See also Articles 18, 19 and 24.

Another important judgment concerning Dublin transfers was rendered in the case *Sharifi and Others*<sup>30</sup>. The case concerned 32 Afghan nationals, two Sudanese nationals and one Eritrean national, who alleged, in particular, that they had entered Italy illegally from Greece and been returned to that country immediately, with the fear of subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment. The Court shared the concerns of several observers with regard to the automatic return, implemented by the Italian border authorities in the ports of the Adriatic Sea, of persons who, in the majority of cases, were handed over to ferry captains with a view to being removed to Greece, thus depriving them of any procedural and substantive rights. In addition, it reiterated that no form of collective and indiscriminate returns could be justified by reference to the Dublin system, being for the State carrying out the return to ensure that the destination country offers sufficient guarantees in the application of its asylum policy to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. The Court found thus a violation by Italy of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), of Article 3 in relation to the return of the applicants to Greece as well as of Article 13 combined with Article 3 of the Convention and Article 4 of Protocol No. 4 on account of the lack of access to the asylum procedure or to any other remedy in the port of Ancona.<sup>31</sup>

On 9 December 2014 the Senate Intelligence Committee released its long awaited Study of the Central Intelligence Agency's (CIA) detention and interrogation program, detailing the so-called enhanced interrogation techniques (EIT) used at the time of the Bush-administration. The study confirms what the European Parliament has condemned on several occasions, the latest in a resolution of 7 October 2013<sup>32</sup>: the **secret detention and transportation of detainees and their torture and ill-treatment by the CIA**, often in collusion with the authorities in third countries including Member States. In July 2014 the European Court of Human Rights held that one Member State had infringed a number of fundamental rights under the ECHR, including the prohibition of torture under Article 3 ECHR, when cooperating with the CIA's activities on that Member States' territory.<sup>33</sup> The European Commission has consistently stressed that all concerned Member States have to conduct in-depth, independent and impartial investigations to establish the facts in relation with the CIA program.

## ***Article 5 – Prohibition of slavery and forced labour***

Slavery violates human dignity. Trafficking in human beings is one form of slavery. The Charter explicitly prohibits trafficking in human beings in Article 5 (3). Preventing and combating it is a priority for the Union and the Member States.

### *Policy*

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<sup>30</sup> ECtHR, *Sharifi and Others v Italy*, No 16643/09, 21.10.2014.

<sup>31</sup> See also Articles 18 and 19.

<sup>32</sup> European Parliament resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA (2013/2702(RSP)).

<sup>33</sup> ECtHR, *Al Nashiri v. Poland*, No. 28761/11.

On 19 June 2012, the European Commission presented a Communication on the "**EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016**"<sup>34</sup>, which aims to address in a comprehensive, integrated and structured way the challenges in the EU for the next five years. The EU Strategy proposes a series of 40 concrete actions, in particular for the European Commission, other EU institutions, Member States and JHA agencies. The document emphasizes the necessity to respect and promote fundamental rights in all legislative and policy measures which address trafficking in human beings.

On 18 October 2014, to mark the 8<sup>th</sup> EU Anti-trafficking Day, the European Commission presented the Midterm Report on the implementation of the EU Strategy towards the eradication of trafficking in human beings 2012-2016<sup>35</sup>, the Second Eurostat Working Paper on statistics on trafficking in human beings<sup>36</sup> and a Communication on the application of the Directive 2004/81/EC regulating the granting of a temporary residence permit to third-country national victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the authorities for the investigation and prosecution of the alleged traffickers<sup>37</sup>.

The **Midterm Report** takes stock of the actions that have been launched and implemented by the European Commission jointly with other EU institutions, Member States, Justice and Home Affairs Agencies and civil society. The Report covers the period since the adoption of the Strategy until the third quarter of 2014. It also includes as an Annex the Second Report on the implementation of the Joint Statement signed by the seven Heads of Justice and Home Affairs Agencies on 18 October 2011.

The **Second Eurostat working paper on statistics on trafficking in human beings**, published on the same day and covering the years 2010, 2011 and 2012, is the only statistical data collection existing at EU level on trafficking in human beings. Encouraging progress has been achieved in terms of availability of data, but the working paper also points to a need for further improvement. The working paper does not measure the full extent of trafficking in human beings, it provides data only on the victims and traffickers that have come into contact with authorities and actors at national level. An important ongoing research project in this regard is Addressing Demand in Anti-Trafficking Efforts and Policies (DemandAT<sup>38</sup>).

The **Communication on Directive 2004/81** takes stock of the relevant steps that have been taken in EU policy addressing trafficking in human beings in the ten years following the adoption of this Directive and provides an updated overview of the main legal and practical issues relating to its

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<sup>34</sup> Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0286:FIN:EN:PDF> .

<sup>35</sup> European Commission Staff Working Document "Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings", COM(2014) 635 final, available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141017\\_mid-term\\_report\\_on\\_the\\_2012-2016\\_eu\\_strategy\\_on\\_trafficking\\_in\\_human\\_beings\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141017_mid-term_report_on_the_2012-2016_eu_strategy_on_trafficking_in_human_beings_en.pdf) .

<sup>36</sup> Available at: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141017\\_working\\_paper\\_on\\_statistics\\_on\\_trafficking\\_in\\_human\\_beings\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141017_working_paper_on_statistics_on_trafficking_in_human_beings_en.pdf) .

<sup>37</sup> Communication from the European Commission to the Council and the European Parliament on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014) 635, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-635-EN-F1-1.Pdf> .

<sup>38</sup> <http://research.icmpd.org/2491.html> .

application. Available figures show that the possibility of issuing temporary residence permits to non-EU victims is currently under-used. For example, in 2012 only 1.124 first residence permits were granted in the EU to victims who cooperated with the authorities, whereas for that very same year 23 Member States registered 2.171 non-EU citizens as victims of trafficking. The European Commission will continue to engage with Member States to ensure full and correct implementation of the legislation and to facilitate exchange of good practices.

Member States and the Commission participated in the negotiations at the International Labour Conference 2014 of a protocol to update the ILO Convention 29 on Forced Labour, which inter alia links forced labour and trafficking in human beings.

Furthermore in 2014, the European Commission also continued facilitating the work of the **EU Civil Society Platform against Trafficking in Human Beings**, launched in May 2013, which brings together more than one hundred civil society organisations including human rights organisations, migrant organisations and those working on the rights of women and children from EU Member States and third countries. The European Commission has also launched the **EU Civil Society e-Platform** to help even more civil society organisations to engage with the Commission and exchange information on actions against human trafficking.

#### *Application by Member States*

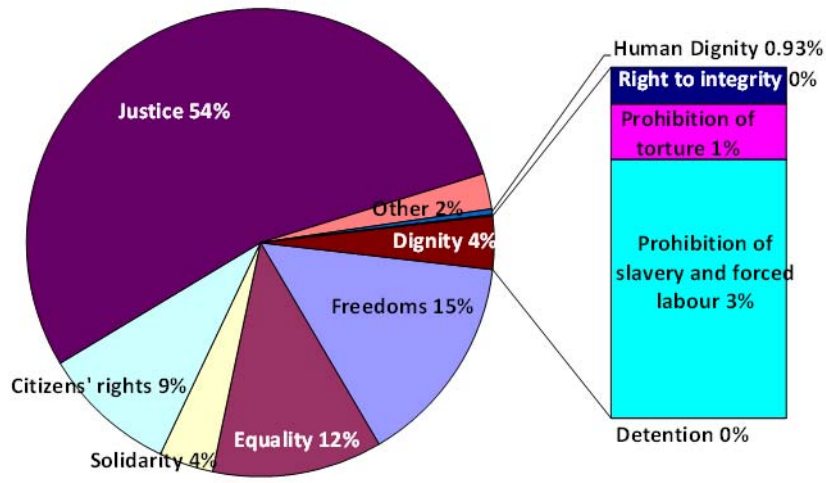
By prioritising the prevention of the crime, the prosecution of traffickers, the protection of the victims, cooperation and coordination, the EU Strategy complements the **Directive 2011/36/EU on preventing and combating trafficking in human beings**<sup>39</sup>, which has a strong focus on victim protection, assistance and support. The Directive adopts an integrated, holistic, and human rights-based approach in addressing trafficking in human beings, recognising the gender-specific nature thereof. The Directive respects fundamental rights and observes the principles recognised in particular by the Charter and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. The Directive had to be transposed by Member States by 6 April 2013. Until the end of 2014, 25 Member States have informed the Commission that they fully transposed the Directive into national laws. Two Member States have informed the Commission of partially having done so. The Commission is currently in the process of assessing the information received by the Member States and will not hesitate to take any necessary steps to ensure full compliance<sup>40</sup>.

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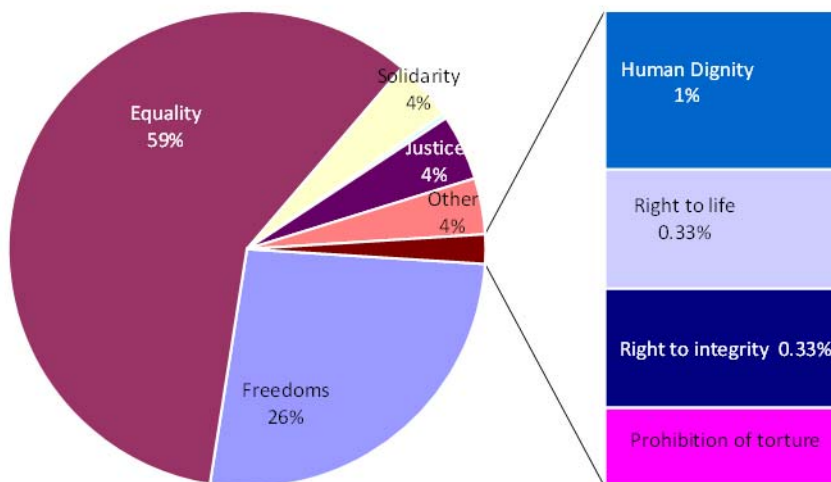
<sup>39</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 271, 18.10.2011, p. 49.

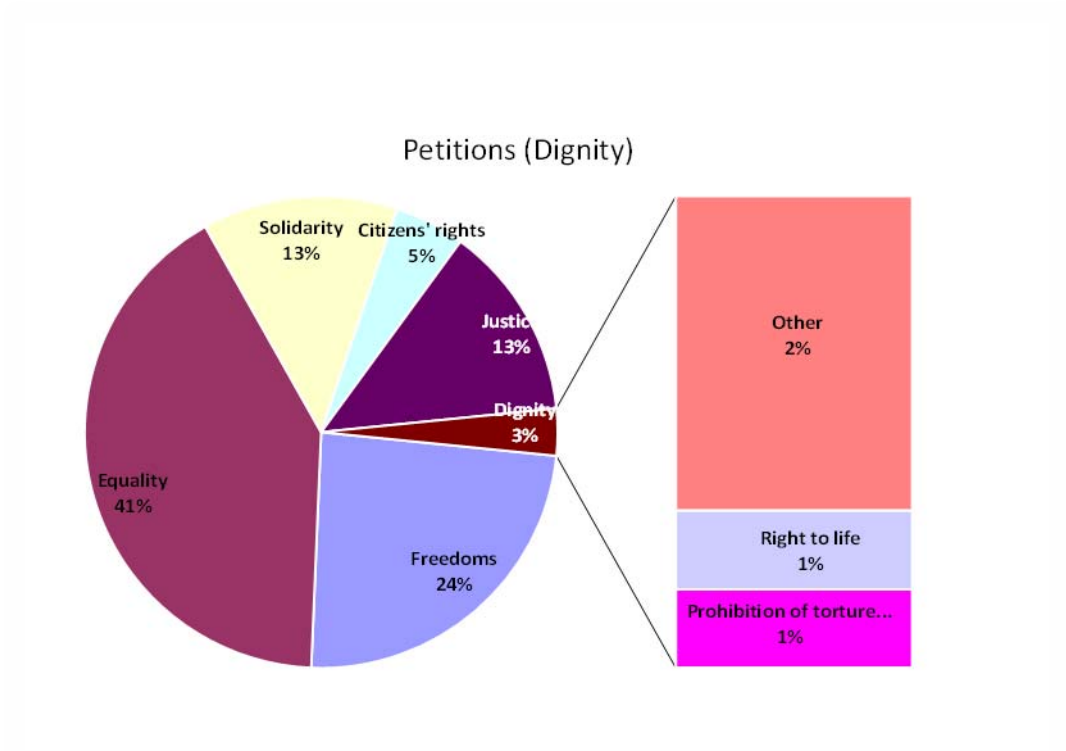
<sup>40</sup> As mentioned in the 2013 Report on the application of the Charter of Fundamental Rights, in May 2013 the European Commission launched infringement proceedings against 13 Member States that by that deadline had not communicated any measures transposing the Directive (Letters of formal notice were sent to them on 29 May 2013). In November 2013, reasoned opinions on non-communication basis were sent to Cyprus, Italy, Spain and Luxembourg.

### Letters (Dignity)



### Questions (Dignity)





Source: European Commission

# Freedoms

The Commission adopted an implementation report on the three detention Framework Decisions. It follows that despite a tight monitoring of these instruments carried out by the Commission, more than half of the Member States have still not yet implemented them.

With view to EU data protection law, the European Parliament adopted its position confirming its strong support for the reforms proposed by the Commission. The Commission continued to negotiate with its US counterparts on the Data Protection Umbrella agreement in order to protect personal data transferred between the EU and the US.

The CJEU in two important judgments underlined the need to protect but also balance fundamental rights correctly in the digital environment. In the Digital Rights Ireland case, the Court declared the Data Retention Directive invalid, because it disproportionately restricted rights to private life and to the protection of personal data as guaranteed by articles 7 and 8 of the Charter. In the Google case the CJEU clarified that a data controller is obliged to respect EU data protection law and therefore has to comply with requests to remove links to personal data, under certain circumstances ("right to be forgotten").

European Parliament and Council adopted Directive 2014/54/EU to ensure the better application at national level of EU citizens' right to work in another Member State. It aims at removing existing obstacles to the free movement of workers.

The Commission adopted a proposal amending Article 8(4) of the Dublin III Regulation on the issue of determining responsibility for examining applications made by unaccompanied children. It codifies the Courts' jurisprudence on this topic as it aims to ensure that the best interests of the child are always a primary consideration in the Dublin procedure.



## Title II

### Freedoms

#### ***Article 6 – Right to liberty and security***

Article 6 of the Charter guarantees the right of everyone to liberty and security of person. Its rights are the same as the rights guaranteed in Article 5 of the ECHR. This means in particular that any a person's liberty can only be limited under strict legal conditions.

The European Commission attaches high importance to the respect of fundamental rights for persons who are detained in the EU and is aware of overcrowding of prisons in certain places. The Commission regularly receives citizens' letters, parliamentary questions and petitions on prison overcrowding and substandard detention conditions in the Member States.

#### *Policy*

As far as non-legislative action is concerned, the European Commission will continue to support the exchange of information and best practices between Member States on detention conditions, including the involvement of the national supervisors in places of detention.

In 2014 a European Commission study reported on ***Children in conflict with the law and in detention***.<sup>41</sup> It found that there was a statutory obligation in most Member States for pre-trial detention of children suspected of committing offences to be used as a measure of last resort. Some Member States had implemented this obligation by establishing additional criteria that must be met before placing child suspects in pre-trial detention. Fifteen Member States had statutory provisions requiring that pre-trial detention is used for the shortest appropriate period of time. However, in practice the maximum duration of pre-charge and post-charge pre-trial detention of child suspects varied significantly across Member States. The longest period of police custody permitted by law was 72 hours (in Bulgaria, the Czech Republic and Hungary). The longest period of post-charge pre-trial detention permitted by law was 8 months (Denmark). The longest exceptional extension of pre-trial detention for terrorism and other serious offences was 10 years (Spain). In all MS except Belgium and Portugal there are rules requiring that children in pre-trial detention are held separately from adults. However, in practice, several Member States failed to implement this obligation due to problems of infrastructure.

Additionally, the European Migration Network study on the *use of detention and alternatives to detention in the context of immigration policies*<sup>42</sup> of 2014 examined alternatives to administrative detention in the field of immigration in 26 Member States. It found that the majority of Member

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<sup>41</sup> European Commission, Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union, available at: <http://bookshop.europa.eu/en/summary-of-contextual-overviews-on-children-s-involvement-in-criminal-judicial-proceedings-in-the-28-member-states-of-the-european-union-pbDS0313659/?CatalogCategoryID=WTQKABsteF0AAAEjKpEY4e5L>.

<sup>42</sup> European Migration Network, Synthesis Report – The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, 2014, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn\\_study\\_detention\\_alternatives\\_to\\_detention\\_synthesis\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf)

States (24 in total) had developed **alternatives to detention**, which included: reporting obligations; residence requirements; the obligation to surrender identity or a travel document; release on bail; electronic monitoring; provision of a guarantor; and release to care workers or under a care plan.

#### *Case law*

In 2014, the CJEU has rendered several important judgments as regards detention conditions for pre-removal detainees. The judgment of 17 July 2014<sup>43</sup> in cases *Bero* and *Bouzalmate* clarified that **detention must be carried out, as a matter of principle, in specialised detention facilities** and that the non-existence of specialised detention facilities in parts of the federal subdivisions of a Member State is no justification to carry out detention in ordinary prisons. The protection oriented approach of the detention related provisions of the Return Directive was further emphasised in the judgment of 17 July 2014 case *Thi Ly Pham*.<sup>44</sup> Here the Court clarified that Member States are not allowed to detain a third-country national for the purpose of removal in prison accommodation together with ordinary prisoners even if the third-country national consents thereto. In its judgment in *Mahdi*<sup>45</sup> the Court insisted that **judicial supervision of prolonged detention must take into account both legal and factual elements**.<sup>46</sup>

#### *Application by Member States*

In 2008 and 2009, EU legislation was adopted which aims at facilitating the social rehabilitation of sentenced persons and at providing alternatives to prison, notably the three Framework Decisions on the transfer of prisoners<sup>47</sup>, on probation and alternative sanctions<sup>48</sup> and on supervision measures<sup>49</sup>. This EU legislation, if properly applied, has the potential to reduce substantially the use or the period of imprisonment, in particular for persons that are non-residents in the Member State where the conviction takes place. The Commission on 5 February 2014 adopted an **implementation report on the three detention Framework Decisions**. It concluded that despite a tight monitoring of these instruments carried out by the Commission since four years, more than half of the Member States have still not yet implemented them.

In 2014 the Commission continued to systematically follow up shortcomings related to the correct transposition of the Return Directive<sup>50</sup>. It opened formal infringement proceedings against three

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<sup>43</sup> CJEU judgment of 17 July 2014 in Cases C-473/13 *Adala Bero v Regierungspräsidium Kassel* and C-514/13 *Ettayebi Bouzalmate v Kreisverwaltung Kleve*.

<sup>44</sup> CJEU judgment of 17 July 2014 in Case C-474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*.

<sup>45</sup> CJEU judgment of 5 June 2014 in Case C-146/14 PPU *Mahdi*.

<sup>46</sup> See also below Article 47.

<sup>47</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008, p. 27.

<sup>48</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p. 102.

<sup>49</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, p.20.

<sup>50</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, p. 98.

Member States for not having correctly implemented several provisions of the Return Directive into national law. One of the most important reasons for infringements is related to the detention of returnees. Conditions of detention and its extensive use (including in one case detention beyond 18 months) as well as the absence of appropriate review of detention have been raising serious concerns. The absence of effective forced return monitoring systems, duration and territorial validity of entry bans, the lack of free legal assistance to returnees in detention centres and procedural issues (translation) were also raised in the infringement procedures just as the definition of return.

In 2014 the European Commission launched infringement proceedings against a Member State on the Returns Directive<sup>51</sup> raising concerns among others on the maximum length of detention, inadequate material detention conditions, the lack of free legal assistance to returnees in detention centres and the absence of judicial review of detention orders before six months and the limited possibilities for review of decisions to extend the detention beyond the six months.

Furthermore, a letter of formal notice was sent to one Member State concerning their practice of detaining certain categories of asylum applicants, which raised questions on the necessity of detention as well as effective remedies against the detention orders.<sup>52</sup>

## ***Article 7 – Respect for private and family life***

Article 7 of the Charter guarantees the right of everyone to respect of their private and family life as well as home and communications.

The right to **private life** includes the protection of privacy in relation to any information about a person. Where legislation, policy or case law refer to this right in connection to the protection of personal data, this report will refer to them under Article 8 below.

### *Policy*

As regards the right to respect of family life the Communication of 3 April 2014 on guidance for application of the **Directive on the right to family reunification**<sup>53</sup> (henceforth "guidelines") clarifies in its general introduction that the Directive must be interpreted and applied in accordance with fundamental rights. This concerns, in particular, the right to respect of private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy, as enshrined in the European Convention of Human Rights and the EU Charter of Fundamental Rights.

With regard to the family members falling into its scope all provisions must be applied in accordance with the non-discrimination principle enshrined in Article 21 of the Charter.<sup>54</sup> This applies in

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<sup>51</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, p. 98.

<sup>52</sup> See also Articles 18 and 47.

<sup>53</sup> Communication on guidance for application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final), available at: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0210\\_/com\\_com\(2014\)0210\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf).

<sup>54</sup> Communication on guidance for application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final), recital 5; see also references to this communication under Article 21.

particular to spouses and unmarried partners in a duly attested stable long-term relationship and registered partnerships, concepts that have been extended in several Member States in recent years.

Furthermore, these guidelines underline that while Member States enjoy a wide margin of appreciation when taking due account of the relevant factors in an individual case, they are limited by the principles of Article 8 of the European Convention on Human Rights, Article 7 of the Charter of Fundamental Rights of the European Union concerning protection of family and respect for family life, as well as the relevant case law of the European Court of Human Rights and the CJEU.

Finally, with regard to the right to legal redress,<sup>55</sup> the guidelines clarify that the Directive's redress provision must be applied in conformity with the right to an effective remedy before a tribunal, as set out in Article 47 of the Charter and the CJEU's case law in this matter. The Directive explicitly envisages the right to legally challenge four possible types of decisions under the Directive (the rejection of an application for family reunification, the refusal to renew a residence permit, the withdrawal of a residence permit, and the order of removal from the territory of a MS). However, the guidelines now state that effective remedies must also be granted with regard to any other decisions, for instance, decisions concerning the restriction of the right to employment or the refusal to grant an independent residence title, since Article 47 applies to all rights provided for in the Directive. The guidelines clarify that full judicial review must be available concerning merits and legality. They also point out that quasi-judicial or administrative review may not be adequate to meet the benchmark of Article 47 of the Charter.<sup>56</sup>

#### *Case Law*

Regarding the right to respect of one's **family life** the CJEU in the **Reyes** case<sup>57</sup> decided that the right to family reunification with a dependant direct descendant who is 21 years old or older, does not depend on the descendant having tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support him- or herself.<sup>58</sup>

The case **A, B, C v Staatssecretaris van Veiligheid en Justitie**<sup>59</sup> touched on questions of the protection of **privacy**, also enshrined in Article 7 of the Charter. It concerned the interpretation of EU provisions on asylum in relation to the methods by which national authorities may assess the **credibility of the declared sexual orientation of applicants for asylum**. The applicants here had claimed that they feared persecution in their countries of origin on account of their homosexuality. The national court asked the CJEU whether there are any limits imposed by EU law as regards the verification of the sexual orientation of applicants for asylum. In its ruling the Court underlined that, while Member States are entitled to assess the credibility of the statements of an applicant regarding his/her sexual orientation, the methods used by the competent national authorities to assess the

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<sup>55</sup> Communication on guidance for application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final), Article 18.

<sup>56</sup> See also references to this communication under Articles 47.

<sup>57</sup> CJEU judgment of 16 January 2014 in Case C-423/12 *Reyes*.

<sup>58</sup> See also below under Article 45.

<sup>59</sup> CJEU judgment of 2 December 2014 in Joined Cases C-148/13, C-149/13 and C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie*, see also under Articles 7, 18 and 21.

credibility of those statements must ensure the respect of fundamental rights, including the right to respect for private and family life.<sup>60</sup>

A case dealing with the right to data protection on the one hand and the interest of an individual to protect his or her home and family on the other was dealt with in the case *Ryneš* discussed below.<sup>61</sup>

#### *Text Box Example*

##### Ruling of the Austrian Constitutional Court

In 2014 the Austrian Constitutional Court<sup>62</sup> examined the constitutionality of the national data retention provisions transposing the Data Retention Directive<sup>63</sup>. Austria provides the Charter with constitutional rank allowing the Charter to be used as a legal benchmark. In its ruling, the Court stressed once more that within the scope of EU law the rights of the Charter form benchmarks when checking the legality of national norms. Although the Court referred to Articles 7 and 8 of the Charter, the challenged national provisions were eventually only measured against national constitutional law and Article 8 ECHR. The Court ruled that the national data retention provisions were unconstitutional and therefore void.

## ***Article 8 – Protection of personal data***

The fundamental right of everyone to the protection of personal data is explicitly recognised by Article 8 of the Charter. It is furthermore stated in Article 16 of the Treaty on the Functioning of the European Union. It aims at the protection of an individual's free decision on the processing of his or her own personal data. This right is gaining increasing importance in view of the explosion of the collection, use and distribution of personal data within our digital society.

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<sup>60</sup> For further information see discussion of the case above under Article 1.

<sup>61</sup> CJEU judgment of 11 December 2014 in Case C-212/13 *Ryneš*, see below under Article 8.

<sup>62</sup> Constitutional Court Austria (Verfassungsgerichtshof Österreich), case G47/2012 u.a., 27.6.2014, available at: [www.ris.bka.gv.at/Dokument.wxe?Abfrage=Gesamtabfrage&Dokumentnummer=JFT\\_20140627\\_12G00047\\_00&ResultFunctionToken=4d6a6c54-02c0-443e-990d-5bdfadfd80bb&SearchInAsylGH=&SearchInBegut=&SearchInBgbAlt=&SearchInBgbAuth=&SearchInBgbPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaessee=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblAuth=&SearchInLrBglD=&SearchInLrK=&SearchInLrNo=&SearchInLrOO=&SearchInLrSbg=&SearchInLrStmk=&SearchInLrT=&SearchInLrVbg=&SearchInLrW=&SearchInNormenliste=&SearchInPvak=&SearchInRegV=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=GRC](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Gesamtabfrage&Dokumentnummer=JFT_20140627_12G00047_00&ResultFunctionToken=4d6a6c54-02c0-443e-990d-5bdfadfd80bb&SearchInAsylGH=&SearchInBegut=&SearchInBgbAlt=&SearchInBgbAuth=&SearchInBgbPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaessee=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblAuth=&SearchInLrBglD=&SearchInLrK=&SearchInLrNo=&SearchInLrOO=&SearchInLrSbg=&SearchInLrStmk=&SearchInLrT=&SearchInLrVbg=&SearchInLrW=&SearchInNormenliste=&SearchInPvak=&SearchInRegV=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=GRC).

<sup>63</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, p. 54.

## Legislation

To ensure adequate protection and promotion of this fundamental right in view of the digital revolution the European Commission has been continuously working on the data protection reform. Already in January 2012 it published its proposals for a **General Data Protection Regulation** and a **Data Protection Directive for Police and criminal justice authorities**.<sup>64</sup> These will replace the existing 1995 Data Protection Directive 95/46/EC and the Framework Decision 2008/977/JHA. The European Parliament adopted its position in the first reading on 12 March 2014, confirming its strong support for the European Commission's data protection reform.<sup>65</sup> However, the Council has yet to reach a full general approach. The European Council, of October 2013 and June 2014, committed to an adoption of a "strong data protection framework" as an essential step for the completion of the Digital Single Market by 2015. The JHA Council of 5 and 6 June 2014 reached partial general approaches on the territorial scope of the regulation and on international transfers, on the rules governing the processing of personal data by data controllers and processors (Council of 9-10 October 2014) and on flexibility for the public sector as well as specific processing operations of the regulation. A majority of justice ministers endorsed the overall architecture of the One-Stop-Shop. Furthermore, the European Commission continued to negotiate with its **US** counterparts on the **Data Protection Umbrella agreement** in order to protect personal data transferred between the EU and the U.S. for law enforcement purposes as well as the conditions of a **new safe harbour regime** as regards data transfers to the US. A critical outstanding issue which remains is the right of effective judicial redress that should be granted by the U.S. to EU citizens not resident in the U.S.

Additionally, the right to data protection has been adequately taken into account during the last year by a number of relevant legislative instruments in a variety of areas as shown by the following examples.

In the area of tax law the European Commission is working with Member States on **the implementation of the OECD Global Standard for automatic exchange of financial account information for the purposes of fighting tax fraud and evasion**<sup>66</sup>. Under the Global Standard, financial institutions would be required to collect certain financial account information (such as account balances, interest, dividends, and sales proceeds from financial assets) in respect of non-resident individuals and entities and report it to their tax authorities which would in turn pass it automatically to the tax authorities of the country of residence of these individuals and entities.

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<sup>64</sup> Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012) 11 final) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0011&from=EN> and: Proposal for a directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, available at: [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_10\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_10_en.pdf).

<sup>65</sup> European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)); available at: <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=5C176F19AC428C1721BF3CDE5676C1A8.node1?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0212%2000%20DOC%20XML%20V0//en>.

<sup>66</sup> Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0107>.

Comments issued by the Article 29 Working Party have been taken into account with the inclusion, of comprehensive data protection safeguards in the draft act, in the course of the discussions with the Council.

As regards maritime and fisheries policy the **the European Maritime and Fisheries Fund (EMFF) Regulation**<sup>67</sup> of 2014 put in place particular safeguards for the right to protection of personal data. It requires Member States to publish the names of natural persons who receive EMFF funding only if such publication is in conformity with the national law of the Member State concerned.<sup>68</sup> This requires respecting the provisions of Directive 95/46/EC on the protection of personal data as well as national acts adopted to implement that Directive. The EMFF Regulation thereby ensures not only the individual's right under Article 8 of the Charter but also the right to respect for private life (Article 7 of the Charter), while at the same time giving effect to the principle of transparency set out in Articles 1 and 10 TEU and Article 15 TFEU.

Furthermore, the **Communication on the Common Information Sharing Environment (CISE) for the EU maritime domain**<sup>69</sup>, which sets out the next steps to be taken as regards enhanced cooperation between maritime surveillance authorities, was adopted on 8 July 2014. It recalls that in cases where maritime surveillance data involve personal data, the relevant EU data protection instruments apply, in particular Directive 95/46/EC, Council Framework Decision 2008/977/JHA, and Regulation (EC) No 45/2001. Furthermore, the Commission outlines its plan to develop a non-binding Maritime CISE handbook that will include guidance on the recommended handling of personal information by relevant authorities. It also points to compliance with data protection requirements within its ongoing review of EU legislation concerning the removal of barriers to cross-sectorial information sharing. Finally, Member States are advised to involve national data protection authorities at an early stage, when adapting their national surveillance systems to the objectives of CISE in order to ensure compliance with national data protection requirements.

To cover specific needs in the energy sector and to ensure adequate attention to data protection and security in the smart grid environment throughout the EU, the Commission adopted its Recommendation 2014/724/EU<sup>70</sup> on the **Data Protection Impact Assessment Template for Smart Grid and Smart Metering Systems** on 10 October 2014, aiming to formalize and promote the template's take-up in order to ensure adequate attention to data protection and security in the smart grid environment throughout the EU. The template aims at the protection of the right to privacy under Article 7 of the Charter as well.<sup>71</sup>

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<sup>67</sup> Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund, OJ L 149, 20.5.2014, p. 1.

<sup>68</sup> Article 119 and Annex V of the EMFF Regulation.

<sup>69</sup> Communication from the Commission to the European Parliament and the Council, Better situational awareness by enhanced cooperation across maritime surveillance authorities: next steps within the Common Information Sharing Environment for the EU maritime domain, available at: [http://ec.europa.eu/maritimeaffairs/policy/integrated\\_maritime\\_surveillance/documents/com\\_2014\\_451\\_en.pdf](http://ec.europa.eu/maritimeaffairs/policy/integrated_maritime_surveillance/documents/com_2014_451_en.pdf), COM(2014) 451 final.

<sup>70</sup> Commission Recommendation 2014/724/EU OJ L300, 18.10.2014, p.63.

<sup>71</sup> A two years test phase for the application of the template was kicked-off at the beginning of March 2015 to apply it to real-life cases. Based on this feedback and in light of the upcoming Data Protection Reform, the template could be further fine-tuned to enhance its efficiency and user-friendliness.

## Policy

Different Policy activities of the EU in 2014 aimed at sufficiently ensuring the right to privacy as well as the right to protection of personal data.

A reference to Article 8 of the Charter in the European Commission's Decision on the protection of personal data in the **European e-Justice Portal**<sup>72</sup> ensures that the institutions, bodies, offices and agencies of the European Union as well as the Member States when they are implementing Union law, respect fundamental rights and observe the principles recognised by the Charter, in particular the right to the protection of personal data.

The European Commission **Communication: 'Towards a thriving data-driven economy'**,<sup>73</sup> adopted in July 2014, identifies the necessary elements of a data-driven economy and lists a number of actions to help Europe position itself as a leader in data-driven innovation. Data driven economy will only thrive if business and individuals have confidence that their data are secure. Systems that can gain the users' confidence in their data protection safeguards may provide a competitive edge to their providers. The Communication lists a number of actions and initiatives, namely to conclude the EU data protection reform package; to partner with Member States and stakeholders to ensure that businesses receive guidance on data anonymisation and pseudonymisation, personal data risk analysis, and tools and initiatives to enhance consumer awareness. The Commission will also invest into the research for related technical solutions that are privacy-enhancing 'by design', produce guidelines on good practices for secure data storage, propose measures to help detect and better respond to cyber-attacks, to launch a consultation and set up an expert group on "data ownership" and liability of data provision, in particular for data gathered through the Internet of Things, and examine the potential of the concept of user-controlled cloud-based technologies for storage and use of personal data ("personal data spaces").

In line with the **European Cloud Strategy**<sup>74</sup> the European Commission works with the industry (C-SIG) to agree on a **Data Protection Code of Conduct for cloud service providers (CSPs)**<sup>75</sup> which aims at supporting an uniform application of data protection rules and to build trust and confidence in the field of cloud computing. The purpose of the Code of Conduct is to assist prospective cloud users in evaluating whether personal data under the Cloud Service Agreement is processed with an appropriate level of data protection, and to help Cloud Service Providers to comply with the data protection framework. The governance structure of the Code will also assist in achieving this goal. The Code will aim to instil trust among cloud users that a CSP needs the applicable requirements related to the processing of personal data.

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<sup>72</sup> Commission Decision of 5 June 2014 on the protection of personal data in the European e-Justice Portal (2014/333/EU), OJ L 167, 6.6.2014, p. 57.

<sup>73</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 July 2014: Towards a thriving data-driven economy (SWD(2014) 214 final), available at: <https://ec.europa.eu/digital-agenda/en/news/communication-data-driven-economy>.

<sup>74</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 27 Sept 2012: Unleashing the Potential of Cloud Computing in Europe, COM(2012) 529 final.

<sup>75</sup> Information on the C-SIG subgroup on Data Protection Code of Conduct: <https://ec.europa.eu/digital-agenda/en/cloud-select-industry-group-code-conduct>.



Finally, the ongoing implementation of a **Digital Single Market (DSM)** as envisaged in the European Commission's work programme needs to be pointed out in this context. In his political guidelines to the European Parliament, President Juncker called for breaking down national silos in the regulation of telecoms, in copyright and data protection legislation, in the management of radio waves and in the application of competition law. Citizens' trust and confidence are key pillars of this strategy and important pre-conditions of a fully functioning Digital Single Market. This includes strong and efficient protection of fundamental rights online.

Challenges in the context of the digital revolution related to protection of fundamental right online are not limited to the data protection reform and the completion of the DSM. They also arise in other areas, most prominently in relation to security policies. The trust of citizens, based on credible protections of fundamental rights, non-discrimination, tolerance and the rule of law is also vital for the success of such policies in democratic societies.

#### *Case Law*

The CJEU in several important judgments underlined the need to protect but also balance fundamental rights correctly in the digital environment. In the **Digital Rights Ireland case**<sup>76</sup>, the Court reiterated the EU institutions' obligations to respect the Charter in its activities, namely where they affect the right to private life and personal data protection. It declared the Data Retention Directive invalid, because it disproportionately restricted rights to private life and to the protection of personal data as guaranteed by Articles 7 and 8 of the Charter. The Directive had required Member States to ensure that telecommunications service providers retain traffic and location data of their customers for a period between six months and two years and to make these data available, on request, to law enforcement authorities for the purposes of investigating, detecting and prosecuting serious crime and terrorism.<sup>77</sup>

In the **Google case**<sup>78</sup> the CJEU clarified that an internet search engine operator, such as *Google*, as a data controller, established in the EU is responsible for the processing of personal data that it carries out and which appear on web pages published by third parties. Consequently it was held to be obliged to respect EU data protection law (Articles 7 and 8 of the Charter) and therefore to comply with requests to remove links to certain personal data, under certain circumstances ("right to be forgotten").

The preliminary ruling case of **Ryneš**<sup>79</sup> highlighted a scenario of tension between the right to protection of personal data (Article 8) on the one side and the right to protection of one's home and family on the other (Article 7). Here it was held that the **use of a camera system that recorded the entrance to the user's home**, the public footpath and the entrance to the house opposite as well as the storage of those recordings on a hard disk drive to which only this user had access rendered such a user a data controller in the sense of the Data Protection Directive 95/46. It was not covered by the exception of collecting data for personal or household activities, as the surveillance recordings included data of persons within the public sphere, e.g. the public footpath. This would generally

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<sup>76</sup> CJEU judgment of 8.4.2014 in Cases C-293/12 and C-594/12 *Digital Rights Ireland and Kärntner Landesregierung*, see also below Article 52.

<sup>77</sup> See also Article 11.

<sup>78</sup> CJEU judgment of 13.5.2014 in Case C-131/12 *Google Spain and Google*.

<sup>79</sup> CJEU judgment of 11 December 2014 in Case C-212/13 *Ryneš*.

entail the obligation of the data controller to obtain the consent of anyone recorded that the latter's data are processed. In the concrete case this lack of consent was the issue in the national case that had led to criminal prosecutions of persons which had attempted to break into Mr Ryneš home. However the CJEU pointed out that the application of Directive 95/46 makes it possible, where appropriate, to take into account legitimate interests pursued by the controller, such as the protection of the property, health and life of his family and himself.

Finally, in the case of *Commission v Hungary*<sup>80</sup> the CJEU held that Hungary had infringed EU law by prematurely bringing to an end the term served by its Data Protection Supervisor.

## ***Article 9 – Right to marry and right to found a family***

The right to marry and to found a family as guaranteed in Article 9 of the Charter is similar to that afforded by the ECHR in its Article 12.

### *Policy*

The right to marry was taken into account when designing a **handbook** on addressing the issue of alleged **marriages of convenience** between EU citizens and non-EU nationals: The Handbook is designed to help uphold the fundamental right to marry as well as that of free movement where national authorities try to identify so-called marriages of convenience. It aims at helping national authorities address this phenomenon - the extent of which varies significantly between Member States - based on the same factual and legal criteria throughout the Union and therefore effectively tackle marriages of convenience, while safeguarding the fundamental right of EU citizens to free movement.<sup>81</sup>

## ***Article 10 – Freedom of thought, conscience and religion***

The right guaranteed in paragraph 1 of Article 10 of the Charter corresponds to the right guaranteed in Article 9 of the ECHR. Besides the freedom of adhering to a chosen religious belief and practising it, the right protects actions of conscience such as for example those of conscientious objectors.

In the context of the **dialogue with churches, religions, philosophical and non-confessional organisations** under Article 17 TFEU, concerns regarding freedom of religion have been raised with view to the legislative framework in Hungary, in particular the registration of churches.

### *Legislation*

**Slaughtering** legislation in some Member States is perceived as an impediment to freedom of religion. Council Regulation 1099/2009<sup>82</sup> on the protection of animals at the time of killing establishes the general rule that animals shall only be killed after stunning. At the same time, in order

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<sup>80</sup> CJEU judgment of 8 April 2014, Case C-288/12 *European Commission v Hungary*.

<sup>81</sup> See also Article 45 below.

<sup>82</sup> Council Regulation 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ L303, 18.11.2009, p.1.

to respect freedom of religion as enshrined in Article 10 of the EU Charter of Fundamental Rights, the regulation contains an exception to the stunning requirement for animals subject to particular methods of slaughter prescribed by religious rites, provided that the slaughter takes place in a slaughterhouse. Derogation from stunning is therefore justified for religious reasons in the case of slaughter under the Jewish rite (for *Kosher* meat) or Muslim rites (for *Halal* meat).

#### *Application by Member States*

In view of the above mentioned Council Regulation 1099/2009 on protection of animals, Member States define themselves in how far exemptions from the stunning requirement for animals due to religious reasons are applicable and notify the Commission. In some Member States ritual slaughter has been banned for some time (Finland, Lithuania, Malta, and Sweden) while three Member States only recently banned slaughter without stunning: Poland and Slovenia in 2013, Denmark in 2014. In Poland the legislation was revoked in December 2014 by its Constitutional Court.<sup>83</sup>

### ***Article 11 – Freedom of expression and information***

The right to freedom of expression is guaranteed by Article 11(1) of the Charter and includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 11(2) ensures respect for freedom and pluralism of the media.

In line with Article 52(3) of the Charter, the EU's approach to this right and its limits takes inspiration from the case law of the European Court of Human Rights. Namely, that the right to freedom of expression extends to speech which "*offends, shocks or disturbs the State or any sector of the population*"<sup>84</sup> but that States may "*sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance*"<sup>85</sup>. Furthermore, the rejection or revision of "*clearly established historical facts - such as the Holocaust*" falls outside the scope of protection of Article 11(1)<sup>86</sup>. These principles find their legislative expression in, among others, the EU Framework Decision on racism and xenophobia<sup>87</sup>.

#### *Policy*

On 12 May 2014, the Council of the European Union adopted the **EU Human Rights Guidelines on Freedom of Expression Online and Offline**.<sup>88</sup> Their aim is to clarify the international human rights standards on freedom of opinion and expression and to provide political and operational guidance to officials and staff of the EU institutions and EU Member States for their work in third countries, in international organisations and civil society.

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<sup>83</sup> Judgment of the Polish Constitutional Tribunal of 12 December 2014, Case Ref. No K 52/13.

<sup>84</sup> ECtHR, *Handyside v UK*, No. 5493/72, 07.12.1976.

<sup>85</sup> ECtHR, *Erbakan v Turkey*, No. 59405/00, 06.07.06.

<sup>86</sup> ECtHR, *Lehideux and Isorni v France*, No. 24662/94, 23.09.1998.

<sup>87</sup> Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law of 28 November 2008, OJ L 328, 6.12.2008, p.55.

<sup>88</sup> Available at:

[http://eeas.europa.eu/delegations/documents/eu\\_human\\_rights\\_guidelines\\_on\\_freedom\\_of\\_expression\\_online\\_and\\_offline\\_en.pdf](http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf). See also Article 21 for more details on this legislation.

Following the Council Conclusions adopted in November 2013 on **media freedom and pluralism**, the European Commission issued a call for proposals for a European Centre for Press and Media Freedom and in early 2014 selected four projects, run by NGOs and academic institutions, with the objective to address violations of media freedom and pluralism in the EU and Candidate Countries. A new call was launched in 2014. During the course of 2014, the European Commission also awarded a grant for the Centre for Media Pluralism and Media Freedom (CMPF) to conduct a pilot implementation of the “Media pluralism Monitoring tool” (MPM)<sup>89</sup>. This included a simplification and a testing of the tool in 9 Member States.<sup>90</sup> For this year's pilot project a testing in the remaining Member States is foreseen. In February 2014, the Commission adopted a decision regarding the European Regulators Group for Audio-visual Media Services (ERGA)<sup>91</sup>. One of the first topics on the agenda of the group was the independence of regulatory authorities<sup>92</sup>. A conference on the exchange of transparency in media ownership was held on 3 October in Brussels.

#### *Case Law*

In the **Deckmyn v Vandersteen** case of 3 September 2014<sup>93</sup> the CJEU clarified the scope of the parody exception under Article 5(3)(k) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

It is noteworthy that the CJEU in the **Digital Rights Ireland** case<sup>94</sup> amongst others found a limitation of the right to freedom of expression under Article 11 of the Charter. However, it did not continue to examine whether such a limitation by the challenged data retention directive was justified, since the court had already established an infringement of Articles 7 and 8. On the basis of the latter the CJEU annulled the directive and saw no further need to examine Article 11.

## ***Article 12 – Freedom of assembly and of association***

The Right to freedom of peaceful assembly and to freedom of association at all levels including political, trade union and civic matters is protected in Article 12 of the Charter. It corresponds to Article 11 of the ECHR. Its scope, however, is wider since it applies to all European levels. Furthermore unlike Article 11 ECHR, it specifically mentions the special contribution of political parties to the expressing the citizens' political will.

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<sup>89</sup> On all these initiatives please refer to <https://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism>

<sup>90</sup> The final report of the first phase was published in January 2015. Link: <http://ec.europa.eu/digital-agenda/news-redirect/20149>

<sup>91</sup> *Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final*, available at: [http://www.google.de/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fec.europa.eu%2Finformation\\_society%2Fnewsroom%2Fcf%2Fdae%2Fdocument.cfm%3Fdoc\\_id%3D4294&ei=cRT3VOPDL4j3O7D1gNgC&usg=AFQjCNHx-nnaB6E1oDb8ZEvQ4gN9X13C1g](http://www.google.de/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fec.europa.eu%2Finformation_society%2Fnewsroom%2Fcf%2Fdae%2Fdocument.cfm%3Fdoc_id%3D4294&ei=cRT3VOPDL4j3O7D1gNgC&usg=AFQjCNHx-nnaB6E1oDb8ZEvQ4gN9X13C1g).

<sup>92</sup> ERGA statement on the independence of NRAs in the audiovisual sector - [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?action=display&doc\\_id=7310](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=7310)

<sup>93</sup> CJEU judgment of 3 September 2014 in Case C-201/13, *Deckmyn v Vandersteen*, see also Article 21.

<sup>94</sup> CJEU judgment of 8.4.2014 in Cases C-293/12 and C-594/12 *Digital Rights Ireland* and *Kärntner Landesregierung*, see also above under Article 8.

### *Legislation*

On the basis of a proposal of the European Commission, the Parliament and the Council adopted on 22 October 2014 the Regulation (EU) No 1141/2014 on the statute and funding of European political parties and European political foundations. The new rules aim at increasing the visibility and EU-wide recognition of European political parties and helping European political parties and their affiliated political foundations to play their role of expressing the political will of EU citizens.

### ***Article 13 – Freedom of the arts and sciences***

Article 13 of the Charter ensures that arts and scientific research are free of constraint. This does not mean that restrictions of the former are not possible, but that they are only possible under the strict conditions of Article 52 I of the Charter.<sup>95</sup>

### *Policy*

Where EU institutions fund areas of research or science, they remain under an obligation to respect the Charter. In this context, the new Framework Programme for Research and Innovation for the period 2014-2020, Horizon 2020 needs to be mentioned. It was launched on 1 January 2014 (regulation 1291/2013<sup>96</sup>). It includes a specific Societal Challenge 6 with the title “Europe in a changing world – Inclusive, innovative and reflective societies” which addresses the many facets of fundamental rights in Europe whether in its internal dimension or in its external dimension. The first calls for proposals were published in July 2014 and contained several topics relevant for research on the EU Charter of fundamental rights and in particular a topic with the title “Europe’s contribution to a value-based global order and its contestant” under a Call “Europe as a global actor”. The results of this research in social sciences and the humanities will be fed into policymaking as they are made available.

### ***Article 14 – Right to education***

The right to education and access to vocational and continuing training is enshrined in Article 14 of the Charter. It is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR.

### *Application in the Member States*

Infringement Proceedings by the European Commission against a Member State launched in 2014 concern discrimination of Roma children in education and are referred to below under Article 21.

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<sup>95</sup> For further explanations see below Article 52.

<sup>96</sup> Regulation (EU) No 1291/2013 of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC, OJ L 347 20.12.2013, p.104.

## ***Article 15 – Freedom to choose an occupation and right to engage in work***

The Charter in its Article 15 (1) protects the **right to engage in work** and to pursue a freely **chosen** or accepted **occupation**.

### *Legislation*

In 2014 a number of legislative instruments were adopted to further facilitate free movement of workers thereby promoting the rights under Article 15.

On 16 April 2014, a **Directive was adopted to ensure the better application at national level of EU citizens' right to work in another Member State**<sup>97</sup>. The new rules, proposed by the European Commission in April 2013, aim to remove existing obstacles to the free movement of workers, such as the lack of awareness of EU rules among public and private employers and the difficulties faced by mobile citizens to get information and assistance in the host Member States. To overcome these barriers and prevent discrimination, the Directive requires Member States to ensure that one or more bodies at national level provide support and legal assistance to EU migrant workers with the enforcement of their rights. It also requires an effective legal protection of rights (including for example protection from victimisation for EU migrant workers who seek to enforce their rights) and easily accessible information in more than one EU language on the rights enjoyed by EU migrant workers and jobseekers.

The **Seasonal workers' Directive** was adopted on 26 February 2014<sup>98</sup>. This Directive concerns the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. The text of the Directive provides for the respect of fundamental rights recognised by the Charter, in particular Articles 7, 15(3), 17, 27, 28, 31 and 33(2). The Directive provides for equal treatment with nationals of the Member State where they work as regards: terms of employment and working conditions, the right to strike and take industrial action and freedom of association and membership of trade unions, back payments, access to branches of social security (with possible exceptions as regards family and unemployment benefits), access to goods and services and to advice services on seasonal work and recognition of diplomas. Third-country national seasonal workers are also entitled to equal treatment as regards education and vocational training and tax benefits, but Member States may decide to restrict it on the basis of criteria specified in the Directive.

The **Directive on Intra-Corporate Transferees** was adopted on 13 May 2014<sup>99</sup>. This directive will make it easier and quicker for multinational companies to temporarily assign highly skilled employees to subsidiaries situated in the EU. Moreover, the Directive will facilitate mobility of intra-

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<sup>97</sup> Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014, p. 8.

<sup>98</sup> Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375.

<sup>99</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, p. 1.

corporate transferees between member states during their assignments. The Directive also lays down a common set of rights for intra-corporate transferees when working in the EU in order to avoid their exploitation and distortion of competition. In particular, the Directive provides for equal treatment between intra-corporate transferees and nationals as regards terms and conditions of employment, access to social security and affiliation to a trade union.

On 18 January 2014, the Directive 2013/55/EU<sup>100</sup> modernising the **Professional Qualifications Directive** (Directive 2005/36/EC) has entered into force. The Directive must be implemented by Member States by 18 January 2016. It further simplifies the possibility for EU qualified citizens to obtain the recognition of their qualifications in order to establish and provide services in another Member State. It also ensures that the protection of personal data is taken into consideration in the framework of the European Professional Card<sup>101</sup> and within the alert mechanism<sup>102</sup>.

#### *Case law*

The CJEU, in *Giordano v Commission*<sup>103</sup>, held that the imposition of a fishing ban due to evidence of a serious threat to the conservation of a particular fish stock did not infringe the freedoms and rights, as set out in Articles 15 and 17 of the Charter, of owners of vessels endowed with a licence and individual quota to fish a particular type of fish, even if the quota had not been exhausted on the day the ban became effective. In particular, the Court considered that the freedom to pursue a trade or profession does not constitute an absolute prerogative, but must be viewed in relation to its function in society.<sup>104</sup> Limitations may be imposed on the exercise of that freedom provided that in accordance with Article 52(1) of the Charter, they are prescribed by law and that, in accordance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. In the present case, the Court considered that Regulation No 530/2008 met an objective of general interest pursued by the European Union, namely to avoid a serious threat to the conservation and recovery of bluefin tuna stock in the Eastern Atlantic and the Mediterranean Sea. Furthermore, the measures prohibiting fishing contained in the regulation were not manifestly inappropriate in relation to what was necessary to attain that objective of general interest, and thus complied with the principle of proportionality.

### ***Article 16 – Freedom to conduct a business***

The Charter in Article 16 recognises the freedom to conduct a business in accordance with Union law and national laws and practices.

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<sup>100</sup> Directive 2013/55 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 354, 28.12.2013, p. 132; see also Articles 8, 38 and 48.

<sup>101</sup> Article 4e of Directive 2013/55/EU: processing and access to data regarding the European Professional Card.

<sup>102</sup> Article 56a(3): processing of personal data for the purpose of the exchange of information.

<sup>103</sup> CJEU (Grand Chamber), Judgment of 14 October 2014 in Case C-611/12 P, *Jean-François Giordano v European Commission*.

<sup>104</sup> Referring to its judgment in cases C-120/06 P and C-121/06 P, *FIAMM and Others v Council and Commission*, paragraph 183.

The impact on the freedom to conduct a business is frequently assessed in EU action in policy areas where measures could interfere in the economic activity of the operators concerned. By way of example a Directive adopted in 2014 on measures to reduce the cost of deploying high-speed electronic communications networks<sup>105</sup> contains in recital 39 a reference to the Charter to ensure ensures compliance of the Directive with the freedom to conduct a business.

### *Legislation*

The European Commission proposal of 2013 on a **Directive on the placing on the market of food from animal clones**<sup>106</sup> specifically refers to the freedom to conduct business in recital 11. Article 20 of the **Regulation on materials and articles intended to come into contact with food**<sup>107</sup> allows those applying for the authorisation of a new substances or processes to claim confidentiality for business information submitted and that may concern intellectual property on the ground that its disclosure might significantly harm its competitive position. To ensure *inter alia*, the freedom to conduct a business in this respect, the European Commission prepared and sent guidance letters in 2014 to relevant business operators to raise awareness of this possibility and to enable them to prepare such claims.

### *Policy*

The freedom to conduct a business was also carefully assessed in the European Commission Recommendation on a **new approach to business failure and insolvency**<sup>108</sup> of 12 March 2014, which concluded that a final Court confirmation of a restructuring plans will be necessary to ensure that the limitation of the rights of creditors, including to their freedom to conduct a business and access to an effective remedy, is proportionate to the benefits of the restructuring entity.

### *Case Law and key pending cases*

In the case of **Mark Alemo-Herron and Others v Parkwood Leisure Ltd**<sup>109</sup> the CJEU ruled that Directive 2001/23 (safeguarding of employees' rights during transfers of undertakings) precludes Member States from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer. In order to reach this conclusion, the Court interpreted Directive 2001/23 in the light of Article 16 of the EU Charter, laying down the freedom to conduct a business.

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<sup>105</sup> Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23.5.2014, p.1.

<sup>106</sup> Proposal 2013/0434 for a Council Directive on the placing on the market of food from animal clones of 18.12.2013, COM(2013) 893 final, available at: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2013\)0893\\_/com\\_com\(2013\)0893\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2013)0893_/com_com(2013)0893_en.pdf).

<sup>107</sup> Regulation 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC, OJ L 338, 13.11.2004, p. 4.

<sup>108</sup> Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency, C (2014) 1500 final.

<sup>109</sup> CJEU judgment of 18 July 2013 in Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*.



In the case of *UPC Telekabel vs Constantin Film*<sup>110</sup> the CJEU, building upon its earlier case law, stated that a blocking injunction ordered against an Internet Service Provider (ISP) on the basis of Article 8(3) of Directive 2001/29 needs to strike a balance, primarily, between (i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter, (ii) the freedom to conduct a business, which economic agents such as internet service providers enjoy under Article 16 of the Charter, and (iii) the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter.

Although still pending, two preliminary rulings concerning the Tobacco Products Directive should be pointed out in view of this recent EU legislation. On 3 April 2014 the European Parliament and the Council adopted Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (**Tobacco Products Directive**)<sup>111</sup>. This Directive is aimed at facilitating the functioning of the internal market while protecting public health. Several fundamental rights, including the rights to conduct a business and to property were considered in the preparation and drafting of the proposal.<sup>112</sup> Alleged infringements of these rights were subsequently invoked in two recent requests for preliminary rulings from the UK Courts to the CJEU. The actions before UK courts were brought by *Philip Morris and British American Tobacco UK Limited*<sup>113</sup> and *Pillbox 38 (UK) Limited*.<sup>114</sup>

## ***Article 17 – Right to property***

Article 17 of the Charter protects the right of everyone to **property**, which includes the right to own, use, and dispose of lawfully acquired possessions. The Charter also guarantees the protection of **intellectual property**.

### *Legislation*

The Regulation on a European Account Preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters (EAPO Regulation) was adopted on 15 May 2014<sup>115</sup>. The **European Account Preservation Order** strengthens the right to property and the procedural rights of

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<sup>110</sup> CJEU judgment of 27 March 2014 in Case C-314/12 *UPC Telekabel vs Constantin Film*.

<sup>111</sup> Directive 2014/40 of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127, 29.4.2014, p.1, see also Articles 16 and 17.

<sup>112</sup> Impact Assessment, see in particular section 2.4:

[http://ec.europa.eu/health/tobacco/docs/com\\_2012\\_788\\_ia\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/com_2012_788_ia_en.pdf)

<sup>113</sup> Case C-547/14, *Philip Morris Brands and Others*, refers also to Articles 11 and 35 of the Charter.

<sup>114</sup> Case C-477/14, *Pillbox 38*, for both cases see also Articles 17 and 35.

<sup>115</sup> Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59.

potential debtors, such as the right to an effective remedy. The aim of the proposed regulation<sup>116</sup> is to facilitate cross-border debt recovery by creating a uniform European procedure leading to the issue of a European Account Preservation order ("Preservation Order"). This European procedure will be available to citizens and businesses as an alternative to national procedures, but will not replace national procedures. It will apply only to cross-border cases. By way of this new European procedure, a creditor would be able to obtain a preservation order which would block funds held by the debtor in a bank account in a Member State and thereby prevent the debtor from dissipating such funds with the aim of frustrating the creditor's efforts to recover his debt.

### *Policy*

The European Commission adopted on 1 July 2014 an Action Plan on the enforcement of Intellectual Property Rights<sup>117</sup>. It aims at renewing the consensus on the enforcement of intellectual property (IP) rights. With this action plan, the European Commission seeks to re-orientate its policy for intellectual property enforcement towards a better compliance of IP rights by all economic actors. Rather than penalising the citizen for infringing – often unknowingly – IP rights, the actions set out in this action plan pave the way towards a “follow the money approach”, seeking to deprive commercial scale infringers of the revenue flows that draw them into such activities.

To address this challenge, the EU Action Plan against infringements of intellectual property rights foresees to improve compliance with IP rights among all actors involved, improving cooperation between Member States and facilitating exchanges of best practices. Such measures must be proportionate and minimise any risk of being anti-competitive or unduly restrict fundamental rights. On 10 November 2014, the Council endorsed in its conclusion the approach proposed by the European Commission Action Plan on the Enforcement of Intellectual Property Rights.

### *Case law*

The CJEU, in the case of *Giordano v Commission*<sup>118</sup> (Case C-611/12 P) the Court ruled that the imposition of a fishing ban in view of a serious threat to the conservation of a fish stock did not infringe the freedoms and rights under Articles 15 and 17 of the Charter of owners of vessels endowed with a licence and individual quota to fish a particular type of fish even if the ban became effective before the individual quota was exhausted.<sup>119</sup>

As already mentioned above, the ***Tobacco Products Directive*** has been challenged in two cases by tobacco companies inter alia because of alleged infringements of the right to property.<sup>120</sup>

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<sup>116</sup> Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, COM(2011) 445, Available at: [http://ec.europa.eu/justice/civil/files/comm-2011-445\\_en.pdf](http://ec.europa.eu/justice/civil/files/comm-2011-445_en.pdf).

<sup>117</sup> Communication "Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan", COM(2014) 0392 final, 1.7.2014.

<sup>118</sup> CJEU, judgment in Case C-611/12 P *Giordano v Commission*.

<sup>119</sup> See also Article 15.

<sup>120</sup> See above under Article 16 as well as below under Article 35.

## ***Article 18 – Right to asylum***

The right to asylum is guaranteed by Article 18 of the Charter.

### *Legislation*

One major legislative development in this area is the adoption by the European Commission, on 26 June 2014, of a proposal amending Article 8(4) of the Dublin III Regulation on the issue of determining responsibility for examining applications made by unaccompanied minors.<sup>121</sup> This proposal was adopted following the ruling by the Court of Justice in the *M.A.* case<sup>122</sup>. The proposal, currently under negotiation, codifies the Courts' jurisprudence on this topic and aims at ensuring that the best interests of the child are always a primary consideration in the Dublin procedure, by providing, in particular, that unaccompanied minors, one of the most vulnerable group of international protection applicants, will not be needlessly transferred from one EU State to another and that the examination of their applications will not be unduly prolonged.

### *Policy*

Following the tragedy in Lampedusa on 3 October 2013, when 366 migrants lost their lives, the European Commission had proposed ways and taken measures to better address migratory and asylum flows, and prevent migrant deaths in the Mediterranean, chairing the Task Force Mediterranean on the basis of a mandate of the Justice and Home Affairs Council and of the European Council. The European Commission presented on 22 May 2014 an overview of the concrete steps taken so far.<sup>123</sup>

On 10-11 November 2014, the European Union Agency for Fundamental Rights (FRA), together with the Italian Presidency of the Council of the EU, held its annual Fundamental Rights Conference, which was dedicated to the topic of fundamental rights and migration to the EU. The Conference was an opportunity to discuss fundamental rights challenges in the area of asylum, border and migrant integration. The conclusions of the conference contain suggestions for measures relating to specific areas of migration, including border surveillance, combating smuggling, protection of children, and migrant integration.<sup>124</sup>

The European Commission on 25 November 2014 held a second Forum on Resettlement and Relocation to discuss specific solidarity and responsibility sharing tools, in order to cope with the pressing refugee crisis related in particular to the situation in the Middle East and in North Africa. On the basis of the conclusions reached, the Commission will continue discussions with the Member

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<sup>121</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State of 26.6.2014, (COM(2014) 382 final), available at: [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0382\\_/com\\_com\(2014\)0382\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0382_/com_com(2014)0382_en.pdf), see also Article 24.

<sup>122</sup> CJEU judgment of 6 June 2013 in Case C-648/11 *MA and Others v Secretary of State for the Home Department*.

<sup>123</sup> See Staff Working Document 'Implementation of the Communication on the Work of the Task Force Mediterranean' (SWD(2014) 173 final); available at: [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/sdw\\_implementation\\_of\\_the\\_communication\\_on\\_the\\_work\\_of\\_the\\_task\\_force\\_mediterranean\\_part\\_1\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/sdw_implementation_of_the_communication_on_the_work_of_the_task_force_mediterranean_part_1_en.pdf).

<sup>124</sup> Available at: <http://fra.europa.eu/en/publication/2014/fundamental-rights-conference-2014-conclusions>.

States on developing a common approach to intra-EU relocation of beneficiaries of protection as a tool which could be triggered in an emergency situation, as well as on a pilot project on resettlement which would involve as many Member States as possible.

The respect for the Charter of Fundamental Rights and human rights lie at the basis of the EU migration policy and its relations with third countries. Therefore, it is at the heart of the EU's external migration policy, the Global Approach to Migration and Mobility (GAMM). This issue is systematically addressed in all policy dialogues with third countries, and is also reflected in the numerous projects carried out under the GAMM focusing on protecting migrants, in particular the most vulnerable groups such as children, asylum seekers and victims of trafficking of human beings, empowering them through effective integration policies and access to basic services, including health care. Hence, during 2014, the protection of the fundamental rights and the human rights continued to be an essential element of the work carried out in the framework of the GAMM and has also been a cross cutting element of the new cooperation processes established last year, i.e. the Khartoum Process with the Eastern African countries (November 2014), the Dialogue on Migration, Mobility and Security established with Lebanon (December 2014), the new Mobility Partnerships signed with Azerbaijan, Jordan and Tunisia. The Commission has launched in 2014 a EUR 9.5 million globally coordinated civil society action with the International Federation of the Red Cross, focusing on the rights of vulnerable migrants and victims of human trafficking.

#### *Case-law*

The abovementioned case *A, B, C*<sup>125</sup> concerned the interpretation of EU provisions on asylum in relation to the methods by which national authorities may assess the credibility of the declared sexual orientation of applicants for asylum. Here the CJEU clarified that, while Member States are entitled to assess the credibility of the statements of an applicant regarding his/her sexual orientation, the methods used by the competent national authorities to assess the credibility of those statements must ensure the respect of fundamental rights, such as the right to respect for human dignity and the right to respect for private and family life.

Another important ruling was rendered by the Court of Justice in case *M'Bodj*<sup>126</sup> where the Court clarified that Articles 28 and 29 of the Asylum Qualification Directive<sup>127</sup>, read in conjunction with Articles 2(e), 3, 15, and 18 of that Directive, are to be interpreted as not requiring a Member State to grant the social welfare and health care benefits provided for in those measures to a third country national in specific circumstances. This concerned the scenario where such a person had been granted leave to reside in the territory of that Member State under national legislation, allowing a foreign national suffering from a serious illness to reside in that Member State on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is not available in his country of origin or in the third country in which he resided

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<sup>125</sup> CJEU judgment of 2 December 2014 in Joined Cases C-148/13, C-149/13 and C-150/13 *A, B, C v Staatssecretaris van Veiligheid en Justitie*, see also Articles 1, 7 and 21.

<sup>126</sup> CJEU judgment of 18 December 2014 in Case C-542/13 *Mohamed M'Bodj v Belgian State*.

<sup>127</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304, 30.9.2004, p.12.

previously. The Court clarified that Article 15(b) of the Directive, defining serious harm, is applicable only to the inhuman or degrading treatment of an applicant in his country of origin. It further clarified that serious harm must be inflicted by a third party and cannot simply be the result of general shortcomings in the health system in the country of origin.

Finally, two important judgments were issued by the European Court of Human Rights concerning the obligations for the sending and receiving Member States under the Dublin procedure, also to be read in light of relevant new obligations for Member States set out in the Dublin III Regulation.<sup>128</sup> In the case of *Tarakhel vs Switzerland*<sup>129</sup> the ECtHR decided on whether a Dublin transfer of a family with children by Switzerland to Italy would violate Articles 3, 13 and 8 of the European Convention of Human Rights. In this context the ECtHR ruled that Switzerland should seek individual guarantees from Italy "that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together" before sending the applicants to Italy. Another important judgment concerning Dublin transfers was rendered in the case *Sharifi and Others*.<sup>130</sup> Here the Court shared the concerns of several observers with regard to the automatic return, implemented by the Italian border authorities in the ports of the Adriatic Sea, of persons who, in the majority of cases, were handed over to ferry captains with a view to being removed to Greece, thus depriving them of any procedural and substantive rights.<sup>131</sup>

#### *Application by Member States*

In the course of 2014 the European Commission has examined how Member States have applied the Charter when implementing EU legislation at the Union's external borders, in particular as regards the application of the principle of *non-refoulement*.<sup>132</sup>

Issues such as the application and length of detention, detention conditions, the particular situation of minors, free legal assistance and effective remedies in the context of the asylum process in some Member States have also been of concern to the European Commission. In particular, infringement proceedings were launched against a Member State for bad implementation of the Reception Conditions Directive<sup>133</sup> and the Asylum Procedures Directive.<sup>134</sup> The Commission raised concerns among others on the duration of the asylum procedure, the effectiveness of remedies against negative asylum decisions, the practical lack of free legal assistance, the detention of certain categories of asylum seekers, which appears to be applied automatically without an individualised assessment, and the right to an effective remedy against a detention decision as well as free legal in detention.<sup>135</sup>

#### *Text Box Example*

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<sup>128</sup> For further information on both following cases - see also above Article 4.

<sup>129</sup> ECtHR, *Tarakhel v Switzerland (GC)*, No 29217/12, 04.11.2014.

<sup>130</sup> ECtHR, *Sharifi and Others v Italy*, No 16643/09, 21.10.2014.

<sup>131</sup> See also Articles 4 and 19.

<sup>132</sup> See also Articles 4 and 19.

<sup>133</sup> Directive 2003/9/EC of 27 January 2003 laying down standards for the reception of applicants for international protection, OJ L31,6.2.2003, p.18.

<sup>134</sup> Council directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L326, 13.12.2005, p.13, see also Articles 6 and 47.

<sup>135</sup> See also Articles 6 and 47.

## Ruling of the Supreme Court of Ireland

This case<sup>136</sup> concerned failed asylum seekers who sought to contest, by means of judicial review, a number of decisions whereby the State refused them recognition as refugees pursuant to s. 17 of the Refugee Act 1966. The State argued that their application for judicial review was out of time as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 imposes a 14 day time limit on the making of such an application in asylum cases. In its ruling the Supreme Court held that the limitation period rendered the applicants' access to a judicial remedy practically impossible or excessively difficult. The Court referred to Articles 18 and 47 of the Charter and acknowledged that Ireland had a duty to grant refugee status to those who qualify as refugees in accordance with the Qualifications Directive<sup>137</sup>. Since the rights sought by the respondents derived exclusively from EU law and since the State was obliged to give effect to EU law it could not limit the rights in any way, including by means of legislation given the primacy of EU law in Ireland.

## ***Article 19 – Protection in the event of removal, expulsion or extradition***

Article 19 of the Charter incorporates the same right as afforded by Article 4 of protocol No.4 to the ECHR as well as case law of the ECtHR on Article 3 of the ECHR. It prohibits collective expulsions and protects individuals from being removed, expelled or extradited to a state where there is a serious risk of death penalty, torture or other inhuman or degrading treatment or punishment.

### *Policy*

The Commission continues its approach to ensure respect for human rights and international refugee protection in the implementation of EU Readmission Agreements (EURA), as outlined in its Communication to the European Parliament and the Council on the Evaluation of EU Readmission Agreements (COM(2011) 76 of 23 February 2011) and as referred to in the 2013 report.

The Commission has together with 2 international organisations launched a pilot project introducing a post-return monitoring mechanism in selected third countries (Pakistan and Ukraine), which monitors the well-being of persons after being returned under an EURA (own nationals as well as third country nationals and stateless persons).

Moreover, as recalled by the Council Conclusions of 5 June 2014 on the EU return policy, further efforts should be done in the framework of our cooperation with third countries, in particular transit countries, to facilitate the return of migrants to their countries of origin with due respect of fundamental rights and the principle of non-refoulement.

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<sup>136</sup> Supreme Court of Ireland, case IESC 29, judgment of Mr Justice Murray, 10.4.2014, available at: <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/b58b66b170cdb1dd80257d12004e4cc0?OpenDocument>.

<sup>137</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

## Case law

In the case of *Mukarubega*<sup>138</sup> the Court expressly endorsed the right to be heard, as enshrined in the general principle of good administration, in the Return Directive context and highlighted that it applies in the context of taking a return decision. The Court held in particular that despite the absence of detailed guidance in the Return Directive on whether and under what conditions observance of the right to be heard must be ensured before the adoption of a return decision concerning a third country national, Member States are required to ensure that return decisions are issued in compliance the right to be heard, which is inherent in observance of the right of defence. While recalling the same principle, the Court clarified in *Boudjlida*<sup>139</sup> that this right implies an obligation upon national authorities to ensure that the person concerned always has the possibility to express his point of view on the legality of his stay and on possible reasons that may justify the non-adoption of a return decision, as well as on the detailed arrangements for his return. In this context, the Court also clarified that in principle such obligations do not go as far as requiring national authorities to set out further and more detailed arrangements in order to ensure full respect of an adversarial procedure.

The Court reiterated the obligation upon national authorities to ensure full protection of fundamental rights as enshrined in the EU Charter in the case of *Abdida*<sup>140</sup> when implementing EU rules on return of illegally staying third country nationals: this may require national authorities to provide for a remedy with suspensive effect in respect of the administrative decision refusing leave to remain or subsidiary protection, as well as to provide for the basic needs of the person concerned to be met under their social security or reception system, pending a ruling on his appeal against that administrative decision.

Finally, two important judgments were issued by the European Court of Human Rights concerning the obligations for the sending and receiving Member States under the Dublin procedure under, respectively, the principle of *non-refoulement* and the prohibition of collective expulsions under Article 4 of Protocol No. 4 of the Convention.<sup>141</sup>

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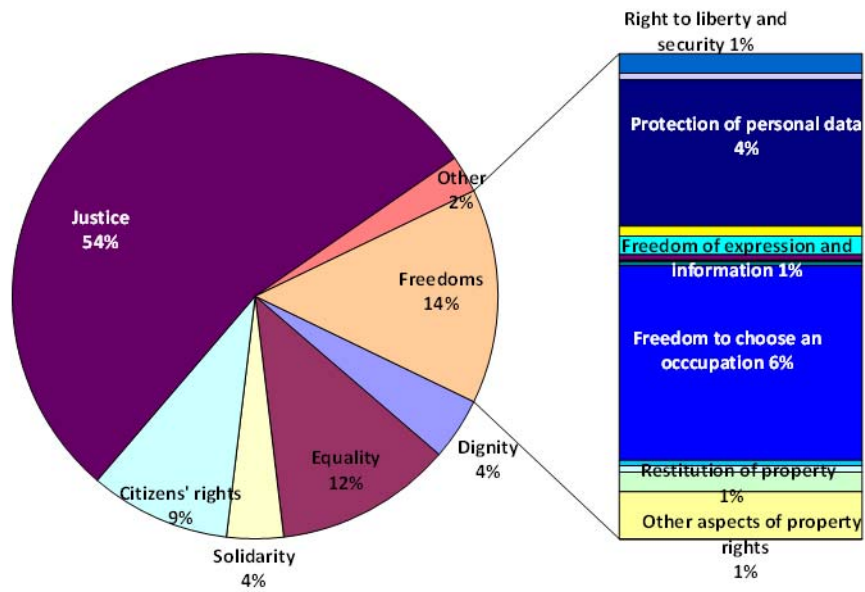
<sup>138</sup> CJEU judgment of 5 November 2014 in case C-166/13 *Mukarubega*.

<sup>139</sup> CJEU judgment of 11 December 2014 in case C-249/13 *Boudjlida*.

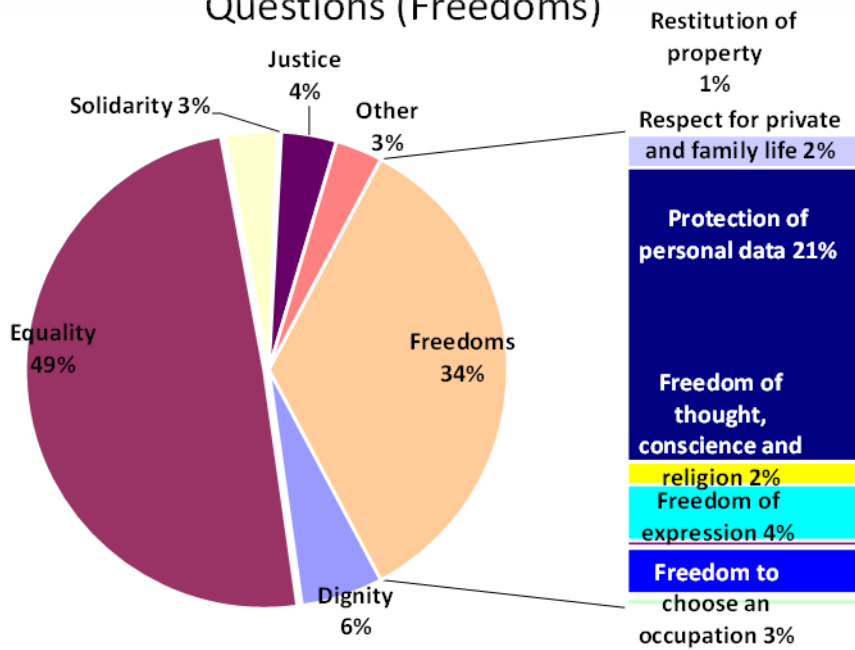
<sup>140</sup> CJEU judgment of 18 December 2014 in Case C-562/13 *Abdida*.

<sup>141</sup> See above under Articles 4 and 18 cases *Tarakhel vs Switzerland* and *Sharifi and Others v Italy*.

### Letters (Freedom)

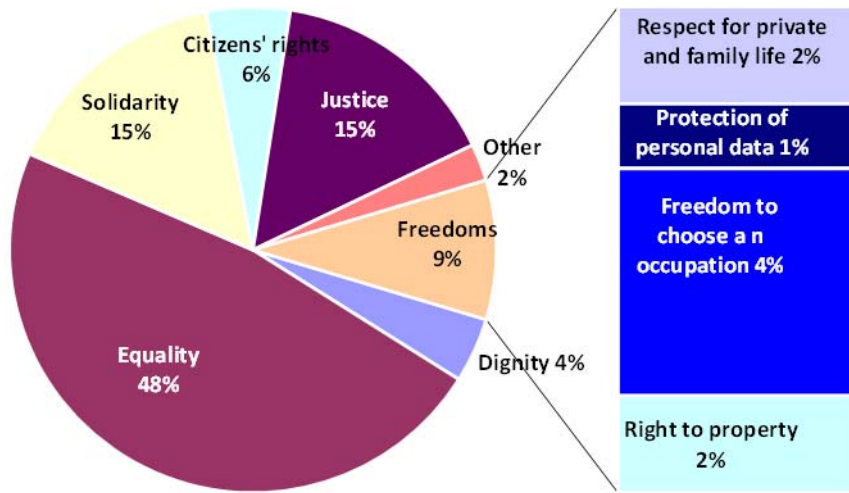


### Questions (Freedom)





## Petitions (Freedoms)



Source: European Commission

# Equality

The Joint High Level Event on Non-Discrimination and Equality "**Shaping the Future of Equality Policies in the EU**" was co-organised by the European Commission and the Italian Presidency in Rome on 6-7 November 2014. Equality and non-discrimination in economic recovery, new directions for diversity management, new possibilities in valuing equality and diversity and future perspectives on access to justice were addressed and a High Level Group on non-discrimination, diversity and equality was launched.<sup>142</sup>

Efforts to combat racism and xenophobia continued in 2014. The 8th seminar between the European Commission and the State of Israel on the **fight against racism, xenophobia and anti-Semitism** was held on 27-28 October 2014 in Jerusalem. In addition, the Fundamental Rights Agency established a **Working Party on improving reporting and recording of hate crime in the EU**.

In the autumn of 2014, anticipating the end of the transitional period on 1 December 2014 applicable to Framework Decisions set by Protocol 36 of the Lisbon Treaty, the European Commission commenced **bilateral dialogues with the Member States** on remaining gaps in their transposition of the **Council Framework Decision 2008/913/JHA on racism and xenophobia**. The Framework Decision obliges the EU Member States to penalise the most serious forms of **hate speech** as well as **hate crimes** based on a racist or xenophobic motivation.

Regarding the inclusion of Roma, in April 2014, the European Commission published the **Report on the Implementation of the EU Framework for National Roma Integration Strategies**. The report presented progress on the situation of the Roma in education, employment, health, housing and discrimination since 2011. The [third EU-level Roma Summit](#)<sup>143</sup> took stock of how the national Roma strategies submitted by Member States as a result of the EU Framework are being implemented and their impact on the life of Roma communities. Around 500 representatives of EU institutions, national governments and parliaments, international organisations, civil society (including Roma organisations) and local and regional authorities were able to express their views on what has been achieved so far and how to further improve Roma integration in the future.

With respect to Article 24 of the Charter on the rights of the child, the actions set out in the **EU Agenda for the rights of the child (2011-2014)** have been successfully completed. As in previous years, the European Commission was involved in a high number of actions promoting the rights of the child, such as a study on the effective use of early childhood education and care in preventing early school leaving and a report on the protection of children online.<sup>144</sup>

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<sup>142</sup> More information on the outcomes of the event can be found at [http://ec.europa.eu/justice/events/hle-2014/index\\_en.htm](http://ec.europa.eu/justice/events/hle-2014/index_en.htm)

<sup>143</sup> More information on the Roma summit can be found at [http://ec.europa.eu/justice/events/roma-summit-2014/index\\_en.htm](http://ec.europa.eu/justice/events/roma-summit-2014/index_en.htm)

<sup>144</sup> For further reference see: [http://ec.europa.eu/education/policy/strategic-framework/archive/index\\_en.htm](http://ec.europa.eu/education/policy/strategic-framework/archive/index_en.htm)

The European Commission has also launched infringement proceedings against 11 Member States for the non-communication of measures transposing Directive 2011/93/EU on combating the **sexual abuse and sexual exploitation of children and child pornography**.

As far as the integration of persons with disabilities is concerned, the European Commission submitted its first report to the UN on how the EU is giving effect to the **UN Convention on the Rights of Persons with Disabilities**.

## Title III

### Equality

#### *Article 20 – Equality before the law*

Article 20 stipulates that everyone is equal before the law. The article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the CJEU as a basic principle of Union law.<sup>145</sup>

#### *Case law*

In the **Baltic Agro SA** case<sup>146</sup>, the CJEU ruled about the compliance of definitive anti-dumping duty on imports of products originating in Russia with the principle of equal treatment as enshrined in Article 20 of the Charter. One of the questions referred by the *Tartu Ringkonnakohus* (Estonia) concerned the issue whether Article 66 of the Customs Code and Article 251 of Regulation No 2454/93 are compatible with the fundamental right to equality before the law affirmed in Article 20 of the Charter in circumstances where, in the context of the common customs tariff referred to in Articles 28 TFEU and 31 TFEU, those provisions of the Customs Code and of Regulation No 2454/93 do not permit the invalidation, on request, of an incorrect customs declaration and thus the grant of the benefit of the exemption from anti-dumping duty to the consignee that the latter could have claimed, if the error had not been made. The referring court considered that, if the provisions of the Customs Code and of Regulation No 661/2008 at issue in the main proceedings do not permit the cancellation of the customs declaration in order to correct the consignee of the goods at issue and thereby preclude Magnet Grupp from relying on the exemption from anti-dumping duty that it could have claimed had there been no such error, the question arises as to whether there is a breach of the fundamental right to equality before the law, since the two companies involved in the main proceedings, which are essentially in the same situation, are not treated in the same manner. However, no error of such a kind as to permit the invalidation of the customs declarations was at issue in the main proceedings. The obligation to provide correct information in a customs declaration falls on the declarant. That obligation is no more than the corollary of the principle of irrevocability of the customs declaration once it has been accepted. Moreover, a company that has complied with the requirements laid down in Article 3 of Regulation No 661/2008 and has correctly completed a customs declaration in order to be eligible for an exemption from anti-dumping duty is not in a situation comparable with that of a company that has not complied with those requirements. Further, even if the entries in the customs declarations at issue in the main proceedings had been correct, Baltic Agro would not be in a position to claim the exemption from anti-dumping duty because it would not, in any event, satisfy the conditions laid down by Article 3(1) of Regulation No 661/2008. Consequently, the answer to the referred question is that Article 66 of the Customs Code and Article 251 of Regulation No 2454/93 are compatible with the fundamental right to equality before the law affirmed in Article 20 of the Charter in circumstances where, in the context of the common customs tariff, referred to in Articles 28 TFEU and 31 TFEU, those provisions of the Customs

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<sup>145</sup> See the Explanation on Article 20 in the Explanations Relating to the Charter of Fundamental rights, OJ C 303/17, 14.12.2007, p. 17

<sup>146</sup> CJEU judgment of 17 September 2014 in Case C-3/13 *Baltic Agro SA*.

Code and of Regulation No 2454/93 do not permit the invalidation, on request, of an incorrect customs declaration and thus the grant of the benefit of the exemption from anti-dumping duty to the consignee that the latter could have claimed, if the error had not been made.

The CJEU also ruled on several cases where Article 20 of the Charter was invoked by the referring judge, but where the Charter did not apply as the circumstances of the case were only related to the implementation of national law, and not EU law.

A first case where Article 20 of the Charter was held not to be applicable is the order of 26 June 2014 in the case *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial – Companhia de Seguros SA*<sup>147</sup>. The Court held that it is obviously not competent for answering the preliminary request by the *Tribunal do Trabalho do Porto* (Portugal). As previously stated in Case C-128/12, which related to the Budget Law 2011, the Budget Law 2012 does not implement EU Law.

A second case where the Charter was invoked but held not to be applicable was the *Dano*<sup>148</sup> case., The CJEU ruled that it has no jurisdiction to answer the question whether Articles 1, 20 and 51 of the Charter require the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State. According to the CJEU, since it is for the legislature of each Member State to lay down the conditions creating the right to those benefits, when laying down these conditions and the extent of such benefits, Member States are not implementing EU law.

## **Article 21 – Non-discrimination**

The Charter **prohibits any discrimination** based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The Charter also prohibits discrimination on grounds of nationality, within the scope of application of the Treaties and without prejudice to any of their specific provisions. Discrimination based on racial or ethnic origin is a violation of the principle of equal treatment and is prohibited in the workplace and outside the workplace.<sup>149</sup> In the area of employment and occupation, EU legislation prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation.<sup>150</sup>

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<sup>147</sup> CJEU order of 26 June 2014 in Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial – Companhia de Seguros SA*.

<sup>148</sup> CJEU judgments of 11 November 2014 in Case C-333/13 *Dano*, for more details see Article 45.

<sup>149</sup> Directive 2000/43/EC, OJ L 180/22.

<sup>150</sup> Directive 2000/78/EC, OJ L 303/16.

## 1. General Non-Discrimination issues

### Legislation and Policy

A **horizontal anti-discrimination directive**, extending the protection against discrimination of the Employment Equality Directive to areas outside employment is under negotiation in the Council<sup>151</sup>. President Juncker identified the adoption of the Directive as a priority in the political guidelines presented to the European Parliament in July 2014.<sup>152</sup>

In terms of information on wide-reaching initiatives on non-discrimination, still related to Article 21 of the Charter, the European Commission and the Italian Presidency organised a Joint High Level Event on Non-Discrimination and Equality in Rome on 6-7 November 2014 entitled "**Shaping the Future of Equality Policies in the EU**", which brought together 250 high-level delegates from governments, NGOs, social partners, media, academics, businesses and independent experts. The themes of equality and non-discrimination in economic recovery, new directions for diversity management, new possibilities in valuing equality and diversity and future perspectives on access to justice were addressed.

Within the actions aimed at fighting against discrimination at the workplace also related to Article 21, the **Diversity Charter** signatories from across the European Union have come together to work as the EU-level exchange Diversity Charter Platform since 2010. In October 2014, the European Commission published an overview of diversity management implementation and impact amongst Diversity Charter signatories in the European Union<sup>153</sup>. This shows that a Diversity Charter stands as a useful framework to build more evolved and ambitious diversity management strategies. The European Commission also co-organised a high level event with the French Diversity Charter, which was attended by 300 representatives of businesses (multinationals, SME, consultants), academia, public authorities and civil society from 24 EU countries.

Finally, the Communication of 3 April 2014 on guidance for application of the **Directive on the right to family reunification**<sup>154</sup> clarifies in its general introduction that the Directive must be interpreted and applied in accordance with fundamental rights. This concerns, in particular, the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy, as enshrined in the European Convention of Human Rights and the EU Charter of Fundamental Rights. With regard to the family members falling into the scope of the above directive, all provisions must be applied in accordance with the non-discrimination principle enshrined in Article 21 of the Charter.<sup>155</sup> This applies in particular to spouses and unmarried partners

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<sup>151</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2.7.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>.

<sup>152</sup> J-C Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the Next European Commission", 22 October 2014, available at [http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf), at p. 9.

<sup>153</sup> The report is available at [http://ec.europa.eu/justice/discrimination/files/diversity\\_report2014\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/diversity_report2014_en.pdf).

<sup>154</sup> Communication on Directive 2003/86/EC, COM(2014) 210 final.

<sup>155</sup> Communication on Directive 2003/86/EC, COM(2014) 210 final, recital 5.

in a duly attested stable long-term relationship and to registered partnerships, concepts that have been extended in several Member States in recent years.<sup>156</sup>

### *Case Law*

In the *Kaltoft* case<sup>157</sup> the CJEU had received a request for a preliminary ruling from the Danish District Court of Kolding (*retten i Kolding*). The Danish Court asked the CJEU to specify whether EU law itself prohibits **discrimination on grounds of obesity**. It also asked whether obesity can constitute a disability and therefore falls within the scope of the Employment Equality Directive<sup>158</sup>. The CJEU specified that in the area of employment and occupation, EU law does not lay down a general principle of non-discrimination on grounds of obesity as such. However, the Court found that, if under given circumstances the obesity of the worker entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, such obesity can be covered by the concept of 'disability' within the meaning of the directive. The concept of 'disability' was interpreted in light of the United Nations Convention on the Rights of Persons with Disabilities, to which the EU and the majority of its Member States are a party.<sup>159</sup> It also stressed that the concept of 'disability' within the meaning of Directive 2000/78 does not depend on the extent to which the person may or may not have contributed to the onset of his disability.

Regarding the applicability of the Charter to the present case, the CJEU noted that the situation at issue in the main proceedings, in so far as it relates to a dismissal purportedly based on obesity, as such, would not fall within the scope of EU law, and that therefore the Charter does not apply.

In the *Deckmyn v Vandersteen* case of 3 September 2014<sup>160</sup> the CJEU clarified the scope of the **parody** exception under Article 5(3)(k) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. As a result, the Court stated that if a parody conveys a discriminatory message, a person holding rights in the parodied work may demand that that work should not be associated with that message.

The CJEU also gave a preliminary ruling on **discrimination on the grounds of nationality** in the case *Grauel Ruffer*<sup>161</sup> where it decided that reserving the option to use a certain language before civil courts only for resident nationals is contrary to Articles 18 and 21 TFEU.

In the *Glatzel*<sup>162</sup> case, the CJEU was asked by the referring German court whether the refusal of a driver's license on the grounds of bad eyesight constituted a violation of Articles 20, 21 and 26 of the Charter. Particularly, the German court asked whether point 6.4 of Annex III to Directive 2006/126 is compatible with Article 20, Article 21(1) and Article 26 of the Charter in so far as that provision

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<sup>156</sup> See also above, Article 7.

<sup>157</sup> CJEU judgment of 18 December 2014 in Case C-354/13 *Kaltoft*; see also Article 26.

<sup>158</sup> Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

<sup>159</sup> Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.01.2010, p. 35.

<sup>160</sup> CJEU judgment of 3 September 2014 in Case C-201/13, *Deckmyn v Vandersteen*.

<sup>161</sup> CJEU judgment of 27 March 2014 in Case C-322/13 *Grauel Ruffer*.

<sup>162</sup> CJEU judgment of 22 May 2014 in Case C-356/12 *Glatzel*, see also Articles 26 and 51.

requires — without permitting any derogation — that applicants for Category C1 and Category C1E driving licences have a minimum visual acuity of 0,1 in their worse eye, even if those persons use both eyes together and have a normal field of vision when using both eyes. Although the CJEU eventually ruled that it did not have sufficient information to conclude that the applicant of the case had such bad eyesight that it constitutes a ‘disability’ within the meaning of the Charter, the court stated that the differential treatment of a person with impaired eyesight can be justified by a concern such as road safety, which fulfils an objective of public interest, is necessary and is not a disproportionate burden.

## *2. Manifestations of intolerance, racism and xenophobia in the EU*

### *Legislation and Policy*

The 8th seminar organised by the European Commission and the State of Israel on the **fight against racism, xenophobia and anti-Semitism** was held on 27-28 October 2014 in Jerusalem, bringing together officials, diplomats and experts from Israel, the European Commission, the EU's Fundamental Rights Agency and several EU Member States. Over the two days, topical issues such as the threat of radicalization in Europe, online anti-Semitism, measures to combat hate speech and hate crime, data and trends of racism and anti-Semitism in the EU, the European Commission's official dialogue with religious and non-confessional organisations as well as prevention through education, training and Holocaust remembrance were discussed.

In response to the Council Conclusions on combating hate crime in the European Union, which invited Member States to take appropriate measures to expedite the reporting of hate crimes by victims, the Fundamental Rights Agency established a **Working Party on improving reporting and recording of hate crime in the EU**<sup>163</sup> which brings together most Member States, the European Commission, the Council of Europe's Commission against Racism and Intolerance (ECRI), ODIHR and FRA. Member State representatives include staff from ministries, prosecutors' offices, law enforcement agencies, police training institutions and national parliaments. The inaugural meeting of the Working Party, which has initially been established for a two-year period, took place on 4 November 2014 in Rome. Its activities are focused on three thematic areas: encouraging victims to report and improving recording of hate crime, enhancing multi-agency partnerships to encourage a closer and better cooperation between various actors for combating hate crime effectively, and fostering training for law enforcement and criminal justice staff. The output of this work is to be reported to the European Commission's Expert Group on racism and xenophobia.

As regards **funding**, for the period 2014-2020 the Rights, Equality and Citizenship Programme supports the development of efficient monitoring and reporting mechanisms for racist and xenophobic hate speech on the internet and hate crime as well as the exchange of best practices to prevent and combat racism, xenophobia and other forms of intolerance focusing in particular on criminal law tools. Supporting effective and consistent implementation of the Framework Decision on the fight against racism and xenophobia through judicial training is also one of the priorities for 2014 of the Justice Programme. In this context MYPLACE, a EU funded research project, needs to be

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<sup>163</sup> <http://fra.europa.eu/en/news/2014/fra-co-hosts-inaugural-meeting-hate-crime-working-party> .



mentioned, which explores how young people's social participation is shaped by the shadows (past, present and future) of totalitarianism and populism in Europe.<sup>164</sup>

#### *Application by Member States*

In January 2014, the European Commission adopted the **first report**<sup>165</sup> on the implementation by the Member States of **Council Framework Decision 2008/913/JHA on racism and xenophobia** which obliges the EU's Member States to penalise the most serious forms of **hate speech**, (i.e. the public incitement to violence and hatred based on race, colour, religion, descent or national or ethnic origin, including on the internet) as well as **hate crimes** based on a racist or xenophobic motivation. With a view to the end of the transitional period of 1 December 2014 applicable to Framework Decisions set by Protocol 36 of the Lisbon Treaty, in autumn 2014 the European Commission commenced **bilateral dialogues with the Member States** on remaining gaps in their transposition and practical implementation of this legislation.

### *3. EU Framework for National Roma Integration Strategies*

#### *Legislation and Policy*

In the context of the **EU Framework for National Roma Integration Strategies up to 2020**<sup>166</sup>, and the Council Recommendation on Roma integration adopted on 9 December 2013<sup>167</sup>, finding solutions for the problems Roma face in Europe has remained a high priority for Member States, the European Parliament and Civil Society.<sup>168</sup>

On a bilateral level, the European Commission has continued to promote the protection of the fundamental rights of Roma through the organisation of high-level meetings with Member States and permanent dialogue regarding country specific recommendations related to Roma as part of the European Semester. On a multilateral level, two National Roma Contact Point meetings were organised in 2014, which focused on funding, stakeholder involvement and developing links with national equality bodies. Moreover, the 3<sup>rd</sup> Roma summit was held on 4 April 2014. Around 500 representatives of EU institutions, national governments, international organizations, mayors, civil society organizations and local and regional authorities were invited to deliver further on the implementation of the EU Framework for National Roma Integration Strategies. The "go local" theme of the summit contributed to the promotion of the Charter values at every level of governance.

In April 2014, the European Commission also published the **Report on the Implementation of the EU Framework for National Roma Integration Strategies**, which consisted of a Communication<sup>169</sup> and a

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<sup>164</sup> <http://www.fp7-myplace.eu/concept.php> .

<sup>165</sup> [http://ec.europa.eu/justice/fundamental-rights/files/com\\_2014\\_27\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf) .

<sup>166</sup> Communication on an EU Framework for National Roma Integration Strategies up to 2020, COM (2011)173 final.

<sup>167</sup> Council recommendation on effective Roma integration measures in the Member States, Brussels, 9 an 10 December 2013, available at

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lsa/139979.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/139979.pdf)

<sup>168</sup> For more information, see [http://ec.europa.eu/justice/discrimination/roma/index\\_en.htm](http://ec.europa.eu/justice/discrimination/roma/index_en.htm)

<sup>169</sup> COM(2014) 209.

Staff Working Document<sup>170</sup>. The report presented progress on the situation of the Roma in education, employment, health, housing and discrimination since 2011.

In terms of **funding**, the Fundamental Rights and Citizenship Programme<sup>171</sup> has supported projects promoting the fundamental rights of Roma, such as the 3-million Euro grant to the Roma Matrix project. This project aims at combating racism, intolerance and xenophobia towards Roma and at increasing integration through actions across Europe. It is a partnership of 20 organizations in 10 EU Member States which contain 85% of the European Union's Roma populations. The project runs for two years from April 2013 until March 2015. The rights of Roma will continue to be promoted through the funds of the new Rights, Equality and Citizenship Programme for the period 2014-2020. These funds support meetings, such as the abovementioned National Contact Point meetings, the annual report on the implementation of the EU Framework for National Roma Integration Strategies), etc. Furthermore, they are available to co-finance projects on raising awareness, on identifying and exchanging good practices, etc.

During 2014 specific actions have been taken to **reduce the health gap** between the Roma and the rest of the population. In this context, the EU Framework for National Roma Integration Strategies calls on Member States to provide access to quality healthcare, preventive care and social services at a similar level and under the same conditions as the rest of the population. To achieve this objective, several Member States (e.g. Romania, Spain) have invested in Roma mediators and the European Commission has launched an initiative to develop training packages for health professionals for migrants and ethnic minorities, including the Roma. The fundamental right of access to preventive health care and to benefit from medical treatment subject to national laws and practices is envisaged in the Union's policies to promote the effective, holistic integration of Roma communities.<sup>172</sup>

The European Commission promotes equal access to quality education for Roma children and inclusive education. The **ROMED programme** (2011-2014), a project jointly run by the European Commission and the Council of Europe, is a training programme for mediators in schools, culture and health. The objective is to increase the inclusion of Roma communities, especially with regard to access to and completion of school education, with a holistic perspective towards the specific challenges of the communities. For 2013-2014, mediation is focusing on local authorities (municipalities, local schools, etc.) as well as the role of mothers in their children's education.

#### *Application by Member States*

In September 2014, the European Commission launched **infringement proceedings** against a Member State by sending a letter of formal notice. The case concerns **discrimination of Roma children in education**, which is deemed to constitute a violation of Directive 2000/43/EC on Racial Equality. The Charter was specifically referred to in the letter of formal notice, since the Member State had referred to the case-law of the Court of Justice related to the Charter in its administrative reply before the infringement proceedings were launched. Consequently, the European Commission

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<sup>170</sup> SWD(2014) 121.

<sup>171</sup> The objective of this programme are available at [http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index\\_en.htm](http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm)

<sup>172</sup> See also Article 35.

deemed it necessary to clarify the correct interpretation of this case-law in the letter of formal notice.<sup>173</sup>

#### *4. Fight against homophobia*

##### *Legislation and Policy*

The FRA together with the Italian Presidency of the Council organised on 28 October 2014 a **high-level conference to discuss ways to further address discrimination and hostility faced by lesbian, gay, bisexual, transgender, and intersex (LGBTI) people across the EU**. Building on FRA's EU LGBT survey results and other studies, the conference brought together over 400 decision makers, experts, civil society organisations, national human rights bodies and practitioners from across the EU to discuss effective and targeted policy responses to address the fundamental rights challenges that LGBTI people face in their daily lives, including hostility, hate crime, discrimination and bullying. The conclusions of the conference<sup>174</sup> highlighted that while LGBTI persons residing in the EU enjoy considerably more rights than they did in past decades - even though the specific situation for the various LGBTI sub-groups differs significantly, also between EU Member States – LGBTI people still face a number of challenges. Concrete steps forward in terms of legislation, policies and institutional practices were suggested.

As part of an active policy on mainstreaming fundamental rights for LGBTI persons and combat LGBTI discrimination, the new Justice Commissioner Věra Jourová has expressed her **willingness to explore the possibility to take further measures** in cooperation with Member States and other key stakeholders.

##### *Case law*

An important judgment<sup>175</sup> was delivered by the Court of Justice as it concerns the scope and limits of the assessment by national authorities of the **credibility of an asylum seeker's declarations regarding his or her sexual orientation**.

Further, a preliminary ruling<sup>176</sup> is pending before the Court of Justice following a request by a French court as to whether, in the light of Annex III to Directive 2004/33/EC implementing Directive 2002/98/EC as regards certain technical requirements for blood and blood components, **the fact that a man has sexual relations with another man constitutes in itself sexual behaviour placing him at a high risk of acquiring severe infectious diseases justifying a permanent deferral from blood donation** or a merely temporary deferral from blood donation after the cessation of the risk behaviour. On 17 July 2014, the **Advocate General** delivered an opinion in this case stating that while Member States may lay down more stringent protective measures than those laid down in the Directive, these would in any case be subject to the limits deriving from relevant EU provisions of primary law and from the fundamental rights as enshrined in the Charter, including Article 21. The Advocate General also maintained that, in the in view of the discriminatory character of the French

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<sup>173</sup> See Article 14.

<sup>174</sup> Available at: <http://fra.europa.eu/sites/default/files/fra-it-presidency-conclusions-lgbti-conference-28-10-2014.pdf>.

<sup>175</sup> CJEU judgment of 2 December 2014 in Joined Cases C-148/13, C-140/13 and C-150/13 A, B, C v *Staatssecretaris van Veiligheid en Justitie*, for more details see Articles 1 and 18.

<sup>176</sup> Request for preliminary ruling in Case C-528/13 *Geoffrey Léger v Ministre des affaires sociales et de la santé*.

measure, it would be up to the referring court to determine whether the measure is justified and proportional.

#### *Application by Member States*

As part of its work of mainstreaming fundamental rights for LGBTI people into all Union policies, **the European Commission has been reviewing a complaint alleging a discriminatory nature of French legislation and practice which are claimed to result in discriminatory blood donation policies against homosexuals** as they are considered a high-risk group as regards exposure to sexually transmitted diseases, in light of relevant provisions of EU legislation on technical requirements for blood and blood components. As the issue is related to the subject of the above-mentioned reference for a preliminary ruling, the assessment of the complaint was suspended.

The European Commission is in contact with the Lithuanian authorities to see whether the Lithuanian law on the 'Protection of Minors against the Detrimental Effect of Public Information' is compatible with, inter alia, the scope of derogations under Article 3 Audiovisual Media Services Directive (AVMSD) (freedom of reception) which may only be limited to protect minors from serious physical, mental or moral impairment or to prohibit incitement to hatred (Articles 12 and 27 AVMSD).

#### *Text Box Example*

##### Ruling of the Austrian Constitutional Court

One example where the scope of application of the Charter was dealt with in detail by a national court, including references to the relevant case law of the CJEU and literature, is the judgment of the Austrian Constitutional Court of 13 March 2014. This case<sup>177</sup> concerned a homosexual couple from the Netherlands who wanted to repeat their marriage in Tyrol. This was refused by the Austrian authorities and the couple claimed that their constitutional rights as guaranteed by Articles 8 and 14 of the ECHR and Article 21 of the Charter were violated by this decision. With regard to its previous judgment<sup>178</sup>, in which the Constitutional Court ruled that the rights enshrined in the Charter can be

<sup>177</sup> Constitutional Court Austria (Verfassungsgerichtshof Österreich), case B166/2013, 13.3.2014, available at: [www.ris.bka.gv.at/Dokument.wxe?Abfrage=Gesamtabfrage&Dokumentnummer=JFT\\_20140312\\_13B00166\\_00&ResultFunctionToken=4d6a6c54-02c0-443e-990d-5bdfadfd80bb&SearchInAsylGH=&SearchInBegut=&SearchInBgbAlt=&SearchInBgbAuth=&SearchInBgbPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblAuth=&SearchInLrBglD=&SearchInLrK=&SearchInLrNo=&SearchInLrOO=&SearchInLrSbg=&SearchInLrStmk=&SearchInLrT=&SearchInLrVbg=&SearchInLrW=&SearchInNormenliste=&SearchInPvak=&SearchInRegV=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=GRC](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Gesamtabfrage&Dokumentnummer=JFT_20140312_13B00166_00&ResultFunctionToken=4d6a6c54-02c0-443e-990d-5bdfadfd80bb&SearchInAsylGH=&SearchInBegut=&SearchInBgbAlt=&SearchInBgbAuth=&SearchInBgbPdf=&SearchInBks=&SearchInBundesnormen=&SearchInDok=&SearchInDsk=&SearchInErlaesse=&SearchInGbk=&SearchInGemeinderecht=&SearchInJustiz=&SearchInBvwg=&SearchInLvwg=&SearchInLgbl=&SearchInLgblAuth=&SearchInLrBglD=&SearchInLrK=&SearchInLrNo=&SearchInLrOO=&SearchInLrSbg=&SearchInLrStmk=&SearchInLrT=&SearchInLrVbg=&SearchInLrW=&SearchInNormenliste=&SearchInPvak=&SearchInRegV=&SearchInUbas=&SearchInUmse=&SearchInUvs=&SearchInVerg=&SearchInVfgh=&SearchInVwgh=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=GRC).

<sup>178</sup> Constitutional Court Austria (Verfassungsgerichtshof Österreich), joined cases U 466/11-18 U 1836/11-13,

VfSlg 19.632/2012, 14.3.2012, available at: [https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta\\_english\\_u466-11.pdf](https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf).

brought to the Constitutional Court as constitutionally guaranteed rights and are to be used as suitable scales in the area of competence of the Charter, the Court raised the question whether Article 21 of the Charter was applicable in the case at hand. The Court found that the national provisions of marital law do not aim at implementing EU law. Therefore, the Court ruled that the Charter was not applicable.

## ***Article 22 – Cultural, religious and linguistic diversity***

Article 22 stipulates that the Union shall respect cultural, religious and linguistic diversity. This Article has been based on Article 6 of the Treaty on European Union and Article 167(1) and (4) of the Treaty on the Functioning of the European Union, concerning culture. Respect for cultural and linguistic diversity is also laid down in Article 3(3) of the Treaty on European Union. The Article is also inspired by Declaration No 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 of the Treaty on the Functioning of the European Union.

### *Policy*

In May 2014 the Council of Education Ministers adopted Council conclusions on **multilingualism and the development of language competences**. They include measures to support children and adults with migrant backgrounds in learning the language(s) of the host country.

In November 2014 the Council of Culture Ministers adopted the EU Work Plan for Culture (2015-2018) which foresees actions to protect and promote the **diversity of cultural expressions**; and to foster the contribution of culture to social inclusion.

Art 17 (3) TFEU stipulates that the Union shall maintain an open, transparent and regular dialogue with churches and philosophical and non-confessional organisation.<sup>179</sup> This dialogue takes place at various levels in the form of written exchanges, meetings or specific events. Interlocutors are invited to contribute to the EU policy making process through the various written consultation processes launched by the European Commission. The dialogue contributes to the promotion of religious diversity. 2014 marked the 10<sup>th</sup> anniversary of the annual high-level meeting with religious leaders. The topic of the discussion was "The future of the European Union".<sup>180</sup>

Diversity was also at the core of the 11<sup>th</sup> meeting of the European Integration Forum "Ten years with the Common Basic Principles on integration – what next?"<sup>181</sup> which took place in Brussels on 3 April 2014. The European Integration Forum is the dialogue platform on integration of immigrants. The goal of the 11th European Integration Forum was to assess to what extent the Common Basic Principles for Immigrant Integration Policy in the European Union<sup>182</sup> have been a useful framework for the development of European integration policies, so as to feed the policy dialogue for their

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<sup>179</sup> See also under Article 10 on freedom of thought, conscience and religion.

<sup>180</sup> [http://europa.eu/rapid/press-release\\_IP-14-650\\_en.htm](http://europa.eu/rapid/press-release_IP-14-650_en.htm)

<sup>181</sup> <http://ec.europa.eu/ewsi/en/policy/legal.cfm>

<sup>182</sup> Council doc 14615/04,

[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/82745.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/82745.pdf)

future development. The Forum structured the discussion around three dimensions of the Common Basic Principles: legal-political, socio-economic and cultural-religious.<sup>183</sup>

## ***Article 23 – Equality between women and men***

According to Article 23 equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

### *Legislation*

The **European Maritime and Fisheries Fund (EMFF) Regulation**<sup>184</sup> adopted in 2014 includes several provisions that explicitly aim at achieving a higher degree of equality between women and men within the scope of the Common Fisheries Policy (CFP). Articles 29 and 50 of the EMFF Regulation, which foresee support in order to promote human capital, job creation, and social dialogue in the fishery and aquaculture sector, explicitly mention the involvement of organisations devoted to gender equality and to the promotion of the role of women in fishing communities in networking activities and the exchange of experiences and best practices. Article 50 EMFF ensures that bodies involved in promoting equality between men and women are informed about funding possibilities and rules on access to EMFF funds. Further, under Article 113 of the EMFF Regulation each national monitoring committee overseeing the implementation of the EMFF must examine actions that promote general equality in order to verify the performance and effective implementation of EMFF support measures.

### *Policy*

In line with Article 23 of the Charter, the European Union promotes equality between women and men, by monitoring legislation, issuing recommendations, and by co-funding and awareness-raising activities, in the five priorities areas of the **2010-2015 Strategy for equality between women and men**.

This report refers to some of the main developments in the gender equality area. A more detailed description can be found in the **annual 2014 Report on equality between women and men**<sup>185</sup>. The latter shows that although gaps between men and women have narrowed in recent decades, inequalities within and between Member States have grown overall and challenges remain in the following areas:

- **For every hour worked women earn on average 16.4% less than men.** This figure is above 20% in Czech Republic, Austria, Estonia and Germany. **Closing the gender pay and pension**

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<sup>183</sup> The summary report of the 11<sup>th</sup> meeting of the European Integration Forum is available at [http://ec.europa.eu/ewsi/UDRW/images/items/static\\_38\\_93999696.pdf](http://ec.europa.eu/ewsi/UDRW/images/items/static_38_93999696.pdf)

<sup>184</sup> Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund, OJ L 149, 20.5.2014, p. 1.

<sup>185</sup> Annual 2014 Report on equality between women and men, 03.03.2015, SWD(2015) 49, available at: [http://ec.europa.eu/justice/gender-equality/files/annual\\_reports/150304\\_annual\\_report\\_2014\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/annual_reports/150304_annual_report_2014_web_en.pdf).

**gap has been frustratingly slow.** The latter has reached 39 %. Women still tend to be concentrated in less well-paid sectors.

- **The prevalence of gender-based violence is still alarmingly high.** A third of women in the EU report having experienced physical and sexual violence. More figures are available in the published by the EU Agency for Fundamental Rights.<sup>186</sup>
- **Gender gaps in employment and decision-making have narrowed in recent years, but women still account for less than a quarter of company board members,** despite representing almost half of the employed workforce (46 %). Also, the extent of gender equality varies substantially across Member States and improvement has not reached all social groups. Many factors continue to hamper women's employment and therefore the potential for economic growth.
- **Women are more likely to have a higher education degree (over 60% of new graduates are female), but are significantly under-represented in STEM<sup>187</sup> studies and careers,** in research and in senior posts at all levels of education, including higher education.

The **annual 2014 Report on equality between women and men** describes how the EU has acted to advance gender equality over the past year. In particular, in 2014, the EU has issued country specific recommendations<sup>188</sup> and used co-funding opportunities with the European Structural and Investment Funds to promote female employment, investment in early childhood education and care facilities, accessible long-term care and the reduction of tax-benefit disincentives for women to work.<sup>189</sup> The EU has also supported specific actions, such as national governments' campaigns against gender-based violence and grass-root projects led by non-governmental organisations.<sup>190</sup> And over the past years, the EU has adopted legislation and practical measures on victims' rights<sup>191</sup>.

Moreover, the European Commission raised awareness of the size and persistence of the gender pay gap by organisation of a **European Equal Pay Day**. It provided **funding** for transnational projects aimed at reducing the gender pay gap and gender imbalances in decision-making.

The European Commission **Recommendation on strengthening the principle of equal pay between men and women through transparency**<sup>192</sup> was adopted on 7 March 2014 and specifically refers in Recital 4 to Article 23 of the Charter of Fundamental Rights.

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<sup>186</sup> FRA study: Violence against women: an EU-wide survey, March 2014, available at:

<http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>.

<sup>187</sup> See European Commission Press Release of 5 March 2015: Commission outlines remaining key challenges on gender equality, available at: [http://europa.eu/rapid/press-release\\_IP-15-4552\\_en.htm#\\_ftn1](http://europa.eu/rapid/press-release_IP-15-4552_en.htm#_ftn1).

<sup>188</sup> Available at: [http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm).

<sup>189</sup> See 2014 Report on equality between women and men, chapter 1.

<sup>190</sup> See 2014 Report on equality between women and men, chapter 4.

<sup>191</sup> see European Commission Fact Sheet of 20 February 2015: Protection of victims in the EU available at [MEMO/15/4465](http://ec.europa.eu/rapid/press-release_IP-15-4465_en.htm) and European Commission Press Release of 9 January 2015: Better protection for victims of violence anywhere in the EU, available at: [IP/15/3045](http://ec.europa.eu/rapid/press-release_IP-15/3045_en.htm).

<sup>192</sup> Recommendation on strengthening the principle of equal pay between men and women through transparency (2014/124/EU).

Finally, in 2014, the European Commission also implemented the concrete actions announced in the Communication "**Towards the elimination of female genital mutilation**"<sup>193</sup>, adopted in November 2013 and promoting Article 3 of the Charter which foresees a right to the integrity of the person.<sup>194</sup>

## ***Article 24 – The rights of the child***

Article 24 of the Charter recognises that children are independent and autonomous holders of rights who have needs and interests which are different from adults. Article 24 also makes the child's best interest a primary consideration for public authorities and private institutions. The promotion and protection of the rights of the child is one of the objectives of the EU on which the Treaty on European Union, following from Article 3(3).

With respect to Article 24 of the Charter on the rights of the child, the actions<sup>195</sup> set out in the **EU Agenda for the rights of the child**<sup>196</sup> have been successfully completed.

### *Legislation*

In 2013, the European Commission tabled a proposal for a **Directive on procedural safeguards for children suspected or accused in criminal proceedings**<sup>197</sup>, which will ensure that children have mandatory access to a lawyer at all stages. This means that children cannot waive their right to be assisted by a lawyer, to ensure that a lacking understanding of the consequence of their actions does not lead them to waive their rights. Children are also set to benefit from other safeguards such as being promptly informed about their rights, being assisted by their parents (or other appropriate persons), not being questioned in public hearings, having the right to receive a medical examination and being kept separate from adult inmates if deprived of liberty. In conjunction with Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime of 2012<sup>198</sup>, and the 2011 legislation on child sexual abuse and exploitation and trafficking in human beings, this proposal will contribute to creating a more child-friendly justice system for all children involved in judicial proceedings.<sup>199</sup> In 2014 discussions in the Council took place culminating in a Council general approach in June 2014.

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<sup>193</sup> Communication from the Commission to the European Parliament and the Council "Towards the elimination of female genital mutilation" of 25.11.2013, COM(2013) 833 final, available at [http://ec.europa.eu/justice/gender-equality/files/gender\\_based\\_violence/131125\\_fgm\\_communication\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf).

<sup>194</sup> See Articles 3 and 24.

<sup>195</sup> On the state of play of the 11 actions taken to implement the EU Agenda for the Rights of the Child, see [http://ec.europa.eu/justice/fundamental-rights/files/20140916\\_state\\_of\\_play.pdf](http://ec.europa.eu/justice/fundamental-rights/files/20140916_state_of_play.pdf).

<sup>196</sup> Commission Communication: An EU Agenda for the Rights of the Child, COM(2011) 60 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0060:en:NOT>.

<sup>197</sup> Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0822:en:NOT>.

<sup>198</sup> Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57.

<sup>199</sup> See also the on-going FRA research on forms of child participation in criminal and civil judicial proceedings. Practices of child participation in justice proceedings vary considerably across EU Member States. There are gaps in relation to clear, consistent standards and guidelines on how and when children should be involved. In



In the context of the **negotiations of the Dublin III Regulation**<sup>200</sup>, the European Parliament and the Council invited the European Commission to consider a revision of Article 8(4). On 26 June 2014, the European Commission **adopted a proposal amending Article 8(4) of the Dublin III Regulation on the issue of determining responsibility for examining applications made by unaccompanied minors**<sup>201</sup>. The proposal codifies the Courts' jurisprudence on this topic and ensures that all loopholes in the responsibility criteria regarding unaccompanied minors are covered. On 6 June 2013, in the case C-648/11 *MA and Others vs. Secretary of State for the Home Department*<sup>202</sup> the Court of Justice ruled that Article 6(2) of the Dublin II Regulation "must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that child is present after having lodged an asylum application there is to be designated the 'Member State responsible' In line with the Charter of Fundamental Rights and as reiterated by the Court of Justice in the *MA* case, the **Commission's proposal ensures that the best interests of the minors will always be a primary consideration in the Dublin procedure**. In particular, it provides that unaccompanied minors, one of the most vulnerable group of international protection applicants, will not be needlessly transferred from one EU State to another and that the examination of their applications will not be unduly prolonged. The European Commission presented its proposal in the LIBE Committee of the European Parliament on 25 September 2014 and to the JHA counsellors on the 26 September 2014.<sup>203</sup>

### *Policy*

The **EU Agenda for the rights of the child** (2011-14) aimed to reinforce the full commitment of the EU - as enshrined in the Treaty of Lisbon and the Charter of Fundamental Rights - to promote, protect and fulfil the rights of the child in all relevant EU policies and actions. It included 11 concrete actions, covering in particular child-friendly justice, and vulnerable children. A preliminary evaluation of the EU Agenda was presented to the relevant Council working group (FREMP) on 3 October and led to **Council Conclusions on the promotion and protection of the rights of the child** adopted in December 2014<sup>204</sup> to mark the 25th Anniversary of the UN Convention on the Rights of the Child. In the conclusions the Council, among other things, made a commitment to consistently apply its internal guidelines on fundamental rights compatibility in its preparatory bodies and invited the European Commission and EU Member States to give full recognition to children as rights holders and to ensure respect for the principle of the best interests of the child in all policies affecting children.

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2011, the Commission highlighted in the EU Agenda for the Rights of the Child that promoting child-friendly justice is at the center of its actions. Therefore, in close cooperation with the Commission, FRA is engaging in research to examine practices and procedures of child participation in justice proceedings which should conform to the Council of Europe's guidelines on child-friendly justice. More information on the research project is available at <http://fra.europa.eu/en/project/2012/children-and-justice>.

<sup>200</sup> Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180, 29.06.2013, p. 31.

<sup>201</sup> COM(2014) 382 final.

<sup>202</sup> CJEU judgment of 6 June 2013

<sup>203</sup> See also Article 18.

<sup>204</sup> <http://db.eurocrim.org/db/en/doc/2272.pdf>.

The **European Parliament adopted a Resolution on the 25<sup>th</sup> anniversary of the UN Convention on the Rights of the Child.**<sup>205</sup> The resolution calls on EU Member States to put the issue of children's rights on the European Union's agenda and to consider children as a priority in future regional and cohesion policies<sup>206</sup>. The resolution also calls on the European Commission to seize the opportunity afforded by the mid-term review of the multiannual financial framework to ensure that EU funds benefit the most disadvantaged and vulnerable children across Europe.

In May 2014, the Council and the representatives of the governments of the Member States also adopted a resolution on an **EU Work Plan for Youth** (2014 – 2015). It is a medium-term structured plan for 18 months, with a limited number of key initiatives in specific youth policy areas so as to enable the EU and its Member States to address urgently the high youth unemployment rates and the consequences of the current crisis for your people. As a follow-up the Council adopted conclusions on promoting young people's access to rights in order to foster their autonomy and participation in civil society in December 2014. The Council has also decided to make youth empowerment the overall thematic priority for the structured dialogue with young people until the end of 2015.

In the same month, the Council of Sport Ministers adopted the **EU Work Plan for Sport** (2014 – 2017) which, among other things, plans actions to protect young athletes and safeguard children's rights in sport. Next to this, the Council of Education Ministers adopted **Council conclusions on multilingualism and the development of language competences**. They include measures to support children and adults with migrant backgrounds in learning the language(s) of the host country.

#### *Investing in Children*

On 20 February 2013 the European Commission adopted a **recommendation on Investing in children: breaking the cycle of disadvantage**<sup>207</sup>, which took a comprehensive child-rights approach to tackling child poverty and promoting child wellbeing. In 2013, members of the European network of independent experts on social inclusion were asked to prepare country reports to assist the European Commission and Member States in implementation of the recommendation and inform its monitoring, resulting in a 2014 synthesis report **Investing in children: breaking the cycle of disadvantage – A study of national policies**. The synthesis report contains an assessment of what Member States would need to do to implement the recommendation.<sup>208</sup> In 2014, the European Commission published a **study on research carried out in the context of the investing in children recommendation, to investigate if and how conditional cash transfers (CCTs) can promote investment in children.**<sup>209</sup> Next to this, to help foster the social inclusion of children, the European Commission established the **European Platform for Investing in Children (EPIC)** website<sup>210</sup>, as a platform to share the best of policymaking for children and families and to foster cooperation and

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<sup>205</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20141127+ITEMS+DOC+XML+V0//EN&language=EN#sdocta7>

<sup>206</sup> Ibidem, at point 9.

<sup>207</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013H0112>

<sup>208</sup> EU Synthesis: <http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=2061&furtherNews=yes>  
Individual country profiles and reports: [http://europa.eu/epic/countries/index\\_en.htm](http://europa.eu/epic/countries/index_en.htm)

<sup>209</sup> <http://bookshop.europa.eu/en/study-on-conditional-cash-transfers-and-their-impact-on-children-pbKE0214922/>

<sup>210</sup> [http://europa.eu/epic/about/index\\_en.htm](http://europa.eu/epic/about/index_en.htm)

mutual learning in the field. The “Practices that work” section features evidence-based practices (reviewed prior to their inclusion on the website).

Following, amongst others, the 2013 Recommendation on Investing in Children, the European Commission also issued **Country-Specific Recommendations**<sup>211</sup> in 2014 to 26 Member States relating to children, covering, amongst others, inclusive education and **early school leaving, income support, affordable housing, financial disincentives, reconciliation, youth activation, health, Roma, efficiency/effectiveness, and ECEC/childcare**.<sup>212</sup> The European Commission also proposed country-specific recommendations to enhance access to affordable quality early childhood education and care services and long-term care services in 2014, with a view of better reconciling family and professional life and supporting parents’ labour market participation.

Access to **quality and inclusive education** is a critically important area for children, reflected in Europe 2020, and the EU’s engagement with and focus on education has increased over the years. A 2014 study on the effective use of early childhood education and care (ECEC) in preventing early school leaving (ESL)<sup>213</sup> was published.

### *Protecting Children*

A **study to collect data on children's involvement in criminal, civil and administrative judicial proceedings** was finalised in 2014 and the results will be published in 2015. The study results on children's involvement in criminal judicial proceedings were published in June 2014.<sup>214</sup> The study gathers all available data, identifies gaps in data and procedural safeguards, and provides examples of good practices in the 28 Member States.

Further to the 2012 and 2013 European Fora on the rights of the child, a 2014 public consultation on **integrated child protection systems** resulted in approximately 300 responses from a broad range of stakeholders. The EU Agency for Fundamental Rights mapped national child protection systems, assessing, amongst others, national legislative frameworks, national policy frameworks (action plan or strategy), decentralized child protection responsibilities, the presence of a central authority with national coordinating role, the possibility of outsourcing service provision to commercial institutions or companies, financial resources and budget allocations, the accreditation procedures for professionals, the vetting of foster families and residential care personnel, and provisions on the legal obligation of professionals to report cases of child abuse, the referral and assessment procedures, as well as the (independent) monitoring performance of national child protection systems and the development of national standards. Both of these exercises informed preparation of a communication on integrated child protection systems, expected to be adopted in 2015.

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<sup>211</sup> <http://europa.eu/epic/docs/2014-final-csrs-on-inv-children.pdf>

<sup>212</sup> For an overview of all the issued country specific recommendations of 2014 or the European Semester in general, please visit [http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm).

<sup>213</sup> Executive summary: <http://bookshop.europa.eu/en/study-on-the-effective-use-of-early-childhood-education-and-care-ecec-in-preventing-early-school-leaving-esl--pbNC0414324/>; other deliverables: [http://bookshop.europa.eu/en/search/?webform-id=WFSimpleSearch&DefaultButton=findSimple&WFSimpleSearch\\_NameOrID=ECEC&SearchConditions=&SearchType=1&SortingAttribute=LatestYear-desc&findSimple.x=0&findSimple.y=0](http://bookshop.europa.eu/en/search/?webform-id=WFSimpleSearch&DefaultButton=findSimple&WFSimpleSearch_NameOrID=ECEC&SearchConditions=&SearchType=1&SortingAttribute=LatestYear-desc&findSimple.x=0&findSimple.y=0)

<sup>214</sup> <http://www.childreninjudicialproceedings.eu/Home/Default.aspx>.

One of the best-known pieces of research co-funded by the European Commission, under the EU **safer/better internet programme**, is EU Kids Online<sup>215</sup>. In 2014 they published a report (based on individual and group interviews of children aged 9-16 carried out in 2013 in nine EU MS) on "**The meaning of online problematic situations for children: results of qualitative cross-cultural investigation in nine European countries**".<sup>216</sup>

The **Global Alliance against Child Sexual Abuse Online**, which was launched in 2012 at the joint initiative of the EU and the US, seeks to ensure that Charter rights such as human dignity and particularly the rights of the child are respected and protected. At the 2nd Ministerial Conference of the Alliance in Washington D.C. on 29-30 September 2014, 54 ministers from countries all across the world endorsed a **Declaration on Facilitating International Cooperation in Online Child Sexual Abuse Investigations** involving commitments to facilitate transnational investigation and prosecution of these crimes. The European Commission has also launched infringement proceedings against 11 Member States for the non-communication of measures transposing Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography.

Under the Connecting Europe Facility, the Commission co-funds hotlines in Member States that work in partnership with law enforcement, industry and children's organisation to combat the distribution of child abuse images online. The Commission also funds awareness centres and helplines in Member States that provide information and support to young people, parents and teachers for issues, including cyberbullying, supported by a central platform of shared information and services.<sup>217</sup>

As discussed under Article 5, on 18 October 2014, to mark the 8th EU Anti-trafficking Day, the Commission presented the Midterm Report on the implementation of the EU Strategy towards the eradication of trafficking in human beings 2012-2016, as well as the **Second Eurostat Working Paper on statistics on trafficking in human beings**.<sup>218</sup> It, amongst others, details that between 2010 and 2012, 30 146 victims of trafficking were registered. Of these victims it was detailed that 16% were children (under the age of 18), and that more than 1000 children have been trafficked for the purpose of sexual exploitation. It also demonstrated that 65% of the victims hold EU citizenship. In June 2014, the European Commission and the Fundamental Rights Agency jointly published "Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking". In 2014 the European Commission also launched a **study on identifying high-risk groups of trafficking**. The study aims to develop the knowledge and increase understanding on children as a particularly vulnerable group that is at greater risk of being trafficked into the EU, within the EU and within a Member State.

In June 2014 the Council adopted conclusions on **preventing and combating all forms of violence against women and girls, including female genital mutilation**.<sup>219</sup>

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<sup>215</sup> [www.eukidsonline.net](http://www.eukidsonline.net)

<sup>216</sup> <http://eprints.lse.ac.uk/56972/>

<sup>217</sup> Regulation of the European Parliament and of the Council on guidelines for trans-European telecommunications networks and repealing Decision No1336/97/EC.

<sup>218</sup> For more information see also Article 5.

<sup>219</sup> See also Articles 3 and 23.

Much of the available EU-level research and information relating to children in migration situations has been gathered by the **European Migration Network (EMN)**<sup>220</sup>. The EMN, amongst other things, published in 2014 compilations of replies on admission/residence and guardianship-related provisions for unaccompanied foreign and/or EU children in vulnerable situations<sup>221</sup> and on issues relating to care orders for foreign children of illegally staying parents<sup>222</sup>. In addition, they also published in 2014 an EU synthesis report on the use of detention and alternatives to detention in the context of immigration policies<sup>223</sup>, covering 26 EU Member States and Norway (excluding Denmark, Italy and Romania), based on national reports<sup>224</sup> that addresses immigration detention as applied to children.

The protection of the human rights of migrants is a cross-cutting priority also in the EU's external migration policy, the **Global Approach to Migration and Mobility (GAMM)**.<sup>225</sup> Numerous projects are carried out under the GAMM focusing on protecting migrants, including children and vulnerable groups like asylum seekers, from abuse and human rights violations such as trafficking in human beings, and empowering them through effective integration policies and promoting access to basic services such as healthcare. The European Commission has launched in 2014 a EUR 9.5 million globally coordinated civil society action with the International Federation of the Red Cross, focusing on the rights of vulnerable migrants and victims of human trafficking.

#### *Child Health*

In March 2014 the EU adopted the **Action Plan on Childhood Obesity 2014 – 2020**, amongst others promoting further synergies with its work with the World Health Organisation. In June the 2014 Council adopted conclusions on '**The European Pact for Mental Health and Well-being: results and future action**', which invited Member States to Strengthen Mental Health promotion of children and young people by supporting positive parenting skills, holistic school approaches to reduce bullying and to increase social and emotional competences as well as supporting families where a parent has a mental disorder.

#### *Case law*

In a series of case law on Council Regulation no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the Brussels IIa Regulation), the Court, without explicitly referring to the Charter or its Article 24, held that jurisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child. The concept of the best interests of the child is enshrined in Article 24 of the Charter, and also in several provisions of the Brussels IIa Regulation

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<sup>220</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/about/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/about/index_en.htm)

<sup>221</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/518\\_emn\\_ahq\\_unaccompanied\\_foreign\\_and\\_or\\_eu\\_minors\\_in\\_vulnerable\\_situations\\_16january2014\\_\(wider\\_dissertation\).pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/518_emn_ahq_unaccompanied_foreign_and_or_eu_minors_in_vulnerable_situations_16january2014_(wider_dissertation).pdf)

<sup>222</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/miscellaneous/536\\_emn\\_ahq\\_care\\_orders\\_17032014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/miscellaneous/536_emn_ahq_care_orders_17032014_en.pdf)

<sup>223</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn\\_study\\_detention\\_alternatives\\_to\\_detention\\_synthesis\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf)

<sup>224</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/studies/results/irregular-migration/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/studies/results/irregular-migration/index_en.htm)

<sup>225</sup> See also Article 18.

itself, the Regulation hereby being a nice example of how children's rights were mainstreamed in the EU legislative process.

In *C v M*<sup>226</sup>, the CJEU held that Article 2(11) and Article 11 of Council Regulation no 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the Brussels IIa Regulation), must be interpreted as meaning that, in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment is wrongful. Article 11 of the Regulation is applicable if it is held that the child was still habitually resident in that Member State immediately before the retention. This means that where a parent has lawfully removed a child from a Member State, in conformity with a judgment of a court of that State allowing it to do so, and has meanwhile settled in another Member State with the child, but a subsequent judgment on appeal reverses the decision at first instance and orders the return of the child, it is for the courts of the second State to determine whether the child has obtained habitual residence there by the time of the judgment on appeal. As regards the concept of 'habitual residence', the Brussels IIa Regulation does not contain a definition of that concept. It is up to the national judge to establish the child's habitual residence. The CJEU has stressed that the national judge, when establishing the child's habitual residence, must determine the meaning and scope of that concept in the light of the best interests of the child, a concept as enshrined in recital 12 in the preamble to the Regulation and also Article 24 of the Charter.

The CJEU further held in *L v M*<sup>227</sup> on the Brussels IIa Regulation, that Article 12(3) of this regulation, must be interpreted as allowing, for the purposes of proceedings in matters of parental responsibility, the jurisdiction of a court of a Member State which is not that of the child's habitual residence to be established even where no other proceedings are pending before the court chosen. As in the *C v M* case, the notion of "the best interest of the child" was a central notion in the judgment and a key concept on which the Court based its reasoning. It held, more in particular, that where a court is seized of proceedings in accordance with Article 12(3) of Regulation No 2201/2003, the best interests of the child can be assured only by an examination, in each individual case, of whether the prorogation of jurisdiction sought is in accordance with those interests. The Court therefore concluded that it cannot be considered that the jurisdiction of the court seized by one party of proceedings in matters of parental responsibility has been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required of him in the first proceedings, pleads the lack of jurisdiction of that court.

In *E v B*<sup>228</sup> the CJEU interpreted Article 12(3) as giving parents in matters relating to custody or access rights a possibility to go to a court in a Member State in which the child is not habitually resident but where the child has a substantial connection with that Member State. The Court again referred to the best interest of the child, holding that where a court is seized of proceedings in accordance with Article 12(3) of Regulation No 2201/2003, the best interests of the child can be safeguarded only by a

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<sup>226</sup> CJEU Judgment of 9 October 2014 in Case C-376/14 PPU.

<sup>227</sup> CJEU Judgment of 12 November 2014 in Case C-656/13.

<sup>228</sup> CJEU Judgment of 1 October 2014 in Case C-436/13.

review, in each specific case, of the question whether the prorogation of jurisdiction which is sought is consistent with those best interests. It concluded its ruling with the finding that jurisdiction in matters of parental responsibility which has been prorogued, under Article 12(3) of Regulation No 2201/2003 in favour of a court of a Member State before which proceedings have been brought by mutual agreement by the holders of parental responsibility, ceases, following a final judgment in those proceedings.

In *Saciri and Others*<sup>229</sup> the CJEU held that where a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers, the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs. The amount of those allowances must be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers may be maintained.<sup>230</sup>

*Tarakhel v Switzerland*<sup>231</sup>, a case judged by the ECtHR, concerned a couple and their children who left Iran for Turkey and from there took a boat to Italy, where they were immediately subjected to the EURODAC on 16 July 2011. The same day the couple and the five children were placed in a reception facility provided by the municipal authorities of Stignano. They were transferred to the Reception Centre for Asylum in Bari. According to the applicants, living conditions in the centre were poor, particularly on account of the lack of appropriate sanitation facilities, the lack of privacy and the climate of violence among the occupants. The applicants left the CARA in Bari without permission. They subsequently travelled to Austria, where on 30 July 2011 they were again registered in the EURODAC system. They lodged an application for asylum in Austria which was rejected. On 1 August 2011 Austria submitted a request to take charge of the applicants to the Italian authorities, which on 17 August 2011 formally accepted the request. On an unspecified date the applicants travelled to Switzerland. The applicants applied for asylum in Switzerland. The first and second applicants were interviewed by the Federal Migration Office (“the FMO”) and stated that living conditions in Italy were difficult and that it would be impossible for the first applicant to find work there. Relying on Articles 3 and 8 of the Convention, the applicants alleged mainly that if they were returned to Italy they would be exposed to inhuman and degrading treatment on account of the risk of being left without accommodation or being accommodated in inhuman and degrading conditions. The risk stemmed, in their submission, from the absence of individual guarantees as to how they would be taken charge of, in view of the systemic deficiencies in the reception arrangements for asylum seekers in Italy. The Court declared, unanimously, the complaints of a violation of Article 3 of the Convention admissible and the remainder of the application inadmissible. The Court subsequently ruled that there would be a violation of Article 3 of the Convention if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the

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<sup>229</sup> CJEU Judgment of 27 February 2014 in Case C-79/13, see also Articles 1 and 7.

<sup>230</sup> See also above Articles 1 and 7.

<sup>231</sup> ECtHR Judgment of 4 November 2014 (Application no 29217/12) *Tarakhel v Switzerland*, see also Articles 4, 18 and 19.

Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.<sup>232</sup>

#### *Application by the Member States*

In the course of 2014 the European Commission has examined how Member States have applied the Charter when implementing EU legislation at the Union's external borders, in particular as regards the application of the principle of *non-refoulement*. Issues such as the application and length of detention, detention conditions, **the particular situation of children**, free legal assistance and effective remedies in the context of the asylum process in some Member States have also been of concern to the Commission.

Member States were due to adopt national measures to comply with their obligations under the **Child Sexual Abuse Directive**<sup>233</sup> by 18 December 2013. Of the 27 Member States bound by the Directive, 18 have notified complete transposition and nine notified partial transposition. There are 11 infringement procedures open against countries that did not notify before December 2013. The content of the notifications are under review.<sup>234</sup>

The European Commission launched an infringement procedure against a Member State by sending a letter of formal notice in 2014 as regards the situation of **unaccompanied minors seeking asylum**. In this case aspects of the asylum and reception system appeared not to properly implement the Reception Conditions Directive<sup>235</sup> and the Asylum Procedures Directive<sup>236</sup>. They also appeared to breach Article 24 of the Charter.

#### *Text Box Example*

##### Ruling of the Supreme Court Italy

The case<sup>237</sup> concerned the refusal of the Italian Immigration Authority to grant an entry visa to a minor who was entrusted to an Italian couple under the Arabic scheme of *kafalah*. *Kafalah* is a guardianship system similar to an adoption. The Supreme Court acknowledged the need to provide a broad interpretation of "family member" in the national provision, which includes relations like the *kafalah* provided that certain conditions were fulfilled. The Court reasoned that the principle of the best interest of the child, as guaranteed in Article 3 of the UN Convention on the Rights of the Child and Article 24 of the Charter, had to be taken into consideration. This ruling shows how the Charter was used to interpret national laws which resulted in providing fundamental rights aspects in the reading of certain national provisions. It particularly exemplifies how a principle found in EU and

<sup>232</sup> See above Articles 4, 18 and 19.

<sup>233</sup> Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1.

<sup>234</sup> See also Article 3.

<sup>235</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6.2.2003, p. 18

<sup>236</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, 13.12.2005, p. 13. See also Articles 6 and 47.

<sup>237</sup> Supreme Court Italy (Cassazione, I sez. Civ.), case 11404, 22.5.2014.



International law, such as the best interest of the child, but does not expressly exist in national constitutional law, can be given effect by way of application of the Charter.

## ***Article 25 – The rights of the elderly***

Article 25 of the Charter provides that the European Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. Whereas most of the policies directly affecting the realisation of these rights are in the competences and responsibilities of the individual member states, the European Union is committed to respect and promote these rights in relevant EU law, policies and programs.

### *Legislation*

In order to cover equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation also outside the labour market, the European Commission had proposed in 2008 the Equal Treatment Directive<sup>238</sup>. While supported by the European Parliament, the proposal is blocked in the Council because of subsidiarity and cost concerns expressed mainly by a few Member States. The newly composed European Commission has announced in 2014 to step up its efforts for the adoption of this proposal.

### *Policy*

In 2014 the European Commission and the Social Protection Committee issued a joint report on **‘Adequate social protection for long-term care needs in an ageing society’**<sup>239</sup>. The report analyses Europe’s rapid demographic ageing and suggests innovative solutions to ensure a proactive, fair and sustainable response to the challenges faced by EU member States. The European Commission also organised a seminar on the rights of older people in need of care and assistance together with the Council of Europe and AGE Platform Europe.

There is an important **correlation between age and disability**. According to Eurostat figures (EU-SILC 2012) the percentages of people reporting a disability are per age group as follows:

- age 55-64: 32 %
- age 65-74: 44 %
- age 75-84: 60 %
- age 85+: 70 %

For the rights of older persons it is therefore important that the European Union became a Party to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In 2014 the EU has submitted its first Report to the UN on the implementation of the UNCRPD, as required by Article

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<sup>238</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2.7.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>. See above Article 21.

<sup>239</sup> Available at: <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7724>.

35. Also more generally the EU is an important actor in international processes to promote and improve the protection of the rights of older people, such as in the UN Open-Ended Working Group on Ageing, which held its fifth meeting in 2014. The group has a mandate to discuss elements of the possible convention on the rights of older people. It is a forum for exchange of information between the world's regions on the initiatives supporting the rights of the elderly. The European Commission's presentation illustrated the above mentioned report on adequate protection against the risk of long-term care and at a side-event showcased its upcoming project on Human Rights in long-term care.

In the framework of the Council of Europe the Committee of Ministers representing its 47 Member States adopted unanimously on 14 February 2014 a Recommendation on the **Promotion of Human Rights of Older Persons**<sup>240</sup>. This Recommendation essentially codifies in a single text relevant standards and case law under the European Convention of Human Rights and the European Social Charter, and consolidates their recognition as common European standards. A first implementation report is expected in 2019.

In 2014 the European Commission reported<sup>241</sup> on the **implementation** of Directive 2000/78/EC on equal treatment in employment and occupation (**'Employment Equality Directive'**). This report has a special focus on age discrimination and contains in its Annex III an overview of provisions on age discrimination in employment and occupation in the Member States.

## ***Article 26 – Integration of persons with disabilities***

The Charter provides that the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. The Charter in Article 53 on the level of protection relates it inter alia "to international law and international agreements to which the Union or all the Member States are party".

### *International agreements*

The level of protection offered by the Charter has to be interpreted in line with the **UN Convention on the Rights of Persons with Disabilities** ('the UN Convention'), to which the EU is a Party since 2011.<sup>242</sup> The UN Convention is the first international legally binding instrument setting minimum standards for a range of civil, political, social, economic and cultural rights for people with disabilities around the world. All 28 Member States have signed the UN Convention and 25 of these have ratified it, while the remaining three (Finland, Ireland and the Netherlands) are progressing towards ratification. On 5 June 2014, the European Commission submitted its **first report to the UN** on how

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<sup>240</sup> Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons, available at: <https://wcd.coe.int/ViewDoc.jsp?id=2162283&>.

<sup>241</sup> Report from the Commission to the European Parliament and the Council, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), available at:

[http://ec.europa.eu/justice/discrimination/files/com\\_2014\\_2\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf).

<sup>242</sup> Council Decision 2010/48/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010D0048>

the EU is giving effect to the UN Convention as required by article 35 of the UN Convention.<sup>243</sup> This first report shows that the ratification of the UN Convention has had tangible impacts in EU legislation and policy-making.

In the area of justice, the 2013 European Commission Recommendation on **procedural safeguards for vulnerable people suspected or accused in criminal proceedings**<sup>244</sup> makes explicit reference to the UN Convention to ensure that the needs of persons with disabilities are properly identified and addressed during the proceedings, for example by providing information about the proceedings in an accessible format.

To promote the implementation of the UN Convention in the EU and the Member States, the European Commission organises the **Work Forum on the implementation of the UN Convention**. The 2014 meeting focused on the right to equal recognition before the law, access to justice and the monitoring frameworks of the Convention at EU and national level.

In April 2014, **the EU signed the Marrakesh Treaty**, a multilateral agreement administered by the World Intellectual Property Organisation (WIPO) which aims to facilitate access to copyright protected published works for persons who are blind, visually impaired, or otherwise print disabled. In October 2014 the European Commission proposed its ratification on behalf of the European Union.

#### *Legislation*

With a view to improve accessibility, the European Commission made further progress towards the preparation of a **European Accessibility Act**, an internal market initiative establishing common accessibility requirements across the EU for a number of products and services to create business opportunities - by removing national regulatory barriers. It would use the internal market potential to increase the availability of better accessible products and services and at a lower price for consumers, notably consumers with disabilities and older consumers.

#### *Policy*

The overall framework for the implementation by the EU of its obligations under the UN Convention is the **European Disability Strategy 2010-2020**. Its aim is to create a barrier-free Europe that allows for the full and equal participation of persons with disabilities.

Each year, the European Commission raises awareness to the disability challenges, through a conference celebrating the **Day of Persons with Disabilities** that it organises with the European Disability Forum.<sup>245</sup> The 2014 conference focused on employment, accessibility and future challenges.<sup>246</sup>

The **2014-2020 regulatory framework for the European Structural and Investment Funds (ESIF)** contains new, reinforced provisions and ex-ante conditionality criteria to make sure that investments are effectively used to promote equality, non-discrimination, social inclusion and accessibility for

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<sup>243</sup> [http://ec.europa.eu/justice/discrimination/files/swd\\_2014\\_182\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf)

<sup>244</sup> Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24.12.2013, p. 8.

<sup>245</sup> [www.edf-feph.org](http://www.edf-feph.org)

<sup>246</sup> [http://ec.europa.eu/justice/newsroom/discrimination/events/eventedpd2014\\_en.htm](http://ec.europa.eu/justice/newsroom/discrimination/events/eventedpd2014_en.htm)

persons with disabilities, including the right to live independently and being included in the community, through both targeted actions and effective mainstreaming of disability as a cross-cutting issue.<sup>247</sup>

In the new Common Provisions Regulation for the ESIFs<sup>248</sup>, one of the "investment priorities" is to support the transition from institutional to community-based services. This objective has been also promoted through seminars on the use of structural funds to support the transition from institutional to community-based services<sup>249</sup>. In addition, Article 8 of the European Social Fund Regulation<sup>250</sup> states that "(...) *actions shall aim to combat all forms of discrimination as well as to improve accessibility for persons with disabilities, with a view to improving integration into employment, education and training, thereby enhancing social inclusion, reducing inequalities in terms of educational attainment and health status, and facilitating the transition from institutional to community-based care, in particular for those who face multiple discrimination.*" Lastly, the new Common Provisions Regulation also requires that national authorities that are managing the EU funds have sufficient administrative capacity for the implementation and application of the UN Convention on the Rights of Persons with Disabilities in the field of ESIFs.

The European Commission organised, in partnership with the European Disability forum, the **2015 Access City Award** which recognises accessibility initiatives improving equal access to city life for people with disabilities. The Award illustrates the wide range of initiatives and policies that can make a society more inclusive – from accessible housing to children's play areas and public transport information.<sup>251</sup>

As announced in the Citizenship Report 2013, the European Commission started to work with a group of Member States and civil society organisations to develop a **mutually-recognised EU-model disability card** that would facilitate the freedom of movement of persons with disabilities within the EU allowing persons with disabilities who travel to another EU country to be treated in the same way as nationals, when it comes to access to culture, tourism and leisure.

Under the ICT-PSP CIP Programme the Commission has co-funded the SIMON project which is testing the feasibility of an intelligent eCard for disability parking rights across borders.

Better mobility for persons with disabilities is also supported by the **Erasmus+ Programme** (2014-2020), which grants additional funds to students with special needs for their mobility periods abroad.

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<sup>247</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013R1303>

<sup>248</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p. 320.

<sup>249</sup> Organised in the framework of the Social Investment Package, available at: <http://ec.europa.eu/social/main.jsp?catId=1044>.

<sup>250</sup> Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006, OJ L 347, 20.12.2013, p. 470.

<sup>251</sup> [http://ec.europa.eu/justice/discrimination/disabilities/award/index\\_en.htm](http://ec.europa.eu/justice/discrimination/disabilities/award/index_en.htm)

Following the European Parliament's initiative, the European Commission launched a pilot project to develop a **web-based service platform** to facilitate communication of deaf and hard of hearing people with the EU institutions.

FRA, together with the Academic Network of European Disability experts, supported by the European Commission, developed indicators on the **right to political participation** of people with disabilities. The findings were released in April and May 2014 on the occasion of the European elections.<sup>252</sup> They show that, given an accessible and enabling environment, people with disabilities actively participate in politics. However, significant challenges remain to participation on an equal basis with others, including: legal obstacles, restrictions linked to the lack of recognition of, and support for the exercise of legal capacity, inaccessible environments, processes and information, and a lack of awareness about the right to political participation.

The Union's **external action financial instruments** also cater for the rights of persons with disabilities. The new regulations establishing the financing instruments for 2014-2020 in the areas of development cooperation<sup>253</sup>, democracy and human rights worldwide<sup>254</sup>, and Pre-accession Assistance (IPA II)<sup>255</sup> include explicit provisions for supporting the social inclusion and the rights of persons with disabilities in accordance with the UN Convention. Moreover, the regulation laying down common rules and procedures for the implementation of Union's instruments for financing external action<sup>256</sup>, which applies to all instruments, indicates that accessibility for persons with disabilities must be duly taken into account in the design and implementation of programmes and projects.

#### *Case law*

In 2014, the CJEU has further developed its jurisprudence<sup>257</sup> on the definition of disability.

In the **Glatzel**<sup>258</sup> case, the CJEU issued a preliminary ruling on the request of the *Bayerischer Verwaltungsgerichtshof* (Germany) about the compatibility with the Charter of Annex III to Directive 2006/126/EC (amended by Directive 2009/113/EC)<sup>259</sup> laying down minimum standards relating to the physical fitness to drive a motor vehicle as regards visual acuity. The CJEU analysed whether the refusal of a driving license for certain vehicles on the ground of not reaching a minimum level of visual acuity on the basis of Directive 2006/126 was compatible with Articles 20 (equality before the law), 21(1) (non-discrimination against persons with disabilities) and 26 (the integration of persons

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<sup>252</sup> FRA, "The right to political participation for persons with disabilities: human rights indicators", May 2014, available at <http://fra.europa.eu/en/publication/2014/right-political-participation-persons-disabilities-human-rights-indicators>.

<sup>253</sup> Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020.

<sup>254</sup> Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide.

<sup>255</sup> Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II).

<sup>256</sup> Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action.

<sup>257</sup> See last year's report, which referred to CJEU judgment of 11 April 2013 in Joined Cases C-335/11 and C-337/11 *HK Danmark* ("Ring and Skoube Werge").

<sup>258</sup> CJEU judgment of 22 May 2014 in Case C-356/12 *Glatzel*, see also Articles 21 and 51.

<sup>259</sup> Directive 2006/126/EC of 20 December 2006 on driving licences (recast), OJ L 403, p. 18.

with disabilities) of the Charter. The CJEU emphasised that the notion of "disability" must be read in light of the UN Convention on the Rights of Persons with Disabilities. Although the CJEU eventually ruled that it did not have sufficient information to conclude that the applicant of the case had such bad eyesight that it constitutes a 'disability' within the meaning of the Charter, the court stated that the different treatment of a person with impaired eyesight can be justified by a concern such as road safety, which fulfils an objective of public interest, is necessary and is not a disproportionate burden.

The *Kaltoft*<sup>260</sup> case has already been discussed above under Article 21. It concerns a request for a preliminary ruling from the Danish District Court of Kolding (*retten i Kolding*) submitted to the CJEU on whether EU law itself prohibits **discrimination on grounds of obesity**. The CJEU was asked whether obesity can constitute a disability and therefore falls within the scope of the Employment Equality Directive<sup>261</sup>.

Disability is not defined by the Employment Equality Directive. However, the Directive must, as far as possible, be interpreted consistently with the UN Convention on the Rights of Persons with Disabilities (UNCRPD)<sup>262</sup>. The CJEU followed the definition of disability offered in previous case law, which is "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers." The CJEU relied on the UNCRPD and acknowledged disability as an evolving concept.<sup>263</sup>

The CJEU specified that in the area of employment and occupation, EU law does not lay down a general principle of non-discrimination on grounds of obesity as such. However, the Court found that, if under given circumstances the obesity of the worker entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, such obesity can be covered by the concept of 'disability' within the meaning of the directive. It also stressed that the concept of 'disability' within the meaning of Directive 2000/78 does not depend on the extent to which the person may or may not have contributed to the onset of his disability.

#### *Application by Member States*

The current EU regulatory framework and in particular Art 26 (4) of the Universal Service Directive (Directive 2002/20/EC as amended by Directive 2009/139/EC) includes measures in favour of persons with disabilities which are an expression of Article 26 of the EU Charter. The provision provides for the obligations on Member States to ensure that disabled end-users enjoy **equivalent access to the Single European emergency number 112**. In the course of monitoring of the implementation of this particular provision, Member States were invited to provide information on their measures, which ensure that disabled end-users enjoy tailored solutions for equal access to 112 taking into account aspects such as speed, mobility, reliability, coverage or language handling. Generally, access to 112 by other means than voice communication is provided in a number of countries for ensuring

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<sup>260</sup> CJEU judgment of 18 December 2014 in Case C-354/13 *Kaltoft*; see also Article 21.

<sup>261</sup> Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16.

<sup>262</sup> See below under Article 26 on integration of persons with disabilities.

<sup>263</sup> This case is a nice illustration of how the CJEU relies on UN instruments for the interpretation of EU law.

accessibility of disabled end-users to emergency services. According to the COCOM report on the Implementation of the European emergency number 112, access to 112 for disabled end-users did not improve significantly. 22 Member States reported the implementation of an alternative access to 112 in 2014 up from 21 in 2013. The take-up of SMS remained the same (18 member States) while 3 Member States reported the ongoing deployment of such alternative means to contact emergency services.

*Text Box Example*

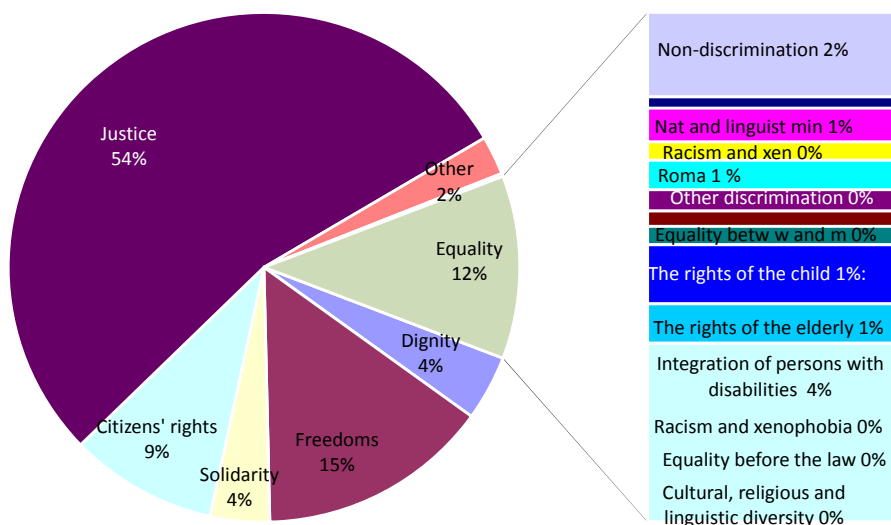
Ruling of the Federal Social Court Germany

This case<sup>264</sup> concerned an employee of a German national authority, who had the status of a disabled person. She applied for being legally equated with a severely disabled person to the Federal Employment Agency, which rejected her application. In its ruling, the Court interpreted the national provision of the Code of Social Law, which aims at disabled person's full participation in working life, against the background of, amongst other provisions of national and international law, Articles 21 and 26 of the Charter. Thus, the Court stated that equality rights have to be guaranteed not only to unemployed persons with disabilities but also to people with disabilities who have a job and want to make a career change. As a result, the Federal Employment Agency was obliged to legally equate the plaintiff to a severely disabled person. In addition, the Court called on the legislator and employer to accordingly modify the requirements for access to the civil service.

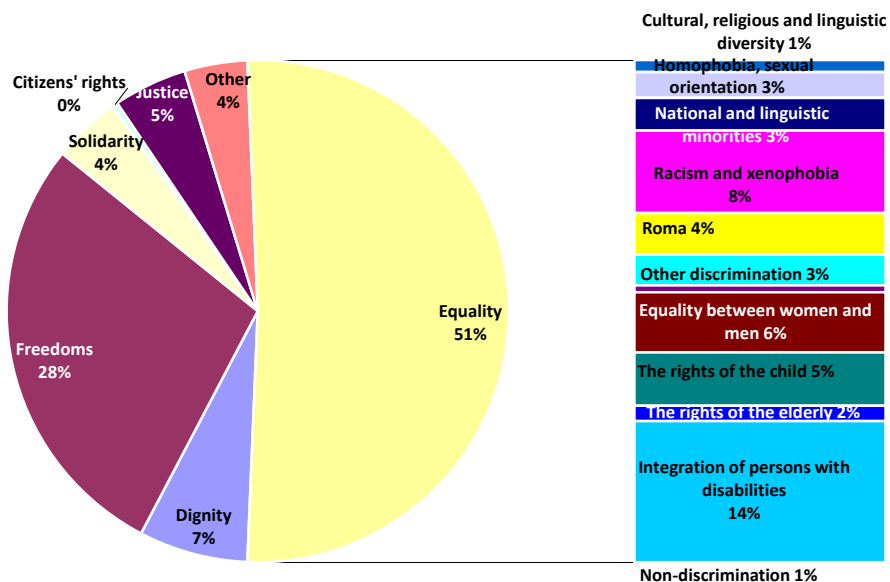
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<sup>264</sup> Federal Social Court Germany (Bundessozialgericht), case B 11 AL 5/14 R, 6.8.2014, available at: <http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=ps&Datum=2014&nr=13566&linked=urt> .

### Letters (Equality)

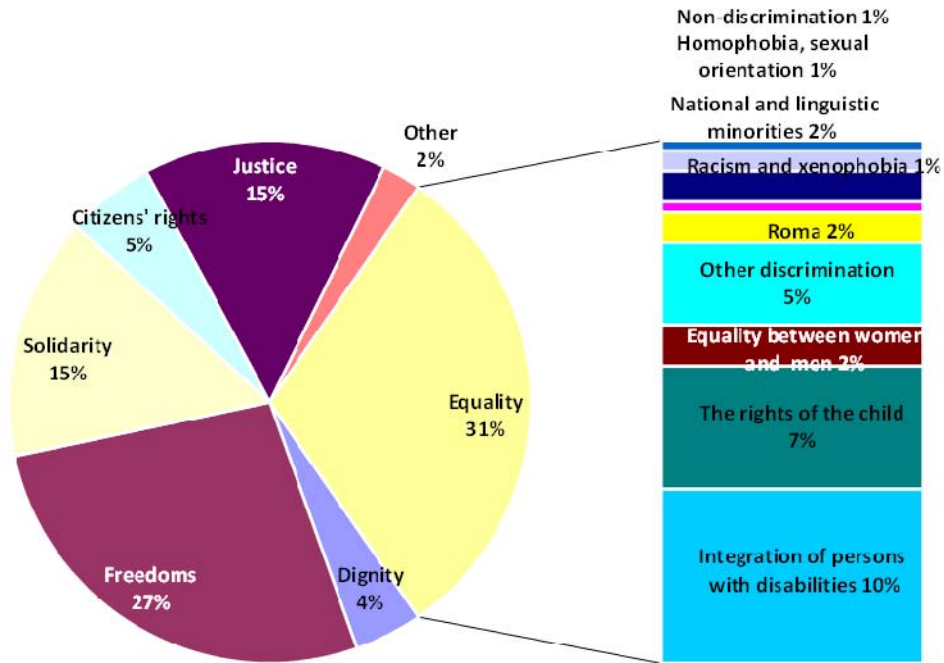


### Questions (Equality)





## Petitions (Equality)



Source: European Commission

# Solidarity

In 2014, the **Seasonal workers' Directive** and the **Directive on Intra-Corporate Transferees** were adopted, which provide for equal treatment as regards access to social security, subject to a number of restrictions.

The EU also adopted the **Tobacco Products Directive**. It is expected that the new rules introduced by the Directive will help to reduce the number of people who start smoking in the EU.

The **Directive on Payment Accounts**, which was also adopted in 2014, will strengthen consumers' rights by giving all EU citizens access to a basic payment account and by ensuring that consumers are provided with transparent and comparable information before making choices with regard to payment accounts.

An important preliminary ruling concerning consumer protection was given by the CJEU in the Case **Sánchez Morcillo**<sup>265</sup>. This Case concerned the procedural rights of consumers in relation to mortgage enforcement procedures and the CJEU stressed the aspect of the equality of arms.

In the case **AMS v CGT**<sup>266</sup>, the CJEU held that **Article 27 of the EU Charter**, alone or in conjunction with Directive 2002/14 (information and consultation of workers), **cannot be invoked in a dispute between individuals ("horizontal application")** in order not to apply a national provision which is not in conformity with the Directive.

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<sup>265</sup> CJEU judgment of 17 July 2014 in Case C-169/14 *Sánchez Morcillo and Abril García*, see Article 47.

<sup>266</sup> CJEU Judgment (Grand Chamber) of 15 January 2014 in Case C-176/12, *Association de médiation sociale (AMS) v Union locale des syndicats CGT*, see also Article 51.

## Title IV

### Solidarity

#### ***Article 27 – Workers' right to information and consultation within the undertaking***

The Charter in Article 27 provides that workers or their representatives must, at the appropriate levels, be guaranteed information and consultation, in good time, in the cases and under the conditions provided for by EU law and national laws and practices.

##### *Legislation*

Discussions before the EU institutions have started on the **proposal to include seafaring workers in the personal scope of application of a number of EU labour law Directives** (the Works Council Directive<sup>267</sup>, the Insolvency Directive<sup>268</sup>, the Collective Redundancies Directive<sup>269</sup>, the Transfer of Undertakings Directive<sup>270</sup> and the Information and Consultation Directive<sup>271</sup>). This proposal was adopted by the European Commission on 18 November 2013<sup>272</sup>. The Economic and Social Committee<sup>273</sup> and the Committee of the Regions<sup>274</sup> adopted opinions thereon, on 25 March 2014 and 3 April 2014 respectively, broadly endorsing the European Commission's proposal. The European Parliament discussed a draft report on this proposal at the beginning of 2014. The report was rejected by the Parliament's EMPL Committee as it proposed to weaken the European Commission's proposal. The Parliament resumed its work in autumn 2014. The Council has started discussing the proposal under the Italian Presidency.

##### *Case law*

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<sup>267</sup> Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 122, 16.5.2009, p. 28.

<sup>268</sup> Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36.

<sup>269</sup> Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16.

<sup>270</sup> Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16.

<sup>271</sup> Directive 2002/14/EC on the establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29.

<sup>272</sup> Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM(2013) 798 final.

<sup>273</sup> Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC' COM(2013) 798 final, OJ C 226, 16.7.2014, p. 35.

<sup>274</sup> Opinion of the Committee of the Regions — Amendment of the directives on exclusions for seafarers, OJ C 174, 7.6.2014, p. 50.

In the case *AMS v CGT*<sup>275</sup>, the CJEU held that **Article 27 of the EU Charter**, alone or in conjunction with Directive 2002/14<sup>276</sup> (the Information and Consultation Directive), **cannot be invoked in a dispute between individuals ("horizontal application")** in order not to apply a national provision which is not in conformity with the Directive. While Article 27 was applicable in the case at issue, the Court observed that Article 27 must be given more specific expression by provisions of EU law or national law to be fully effective. In the present case, the prohibition on excluding from the calculation of the staff numbers of an undertaking a particular category of employees could not be inferred, as a directly applicable rule of law, from the wording of Article 27 of the Charter. In other words, Article 27 of the Charter does not by itself suffice to confer on individuals a right which they may invoke as such. The Court concluded from this that it is necessary to reach the same assessment where that article is considered in conjunction with the provisions of the Information and Consultation Directive<sup>277</sup>.

## ***Article 28 – Right of collective bargaining and action***

Article 28 of the Charter provides that workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. There is no specific EU law regulating the conditions and consequences of the exercise of these rights at national level<sup>278</sup>. Member States remain, of course, bound by the provisions of the Charter, including the right to strike, in instances where they implement EU law.

### *Legislation*

On 15 May 2014, the EU adopted the **Posting of Workers Enforcement Directive**<sup>279</sup>. The Enforcement Directive provides for a comprehensive package of specific rules and obligations in order to enhance the implementation, application and enforcement of the Posting of Workers Directive<sup>280</sup>. These measures are expected to considerably improve the current protection of posted workers' rights as well as to prevent circumvention and abuse. The Enforcement Directive contains provisions

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<sup>275</sup> CJEU Judgment (Grand Chamber) of 15 January 2014 in Case C-176/12, *Association de médiation sociale (AMS) v Union locale des syndicats CGT*, see also Article 51.

<sup>276</sup> Directive 2002/14/EC on the establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29.

<sup>277</sup> The Court confirmed its previous case-law and declared that the provisions of Directive 2002/14 prohibit the exclusion of certain categories of employees (apprentices and holders of professional insertion/training contracts) from the calculation of the staff numbers of an undertaking. The Court declared also that the trade unions cannot rely on the provisions of Directive 2002/14 (in particular Article 3.1) as such against the private employer, AMS, since these provisions do not have horizontal direct effect, see also Article 51.

<sup>278</sup> Article 153(5) of the Treaty on the Functioning of the EU (TFEU) stipulates that it does not apply to the right to strike.

<sup>279</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( 'the IMI Regulation' ), OJ L 159, 28.5.2014, p. 11, see also Article 31.

<sup>280</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 , 21.1.1997, p. 1.

improving the effectiveness of controls and sanctions and the possibilities given to posted workers to defend their rights better.

## ***Article 29 – Right of access to placement services***

According to Article 29 of the Charter everyone has the right of access to a free placement service.

### *Policy*

Member States endorsed the initiative developed by the European Commission in 2013 on a **quality framework for traineeships**<sup>281</sup> through **Council Recommendations** in March 2014<sup>282</sup>. The initiative has the objective to make it easier for young people to find quality work experience in another EU country. The framework sets out the main features of high quality traineeships in terms of protecting trainees' rights and helping them make the most of their working experience.

An initiative<sup>283</sup> was prepared to **modernise EURES**, the European job search network supporting labour mobility within the EU. The initiative was adopted in January 2014 and aims to further increase the likelihood of job matches across borders and help employers to fill job vacancies faster and better. A pilot project with several Member States was launched to improve the EURES information exchange about traineeships and apprenticeships with a view to further facilitating the transition to work in other EU countries for young people.

## ***Article 30 – Protection in the event of unjustified dismissal***

According to Article 30 every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

## ***Article 31 – Fair and just working conditions***

Article 31 guarantees that every worker has the right to working conditions which respect their health, safety and dignity. Every worker has the right to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. There is a substantial body of EU law in this area concerning, in particular, health and safety at work<sup>284</sup>.

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<sup>281</sup> Proposal for a Council Recommendation on a Quality Framework for Traineeships, COM(2013) 857 final. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0495:FIN:EN:PDF>.

<sup>282</sup> Council recommendation on a Quality Framework for Traineeships, Brussels, 10 March 2014. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lsa/141424.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/141424.pdf).

<sup>283</sup> Proposal for a Regulation of the European Parliament and of the Council on a European network of Employment Services, workers' access to mobility services and the further integration of labour markets, COM(2014) 6 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014PC0006>.

<sup>284</sup> The central piece is the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1, which lays down general principles on the protection of workers' health and safety. Several specific directives cover a number of specific risks, e.g. exposure of workers to biological and chemical agents at work, noise, work at the

## Legislation

The adoption of the **Posting of Workers Enforcement Directive**<sup>285</sup> - mentioned under the part concerning Article 28 - aims at ensuring a better protection of the rights of posted workers, including in the areas covered under Article 31 of the Charter.

The European Commission adopted on 9 April 2014 a **Proposal for a Decision of the European Parliament and of the Council on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work**<sup>286</sup>. Undeclared work has negative impacts on employment, productivity and working conditions, skills development and life-long learning. Preventing and deterring undeclared work contributes to better enforcement of EU and national law, including as regards fundamental rights in the areas of employment, labour law, health and safety and coordination of national social security systems. At the moment, there is no formal mechanism in place for all relevant authorities from the Member States to address issues related to cross-border aspects of undeclared work. The proposal foresees that the platform would bring together Member States' different enforcement bodies such as the labour inspectorates and the social security, tax and migration authorities to ensure a better enforcement of EU and national law.

Work continued during 2014 on the **review of the Working Time Directive**<sup>287</sup>. The aim of this review is to ensure that EU working time rules can meet the needs of employers and workers in the 21st century, while securing effective protection of workers' health and safety. Following the end of the negotiations between social partners at EU level without any agreement in December 2012, the European Commission has been engaged since 2013 in a comprehensive Impact Assessment on the future of the Directive, the results of which are expected in 2015.

On 7 July 2014, the European Commission adopted a proposal for a **Directive on working time for mobile workers in commercial inland waterway transport**<sup>288</sup>. This proposal implements the EU social partner agreement on this issue. It contains specific working time rules for mobile workers working on crafts in the EU Member States in commercial inland waterway transport. This will provide flexibility for the operators while at the same time maintaining the protection of health and safety for workers.

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construction sites, manual handling of loads, etc. Another important piece of legislation covers working time and regulates issues such as minimum daily and weekly rest periods, breaks, maximum weekly working time, night work and annual leave.

<sup>285</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ( 'the IMI Regulation' ), OJ L 159, 28.5.2014, p. 11.

<sup>286</sup> Proposal for a decision of the European Parliament and of the Council on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work, COM(2014) 221 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014PC0221> .

<sup>287</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

<sup>288</sup> Proposal for a Council Directive implementing the European Agreement concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) concerning certain aspects of the organisation of working time in inland waterway transport, COM/2014/0452 final, 7.7.2014. Available at : <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014PC0452> .

The EU adopted the Council Decision authorising Member States to **ratify the International Labour Organisation 2011 Convention concerning decent work for domestic workers** (Convention No. 189)<sup>289</sup>. Member States ratifying the ILO Convention agree to ensure fair and decent conditions for domestic workers by protecting their fundamental labour related rights, preventing abuse and violence and establishing safeguards for young domestic workers. The Convention contains provisions that ensure equal payment of domestic workers, decent living conditions and access to complaint mechanisms.

### *Policy*

On 6 June 2014, the European Commission adopted a new **Strategic Framework on Health and Safety at Work 2014 – 2020**<sup>290</sup>. This Framework identifies three major health and safety at work challenges. First, the need to improve implementation of existing health and safety rules, in particular by enhancing the capacity of micro and small enterprises to put in place effective and efficient risk prevention strategies. Second, work-related diseases must be prevented by tackling new and emerging risks without neglecting existing risks. Third, the ageing of the EU's workforce must be taken into account. The Framework proposes to improve policy coordination and mutual learning, enforcement by Member States, in particular national labour inspectorates. It is also proposed to simplify existing legislation and improve statistical data collection.

The implementation of the **Youth Guarantee Recommendation**, adopted in 2013<sup>291</sup>, has continued in 2014 with the development of **national Youth Guarantee Implementation Plans**. The Youth Guarantee aims to tackle youth unemployment by ensuring that all young people under 25 get a good-quality, concrete offer for a job, apprenticeship, traineeship, or continued education within 4 months of them leaving formal education or becoming unemployed. The European Commission is helping Member States to develop the national Implementation Plans and to set up the Youth Guarantee scheme. The European Commission also facilitates the sharing of best practices between governments.

### *Case law*

The case *Lock*<sup>292</sup> concerned the right to minimum paid annual leave laid down in Article 31(2) of the Charter and more concretely in Article 7 of the Working Time Directive. The CJEU held that workers on performance-related pay are entitled to their normal, average remuneration in relation to their minimum paid annual leave. The ruling addresses the increasingly common phenomenon of performance-related pay schemes under which workers' salaries sometimes consist entirely or for a large part of commissions on sales or other targets. The Court has ruled that when there is an intrinsic link between a component of a workers' remuneration (such as a commission) and the performance of his work, such a component must be taken into account in the calculation of the total remuneration to which a worker is entitled in respect of his annual leave. While it falls to the

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<sup>289</sup> Council Decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189), OJ L 32, 1.2.2014, p. 32.

<sup>290</sup> Communication of the Commission on a new Strategic Framework on Health and Safety at Work 2014 – 2020, COM(2014) 332, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2053&furtherNews=yes> .

<sup>291</sup> Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, OJ C 120, 26.4.2013, p. 1. .

<sup>292</sup> CJEU judgment of 22 May 2014 in Case C-539/12, *Z.J.R. Lock v British Gas Trading Limited*, - *Lock*.

national court to determine the way in which the worker's salary in relation to the period of annual leave has to be calculated, the Court has made it clear that it must be determined in such a way as to correspond to the normal remuneration received by the worker, including an average of his commissions.

### ***Article 32 – Prohibition of child labour and protection of young people at work***

Article 32 states that the employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

### ***Article 33 – Family and professional life***

Article 33 stipulates that the family shall enjoy legal, economic and social protection. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

#### *Legislation*

In order to further promote the rights and principles laid down in Article 33, the European Commission proposed an amendment of the **Maternity Leave Directive**<sup>293</sup> in 2008. This proposal aims to grant four weeks of paid maternity leave in addition to the current 14 weeks. Since the co-legislators could not reach an agreement on the proposal, the European Commission announced in December 2014<sup>294</sup> that it would withdraw the proposal and replace it by a new initiative if the co-legislators do not find an agreement within the first half of 2015.

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<sup>293</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 1.

<sup>294</sup> Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission Work Programme 2015 – A New Start, COM(2014) 910 final Annex 2, available at: [http://ec.europa.eu/atwork/pdf/cwp\\_2015\\_withdrawals\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf).



## ***Article 34 – Social security and social assistance***

Article 34 of the Charter recognises citizens' entitlement to social security benefits and social services providing protection in cases of maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages (including social and housing assistance) in accordance with Union law and national laws and practices.

Member States are free to determine the details of their social security systems, including which benefits shall be provided, the conditions of eligibility, how these benefits are calculated, as well as how much contribution should be paid, provided it complies with applicable EU law. EU rules ensure that the application of the different national legislations respects the basic principles of equality of treatment and non-discrimination. They guarantee that migrant EU workers are treated in the same way as national workers and that the application of the different national legislations does not adversely affect them.

### *Legislation*

In 2014, the **Seasonal workers' Directive**<sup>295</sup> and the **Directive on Intra-Corporate Transferees**<sup>296</sup> were adopted. These directives provide for equal treatment as regards access to social security, subject to a number of restrictions. The **Seasonal workers' Directive** concerns the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers and provides for equal treatment as regards access to branches of social security (with possible exceptions as regards family and unemployment benefits). The **Directive on Intra-Corporate Transferees** will make it easier and quicker for multinational companies to temporarily assign highly skilled employees to subsidiaries situated in the EU and provides for equal treatment between intracorporate transferees and nationals in particular as regards to benefits related to sickness, invalidity and old-age. Member States can make exceptions where the national law or a bilateral agreement with the host member state establishes that the laws of the country of origin of the intra-corporate transferee will apply. Member states may also decide not to grant family benefits to employees who stay less than 9 months in the EU.

### *Policy*

Within the European Semester, the European Commission has urged Member States to ensure the **adequacy of income support**, joined up with **inclusive labour market measures** and **access to quality, enabling services such as job-search assistance and skill training**. In 2014, the European Commission proposed several **Country-Specific Recommendations** to raise the adequacy of income support, improve the coverage of benefits and social services, and/or link the benefits to activation measures where appropriate<sup>297</sup>.

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<sup>295</sup> Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375.

<sup>296</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, p. 1. .

<sup>297</sup> [http://europa.eu/rapid/press-release\\_IP-13-1064\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1064_en.htm) .

As mentioned above under Article 1, the European Parliament Resolution of 16 January 2014 on an **EU Homelessness Strategy**<sup>298</sup> makes reference to the Charter of Fundamental Rights and recalls that homelessness is a violation of human dignity and of human rights, whereas housing is a basic human need and a precondition for a decent life and social inclusion. The Opinion of the Committee of the Regions on a European strategy on homelessness<sup>299</sup> notes that homelessness is the most extreme form of poverty and social exclusion, and violates human dignity and rights, given that housing is a fundamental human need. The European Commission confirmed that confronting homelessness remains a priority and that the EU will continue efforts to reduce homelessness and housing exclusion through the implementation of the Social Investment Package.

## ***Article 35 – Health care***

Article 35 of the Charter provides that everyone has the right to access preventive health care and the right to benefit from medical treatment under the conditions established by national law and practices. A high level of human health protection shall be ensured in the definition and implementation of the Union's policies and activities.

### *Legislation*

On 3 April 2014 the European Parliament and the Council adopted the **Tobacco Products Directive**<sup>300</sup>. The Directive governs the use of tobacco and related products in the EU. The new rules introduced are expected to help to reduce the number of people who start smoking in the EU. In particular, the prohibition of lip stick-style packs and the large mandatory picture and text warning to be placed on both sides of the pack of cigarettes is designed to put an end to products which entice children and teenagers into starting to smoke in the EU. The Directive is in force since 19 May 2014. The EU Member States have the obligation to transpose the Directive by 20 May 2016.

The Tobacco Products Directive refers to several fundamental rights and to the general respect of fundamental rights in the preamble. Some aspects of fundamental rights were invoked in two recent requests for preliminary rulings from UK Courts to the CJEU. The actions before UK courts were brought by Philip Morris and British American Tobacco UK Limited<sup>301</sup> and Pillbox 38 (UK) Limited<sup>302</sup>. The claimants challenge the validity of the Directive and invoke in this respect the freedom of expression and information in relation to Article 13 of the Tobacco Products Directive concerning the

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<sup>298</sup> European Parliament resolution of 16 January 2014 on an EU homelessness strategy (2013/2994(RSP)).

<sup>299</sup> Opinion of the Committee of the Regions — A European homelessness strategy, OJ C 271, 19.8.2014, p. 36.

<sup>300</sup> Directive 2014/40 of the European Parliament and of the Council of 3 April 2014, OJ L 127, 29.4.2014, p.1, see also Articles 16 and 17.

<sup>301</sup> CJEU, reference for a preliminary ruling from the High Court of Justice, Queen's Bench Division (Administrative Court) (England and Wales) (United Kingdom) made on 1 December 2014 in Case C-547/14 – *Philip Morris Brands SARL, Philip Morris Limited, British American Tobacco UK Limited against Secretary of State for Health*.

<sup>302</sup> CJEU, reference for a preliminary ruling from High Court of Justice Queen's Bench Division (Administrative Court) (England and Wales) (United Kingdom) made on 27 October 2014 in Case C-477/14 – *Pillbox 38 (UK) Limited, trading as "Totally Wicked" v Secretary of State for Health*.

rules on product presentation and the freedom to conduct business and the right to property in relation to Article 20 of the Tobacco Products Directive, which contains rules on electronic cigarettes.

Also concerning the rules on tobacco products, the Commission adopted on 10 October 2014 a proposal for a delegated Directive amending Annex II to Directive 2014/40/EU establishing the **library of picture warnings** to be used on tobacco products<sup>303</sup>. Protection of personal data and intellectual property rights were carefully addressed in this context.

### *Policy*

As mentioned under Article 21, during 2014 specific actions have been taken to reduce the health gap between the Roma and the rest of the population. In this context, the **EU Framework for National Roma Integration Strategies**<sup>304</sup> calls on Member States to provide access to quality healthcare, preventive care and social services at a similar level and under the same conditions as the rest of the population. To achieve this objective, several Member States (e.g. Romania, Spain) have invested in Roma mediators and the European Commission has launched an initiative to develop training packages for health professionals for migrants and ethnic minorities, including the Roma. The fundamental rights of access to preventive health care and to benefit from medical treatment subject to national laws and practices are therefore enshrined in the Union's policies to promote the effective, holistic integration of Roma communities.

The **EU Joint Action on Mental Health and Well-being**<sup>305</sup> is a 3-year initiative that aims at building a framework for action in mental health policy at the European level. In this context good practices are being gathered and recommendations developed for people with severe mental disorders, in particular the transition from institutional care to community care.

### *Case law*

On 6 August 2014 a UK Court made a reference for a preliminary ruling to the CJEU<sup>306</sup> on the compatibility with European Union law (in particular free movement of goods) of national legislative measures imposing a **minimum price on alcohol in Scotland**. The national measures aim to tackle health harm caused in particular by drinks that are high in alcohol content and sold relatively cheaply. The Commission supported the national measures and relies in this respect to the Charter principle laid down in Article 35 that 'A high level of human health protection shall be ensured in the

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<sup>303</sup> Annex Picture Library (of combined health warnings) (referred to in Article 10(1)) to the Commission delegated directive .../.../EU amending Annex II to Directive 2014/40/EU of the European Parliament and of the Council by establishing the library of picture warnings to be used on tobacco products, C(2014) 7212 final Annex 1, available at: <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-7212-EN-F1-1-ANNEX-1.Pdf> .

<sup>304</sup> Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions – An EU Framework for National Roma Integration Strategies up to 2020, COM (2011)173 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0173&from=en> .

<sup>305</sup> For further information see <http://www.mentalhealthandwellbeing.eu/> .

<sup>306</sup> CJEU, reference for a preliminary ruling from Court of Session, Scotland (United Kingdom) made on 8 July 2014 in Case C-333/14 – *The Scotch Whisky Association and others against The Lord Advocate, The Advocate General for Scotland*.

definition and implementation of all the Union's policies and activities' and several TEU and TFEU provisions which concern EU health policies and well-being of people.

## ***Article 36 – Access to services of general economic interest***

Article 36 of the Charter provides that the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Reference to services of general economic interest (SGEI) is also made in Articles 14 and 106 TFEU. Protocol n. 26 TFEU refers to the broader notion of services of general interest. No definition is provided in the EU Treaties or in secondary EU law. In its Communication on A Quality Framework for Services of General Interest in Europe<sup>307</sup>, the Commission stated:

"SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The PSO [public service obligation] is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission."

### *Legislation*

Respect for Article 36 of the Charter is especially important in the **energy sector**. Here, EU policies aim at fostering affordable, sustainable and secure energy to consumers through competition and market integration while at the same time ensuring adequate access to SGEI. The Third Energy Package<sup>308</sup>, in force since 3 March 2011, defines universal service obligations for electricity supply. For both the electricity and natural gas sectors it includes provisions on protection of consumers in general and more specifically of those consumers that qualify as vulnerable consumers, as well as provisions on public service obligations. The latter have to observe strict conditions set out in the Third Energy Package and in the case law of the Court of Justice. These provisions contribute to the implementation of the right to access set out in Article 36. In this context, in 2014 the

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<sup>307</sup> Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions – A Quality Framework for Services of General Interest in Europe COM(2011) 900, available at:

[http://ec.europa.eu/services\\_general\\_interest/docs/comm\\_quality\\_framework\\_en.pdf](http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf).

<sup>308</sup> The package includes: Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for Cooperation of Energy Regulators; Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003; Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, p. 1.

Communication on Energy Prices and Costs in Europe<sup>309</sup> explicitly acknowledges that, in the framework of the Internal Energy Market, the actions aimed at reducing energy costs through the use of new technologies and energy services (such as energy efficiency measures and demand response) will primarily benefit vulnerable consumers.

#### *Policy*

The Commission finances **energy efficiency improvements**<sup>310</sup> that are a cost-effective means of alleviating energy poverty and runs stakeholder events to develop solutions and share best practices in protecting vulnerable consumers. Further, the Commission is conducting studies to identify possible future policy actions to mitigate vulnerability patterns across key consumer markets, including energy. Results of the studies are expected during 2015.

### ***Article 37 – Environmental protection***

The Charter in Article 37 establishes that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the union and ensured in accordance with the principle of sustainable development.

#### *Legislation*

In 2014, the Environmental Impact Assessment Directive (EIA)<sup>311</sup> has been amended with a view to strengthening public access to information and transparency. The environmental impact assessment procedure laid down by the Directive ensures that the public is duly informed and consulted before decisions on projects with likely significant effects on the environment are taken. 25 years after the original rules came into force, the **new Environmental Impact Assessment Directive (EIA)**<sup>312</sup> reflects on-going environmental and socio-economic changes and challenges in the legislation and aligns it with the principles of smart regulation. The newly amended Directive which entered into force on 15 May 2014 also reduces the administrative burden and improves the level of environmental protection in the EU.

In particular, as from May 2017 (due date of transposition by EU Member States), environmental information should also be accessible in electronic format and Member States should establish at least a central portal or points of access allowing the public to access that information easily and effectively. In addition, the new Directive provides for a new timeframe ensuring the minimum

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<sup>309</sup> Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee and the Committee of the Regions – Energy Prices and Costs in Europe COM(2014) 21/2, available at:

[http://ec.europa.eu/energy/sites/ener/files/documents/20140122\\_communication\\_energy\\_prices\\_1.pdf](http://ec.europa.eu/energy/sites/ener/files/documents/20140122_communication_energy_prices_1.pdf).

<sup>310</sup> <http://ec.europa.eu/research/participants/portal/desktop/en/opportunities/index.html>.

[http://ec.europa.eu/regional\\_policy/thefunds/index\\_en.cfm](http://ec.europa.eu/regional_policy/thefunds/index_en.cfm)

<sup>311</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance, OJ L 26, 28.1.2012, p. 1.

<sup>312</sup> Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance, OJ L 124, 25.4.2014, p. 1.

period (at least 30 days) of consulting the public on the environmental report for a given project will also be introduced by Member States. Once a decision on a project is taken, the competent national authority should promptly inform the public on the content of the decision and on several items substantiating it in order to ensure transparency and better explanation of the decision-making process. All the above strengthen the environmental integration principle enshrined in Article 37 of the Charter.

### *Policy*

On 7 February 2014 the European Commission adopted a **Communication on the EU approach to Wildlife Trafficking**<sup>313</sup>. Although Wildlife Trafficking (defined as the illegal cross-border trade in biological resources taken from the wild, including trade in timber and marine species) is not a new phenomenon, poaching has reached over the last few years unprecedented levels for some species. Facing this dramatic surge in wildlife trafficking, the European Commission in its Communication proposes to review existing policies and measures at EU level so as to enable the Union to react more effectively to the current crisis situation.

### *Case law*

Specific reference to the Article 37 of the Charter was made in the Opinion of the Advocate General of the CJEU, in the joined cases *Essent Belgium NY v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*<sup>314</sup>. In fact, in its Opinion, the Advocate General referred to Article 37 of the Charter while arguing that environmental protection could justify measures that restrict the freedoms of movement even where such measures are discriminatory. However, he concluded that in the case at issue national rules that preclude electricity suppliers from importing renewable energy produced in other Member States or in the EEA cannot be justified on grounds of environmental protection. The court disagreed and held that the objective of promoting the use of renewable energy sources for the production of electricity is in principle capable of justifying barriers to the free movement of goods. Therefore, even without mentioning Article 37 of the Charter, the Court has granted a high priority status to environmental protection. In this respect, the *Essent* judgment follows closely the judgment in the Case *Ålands vindkraft AB v Energimyndigheten*<sup>315</sup>. In the latter no reference was made to fundamental rights.

## ***Article 38 – Consumer protection***

Article 38 of the Charter provides that Union policies shall ensure a high level of consumer protection, giving guidance to the EU institutions when drafting and applying EU legislation.

### *Legislation*

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<sup>313</sup> Communication from the Commission to the Council and the European Parliament on the EU Approach against Wildlife Trafficking, COM(2014) 64 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0064&from=EN>.

<sup>314</sup> CJEU Judgment of 11 September 2014 in Joined Cases C-204/12 - 208/12 *Essent Belgium NY v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*.

<sup>315</sup> CJEU Judgment (Grand Chamber) of 1 July 2014 in Case C-573/12 *Ålands vindkraft AB v Energimyndigheten*.

The **Directive on Payment Accounts**<sup>316</sup>, which was adopted on 23 July 2014, will strengthen consumers' rights by giving all EU citizens access to a basic payment account and by ensuring that consumers are provided with transparent and comparable information before making choices with regard to payment accounts.

Negotiations on the European Commission's proposal for a new **Directive on Package Travel**<sup>317</sup> continued with the European Parliament voting in favour of this reform in March 2014 and largely supporting the European Commission's proposal and the adoption of a general approach by the Council in December 2014. This means that inter-institutional negotiations can start at the beginning of 2015.

The majority of Member States respected the 13 December 2013 transposition deadline set by the **Directive on Consumer Rights**<sup>318</sup> and, consequently, started applying the new measures from 13 June 2014, as required by the Directive. The European Commission ensured, through infringement proceedings, that the remaining Member States transposed the directive by July 2014.

A **Directive amending and modernising the Professional Qualifications Directive**<sup>319</sup>, which entered into force on 18 January 2014 and must be implemented by Member States by 18 January 2016, contains, *inter alia*, measures aimed at ensuring a high level of consumer protection (including provisions of language proficiency and the setting up of alert mechanisms in case of professional malpractice).

In April 2014 the European Parliament adopted a position on the European Commission legislative proposal of 11 September 2013 for a **Regulation laying down measures concerning the Single Market for Electronic Communications in the EU and to achieve a Connected Continent** (known as the **Connected Continent Proposal**).<sup>320</sup> The proposal contains *inter alia* measures on consumers' interests and rights in the field of electronic communications in key areas such as roaming, open internet access, and end-user protection and empowerment. The proposal was in first reading in the Council in December 2014.

### *Policy*

Following the adoption, in 2013, of a report and a communication<sup>321</sup> on the functioning of the **Unfair Commercial Practices Directive**<sup>322</sup>, in the course of 2014 the European Commission organised two

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<sup>316</sup> Directive 2014//92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257, 28.8.2014, p.214.

<sup>317</sup> Proposal for a Directive on package travel and assisted travel arrangements, amending Regulation (EC) No 2006/2004, Directive 2011/83/EU and repealing Council Directive 90/314/EEC, COM(2013) 512 final, available at: [http://ec.europa.eu/justice/consumer-marketing/files/com\\_2013\\_512\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/com_2013_512_en.pdf).

<sup>318</sup> Directive 2011/83/EU on consumer rights, OJ L 304, 22.11.2011, p.64.

<sup>319</sup> Directive 2013/55 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ L 354/132, 28.12.2013, see also Articles 8, 15 and 48.

<sup>320</sup> Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, COM(2013) 627 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0627&from=EN>.

<sup>321</sup> Refer to the 2013 SWD on the application of the EU Charter for details.

**workshops** with national enforcement agencies regarding the implementation of the Directive in relation to emerging challenging practices on-line and with specific attention to problems faced by consumers in the areas of financial services, immovable property and environmental claims. The European Commission is currently in the process of updating the 2009 **Guidance Document on the Application of the Directive**. With regard to its **transposition**, the Commission closed 14 EU-pilot investigations, in most cases following positive legislative changes in the Member States concerned. The European Commission has initiated other infringement proceedings, so that, to date, in total twelve cases are still pending.

With regard to the **Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees**<sup>323</sup>, the European Commission launched a market study on the functioning of legal and commercial guarantees for consumers, which will feed into the upcoming REFIT exercise, announced in the European Commission's Communication of 2 October 2013 on the Regulatory Fitness and Performance (REFIT): Results and Next Steps<sup>324</sup>. This exercise will in particular test the suitability of existing consumer protection instruments for the Digital Single Market.

**The Vulnerable Consumer Working Group**, which was established by the European Commission to support the implementation of consumer protection provisions in the Third Energy Package, issued in 2014 a **Guidance Document on Vulnerable Consumers**<sup>325</sup> whose main aim is to (i) assist those Member States that have not yet defined the concept of vulnerable customers as required by energy legislation, and (ii) assist Member States develop policy - where it is needed - to ensure vulnerable customers are supported in the best possible way.

Between January and April 2014 a **public consultation on the retail energy market**<sup>326</sup> was undertaken with the aim of seeking the views of stakeholders on the functioning of the retail energy market and consumer participation. The results of the consultation are under assessment and will lead to a Commission communication on the retail energy market.

#### *Case law*

In the *Monika Kušionová v SMART Capital a.s.*<sup>327</sup> case the CJEU clarified the scope of consumer protection in a case concerning the methods of enforcement of a charge provided by way of guarantee for a mortgage loan agreement and the lawfulness of terms included in that agreement. Since the right to accommodation is a fundamental right enshrined in Article 7 of the Charter, it must be taken into consideration by the national court when implementing the unfair terms in consumer contracts directive.

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<sup>322</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance), OJ L 149, 11.6.2005, p. 22.

<sup>323</sup> Directive 1999/44/EC of 25 May 1999.

<sup>324</sup> COM(2013) 685 final of 2 October 2013.

<sup>325</sup> Available at:

[http://ec.europa.eu/energy/sites/ener/files/documents/20140106\\_vulnerable\\_consumer\\_report.pdf](http://ec.europa.eu/energy/sites/ener/files/documents/20140106_vulnerable_consumer_report.pdf) .

<sup>326</sup> See <http://ec.europa.eu/energy/en/consultations/consultation-retail-energy-market> .

<sup>327</sup> CJEU judgment of 10 September 2014 in Case C-34/13 *Monika Kušionová v SMART Capital a.s.*



Another important preliminary ruling concerning consumer protection was given by the CJEU in the Case *Sánchez Morcillo*<sup>328</sup>. This Case concerned the procedural rights of consumers in relation to mortgage enforcement procedures and the CJEU stressed the aspect of the equality of arms. It considered that national law was contrary to the Directive on unfair terms in consumer contracts and Article 47 of the Charter in cases where the law does not provide consumers with a right of appeal even though the creditor does benefit from such a right of appeal in the reverse scenario.

In the *Alexandra Schulz v Technische Werke Schussental GmbH und Co. KG and Josef Egbringhoff v Stadtwerke Ahaus GmbH*<sup>329</sup> case the CJEU held that Directives 2003/54/EC<sup>330</sup> and 2003/55/EC<sup>331</sup> preclude national legislation that, while determining the content of consumer contracts for the supply of electricity and gas covered by a universal supply obligation, does not ensure that customers are given adequate notice, before price adjustment comes into effect, of the reasons and preconditions for the adjustment, and its scope. No explicit mention is made of fundamental rights in the judgment. However, the Court stated that consumers can fully and effectively benefit from the rights conferred upon them by the Directives only when they are adequately informed. From this point of view, the interpretation of the Court is in line with the goal of ensuring a high level of consumer protection laid down in Article 38 of the Charter.

#### *Application by Member States*

With regard to the **Timeshare Directive**<sup>332</sup>, the European Commission has closed 16 out of the 19 **EU-pilot investigations** it had launched, thanks to the fact that, in most cases, the concerned Member States have in the meantime adopted the legislative changes needed to bring their laws in compliance with the text of the Directive. In one case formal **infringement proceedings** were opened.

#### *Text Box Example*

##### Ruling of the Czech Constitutional Court

In the original proceedings of this case<sup>333</sup> the applicant sued a bank and requested that the bank fees she had paid were returned to her. This action was dismissed by the District Court in Prague. The applicant filed a constitutional complaint against this decision. The Constitutional Court interpreted the right to consumer protection pursuant to Article 38 of the Charter and concluded – by referring also to horizontal consumer protection clause in Article 12 TEU and the policy provision in Article 169 TFEU – that this Charter provision does not grant an individual right and is not directly enforceable.

<sup>328</sup> CJEU judgment of 17 July 2014 in Case C-169/14 *Sánchez Morcillo and Abril García*, see Article 47.

<sup>329</sup> CJEU judgment of 23 October 2014 in Joined Cases C-359/11 and C-400/11 *Alexandra Schulz v Technische Werke Schussental GmbH und Co. KG and Josef Egbringhoff v Stadtwerke Ahaus GmbH*.

<sup>330</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 37.

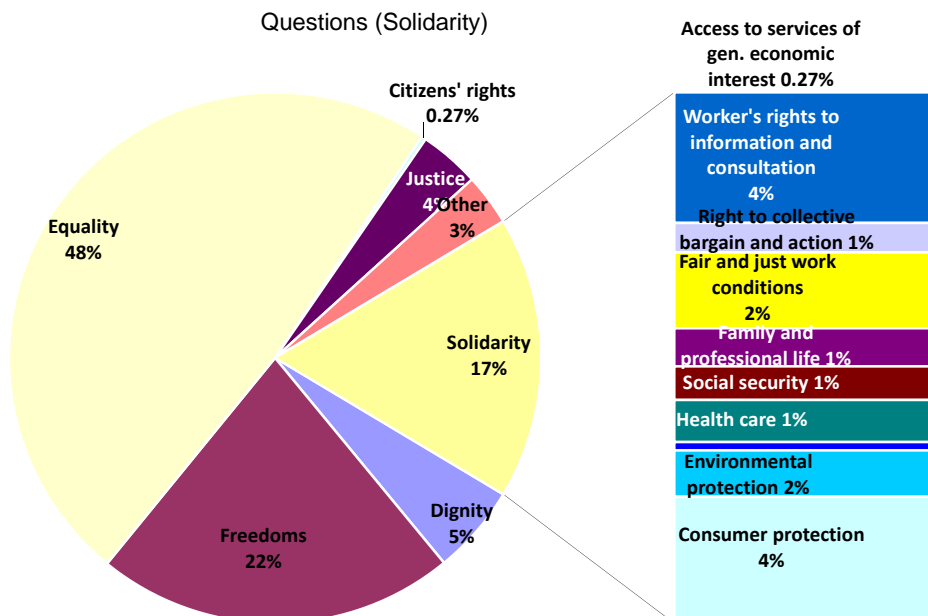
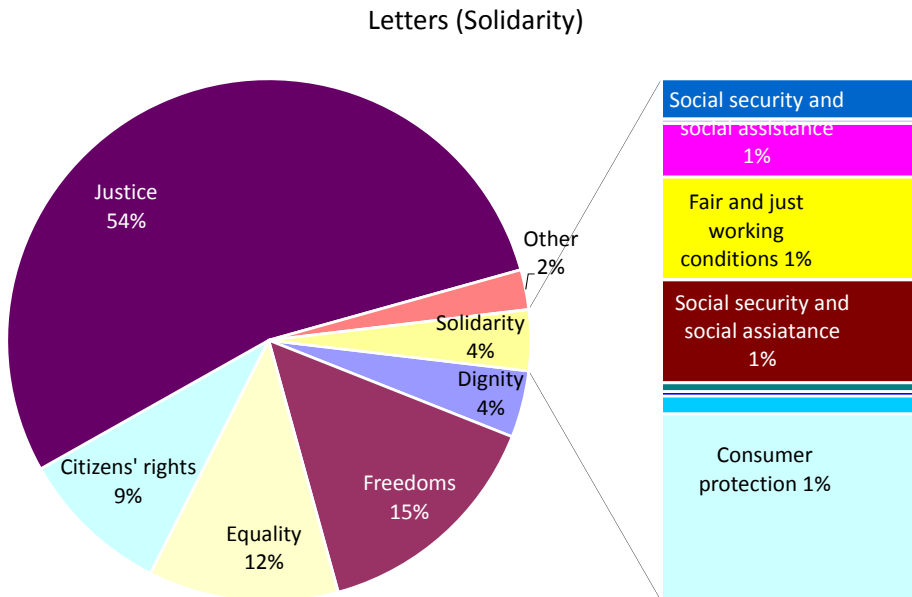
<sup>331</sup> Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176, 15.7.2003, p. 57.

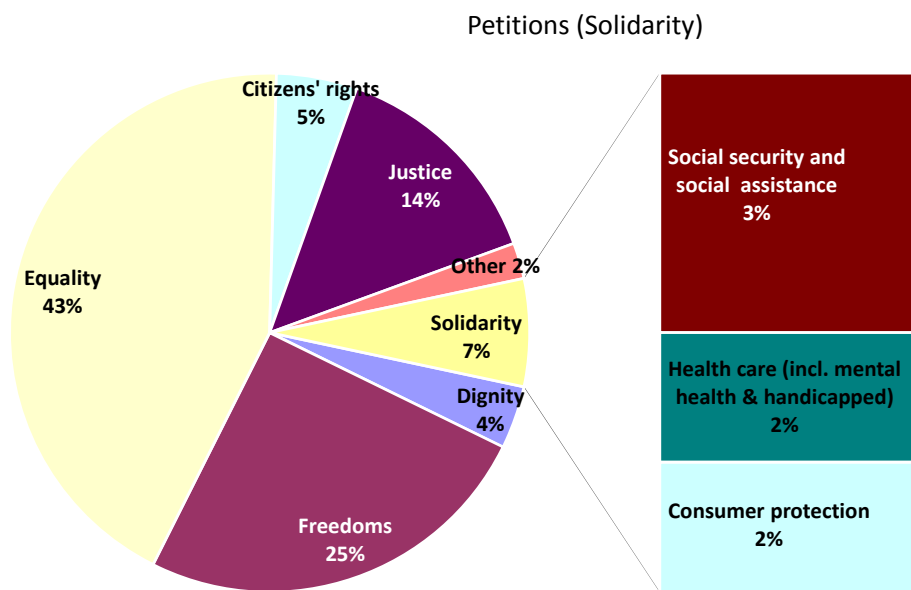
<sup>332</sup> Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33, 3.2.2009, p. 10.

<sup>333</sup> Constitutional Court of the Czech Republic (Ústavní soud), case III. ÚS 3725/13, 10.4.2014, available at:

<http://nalus.usoud.cz>.

The Court explained that Article 38 of the Charter was a principle that EU institutions and Member States reflect when transposing EU legislation. The applicant's claim was thus dismissed.





Source: European Commission

## Citizens' rights

Ahead of the 2014 European Parliament elections, the European Commission published a report on the implementation of its recommendation for further enhancing the **democratic and efficient conduct of the European Parliament elections**. The European Commission also issued a **Handbook on the rights of EU citizens** to participate in municipal and European Parliament elections.

The European legislators adopted the **Portability Directive**, which promotes the freedom of movement by improving the acquisition and preservation of supplementary pension rights.

In 2014, the **European Ombudsman** opened on her own initiative an investigation<sup>334</sup> concerning the **respect for fundamental rights in the implementation of EU cohesion policy** examining the adequacy of the means the European Commission has at its disposal to ensure that fundamental rights enshrined in the Charter of Fundamental Rights are complied with.

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<sup>334</sup> Case OI 8/2014/AN, available at:  
<http://www.ombudsman.europa.eu/en/press/release/faces/en/54420/html.bookmark> .

## Title V

### Citizens' rights

#### ***Article 39 – Right to vote and stand as a candidate at elections to the European Parliament***

Article 39 of the Charter and Article 20 (2) b of the Treaty on the Functioning of the European Union (TFEU) guarantee the right of every EU citizen to vote in the European elections in whichever Member State they reside. Both articles also provide for the right of EU citizens to vote and to stand as candidates at municipal elections in the Member State in which they reside.

#### *Policy*

On 12 March 2013, the European Commission adopted a **Recommendation for further enhancing the democratic and efficient conduct of the European Parliament elections**<sup>335</sup>. On 27 March 2014, the European Commission also published a **report on the implementation**<sup>336</sup> of the said recommendations ahead of the May 2014 elections. The report took stock of the measures taken by the Member States, and by political parties at national and European level, to promote the transparency of the European Parliament elections and to encourage genuine pan-European debates to help stimulate voter interest and ultimately reinforce the democratic legitimacy of the EU decision-making process. The European Commission furthermore issued a **Handbook on the rights of EU citizens**<sup>337</sup> to promote and raise awareness of these rights, including notably the right to participate in municipal and European Parliament elections.

#### *Application by Member States*

Following the action announced in its 2010 EU Citizenship Report<sup>338</sup> (action 18), the European Commission pursued a dialogue with Member States to ensure that EU citizens can **found and become members of political parties in the Member State in which they reside**. In two cases (Bulgaria and Finland) national legislation was adopted that removed the restriction preventing non-national EU citizens to found a political party, and in three other cases (Lithuania, Slovakia and Spain) amendments were announced allowing non-national EU citizens to found and become members of political parties. The European Commission is monitoring the situation to ensure that legislation restricting mobile voters' rights is removed across the EU.

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<sup>335</sup> Commission Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, OJ L 79, 21.3.2013, p. 29.

<sup>336</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards more democratic European Parliament elections Report on the implementation of the Commission's recommendations of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament, COM (2014) 196 final, available at: [http://ec.europa.eu/justice/citizen/files/report\\_ep\\_elections\\_2014\\_en.pdf](http://ec.europa.eu/justice/citizen/files/report_ep_elections_2014_en.pdf).

<sup>337</sup> Did you know: 10 EU rights at a glance, available at <http://bookshop.europa.eu/en/did-you-know--pbNA0414127/>

<sup>338</sup> Available at: [http://ec.europa.eu/justice/citizen/files/com\\_2010\\_603\\_en.pdf](http://ec.europa.eu/justice/citizen/files/com_2010_603_en.pdf).

Ahead of the 2014 European Parliament elections, the European Commission took measures to ensure that the **Directive**<sup>339</sup> adopted in January 2013, which simplified the procedure for EU citizens to **stand as candidates for the European Parliament**, was transposed in a timely manner into the national legislation of the Member States. The European Commission launched infringement procedures against fourteen Member States, after which the Member States concerned transposed the Directive into national law. In one case, the Commission issued a reasoned opinion.

### ***Article 40 – Right to vote and to stand as a candidate at municipal elections***

According to Article 40 every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

### ***Article 41 – Right to good administration***

Every person according to Article 41 of the Charter has the right to have his or her affairs handled impartially, fairly and within a reasonable timeframe by the Institutions, bodies and agencies of the Union. It also includes the right to be heard and to receive a reply.

#### *Legislation*

In the field of customs, work is underway for draft delegated and implementing acts for the **Union Customs Code**<sup>340</sup>, which are deemed to be adopted in 2015. The aim is to promote the right to good administration through the following provisions: time limits for the taking of a decision by customs authorities; right to the applicant to be heard before a decision which would affect him or her is taken; right of appeal against a customs decision and the recognition of Union-wide validity of customs decisions.

#### *Policy*

A huge number of enquiries are addressed by citizens to the European Commission, whether by phone, e-mail or correspondence. The European Commission commits itself to answering them in the most appropriate manner and as quickly as possible. The general rule applied in the European Commission is that every letter is registered and, with the exception of those that are unreasonable, repetitive or abusive, should receive a reply within 15 working days from the date of receipt of the letter. The European Commission also takes care that replies are sent in the language of the author of the correspondence, provided that it was written in one of the official language of the Union. For

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<sup>339</sup> Directive 2013/1/EU amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 26, 26.1.2013, p. 27.

<sup>340</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p. 1.

complaints and enquiries by citizens on the application of EU law, the European Commission uses an IT tool for registering and managing this specific kind of correspondence.

In May 2014, the European Ombudsman opened an investigation into respect for fundamental rights in the EU cohesion policy.<sup>341</sup> In its reply of 29 October 2014<sup>342</sup> the European Commission has committed to adopting a set of measures to **increase the awareness of the Charter's relevance among Member States when disbursing ESI funds:**

- First, the Commission will formally write to Member States to remind them of their obligations as regards respect of the Charter when they implement EU law.
- Second, the Commission will draw the attention of Member States to the possibility to use technical assistance from ESI funds to support arrangements for handling complaints.
- Third, the Commission will disseminate good practices of what are effective arrangements for the treatment of complaints.
- Fourth, the Commission will issue a guidance document addressed to the Member States as regards respect of the Charter when Member States implement EU law in the context of the disbursement of ESI funds.
- Fifth, after this guidance has been issued, the Commission will organise training in the Member States on the Charter, its applicability and its relevance in the context of the disbursement of ESI funds.

#### *Case law*

In 2014 the CJEU rendered several judgments which concerned Article 41 and its scope of application. The right to good administration as enshrined in the Charter expressly only binds the institutions, bodies, offices and agencies of the Union. The question of whether Article 41 is also applicable when Member States implement EU law was discussed by the CJEU in the case ***Mukarubega***<sup>343</sup>. This case concerned the right to be heard of third-country nationals as regards return decisions in the field of asylum. Ms Mukarubega brought an action in France for the annulment of the return decisions adopted in 2012 and 2013. She claimed that the adoption of those decisions was contrary to the principle of good administration stated in the Charter of Fundamental Rights of the EU, since she was not given the opportunity to submit her observations before those decisions were adopted. The CJEU reiterated its previous case law that Article 41 is not addressed to Member States and therefore ruled that Article 41 was not applicable in the case at hand. Since the right to good administration is however inherent in respect for the rights of the defence, which is a general principle of EU law, the Court further discussed the conditions that must be met to fulfil this principle. In the case of Ms Mukarubega, the Court clarified that third-country nationals who have been duly heard on the illegality of their stay need not necessarily be heard again before the adoption of a return decision. Therefore the Court held that there was no violation of the right to be heard.

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<sup>341</sup> <http://www.ombudsman.europa.eu/en/press/release.faces/en/54420/html.bookmark> .

<sup>342</sup> <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58451/html.bookmark>

<sup>343</sup> CJEU judgment of 5 November 2014 in Case C-166/13 *Mukarubega*, see also Article 19.

In another judgment, which concerned the right to good administration, the Court recalled that Article 41 was not applicable, but that the right to be heard as a general principle could be applied. The Court clarified in *Boudjlida*<sup>344</sup> that this right implies an obligation upon national authorities to ensure that the person concerned always has the possibility to express his point of view on the legality of his stay and on possible reasons that may justify the non-adoption of a return decision, as well as on the detailed arrangements for his return. In this context, the Court also clarified that in principle such obligations do not go as far as requiring national authorities to set out further and more detailed arrangements in order to ensure full respect of an adversarial procedure.

In order to achieve the objectives of Article 21 TEU, the EU also applies restrictive measures<sup>345</sup>, which often give effect to binding Resolutions of the UN Security Council based on Article 41 or 42 of the Charter of the United Nations but can also be autonomous EU measures. Some of the restrictive measures involve the listing of individuals and entities with a view to having their funds and economic resources frozen. For the individuals and entities concerned, the right to good administration (Article 41) and the right to an effective remedy and to a fair trial (Article 47 of the Charter) are of particular importance. In 2014, the CJEU decided on a number of cases concerning the procedure to list individuals and entities for this purpose. Of more than 30 judgments issued in 2014 on the legality of the restrictive measures imposed, the Court upheld the listings in only a small number of cases,<sup>346</sup> whereas in the other cases<sup>347</sup> the listing decisions were annulled.

As regards UN Security Council based restrictive measures, the General Court handed down the *Yusef* judgment<sup>348</sup> concerning restrictive measures taken on the basis of Council Regulation (EC) No 881/2002<sup>349</sup>. This regulation is designed to give effect to UN Security Council resolution on the freezing of assets of the individuals, entities and groups identified by the UN Sanctions Committee as

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<sup>344</sup> CJEU judgment of 11 December 2014 in Case C-249/13 *Boudjlida*, see also Article 19.

<sup>345</sup> See Article 215 TFEU.

<sup>346</sup> Case T-646/11, *Vadzim Ipatau v Council of the EU*; Case T-256/11, *Ahmed Abdelaziz Ezz and others v Council of the EU*; Joined Cases T 174/12 and T 80/13, *Syrian Lebanese Commercial Bank SAL v Council of the EU*; Case T-202/12, *Bouchra Al Assad v Council of the EU*; Case T-263/12, *Manufacturing Support & Procurement Kala Naft v Council of the EU*.

<sup>347</sup> Joined Cases T-208/11 and T-508/11, *Liberation Tigers of Tamil Eelam (LTTE) v Council of the EU*; Case T-400/10, *Hamas v Council of the EU*; Joined Cases T-196/11 et T-542/12, *Aliaksei Mikhalchanka v Council of the EU*; Case T-66/12, *Ali Sedghi, Ahmad Azizi v Council of the EU*; Case T-67/12, *Sina Bank v Council of the EU*; Case T 181/13, *Sharif University of Technology v Council of the EU*; Case T-182/13, *Moallem Insurance Co v Council of the EU*; Case T-384/11, *Safa Nicu Sepahan Co. v Council of the EU*; Case T-348/13, *Ahmed Mohammed Kadhaf Al Dam v Council of the EU*; Case T-293/12, *Syria International Islamic Bank PJSC v Council of the EU*; Case T-203/12, *Mohamad Nedal Alchaar v Council of the EU*; Joined Cases T-329/12 and T-74/13, *Mazen Al-Tabbaa v Council of the EU*; Case T-306/10 *Hani El Sayyed Elsebai Yusef v European Commission*; Case T-565/12, *National Iranian Tanker Company v Council of the EU*; Case T-155/13, *Zanjani v Council of the EU*; Case T-133/12, *Ben Ali v Council of the EU*.

<sup>348</sup> CJEU judgment of 21.3.2014 in Case T-306/10 *Hani El Sayyed Elsebai Yusef v European Commission*.

<sup>349</sup> Regulation (EC) No 881/2002, OJ L 139/9.



associated with Al Qaida. In this case, the General Court applied the 2008 Kadi I case-law<sup>350</sup> and ruled that the Commission had failed to act by still not having remedied the procedural deficiencies and substantive irregularities affecting Regulation (EC) No 1629/2005 ordering the freezing of the funds and economic resources of Mr Yusef. It called on the Commission to discharge its obligation to examine the grounds for listing carefully and impartially and where appropriate in "effective cooperation" with the Sanctions Committee of the UN<sup>351</sup>. The failure to act held to have occurred did not consist in a failure to revoke Regulation (EC) No 1629/2005<sup>352</sup> and the Commission is currently proceeding with the review of the grounds for listing in cooperation with the relevant UN bodies.

Most of the other cases<sup>353</sup> where restrictive measures against entities or individuals were annulled by the CJEU concerned Council Decisions and Regulations, in which the evidence or information substantiating the grounds for listing the individual or entity submitted by the Council was not sufficient and the burden of proof which rested on it under Article 47 of the Charter, as interpreted by the Court of Justice in Kadi II<sup>354</sup>, was not discharged.

### ***Article 42 – Right of access to documents***

The Charter in Article 42 guarantees that any EU citizen and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the EU institutions, bodies, offices and agencies. This right is subject to certain exceptions.<sup>355</sup> In particular, the institutions refuse access where disclosure would undermine the protection of the public interest.

In 2014, the European Commission registered 6227 initial requests for access to documents, which is approximately 300 less than in 2013. Full or partial access was granted at the initial stage in more than 80 % of the cases. Some 70% of requests were granted at the initial stage. In 2014, the European Commission received 300 confirmatory applications, a 27% increase compared to 2013. Such applications are reassessed by case handlers acting independently from the ones that handled the initial application. This review has led to wider access being granted in almost half of the cases.

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<sup>350</sup> CJEU judgment of 3.9.2008 in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*

<sup>351</sup> CJEU judgment of 21.3.2014 in Case T-306/10 *Hani El Sayyed Elsebai Yusef v European Commission*, at para. 102.

<sup>352</sup> *Ibid*, at para. 107.

<sup>353</sup> For instance CJEU judgment of 3.07.2014 in Case T-565/12 *National Iranian Tanker Company v Council*; CJEU judgment of 9.12.2014 in Case T-439/11 *Sport-pari v Council*

<sup>354</sup> CJEU judgment of 18.07.2013 in Case C-584/10 P *Commission and Others v Kadi (Kadi II)*, Appeal Case against T-85/09 *Kadi v Commission (Kadi I)*.

<sup>355</sup> Under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

## **Article 43 – European Ombudsman**

The Charter provides that any EU citizen and any natural or legal person residing or having its registered office in a Member State, has the right to refer to the European Ombudsman on cases of maladministration in the activities of the EU institutions, bodies, offices and agencies, with the exception of the CJEU acting in its judicial role.

In 2014, the European Ombudsman was able to help more than 23,000 citizens<sup>356</sup>. This includes individuals who complained directly to the European Ombudsman (2,079 complaints), those who received a reply to their request for information (1,823), and those who obtained advice through the interactive guide on the European Ombudsman's website (19,170).

About 60% of the complaints fell within the competence of a member of the European Network of Ombudsmen, and 34% fell within the European Ombudsman's mandate.

### *Policy*

On 19 May 2014, the **European Ombudsman** opened on her own initiative an investigation<sup>357</sup> concerning the **respect for fundamental rights in the implementation of EU cohesion policy** examining the adequacy of the means the European Commission has at its disposal to ensure that fundamental rights enshrined in the Charter of Fundamental Rights are complied with.

In its response<sup>358</sup>, the European Commission confirmed that it attached great importance to the respect of fundamental rights, including in the context of cohesion policy implementation. It outlined that the framework for ensuring respect of fundamental rights was significantly strengthened in Regulation (EU) No 1303/2013<sup>359</sup> through provisions requiring the European Commission and the Member States to ensure that support of the ESI Funds was consistent with relevant policies and horizontal principles. Furthermore, Regulation (EU) No 1303/2013 established ex ante conditionalities inter alia in the area of anti-discrimination, gender and disability. These had to be fulfilled, if they were applicable to the specific objectives pursued within the priorities of Member States' programmes. Where they applied, they required administrative capacity for the implementation and application of Union anti-discrimination law and policy, gender equality law and policy, and the United Nations Convention on the rights of persons with disabilities (UNCPRD).

The European Commission stressed that these provisions were complemented by a new explicit obligation imposed on Member States to set up effective arrangements for the examination of

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<sup>356</sup> It is not possible to indicate how many users who were advised by the Interactive Guide to complain to the European Ombudsman actually did so, since the Interactive Guide does not require a login name and password in the way that the online complaint form does, and this for data protection reasons.

<sup>357</sup> Case OI 8/2014/AN, available at:

<http://www.ombudsman.europa.eu/en/press/release.faces/en/54420/html.bookmark> .

<sup>358</sup> Available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58451/html.bookmark>

<sup>359</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p. 320.

complaints, including complaints alleging violation of the Charter of Fundamental Rights (Article 74(3) of Regulation). The European Commission further pointed to the possibility to interrupt payment deadlines, to suspend payments in case of serious deficiencies and to apply financial corrections in cases where Member States do not comply with this obligation.

Another example of the European Ombudsman's work included a request by an academic to the European Commission for **access to various documents concerning a new regulation on the Common Fisheries Policy**<sup>360</sup>. The European Commission granted partial access, arguing that full disclosure would undermine its ongoing decision-making process.<sup>361</sup> The researcher turned to the Ombudsman who inspected the documents and concluded that the European Commission's arguments for refusing full disclosure were not convincing. According to the Ombudsman, the EU's transparency rules foresee the widest possible access when EU institutions act in their legislative capacity. The European Commission followed the European Ombudsman's proposal for a friendly solution recommendation to release the documents as an agreement on the reform of the Common Fisheries Policy had been reached in May 2013.

### ***Article 44 – Right to petition***

All EU citizens, as well as any natural or legal person residing or having its registered office in a Member State, have the right to petition the European Parliament on matters which come within the Union's fields of activity and which affect the petitioner directly.

The petition may present an individual request, a complaint or observation concerning the application of EU law or an appeal to the European Parliament to adopt a position on a specific matter. Such petitions give the European Parliament the opportunity of calling attention to infringements of citizens' rights. A petition's portal was created to help citizens to submit their petitions easily: <http://www.petiport.europarl.europa.eu/petitions/en/main>.

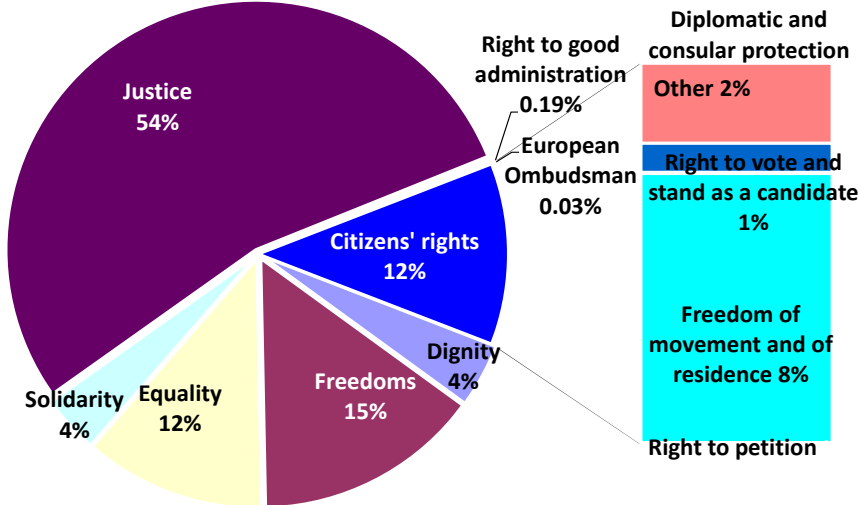
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<sup>360</sup> Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, COM(2011) 425 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0425&from=EN>.

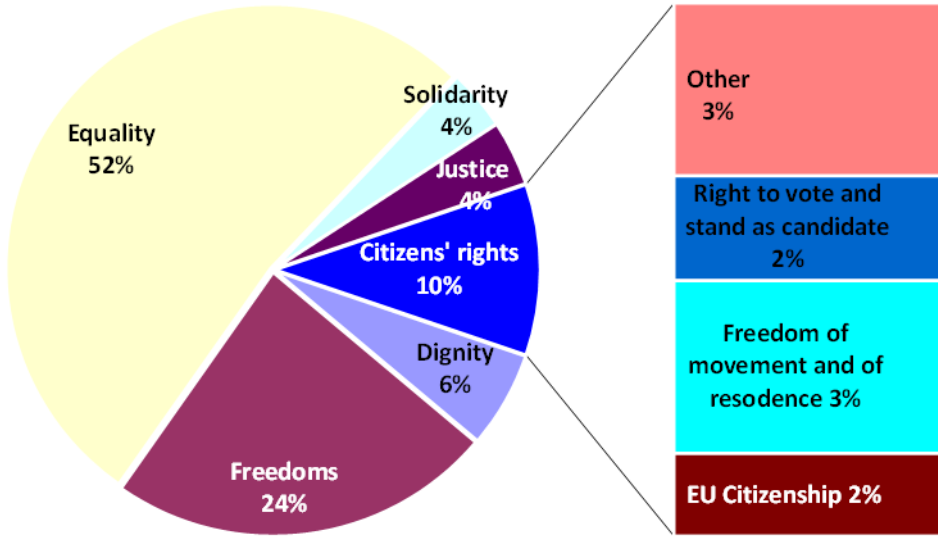
<sup>361</sup> Case: 2232/2011/FOR, available at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54453/html.bookmark>

In the year 2014 the European Commission has dealt with 1053 petitions, 185 of which concerned fundamental rights.

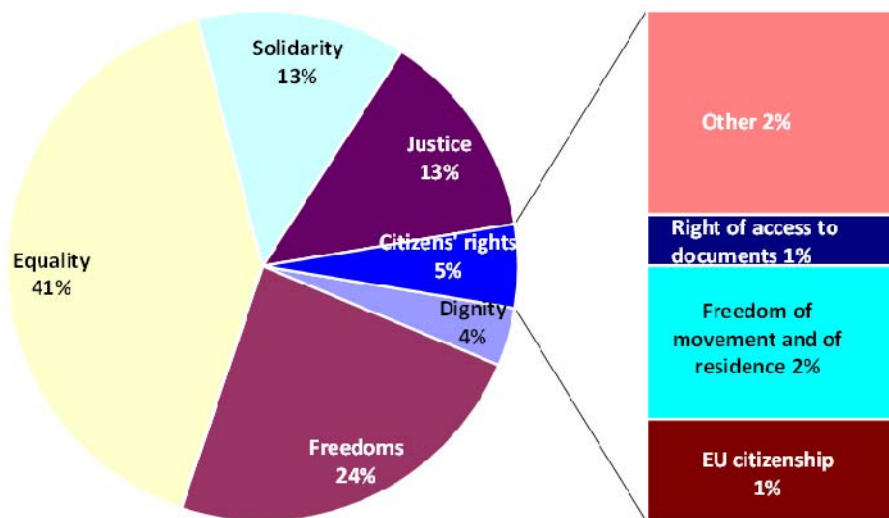
Letters (Citizens' rights)



Questions (Citizens' rights)



Petitions (Citizens' rights)



Source: European Commission

### ***Article 45 – Freedom of movement and of residence***

The Charter guarantees the right of every EU citizen to move and reside freely, whilst respecting certain conditions, within the territory of the Member States. This fundamental right is also included in the Treaty on the Functioning of the EU.

#### *Legislation*

In 2014, a **Directive on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights (Portability Directive)**<sup>362</sup> was adopted. The Directive provides that workers' occupational pension rights should be granted no later than after three years of employment relationship and preserved after they leave the pension scheme. The Directive applies to workers who move between Member States, however Member States may extend these standards also to workers who change jobs within a single country.

<sup>362</sup> Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights, OJ L 128, 30.4.2014, p. 1.

The European legislators also adopted a **Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers**<sup>363</sup>. This Directive, in its Article 3, imposes a legal obligation on Member States to provide the Union workers with appropriate means of redress at national level. It also relates to the enforcement and defence of rights, which in itself concerns a fundamental right. The Charter of Fundamental Rights of the European Union confirms the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the European Union are violated or not respected. The directive covers both judicial and extra-judicial means of redress, including alternative dispute settlement mechanisms such as conciliation and mediation. Ombudsmen and equality bodies or other similar structures may also provide an alternative to the general courts. In accordance with Article 47 of the Charter of Fundamental Rights of the European Union this Article provides that, in case where Member States only provide for administrative procedures, they shall ensure that any administrative decision may be challenged before a tribunal.<sup>364</sup>

### *Policy*

On 8 October 2014 the European Commission organised a **workshop on Inclusion of Mobile EU Citizens**, aimed at encouraging an effective use of EU funding to promote reception and social inclusion policies for incoming mobile EU citizens, as well as to promote intra EU mobility and best practices and partnerships among cities.

### *Case law*

One important judgment involving the freedom of movement was rendered by the CJEU on 11 November 2014 in the **Dano**<sup>365</sup> case. As already discussed under Article 20, this case concerned a national of one Member State who had applied for basic welfare benefits in another Member State for herself and her son. The Court ruled that in order to access certain social security benefits nationals of other Member States could claim equal treatment with nationals of the host Member State only if their residence complied with the conditions laid down in the Free Movement of Persons Directive<sup>366</sup>.

Freedom of movement was also at the centre of the **Reyes** case,<sup>367</sup> which revolved around the interpretation of the word "dependant" in the context of the Free Movement of Persons Directive<sup>368</sup>.

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<sup>363</sup> Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014, p. 8.

<sup>364</sup> See also Article 47.

<sup>365</sup> CJEU judgment of 11 November 2014 in Case C-333/13 *Dano*, see also Articles 20 and 51.

<sup>366</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

<sup>367</sup> CJEU judgment of 16 January 2014, Case C-423/12 *Reyes*, see also above Article 7.

<sup>368</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

Here the CJEU decided that the right to family reunification with a dependant direct descendant who is 21 years old or older, does not depend on the descendant having tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support him- or herself.<sup>369</sup>

#### *Application by Member States*

The European Commission's action to promote the freedom of movement resulted in several changes to national legislation. In **Sweden**, holders of Swedish identity cards were prevented from travelling to an EU country outside the Schengen area on the basis of this document. Following the Commission's intervention, amendments to the law are foreseen to enable Swedes to leave the country with only their national ID card. In **Belgium**, a modifying law was adopted on 19 March 2014 to better recognise the rights of family members and notably those of durable partners, as well as with respect to the right of residence of EU citizens and their family members.

The European Commission furthermore identified the need to help EU Member States take action against marriages of convenience between EU citizens and non-EU nationals in the context of EU legislation on free movement, which frames Article 45 of the Charter and therefore prevents abuse. Working in close cooperation with Member States, the European Commission published, on 26 September 2014, a **handbook on marriages of convenience**<sup>370</sup> in order to help national authorities effectively tackle marriages of convenience, while safeguarding the right of EU citizens to free movement as guaranteed by the Charter.

### ***Article 46 – Diplomatic and consular protection***

Article 46 of the Charter guarantees the right of unrepresented EU citizens to seek diplomatic or consular protection from embassies or consulates of other Member States in third countries under the same conditions as nationals. EU citizens must be able to rely effectively on this right when travelling abroad.

#### *Legislation*

The European Commission has proposed a **Directive on consular protection for citizens of the Union abroad**<sup>371</sup> in a bid to clarify and streamline implementation of EU citizens' right to receive equal protection. During 2014, progress has been made at both European Parliament and Council.

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<sup>369</sup> See also above under Article 7.

<sup>370</sup> Available at: [http://ec.europa.eu/justice/citizen/files/swd\\_2014\\_284\\_en.pdf](http://ec.europa.eu/justice/citizen/files/swd_2014_284_en.pdf) , see also Article 9.

<sup>371</sup> Proposal for a Council Directive on consular protection for citizens of the Union abroad, COM(2011) 881 final, available at: [http://ec.europa.eu/justice/citizen/files/consular-protection\\_en.pdf](http://ec.europa.eu/justice/citizen/files/consular-protection_en.pdf) .

## Title VI

### Justice

The adopted **Directive on the European Investigation Order** in criminal matters includes several procedural safeguards including specific grounds of refusal in case of violation of fundamental rights or remedies.

During 2014 negotiations on the **Procedural rights package** advanced. It consists of three Directives; one on the presumption of innocence and the right to be present at trial; one on special safeguards for children in criminal proceedings; and one on provisional legal aid and legal aid in European Arrest Warrant proceedings.

To better protect and to reinforce the integrity of the EU's financial markets, a Directive and a Regulation on Market abuse were adopted in 2014. The Directive clarifies that in the application of national law transposition measures, Member States should ensure that the imposition of criminal sanctions for offences does not lead to a breach of the principle of the *ne bis in idem* principle.

In the area of **disbursement of EU funds**, the Court of Justice ruled on the applicability and scope of Article 47 of the Charter. The Court ruled that the adoption of the programme manual by the monitoring committee within the disbursement procedure had to be regarded as a measure implementing EU law within the meaning of Article 51(1) of the Charter and that the lack of any remedy against the decision refusing funding for a project did not comply with the principle of effective judicial protection laid down in Article 47(1) of the Charter.



## ***Article 47 – Right to an effective remedy and to a fair trial***

Article 47 of the Charter provides that when EU rules give a right to a person, he or she has the right to an effective remedy before a tribunal in case this right is violated. This protection is called **right to an effective remedy**, because it provides to individuals a legal solution decided by a tribunal when an authority applied EU law in an incorrect way. The right to an effective remedy guarantees judicial protection against violations of any EU rule which grants rights to people. It therefore plays a key role in ensuring the effectiveness of all EU provisions, ranging from social policy, to asylum legislation, competition, agriculture, etc.

Closely related to the right to an effective remedy is the provision, also guaranteed by Article 47, that **legal aid** shall be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice. This means that the right to effective access to justice cannot be hampered by the fact that a person cannot afford to take a lawyer.

Article 47 of the Charter does not only provide a right to an effective remedy, but it also stipulates that, in all judicial proceedings which relate to the interpretation or the validity of EU rules, everyone shall have the right to a **fair trial**. This right encompasses the right to a fair and public hearing, the right to have one's case adjudicated within a reasonable time, the principles of independence and impartiality of the tribunal as well as the right to be advised, defended and represented.

### *Legislation*

During the negotiations of the **Directive on the European Investigation Order in criminal matters**<sup>372</sup> stemming from a Member States' initiative between the Council and the European Parliament, the European Commission strongly supported the efforts of the European Parliament to strengthen defence rights. As a result, the Directive includes several procedural safeguards including specific grounds of refusal in case of violation of fundamental rights or remedies.

The European Commission also undertakes actions to assist the Member States in the process of correct and timely implementation and application of the **Directive on Victims' Rights**<sup>373</sup>. The Directive contains, among others, a number of provisions aimed at ensuring that victims of crime are granted individual rights aimed at ensuring their access to justice and full participation in criminal proceedings. In order to ensure effective implementation of the provisions of the Directive, the European Commission's Directorate General for Justice and Consumers has issued a Guidance document related to the transposition and implementation of the Directive in December 2013.

On 11 June 2014, the European Commission has proposed **measures to further safeguard procedural guarantees in OLAF investigations**<sup>374</sup>, in order to complete the reform of the EU's anti-fraud office implemented in 2012 and 2013. The proposal foresees the creation of a new Controller

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<sup>372</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. OJ L 130, 1.5.2014, p. 1.

<sup>373</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L315, 14.11.2012, p.57.

<sup>374</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees (COM/2014/0340 final), available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014PC0340>.

of Procedural Guarantees tasked with reviewing and providing recommendations on complaints that might be lodged by a person subject of an OLAF investigation. Second, OLAF will have to get authorisation from the Controller before inspecting the offices of members of EU institutions, or taking any documents or data from these offices. The proposal is another step to ensure that OLAF can continue to work efficiently and independently in protecting EU financial interests, while also guaranteeing the effective protection of fundamental rights.

Finally **Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers** needs to be mentioned in this context. This Directive, as adopted in 2014 by the European legislator, imposes a legal obligation on Member States to provide the Union workers with appropriate means of redress at national level. The directive covers both judicial and extra-judicial means of redress, including alternative dispute settlement mechanisms such as conciliation and mediation. In accordance with Article 47 of the Charter of Fundamental Rights of the European Union this Article provides that, in case where Member States only provide for administrative procedures, they shall ensure that any administrative decision may be challenged before a tribunal.<sup>375</sup>

### *Policy*

FRA started working on a **Handbook on access to justice**: the Handbook will be produced in partnership with the European Commission for the Efficiency of Justice (CEPEJ) and the European Court of Human Rights, and will highlight and summarise the key European legal and jurisprudential principles in the area of access to justice.

The right to an effective remedy was furthermore subject of the Communication of 3 April 2014 on guidance for application of the **Directive on the right to family reunification**<sup>376</sup> (henceforth "guidelines"). These guidelines clarify in their general introduction that the Directive must be interpreted and applied in accordance with fundamental rights. This concerns, amongst others also the right to an effective remedy, as enshrined in the European Convention of Human Rights and the EU Charter of Fundamental Rights. The guidelines clarify that the Directive's redress provision must be applied in conformity with the right to an effective remedy before a tribunal, as set out in Article 47 of the Charter and the CJEU's case law in this matter.<sup>377</sup> The Directive explicitly envisages the right to legally challenge four possible types of decisions under the Directive (the rejection of an application for family reunification, the refusal to renew a residence permit, the withdrawal of a residence permit, and the order of removal from the territory of a MS). However, the guidelines now state that effective remedies must also be granted with regard to any other decisions, for instance, decisions concerning the restriction of the right to employment or the refusal to grant an independent residence title, since Article 47 applies to all rights provided for in the Directive including. Furthermore, full judicial review must be available concerning merits and legality, and that quasi-judicial or administrative review may not be adequate to meet the benchmark of Article 47 of the Charter.

### *Case law*

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<sup>375</sup> See also Article 45.

<sup>376</sup> Communication on Directive 2003/86/EC (COM(2014) 210 final), see also Article 7.

<sup>377</sup> Communication on Directive 2003/86/EC (COM(2014) 210 final), Article 18.

The CJEU has ruled in a number of cases<sup>378</sup> that the Council of the EU and the European Commission need to respect the fundamental rights (in particular the right to be heard, right to effective judicial review and right to property) of the individuals and entities subject to **restrictive measures** against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban. When giving effect to UN Security Council Resolutions, the EU needs in particular to ensure that the reasons provided by the United Nations (or Member States in case of autonomous EU sanctions) are sufficiently detailed to allow the effective exercise of the right of defence.<sup>379</sup>

An Austrian Administrative Court lodged a request for a preliminary ruling to the CJEU in a case that concerns the interaction between the transparency principle under the 'Environmental Information Directive' 2003/4/EC and the right to a fair trial as stipulated in Article 47 of the EU Charter of Fundamental Rights. In its order<sup>380</sup> the CJEU held that Member States are required to respect the Charter when they implement the Environmental Information Directive and that an interpretation that would authorise Member States to adopt measures that are incompatible with Article 47 of the Charter would not be accepted.

In case *A v B and Others*<sup>381</sup> concerning the interpretation of the Brussels I Regulation<sup>382</sup> the CJEU, concluded that Article 24 of the Regulation read in the light of Article 47 of the Charter, must be interpreted as meaning that, if a national court appoints, in accordance with national legislation, a representative in absentia for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, the appearance entered by that representative does not amount to an appearance being entered by that defendant for the purposes of Article 24 of that Regulation.

In its judgment in *Mahdi*<sup>383</sup> the CJEU decided on the question of **judicial supervision of prolonged detentions**.<sup>384</sup> It ruled, in particular, that **Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals**, read in the light of Articles 6 and 47 of the Charter, must be interpreted as meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision.

In the area of **disbursement of EU funds**, the Court of Justice ruled on the applicability and scope of Article 47 of the Charter in relation to national rules providing for an absolute ban on judicial review of a decision refusing funding for a project, which was made by the monitoring committee of a cross-border cooperation programme.<sup>385</sup> The request for a preliminary ruling was made in proceedings between an association of cattle breeders and the Monitoring Committee of the Estonia-Latvia

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<sup>378</sup> See in particular CJEU judgment of 21 March 2014 in Case T-306/10 *Yusef v Commission*.

<sup>379</sup> The cases are presented under Article 41.

<sup>380</sup> CJEU order of 8 May 2014 in Case C-329/13 *Stefan*.

<sup>381</sup> CJEU judgment of 11 September 2014 in Case C-112/13 *A v B and Others*.

<sup>382</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L12,16.1.2001,p.1.

<sup>383</sup> CJEU judgment of 5 June 2014 in Case C-146/14 PPU *Mahdi*.

<sup>384</sup> See also Article 6.

<sup>385</sup> CJEU judgment of 17 September 2014 in Case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee*.

Programme for 2007 to 2013, concerning the latter's rejection of an application for subsidies made by that association in the context of the implementation of the European Regional Development Fund (ERDF). The Court ruled that the adoption of the programme manual by the monitoring committee had to be regarded as a measure implementing EU law within the meaning of Article 51(1) of the Charter and that the lack of any remedy against the decision refusing funding for a project did not comply with the principle of effective judicial protection laid down in Article 47(1) of the Charter.

In the field consumer protection and unfair contract terms in mortgage enforcement proceedings, the CJEU, in the *Sánchez Morcillo and Abril García* case<sup>386</sup>, concluded that article 47 and the requirement to respect the principle of equality of arms, must be interpreted as precluding a system of enforcement whereby a creditor seeking enforcement of a mortgage claim, may bring an appeal against a decision terminating the proceedings while the debtor in the same proceeding, would not be able to appeal against a decision dismissing his objection to that enforcement.

The CJEU also ruled on a number of cases concerning the excessive duration of proceedings before the General Court.<sup>387</sup>

Finally, the European Court of Human Rights found in *Dhahbi v. Italy* a violation of the right to a fair trial as enshrined in Article 6 § 1 of the Convention because the Italian Court of Cassation did not provide reasons to its refusal to refer a preliminary ruling to the Court of Justice in order to determine whether the Euro-Mediterranean Agreement allowed the national authorities to refuse to pay the allowance in question to a Tunisian worker<sup>388</sup>. The Court noted that the Italian court, whose decisions were not open to appeal under domestic law, had failed to comply with their obligation to give reasons for refusing to submit a preliminary question to the Court of Justice on the interpretation of relevant provisions of EU law, in line with the applicable law and the exceptions laid down in CJEU case-law.

#### *Application by Member States*

Infringement proceedings were also launched against a Member State for deficiencies in the implementation of the Reception Conditions Directive<sup>389</sup> and the Asylum Procedures Directive<sup>390</sup>. The concerns raised by the Commission included the duration of the asylum procedure, the effectiveness of remedies against negative asylum decisions, the lack of effective free legal assistance, the detention of certain categories of asylum seekers, which appears to be applied automatically without an individualised assessment, and the right to an effective remedy against a detention decision as well as free legal assistance in detention.<sup>391</sup>

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<sup>386</sup> CJEU judgment of 17 July 2014 in Case C-169/14 *Sánchez Morcillo and Abril García*, see also under Article 38.

<sup>387</sup> CJEU judgment of 30 April 2014 in Case C-238/12 *P FL Smidth v Commission*, judgment of 12 November 2014 in case C-580/12 *P Guardian v Commission*, and CJEU judgment of 12 July 2014 in Case C-578/11 *P Deltafina*.

<sup>388</sup> ECtHR judgment of 8 April 2014 in Case *Dhahbi v. Italy* (no. 17120/09).

<sup>389</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6.2.2003, p. 18.

<sup>390</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, 13.12.2005, p. 13.

<sup>391</sup> See also Articles 6 and 18.

As indicated in the 2013 Charter Report, letters of Formal Notice were sent to several Member States in 2013 in the context of national implementation of the **Visa Code**<sup>392</sup> and in particular as concerns the right to appeal against a visa refusal/annulment/revocation. Reasoned opinions on this matter were subsequently addressed to the Czech Republic, Estonia, Slovakia, Poland and Finland in 2014.

The European Commission also inquired with the Italian authorities on the compatibility of their legislation regulating **compulsory mediation proceedings**, provided for under Article 5(2) of the EU Directive on civil and commercial mediation<sup>393</sup> read in light with Article 47 of the Charter. More in particular it was questioned whether the Italian legislation regulating compulsory mediation proceedings is compatible with relevant provisions of EU law, insofar as the apparent lack of availability of legal aid could hamper the right to access to justice.

Finally, the European Commission started an inquiry with Italian authorities on the compatibility of their legislation implementing EU provisions on free movement of workers with regards to **Italian lecturers**, as interpreted by the Court of Justice<sup>394</sup>, with Article 47 of the Charter. The issue concerns, in particular, the closing of all cases pending before national courts concerning the economic treatment of the lecturers, provided for in national law<sup>395</sup>, and the alleged detrimental effects that the application of such provisions would produce on the parties in the proceedings.

#### *Text Box Example*

##### Ruling of the Supreme Court of the Republic of Croatia

A ruling<sup>396</sup> by the Supreme Court of the Republic of Croatia concerning the right to appeal in the field of judicial cooperation in criminal matters illustrates how the Charter was used to interpret national laws and which resulted in providing fundamental rights aspects in the reading of certain national provisions. In this case the appeal of the wife of a murder victim against the decision not to surrender to German prosecuting authorities the suspect of this crime was dismissed by Croatian authorities. The Croatian Supreme Court held that although the Judicial Cooperation in Criminal Matters with the EU Member States Act only provides the right to appeal the decision on surrender to the state attorney and the person whose surrender is requested and not to the victims of the crime, legislation should be interpreted in light of the human rights standards, including the rights guaranteed by the Charter. The Court particularly referred to the rights to a fair trial and to effective legal remedy as protected by Article 47 of the Charter and allowed the appeal.

<sup>392</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243, 15.9.2009, p. 1.

<sup>393</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters OJ L 136, 24.5.2008, p. 3.

<sup>394</sup> See CJEU, judgment of 26 June 2001 in Case C-212/99 *Commission v Italy* and judgment of 18 July 2006 in Case C-119/04 *Commission v Italy*.

<sup>395</sup> Article 26(3) of law n. 240 of 30 December 2010

<sup>396</sup> Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske), case VSRH Kž eun5/2014-4, 6.3.2014, available at: [www.iusinfo.com](http://www.iusinfo.com) (only to subscribers).

## ***Article 48 – Presumption of innocence and right of defence***

Article 48 of the Charter provides that everyone who has been charged shall be presumed innocent until proven guilty according to the law. It further specifies that respect for the right to defence of anyone who has been charged shall be guaranteed.

### *Legislation*

During 2014 negotiations on the **Procedural rights package** advanced with the co-legislator<sup>397</sup>. The package consists of three Directives; one on the presumption of innocence and the right to be present at trial; one on special safeguards for children in criminal proceedings; and one on provisional legal aid and legal aid in European Arrest Warrant proceedings. It also includes two Commission recommendations on special safeguards for vulnerable suspects in criminal proceedings and on legal aid in criminal proceedings.

In terms of implementation, the European Commission observed the speedy and effective transposition by the Member States of the 2010 Directive on the right to interpretation and translation, the 2012 Directive on the right to information and on the 2013 Directive on the right of access to a lawyer.

A new Directive<sup>398</sup> modernising the 2005 **Professional Qualifications Directive** entered into force on 18 January 2014. The Directive takes into account the presumption of innocence and right of defence by the provisions on an alert mechanism, exchange of information on sanctions and right of appeal.<sup>399</sup>

### *Policy*

The European Commission continues to provide financial support for the **training of legal practitioners** on fundamental rights, following the ambitious target set in 2011 for expanding training for legal practitioners on how to apply EU law. In 2014 almost 8 % of the training activities followed by legal practitioners on EU law or of the law of another Member State dealt mainly or exclusively with fundamental rights and over 9 % of all legal practitioners whose training on EU law or law of another Member State received EU financial support have been funded by the programme on fundamental rights and citizenship.

## ***Article 49 – Principles of legality and proportionality of criminal offences and penalties***

Some fundamental rights are guaranteed in absolute terms and cannot be subject to any restrictions. Interferences with other rights may be justified if, subject to the principle of proportionality, they are necessary and genuinely serve to meet objectives of general interest recognised by the Union.

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<sup>397</sup> COM(2013) 821, 822 and 824 of 27 November 2013 and COM(2013) 8178 and 8179 of 27 November 2013.

<sup>398</sup> Directive 2013/55/EU.

<sup>399</sup> See also Articles 8, 15 and 38.

This Article follows the traditional rule of the non-retroactivity of laws and criminal sanctions. There has been added the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights.

Paragraph 2 refers to crimes against humanity in particular. In accordance with Article 52(3), the right guaranteed here therefore has the same meaning and scope as the right guaranteed by the ECHR, which is Article 7 ECHR.

Paragraph 3 states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the CJEU.

#### *Case law*

In Case T-519/09, ***Toshiba Corp v European Commission***,<sup>400</sup> the applicant requested the annulment of a Commission Decision of 7 October 2009 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement, asking the Court if the methodology set out in paragraph 18 of the Guidelines on the method of setting fines is consistent with Article 23(3) of Regulation No 1/2003 and is not contrary to Article 49(3) of the Charter, which contains the requirement that the severity of penalties must not be disproportionate to the criminal offence.

The market at issue in the present case is that of power transformers, auto transformers and shunt reactors with a voltage range of 380 kV and above. A power transformer is a major electrical component the function of which is to reduce or increase the voltage in an electrical circuit. The transformers are sold as stand-alone equipment or as part of turnkey power substations. The applicant, Toshiba Corp., is a Japanese company which is primarily active in three key domains: digital products, electronic devices and components and infrastructure systems.

On 7 October 2009, the European Commission adopted its decision relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/39.129 — Power Transformers) ('the contested decision'), in which it found that the applicant had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) and imposed on it a fine of EUR 13.2 million.

The applicant contested the proportionality and the appropriateness of the method provided for in paragraph 18 of the 2006 Guidelines on the method of setting fines. According to the applicant, the Commission should take into consideration the actual impact of the infringement when establishing the amount of the fine. The applicant contended that the methodology provided for in point 18 of the Guidelines is excessively abstract and therefore contrary to Article 49 of the Charter.

First of all, the Court considered that, in the present case, since the applicant participated in a market-sharing agreement designed to restrict access by Japanese producers to the EEA, the Commission rightly held that it would not be appropriate to apply a methodology which is based on its actual sales in the EEA. The Court also considered that, in the light of the nature of the infringement in question, a methodology which takes into account the worldwide market shares is appropriate for reflecting the weight of the infringement.

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<sup>400</sup> CJEU judgment of 21 May 2014 in Case T-519/09, *Toshiba Corp v European Commission*.

Having regard to the extremely harmful nature of a market-sharing agreement, one of the most serious infringements of Article 81 EC, the imposition of sufficiently dissuasive penalties against non-European producers which undertake not to compete with European producers in their territory is justified. The Court underlined that the methodology set out in paragraph 18 of the 2006 Guidelines is not a mere presumption. The worldwide market shares give the best adapted representation of the capacity of those undertakings to cause significant damage to other operators in the European market and give an indication of their contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had they not participated. The Court thus concluded that the methodology set out in paragraph 18 of the Guidelines is consistent with Article 23(3) of Regulation No 1/2003 and is not contrary to Article 49(3) of the Charter of Fundamental Rights.

### ***Article 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence***

The *ne bis in idem* principle is one of the cornerstones of criminal law and is based on the principle that no one shall be held liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted. Article 50 provides that criminal laws should respect this.

#### *Legislation*

To better protect and to reinforce the integrity of the EU's financial markets, a **Directive and a Regulation on Market Abuse** were adopted in 2014<sup>401</sup>. The Directive provides for minimum criminal sanctions for insider dealing and market manipulations while the Regulation allows regulators to impose administrative sanctions and other administrative measures in cases where someone tries to insider deal or manipulate the market. An exemption from the obligation to provide for administrative sanctions has been agreed in the scope of the Market Abuse Regulation: Member States may decide, in accordance with Article 26 Market Abuse Regulation, not to lay down rules for administrative sanctions where those breaches are already subject to criminal sanctions in their national law by 24 months after the entry into force of the regulation. The Directive clarifies that in the application of national law transposition measures, Member States should ensure that the imposition of criminal sanctions for offences and of administrative sanctions do not lead to a breach of the principle of *ne bis in idem* principle.

#### *Case Law*

In *Grande Stevens and Others v Italy*<sup>402</sup>, the ECtHR delivered a judgment concerning **administrative and criminal proceedings** against persons responsible for market manipulation. In this case the

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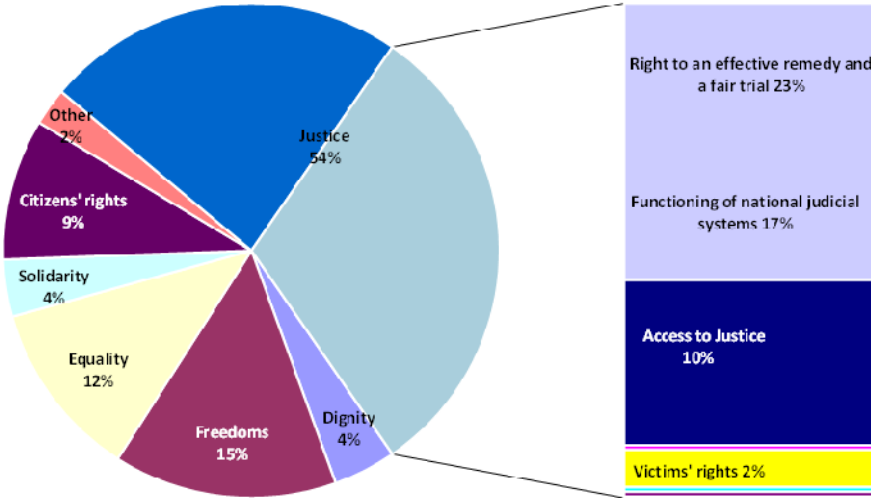
<sup>401</sup> Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) OJ L 173, 12.6.2014, p. 179–189 and Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance OJ L 173, 12.6.2014, p. 1.

<sup>402</sup> ECtHR Judgment in Case *Grande Stevens and Others v Italy* (nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10).

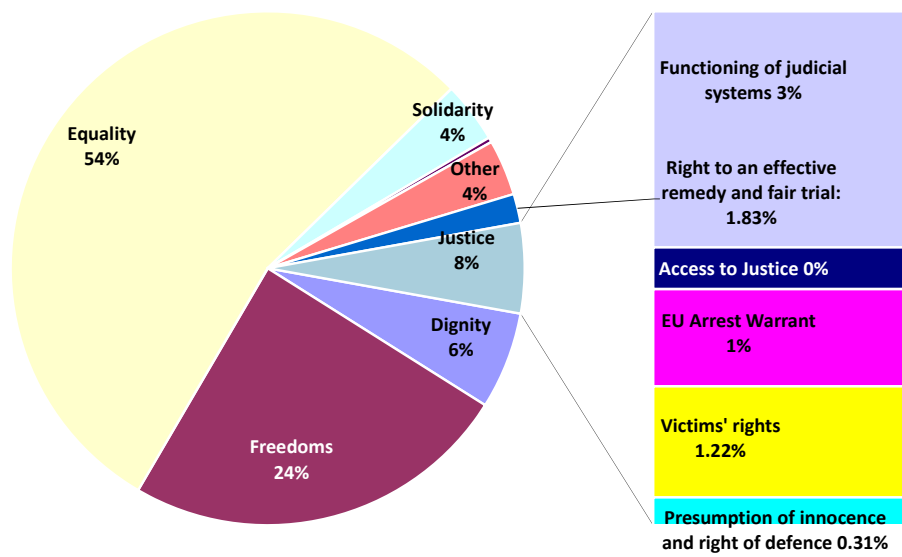


ECtHR observed that the prohibition on disseminating false or misleading information with regard to financial instruments was intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions, which undeniably amounted to an aim that was in the public interest. Accordingly, the fines imposed on the applicants, while severe, did not appear disproportionate in view of the conduct with which they had been charged. However, the subsequent criminal proceedings against the applicants concerned offences involving identical facts to those for which they had been finally convicted, breaching Article 4 of Protocol 7, and ought to consequently be closed as rapidly as possible.

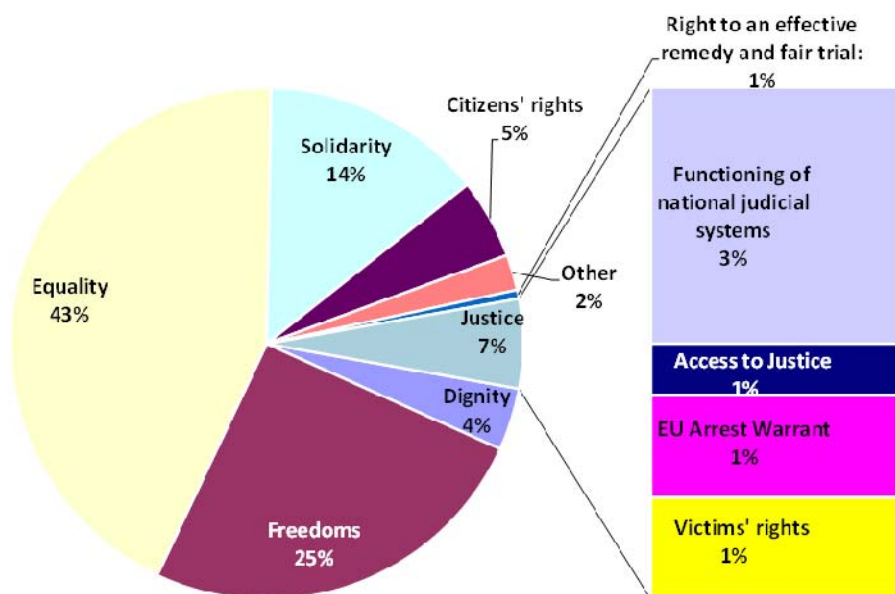
Letters (Justice)



Questions (Justice)



Petitions (Justice)



Source: European Commission

## Title VII

### General provisions governing the interpretation and application of the Charter

The CJEU has delivered several judgments giving further guidance on the **applicability of the Charter**. In the **Dano case** the court stated that the conditions for receiving social security benefits did not result from Union law but directly from that of the Member States. Therefore, the Charter was not applicable.

In the **AMS case** the CJEU held that Article 27 of the EU Charter cannot be invoked in a dispute between individuals ("horizontal application") in order not to apply a national provision which is not in conformity with the Directive.

In a landmark case of 2014 (**Digital Rights Ireland**) the CJEU held the EU Data Retention Directive to breach Articles 7 and 8 of the Charter and subsequently declared it invalid. It did so by carefully examining all **conditions laid down in Article 52 (1)** of the Charter which may justify the limitation of fundamental rights. In the case concerned it found the limitations to fail the proportionality test.

#### **Article 51 – Field of application**

The scope of applicability of the Charter is defined in Article 51. It clearly states that it is addressed to all EU institutions, bodies, offices and Agencies and to the Member States in so far as the latter are implementing EU law. It further clarifies that the Charter cannot extend the field of application of EU law or any competences of the EU as defined in the Treaties.

#### *Case Law*

The question of applicability arose in some cases in 2014. In the case of **Siragusa**<sup>403</sup> the Regional Administrative Court in Sicily (*Tribunale Amministrativo Regionale per la Sicilia*) lodged a request for a preliminary ruling to the CJEU. This case concerned the interaction between the public interest in the protection of the environment and the private right to property as provided for by Article 17 of the EU Charter of Fundamental Rights. By judgment of 6 March 2014, the CJEU declared itself not competent to reply to the preliminary question by the Italian Court, as the Italian legislation did not intend to apply EU law and thus the EU Charter of Fundamental Rights.

Similarly, the CJEU held the Charter not to be applicable in the **Dano**<sup>404</sup> case. It concerned, in particular, the interpretation of EU legislation concerning the coordination of social security systems and of the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. In so far as questions on the interpretation of Articles 1, 20 and 51 of the Charter were concerned the CJEU refused to rule on them. It stated that the conditions for

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<sup>403</sup> CJEU judgment of 18.4.2013 in case C-206/13 *Siragusa*.

<sup>404</sup> CJEU judgment of 11.11. 2014 in case C-333/13 *Dano*; for further details see also case description under Articles 20 and 45.

receiving social security benefits did not result from Union law but directly from that of the Member States. Therefore, the Charter was not applicable.

By contrast the CJEU held the Charter to be applicable in the case of *Pfleger*.<sup>405</sup> The case concerned restrictions on the use of gaming machines. The concerned Member State, Austria argued that this was an entirely internal case without cross-border factors. As a consequence it was claimed that no EU law was implemented. However, the Court pointed to the ownership of the machines by a Czech company and the resulting issue of freedom to provide services. It further held that, where a Member State relies on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter. Thus the CJEU ruled that the national rules in question could fall under the exceptions provided for only if they were compatible with the fundamental rights of the Charter. Therefore the use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty had to be regarded, as 'implementing Union law' within the meaning of Article 51(1) of the Charter.

The CJEU also confirmed that Member States are under an obligation to respect the Charter, whenever they implement Union law, including when disbursing Union funds. In the case *Liivimaa Lihaveis MTÜ*<sup>406</sup> the Court held that the Member States implement Union law whenever "EU law required the [...] Member States involved in [an] operational programme to implement that programme".<sup>407</sup> Whenever a Member State adopts legislation, or any other (guidance) document of a non-legislative nature, such as a programme manual, and whenever its adoption is required by EU law, the Member State is implementing Union law. In the above case, the programme manual excluded the possibility of judicial review of decisions by the monitoring committee rejecting a subsidy. The CJEU held this to infringe the right to an effective remedy as enshrined in Article 47 of the Charter.

The question of the Charter's applicability was also raised in the case *AMS v CGT*.<sup>408</sup> Here the CJEU held that **Article 27 of the EU Charter**, alone or in conjunction with Directive 2002/14 (information and consultation of workers), **cannot be invoked in a dispute between individuals ("horizontal application")** in order not to apply a national provision which is not in conformity with the Directive.<sup>409</sup> While Article 27 is applicable in the case at issue, the Court observed that Article 27 must be given more specific expression by provisions of EU law or national law to be fully effective. The Court also declared that trade unions cannot rely on the provisions of Directive 2002/14 as such against the private employer, AMS, since these provisions do not have horizontal direct effect.

As regards rights and principles of the Charter the CJEU in the case *Glatzel*<sup>410</sup> emphasised that by virtue of the second sentence of Article 51(1) of the Charter, the EU legislature is to observe and

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<sup>405</sup> CJEU judgment of 30.4.2014 in case C-390/12 *Pfleger and Others*.

<sup>406</sup> CJEU judgment of 12.9.2014 in Case C-562/12 *Liivimaa Lihaveis MTÜ*.

<sup>407</sup> *Ibid.*, at para 63.

<sup>408</sup> CJEU, judgment of 15.1.2014 in case C-176/12, *Association de médiation sociale (AMS) v Union locale des syndicats CGT* (Grand Chamber).

<sup>409</sup> See also above under Articles 20 and 27.

<sup>410</sup> CJEU, judgment of 2.5.2014, case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, see also above under Article 26.

promote the application of the principles laid down in it. In the concrete case it referred particularly to the principle of the integration of persons with disabilities according to Article 26 of the Charter. The latter states that the Union is to recognise and respect the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

### ***Article 52 – Scope and interpretation of rights and principles***

Article 52 lays down main general provisions on the scope and interpretation of rights and principles. In its first paragraph it defines the strict conditions under which the rights of the Charter can be limited. It also explains the relation of the Charter to the ECHR aiming at the highest level of fundamental rights protection possible (paragraph 3). It also clarifies that the principles named in the Charter may be implemented by the EU institutions in their legislative and executive acts – and similarly by the Member States where they implement EU law (paragraph 5). Yet they can only be invoked in court in view of the interpretation of such acts. This means that these principles do not confer subjective rights on the individual.

It is thus important to distinguish whether a certain Charter article contains concrete rights, or rather principles. This is not always clear from the wording of the article itself. Guidance on the nature of the different Charter articles can be found in the explanatory memorandum to the Charter. This explanatory memorandum explicitly lists Article 25 (the rights of the elderly), Article 26 (integration of persons with disabilities) and Article 37 (environmental protection) as examples of Charter provisions which contain principles, as opposed to subjective rights. It also explicitly mentions under Article 34 (1) (social security and social assistance), Article 35 (health care), Article 36 (access to services of general economic interest) and Article 38 (consumer protection) that the articles set out principles, not rights.

Regarding the difference between rights and principles, the explanatory memorandum points out that subjective rights shall be respected, whereas principles shall be observed (Article 51(1) of the charter). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice<sup>411</sup> and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law.

The explanatory memorandum also lists examples of articles which contain both elements of a right and of a principle, such as Article 23 (equality between women and men), 33 (family and professional life) and 34 (social security and social assistance).

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<sup>411</sup> Cf. notably case-law on the 'precautionary principle' in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 *Pfizer v Council*, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 *Van den Berg* [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations.

The discussion on the *summa divisio* between rights and principles versus the general principles of EU law recognised by the case law of the CJEU was prominently present in the *AMS* case.<sup>412</sup> In his Opinion, Advocate General Cruz Villalon elaborates extensively on the status of a fundamental right in the Charter as a ‘principle’, and on the question whether the national court is to refrain from applying national provisions contrary to acts which directly specify the substantive content of a ‘principle’. The main issue at stake in the case was whether a ‘principle’ may be relied on in a dispute between individuals. The case is discussed above under Article 27.

#### *Case law*

In one of the most important cases of 2014, the ***Digital Rights Ireland***<sup>413</sup> case, the CJEU, when examining the validity of the Data Retention Directive, had undertaken careful assessment of all conditions listed in Article 52 (1) for limitations of fundamental rights. It then declared the directive invalid, because it disproportionately restricted rights to private life and to the protection of personal data as guaranteed by Articles 7 and 8 of the Charter. The Directive had required Member States to ensure that telecommunications service providers retain traffic and location data of their customers for a period between six months and two years and to make these data available, on request, to law enforcement authorities for the purposes of investigating, detecting and prosecuting serious crime and terrorism. The Court agreed that the directive met most of the conditions mapped out in Article 52 (1) for a justified limitation of the rights under Articles 7 and 8. It confirmed that the essence of the rights were retained, and that the limitations were imposed in order to achieve an objective of a general interest recognised by the Union, namely that of fighting terrorism and organised crime. It also agreed. Within the proportionality test (examining appropriateness and necessity of the restrictions) the Court went into considerable detail. It agreed that the measure was an appropriate one to achieve the objective of providing enhanced security. However, it observed that the Directive did not lay down clear and precise rules governing the extent of the interference with the Articles 7 and 8 of the Charter. Hence the Court took the view that the Directive, whilst entailing a wide-ranging and particularly serious interference with those fundamental rights, did not precisely circumscribe such interference by provisions to ensure that it would be actually limited to what is strictly necessary. **The judgment also clarified that specific safeguards for the purpose of protecting fundamental rights would have to be expressly included in the secondary legislation and not left to the discretion of national law.**

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<sup>412</sup> CJEU Judgment (Grand Chamber) of 15 January 2014 in Case C-176/12, *Association de médiation sociale (AMS) v Union locale des syndicats CGT*, see also Article 28 and Article 51.

<sup>413</sup> CJEU judgment of 8.4.2014 in Cases C-293/12 and C-594/12 *Digital Rights Ireland and Kärntner Landesregierung*, see also above under Article 8.

### ***Article 53 – Level of protection***

Article 53 ensures that nothing in the Charter will be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by Union law, international law and international agreements to which the Union or all the Member States are party, including the ECHR. Its main aim is thus to provide the minimum standard of fundamental right protection allowing for wider protection under instruments other than the Charter where they are applicable.

This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR.

### ***Article 54 – Prohibition of abuse of rights***

Furthermore Article 54 provides for a safeguard against an abuse of the Charter rights. It states that nothing in the Charter can be interpreted as implying any right to engage in activities aimed at the destruction of rights or freedoms recognised in the Charter or at their limitation beyond its extent as envisaged in the Charter.