EUROPEAN
COMMISSION

Brussels, 14.4.2014
SWD(2014) 141 final

PART 1/2

COMMISSION STAFF WORKING DOCUMENT
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

2013 Report on the application of the EU Charter of Fundamental Rights

{COM(2014) 224 final}
{SWD(2014) 142 final}

INTRODUCTION

After the entry into force of the EU Charter of Fundamental Rights[1] (the Charter), in December 2009, the European Commission adopted a Strategy on the effective implementation of the Charter[2] setting as an objective that the EU is beyond reproach as regards the respect of fundamental rights, in particular when it legislates. The European 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 2013 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 role of the European Commission is to ensure that all its acts respect the Charter. In fact, 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 factor connecting an alleged violation of the Charter with EU law will depend on the situation in question. For example, a connecting factor exists: when national legislation transposes an EU Directive in a way contrary to fundamental rights, when a public authority applies EU law in a manner contrary to fundamental rights, or when a final decision of a national court applies or interprets EU law in a way contrary to fundamental rights.

If a national authority (administration or court) violates fundamental rights set out in the Charter when implementing EU law, the European Commission can take the matter to the **CJEU** and start an infringement procedure against the Member State in question. The European 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. In particular, if it detects a wider, e.g. structural, problem, the European Commission can contact the national authorities to have it solved, and ultimately it can take a Member State to the CJEU. The objective of these infringement procedures 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.

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.

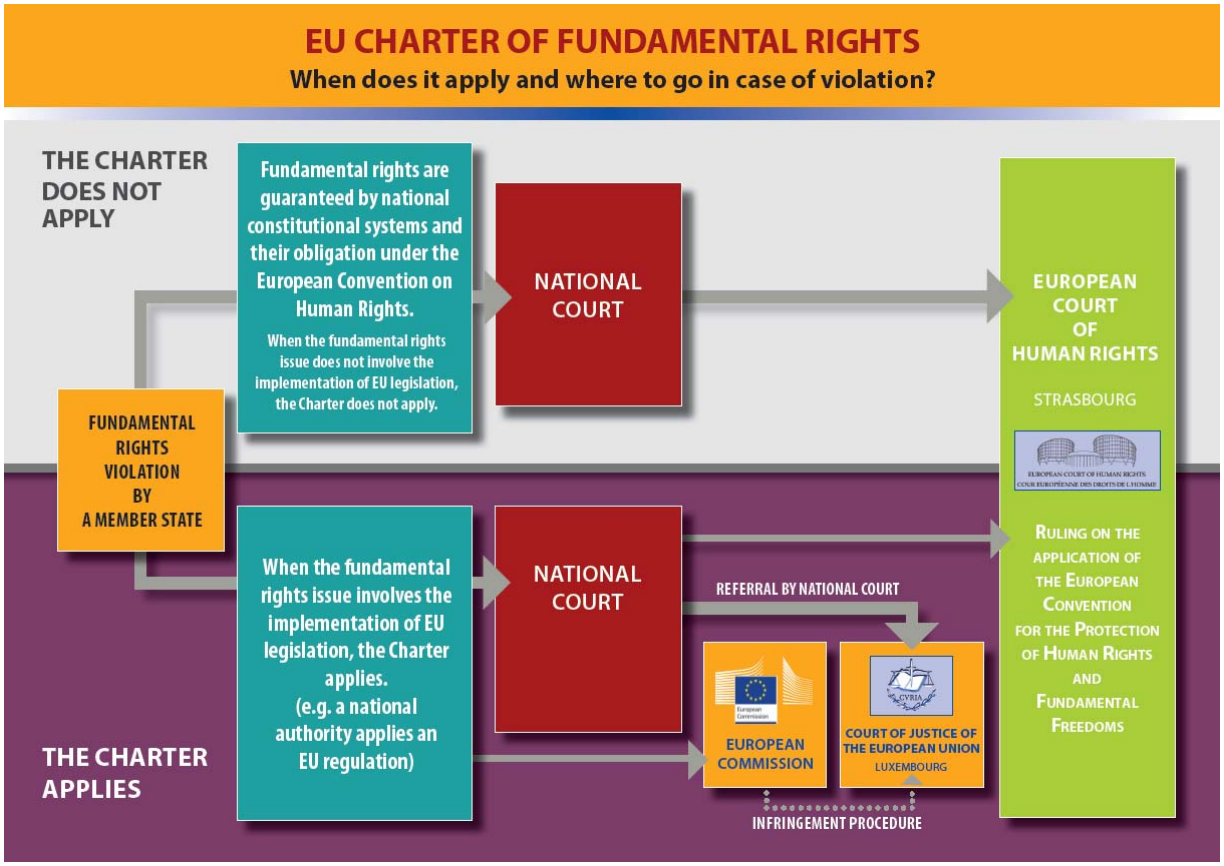
The European Commission cannot pursue complaints which concern matters outside the scope of EU Law. This does not necessarily mean that there has not been a violation of fundamental rights. If a

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

[2] Available at: http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf.

situation does not relate to EU law, it is for the Member States alone to ensure that their obligations regarding fundamental rights are respected. Member States have extensive national rules on fundamental rights, which are guaranteed by national judges and 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[3].



The European Convention of Human Rights (ECHR)

Therefore, where the Charter is not applicable in certain situations 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, which can be considered a milestone in the accession process. As a next step, the European Commission has asked the Court to give its opinion on the draft agreement.

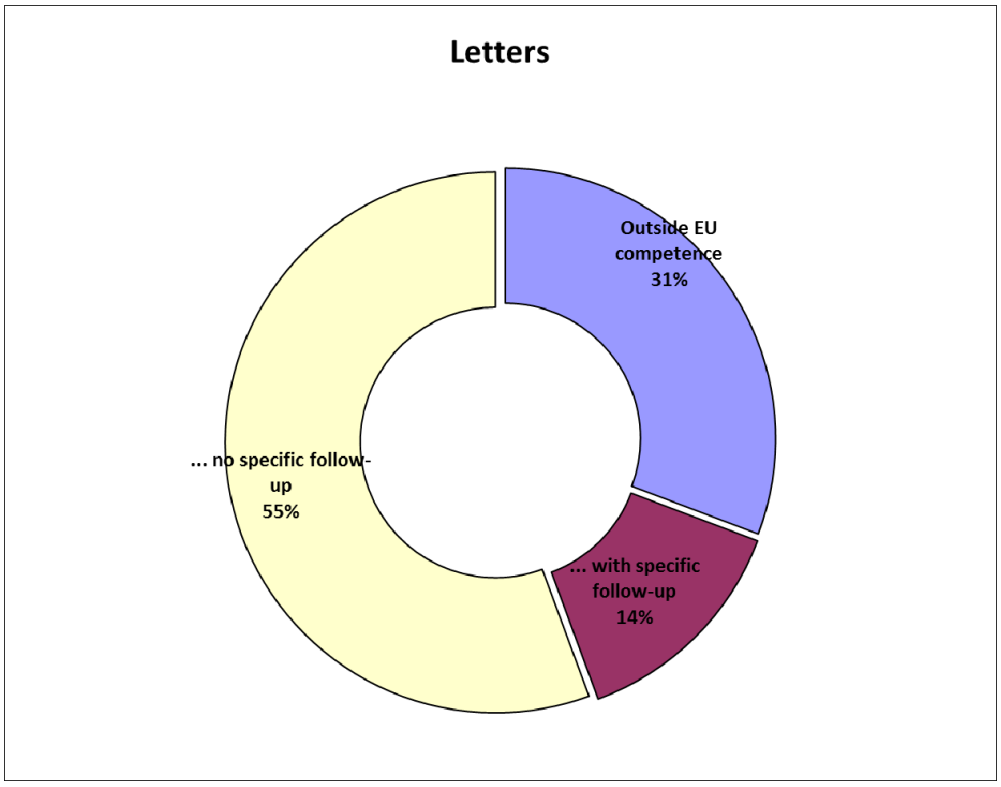
Furthermore, any application of the Charter must comply with the ECHR as interpreted in the case law of the ECtHR. The Charter itself contains an explicit reference to the ECHR in its Articles 52 and 53. Data collected by the EU Fundamental Rights Agency on references made to the Charter in national

[3] Available at: http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Checklist/.

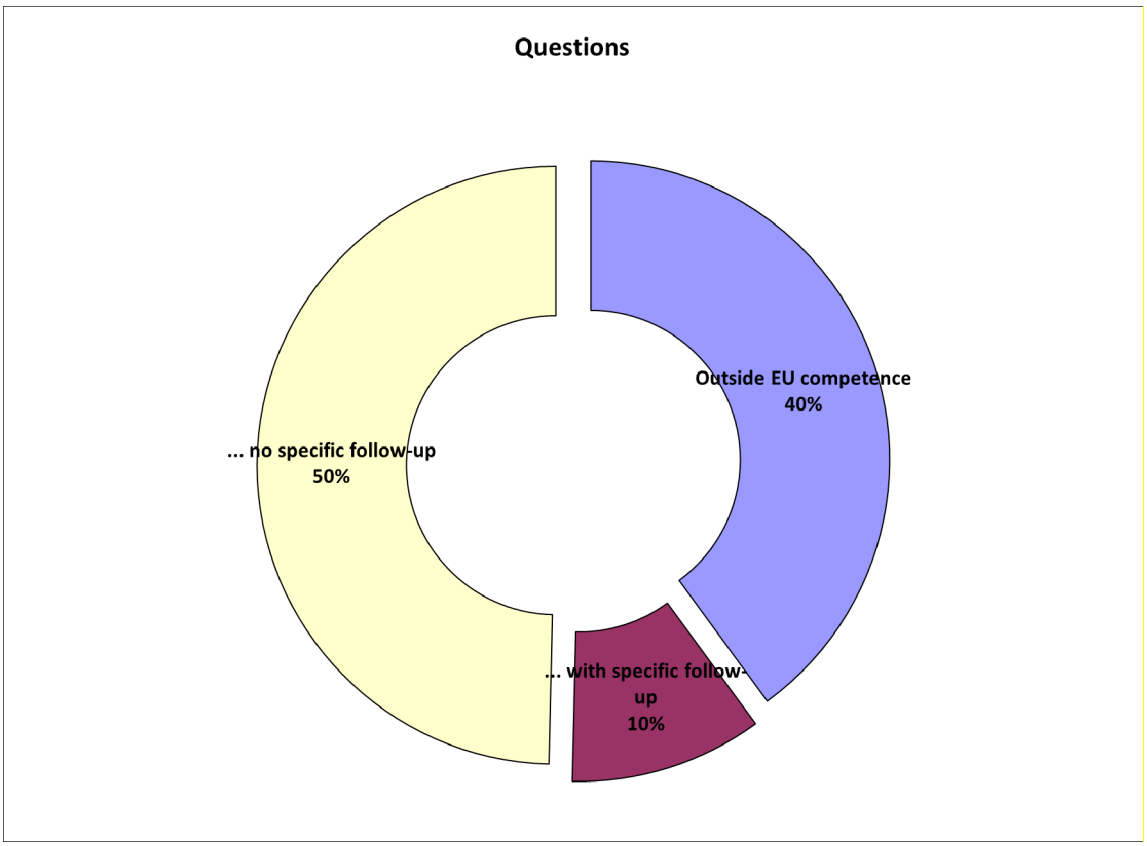
judgments in two thirds of the cases also show references to the ECHR. Thus, there is a certain degree of parallelism when referring to both the ECHR as well as the Charter in judgments handed down in the Member States.

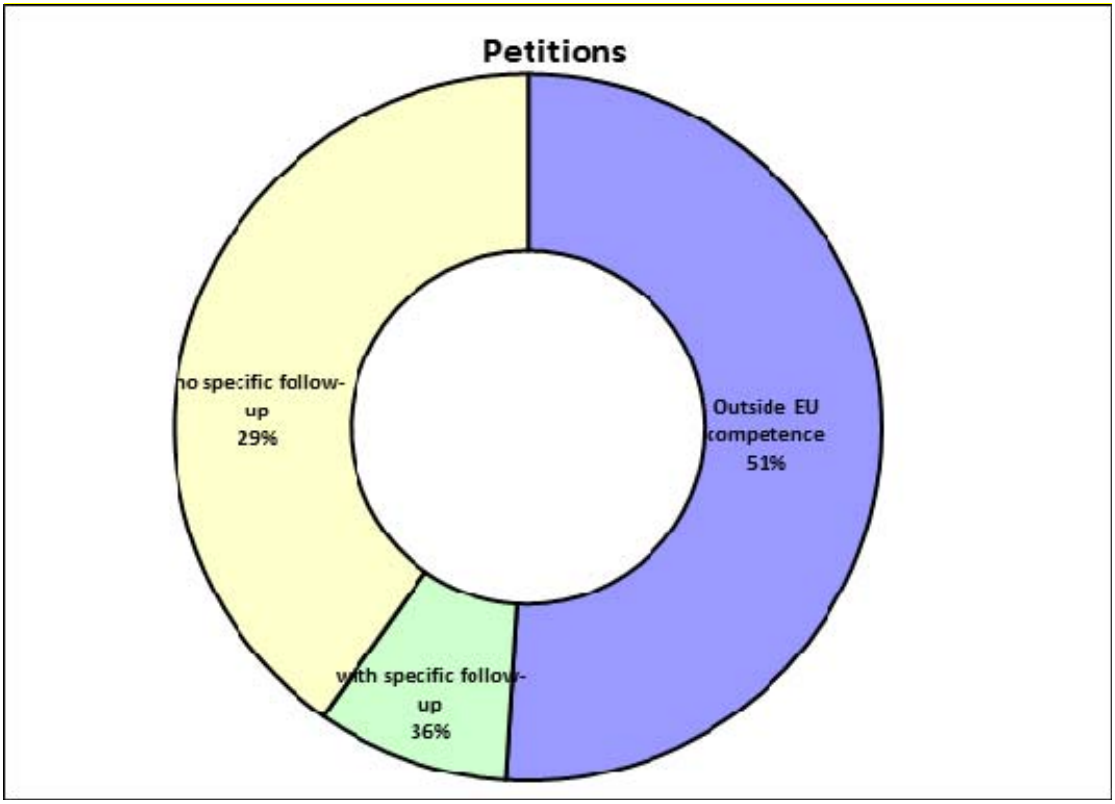
Overview of the letters and questions to the European Commission on fundamental rights

Among the **letters from the general public** on fundamental rights issues received by the European Commission in 2013, 69 % concerned situations where the Charter could apply. In a number of cases, the European 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).



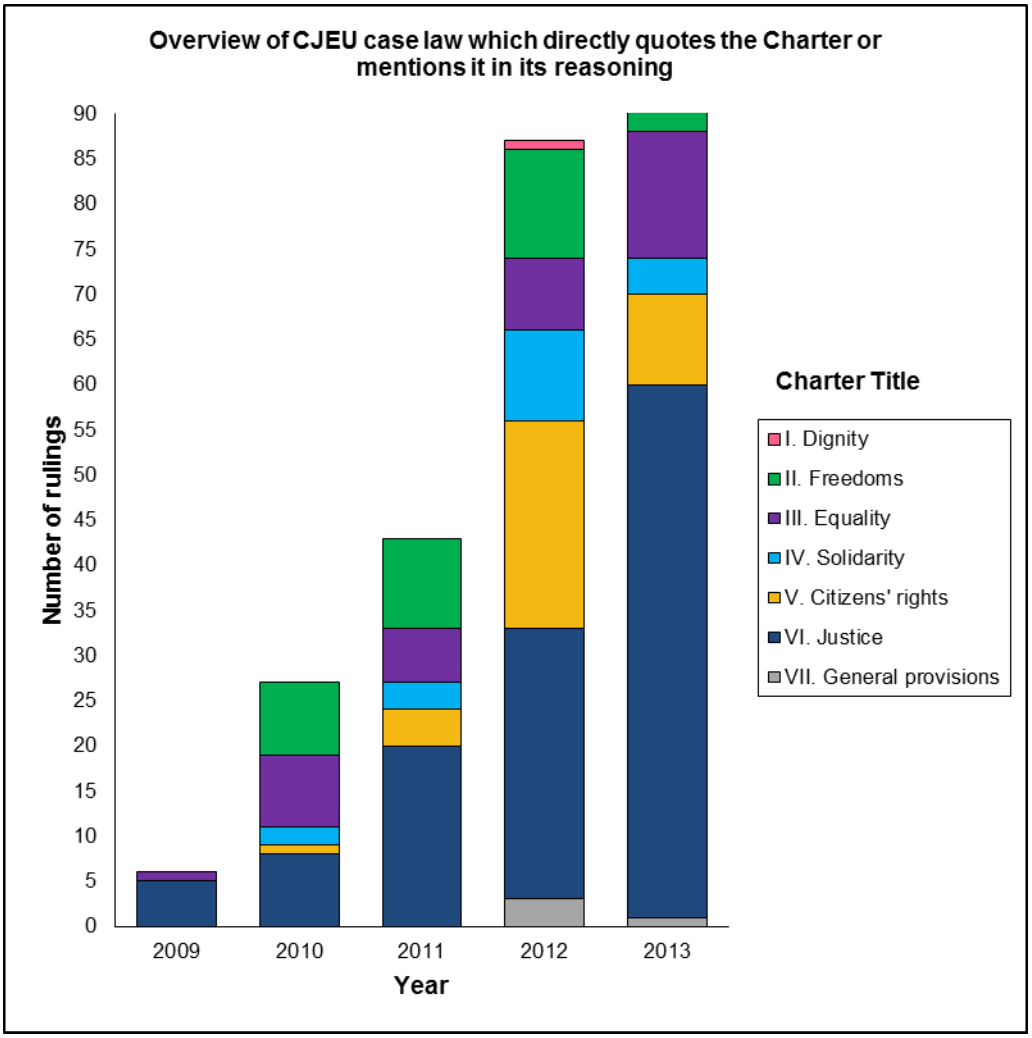
Among the **questions from the European Parliament** 60 % concerned issues within EU competence **whereas among its petitions 55% concerned such issues.** In a number of cases, the European Commission contacted the Member States to obtain clarifications on alleged violations. The replies given by the European Commission explained or clarified the relevant policies and on-going initiatives.


Questions
Outside EU competence
40%
... no specific follow-up
50%
... with specific follow-up
10%

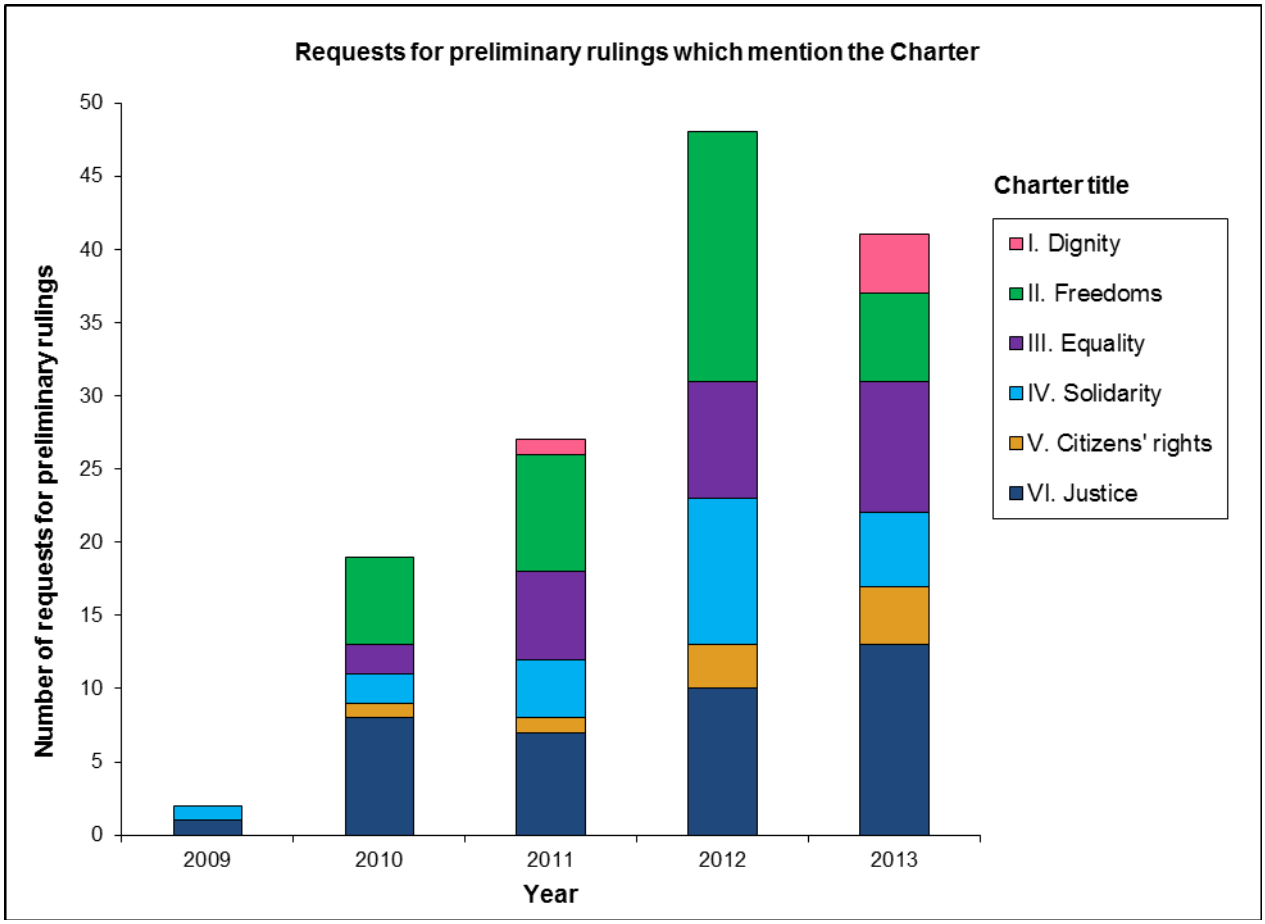

Petitions
Outside EU competence
51%
no specific follow-up
29%
with specific follow-up
36%

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 114, which is almost a triple of the number of cases of 2011 (see Appendix I for an overview of all relevant rulings).

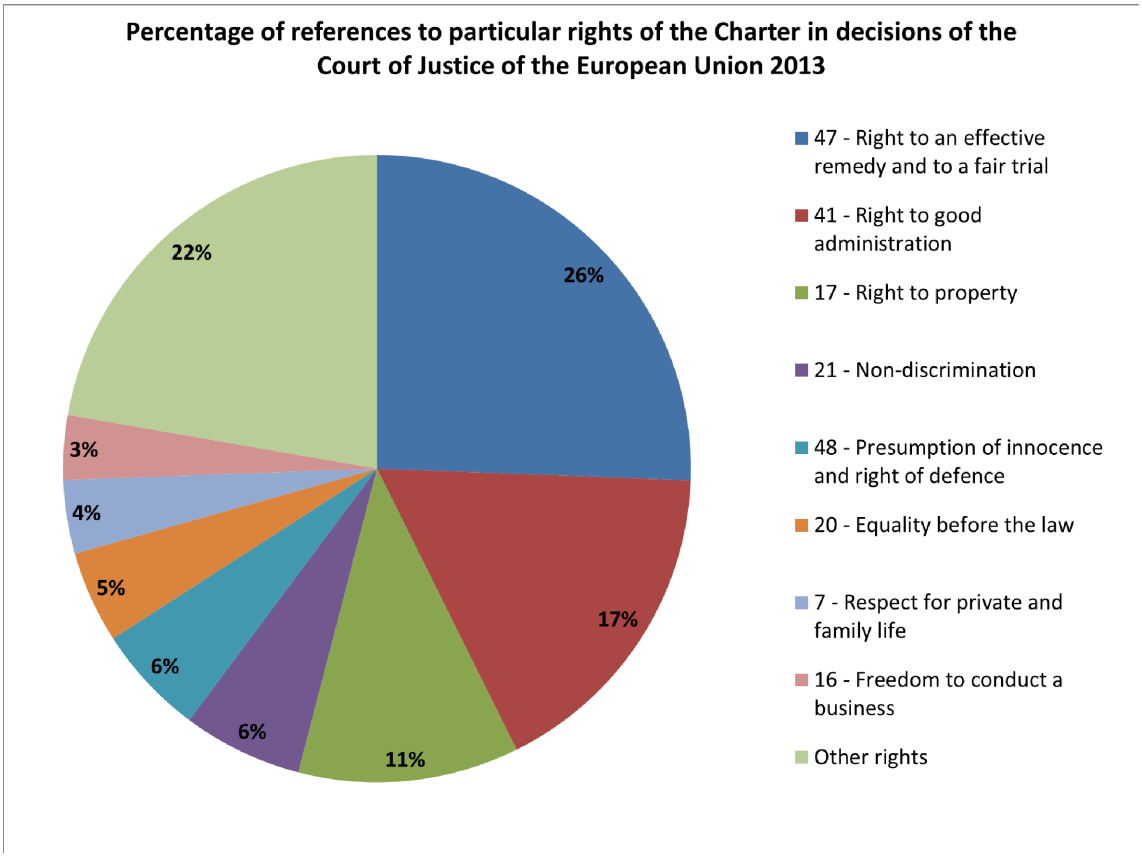


National courts when addressing questions to the CJEU (preliminary rulings) are often referring to the Charter. Regarding applications for preliminary rulings submitted by national judges to the CJEU in 2013, 41 of the requests submitted contained a reference to the Charter, which is exactly the same number as for 2012 (See Appendix II for an overview of the applications for preliminary rulings submitted in 2013 which refer to the Charter). This is a rise by 65 % as compared to 2011, when only 27 requests submitted contained a reference to the Charter.



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

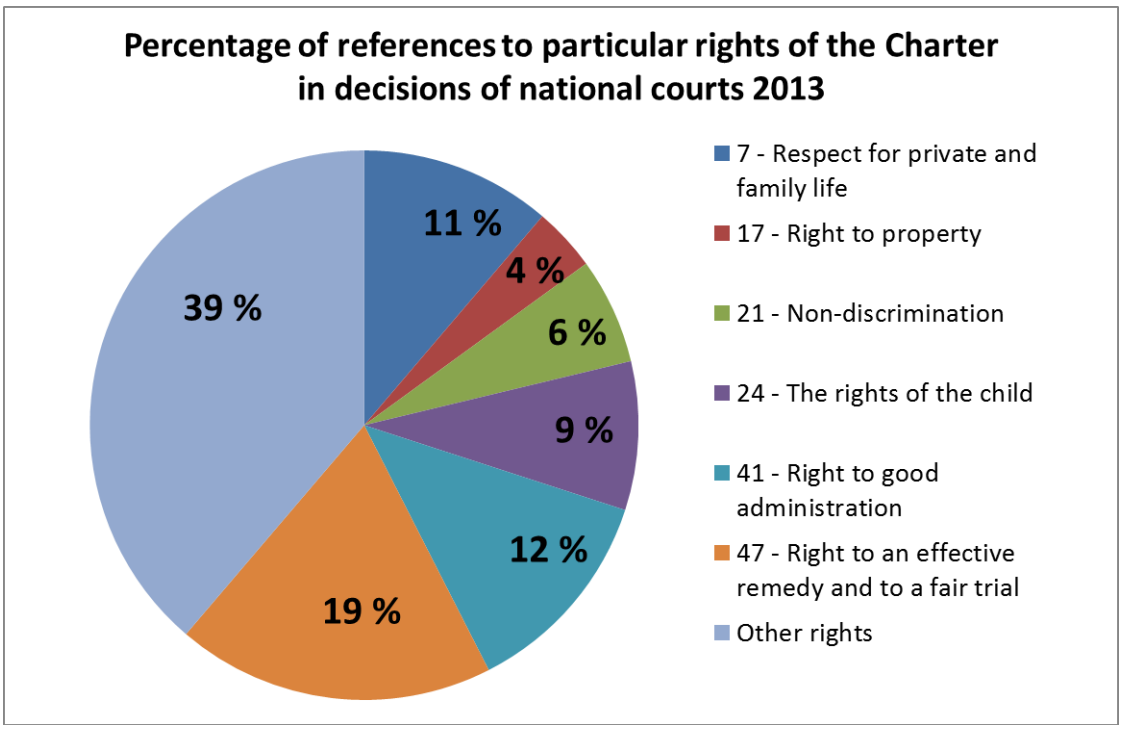
When focussing on the different articles of the Charter referred to in cases before the EU Courts and before national courts the following articles featured prominently in both scenarios: the right to an effective remedy and to a fair trial, and the right to good administration. However, the right to property, the right not to be discriminated against, the presumption of innocence and the right of defence, and the right to equality before the law were more often referred to in the jurisprudence of the EU Courts, whereas the right to respect for private and family life and rights of the child played a more important role before national courts.



Source: European European Commission

Note: The basis for this pie chart is the case law as referred to in Appendix I. In those cases where reference was made to both a Title VII (general provisions) article and an article contained in Title I-VI, only the latter was taken into account. Those cases which only referred to a Title VII article (C-276/12 Sabou) were not taken into account. The total number of judgments analysed therefore amounted to 113, and the total number of references to different Charter articles amounted to 212, as several judgments referred to more than one article. The percentages were calculated on the basis of these 211 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 2013** were the right to an effective remedy and to a fair trial, the right to good administration, and the right to respect for private and family life. Please note that the chart below only takes into account those decisions were the Charter was referred to in the reasoning of the court.



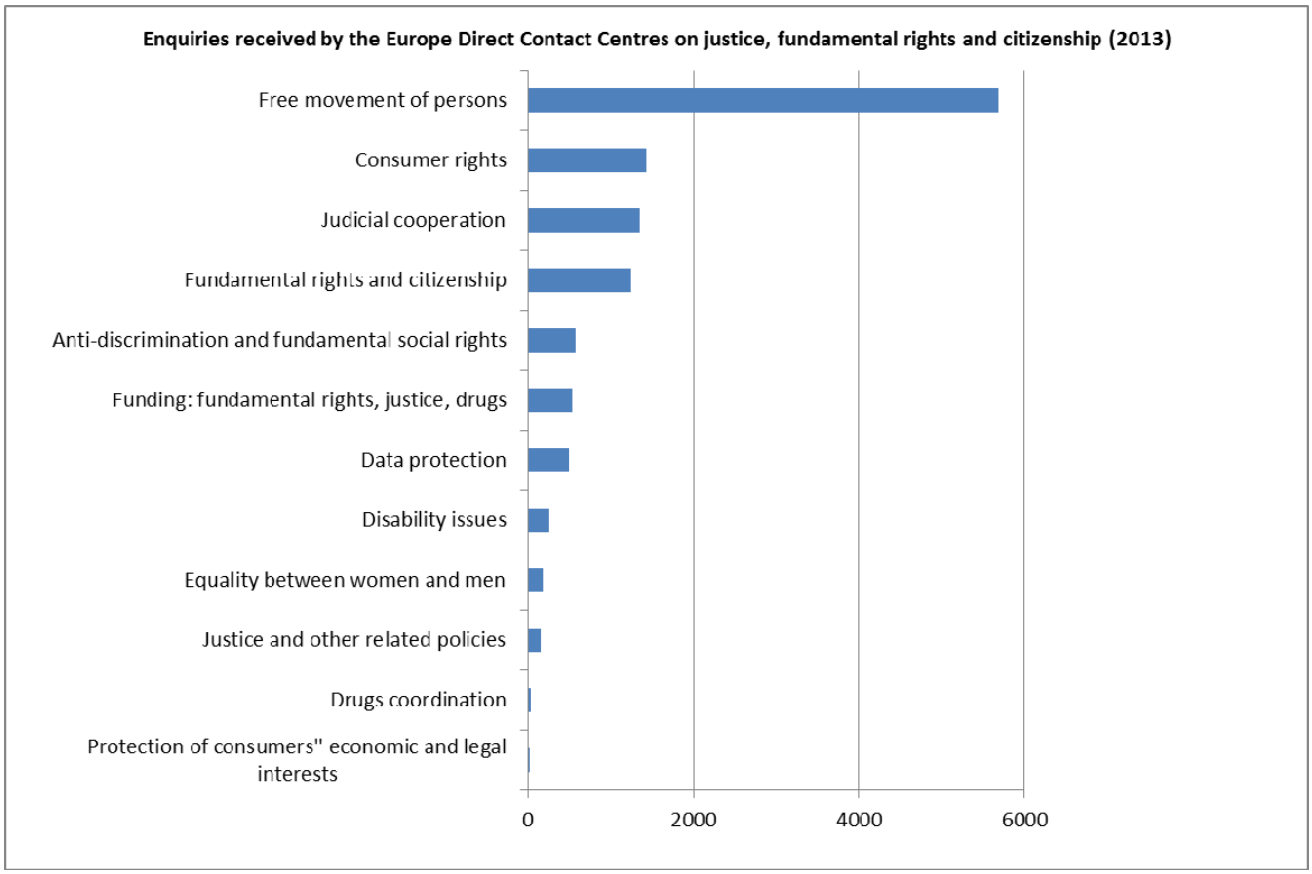
Source: European Union Agency for Fundamental Rights (FRA)[4]

Note: Only decisions where the Charter was referred to in the reasoning of the courts were taken into account, and only up to 5 judgments per Member State were considered. Just as with the pie-chart on the EU Courts, references to articles in Title VII (general provisions) were not taken into account. The category 'Other Rights' refers to all rights for which the percentage amounts to less than 3 %.

[4] For more information, see also the 2013 Annual Report of the European Union Agency for Fundamental Rights, which is expected to be adopted in June 2014, and which will be available on the FRA website under "publications and resources": http://fra.europa.eu/en/publications-and-resources.

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 2013, the EDCC replied to 11974 enquiries from citizens on topics such as free movement of persons (48 % of the total number of enquiries), consumer rights (12%) and judicial cooperation (11%).



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 2013. 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 six titles of the Charter itself: Dignity, Freedoms, Equality, Solidarity, Citizens' rights and Justice. Each of the six 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 2013 within other (proposed or adopted) legislation;
  - Follow-up: infringement procedures launched by the Commission against Member States for not or wrongly implementing relevant legislation;
- *Policies:*
  - Examples of how the EU institutions and the Member States ensured compliance with and have applied the Charter in 2013 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);
- An *overview of questions and petitions* from the European Parliament, and letters from the general public received in 2013 focusing on main fundamental rights issues;
- Data gathered by *the EU Agency for Fundamental Rights* throughout 2013.

1. Dignity

Human dignity

Right to life

Right to the integrity of the person

Prohibition of torture and inhuman or degrading treatment or punishment

Prohibition of slavery and forced labour

In 2013, The European Commission adopted its first **Communication on female genital mutilation** demonstrating the commitment of the EU to address effectively one aspect of the issue of gender based violence.

A **recast piece of legislation on asylum** (determination of Member States responsible for examining applications and reception of applicants) was adopted. It guarantees effective remedies to asylum applicants as regards appeals against transfer decisions in accordance with case law of the CJEU. This ensures that asylum seekers cannot be sent back to a Member State where there is a serious risk of violation of their fundamental rights under the newly agreed rules. It also offers better protection to the most vulnerable asylum seekers, e.g. minors.

The European Commission presented a **Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex** in response to the judgment of the CJEU, European Parliament v. Council of EU (C-355/10)**.** It aims at establishing clear rules for joint patrolling as regards interception, including on the high seas, search and rescue situations which arise during these surveillance operations and disembarkation. It emphasises also the obligation to respect the principle of *non-refoulement*.

The European Commission adopted the **EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 in June 2012.,** One of its actions was the launch of **the European Civil Society Platform against Trafficking in Human Beings** in 2013 which brought together numerous civil society organisations from the EU MS as well as neighbouring priority countries. The European Commission also established an **EU anti-trafficking website.** The **EU Anti-trafficking Day** conference in Vilnius explored the links between Trafficking in Human Beings and the Internet; issues discussed included the problem of online recruitment of victims and facilitation of trafficking in human beings as well as online awareness raising and investigation.

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 a 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.[5] 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 2013. Thus, the European Commission took the right to human dignity into account when preparing a legislative proposal[6] for amendment of Regulation 1236/2005 concerning **trade in certain goods which could be used for capital punishment**, torture or other cruel, inhuman or degrading treatment or punishment, notably with a view to improving export controls on certain medicinal products to prevent the use of such products for capital punishment.[7]

Furthermore, when adopting a legislative package (notably Regulations 1141/2011, 1147/2011 and Decision 2011/8042)[8] allowing the use of **security scanners** at EU airports the European Commission had considered the impact on fundamental rights, namely on human dignity. Subsequently, in 2013, the European Commission received a number of parliamentary written questions and letters from citizens on security scanners and their deployment at the airports of a Member State. The issues raised concerned the policy of not offering passengers alternative control methods ("opt-out") on request, as provided for in the regulation. Thus, the services of the European Commission investigated the compliance of such a policy with EU law. They came to the conclusion that the policy of the Member State in question risks to constitute a breach of EU law. The European Commission informed this Member State of the assessment of their policy requesting it on 8 July 2013 to take corrective action. On 21 November the Member State issued a new measure. This new legal framework offers to passengers the possibility to opt out of being scanned by a security scanner.

Case law

As regards minimum benefits for asylum seekers the CJEU had already decided in 2012[9] that a Member State in receipt of an application for asylum is obliged to **grant the minimum conditions for reception of asylum seekers** laid down in Directive 2003/9 even to an asylum seeker in respect of whom it decides to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant. Subsequently, on 17 April 2013, the French ***Conseil d'Etat*** **annulled internal** guidelines which until then had excluded such asylum applicants from minimum benefits.

---

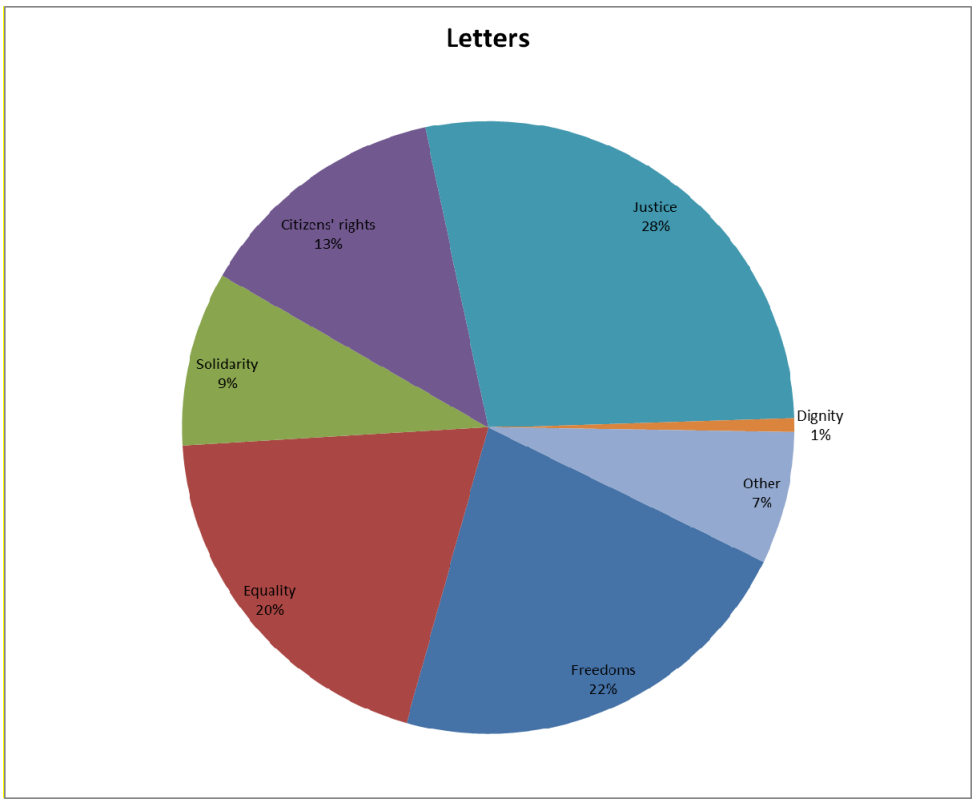
[5] In similar form they are guaranteed by the European Convention of Human Rights.

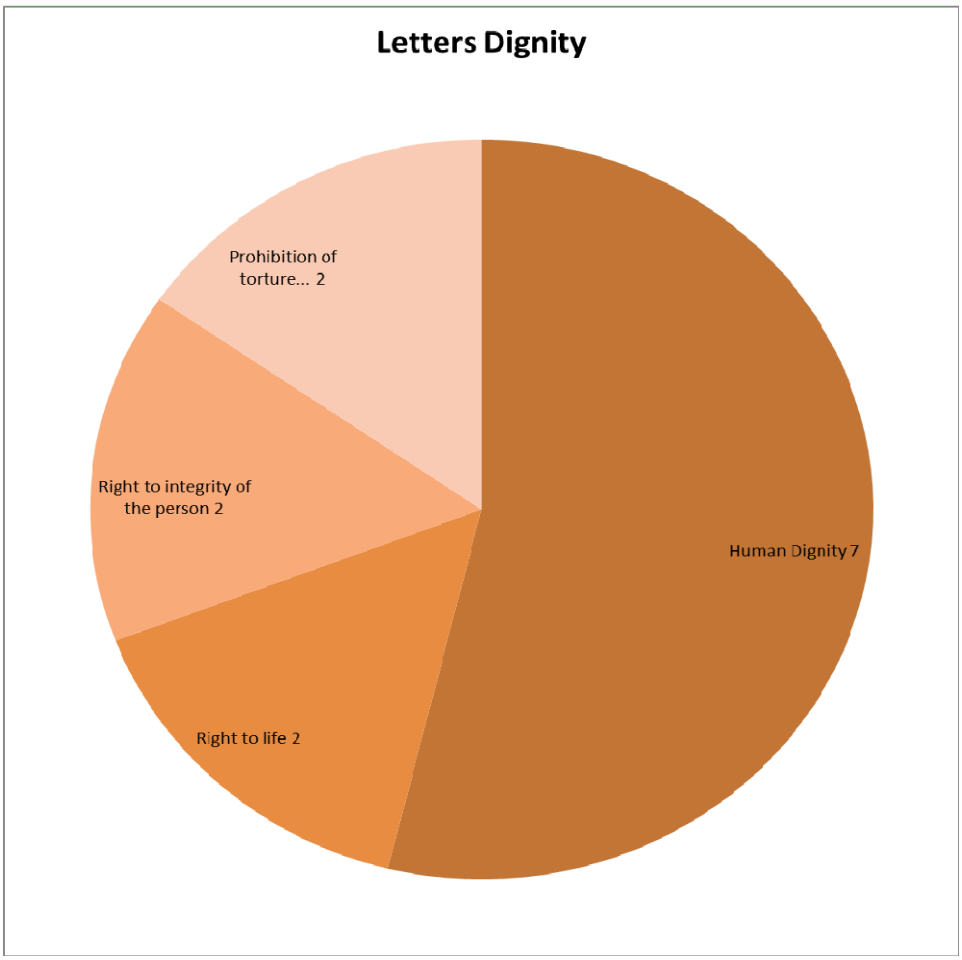
[6] Document COM(2014)1 of 14 January 2014, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment; available under: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52014PC0001:EN:NOT .

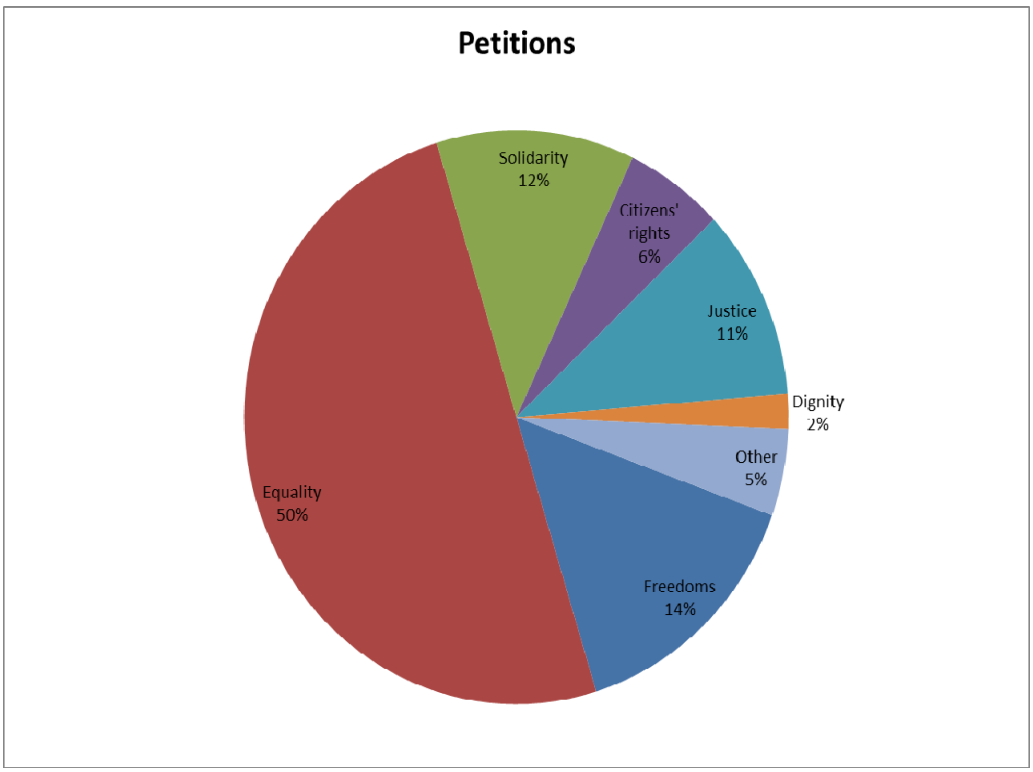
[7] See also European Commission Regulation 1352/2011 of 20 December 2011.European Commission

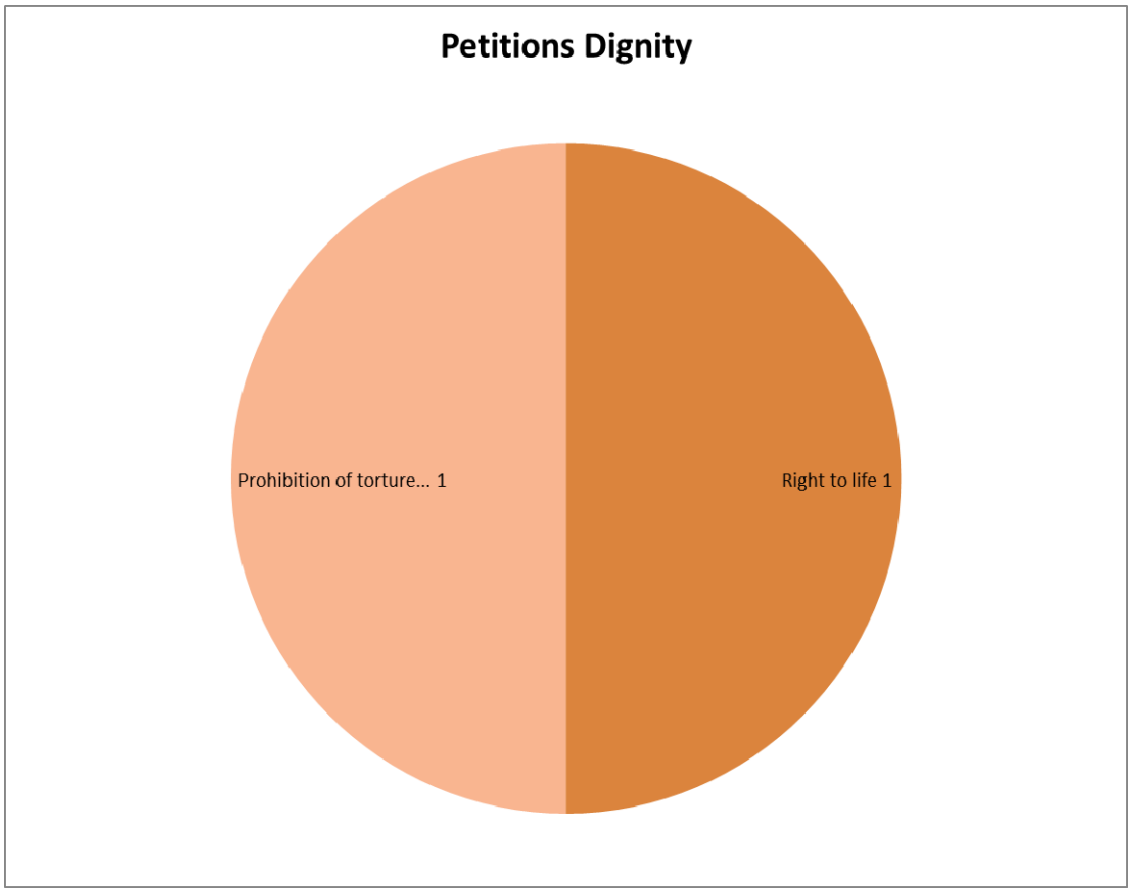
[8] European Commission Regulation No 1141/2011 amending Regulation No 272/2009 supplementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports Text with EEA relevance, OJ L 293, 11.11.2011, p. 22; European Commission Implementing Regulation No 1147/2011 amending Regulation No 185/2010 implementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports Text with EEA relevance; European Commission Decision 2011/8042/EU of 14 November 2011 addressed to all Member States; OJ L 294, 12.11.2011, p. 7.

[9] CJEU, Case C-179/11, Cimade and GISTI , 27.09.2012.


Letters
Justice
28%
Dignity
1%
Other
7%
Freedoms
22%
Equality
20%
Solidarity
9%
Citizens' rights
13%


Letters Dignity
Human Dignity 7
Right to life 2
Right to integrity of the person 2
Prohibition of torture... 2


Petitions
Solidarity 12%
Citizens' rights 6%
Justice 11%
Dignity 2%
Other 5%
Freedoms 14%
Equality 50%


Petitions Dignity
Prohibition of torture... 1
Right to life 1

Ruling of the Supreme Court of the Czech Republic[10]

In a case where a patient in a psychiatric hospital was fastened to a toilet for 4 hours and found death after insufficient supervision, the mother of the patient brought proceedings against the hospital claiming among others an infringement of the right to human dignity. The district court held that, even though the way the patient was treated restricted her right to human dignity, it was legitimate. The case went up to the Supreme Court. One of the legal questions raised before the Supreme Court was whether a person with a grave mental disorder can be treated in a less dignified manner than a healthy person. The Supreme Court determined that human dignity is protected by both national and international law, including the Charter of Fundamental Rights. The Supreme Court disagreed with the district court and concluded that the right to human dignity is absolute. The right to human dignity of a mentally disordered person cannot be any different from the protection of this right of any other person. Although the Charter was not directly applicable in this purely internal case it was used by the Supreme Court as point of reference to interpret the notion of human dignity.

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 from infringements by public authorities. On the other hand it also puts them under an obligation to promote such protection, e.g. by concrete legislation.

Legislation

In this context attention is drawn to the **Directive on combating the sexual abuse and sexual exploitation of children and child pornography**.[11] The deadline for the Member States to transpose this directive into national law was on 18 December 2013.

Article 3 (2) (c) of the Charter prohibits making the human body as such a source of financial gain in the fields of medicine and biology. Hence, Article 20 of Directive 2002/98/EC[12] sets out principles **governing voluntary and unpaid donation of blood and blood components.** It states that Member States shall take the necessary measures to encourage voluntary and unpaid blood donations with a view to ensuring that blood and blood components are as far as possible provided by such donations. In accordance with Article 20 (2) of the Directive, Member States shall submit reports on the practice of voluntary and unpaid blood donation to the European Commission every three years. The European Commission prepared a new survey on the implementation of this principle in the Member States which was launched by the end of 2013.

Policy

The European Commission supports Member States in 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, non-discrimination.[13] In 2013, the European Commission adopted its first Communication on female genital mutilation demonstrating the commitment of the EU to address the issue effectively. It also co-finances national awareness-raising campaigns against gender-based violence.

[10] Supreme Court of the Czech Republic (Nejvyšší soud), case 30 Cdo 3223/2011, J.M. v. The psychiatric hospital in Bohnice, 14.5.2013.

[11] 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.

[12] Directive 2002/98/EC setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC, OJ L 33, 8.2.2003, p. 30.

[13] see: Council Conclusions on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence adopted on 6 December 2012, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/134081.pdf.

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. This was in particular taken into account by EU Institutions in 2013 when dealing with provisions that concern border controls immigration and asylum issues.

Legislation

On 12 April 2013, the European Commission presented a Proposal for a **Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex**[14] in response to the judgment of the CJEU in the case of *European Parliament v. Council of EU*[15]. The aim of the proposal is to establish clear rules for joint patrolling as regards interception, including on the high seas, search and rescue situations which arise during these surveillance operations and disembarkation. The proposal takes into account recent legal and judicial developments, such as the amendments to the Regulation establishing Frontex[16] and the judgment of the European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*[17], as well as the practical experiences of Member States and the Agency when implementing the annulled Council Decision. The European Commission proposal now provides that any measures taken during surveillance operations must be in full respect of fundamental rights and the principle of non-refoulement. Before disembarkation in a third country, Member States must take into account the general situation in that country to ensure that it is not engaged in practices in violation of the principle of non-refoulement. Furthermore, the persons intercepted or rescued must be identified and their personal circumstances must be assessed to the extent possible before disembarkation. They must be informed of the place of disembarkation in an appropriate way and they must be given an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of non-refoulement. This guarantees that the migrants are informed about their situation and the proposed place of disembarkation thereby allowing them to express any objections.

Following another European Commission proposal, the co-legislator **adopted the recast Dublin Regulation**[18]. Its provisions guarantee effective remedies to asylum applicants as regards appeals against transfer decisions, thus ensuring full effect of the right to remain on the territory and reducing the risk of "chain refoulement". It provides for widened rules of reunification for unaccompanied minors, guarantees the right to a guardian, the right of all applicants to detailed information on the functioning of the Dublin system including, for minors, in a manner adequate for their understanding.[19] The regulation contains furthermore substantial provisions on detention, limiting it to cases of established risk of absconding, restricting it to a maximum of three months, and providing that the detention conditions and guarantees applicable to asylum seekers under this procedure are the ones foreseen by the **Reception Conditions Directive**[20] (thus ensuring the same level of rights as for any other asylum applicant). The latter was adopted by the co-legislator following a European Commission proposal. It lays down improved and clearer standards to more effectively safeguard the fundamental right to dignity, especially as regards vulnerable asylum seekers. In particular it further harmonises the rules on detention lying down clear and restrictive grounds, conditions for detention and guarantees for detainees.

---

[14] Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0197:FIN:EN:PDF.

[15] CJEU, Case C-355/10, *Parliament v Council*, 05.09.2012.

[16] Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1.

[17] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23.02.2012,

[18] Regulation No 604/2013 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, OJ L 180, 29.6.2013, p. 31.

[19] Thus, together with the Directive on common procedures for granting and withdrawing international protection status (Recast) expressly mention the best interest of the child principle; for the rights of the child see also below Article 24.

[20] Directive 2013/33/EU laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96.

The Regulation also incorporates in an article the judgment of the CJEU in the case **NS v UK (case C-411/10)**[21], whereby an asylum seeker cannot be sent to a Member State where there is a serious risk of violation of his/her fundamental rights, but instead another Member State is to assume responsibility on the basis of the Dublin criteria, within the shortest delay, in order not to jeopardize his/her quick access to procedure.

In a declaration annexed to the recast Dublin Regulation, the European Parliament, the Council, and the European Commission declared to use their respective legislative powers for a revision of the provisions in the recast Dublin Regulation, so as to ensure that the best interest of the child is safeguarded, once the CJEU has ruled on case C-648/11 *MA and Others vs. Secretary of State for the Home Department*. [22] This judgement has been delivered on 6 June 2013, clarifying that in an abovementioned scenario the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'[23].

Article 5: Prohibition of slavery and forced labour, including trafficking in human beings

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.

Legislation/Policy

On 19 June 2012, the European Commission had presented a **Communication on the "EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016"**[24] , which aims to address in a comprehensive, integrated and structured way the challenges for the next five years. It proposes a series of 40 concrete and time-bound actions emphasizing the necessity to respect and promote fundamental rights in legislative and policy measures which address trafficking in human beings.

One of the latest actions delivered under the Strategy is the launch in May 2013 of an **EU Civil Society Platform** against Trafficking in Human Beings which aims at bringing together more than 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.

By prioritising prevention of the crime, prosecution of traffickers, the protection of the victims, as well as cooperation and coordination, the EU Strategy complements the **Directive 2011/36/EU**[25] on preventing and combating trafficking in human beings, which has a strong focus on victim protection, assistance and support. This directive adopts an integrated, holistic, and human rights-based approach in addressing trafficking in human beings, recognising the latters the gender-specific nature. It also refers to the role of an EU Anti-Trafficking Coordinator providing the overall strategy policy orientation in the field of trafficking in human beings. He or she will improve coordination and coherence between EU institutions, EU agencies, Member States and international actors. The Directive should have been transposed into national law by 6 April 2013. As thirteen Member States had not communicated by that deadline any measures transposing the directive, infringement procedures have been launched against them. Letters of formal notice (under Article 258 TFEU) were sent on 29 May 2013 to these thirteen Member States. In November 2013, Reasoned Opinions on non-communication basis were sent to Cyprus, Italy, Spain and Luxembourg.

[21] CJEU, Joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications European Commissioner,* 21.12.2011.

[22] CJEU, Case C-648/11, MA and others, 06.06.2013.

[23] For a more extensive analysis of the case *MA and Others* and the obligation to interpret the provisions of the Dublin II Regulation in conformity with Article 24 of the Charter on the Rights of the Child, see below Article 24 under the section "CJEU jurisprudence".

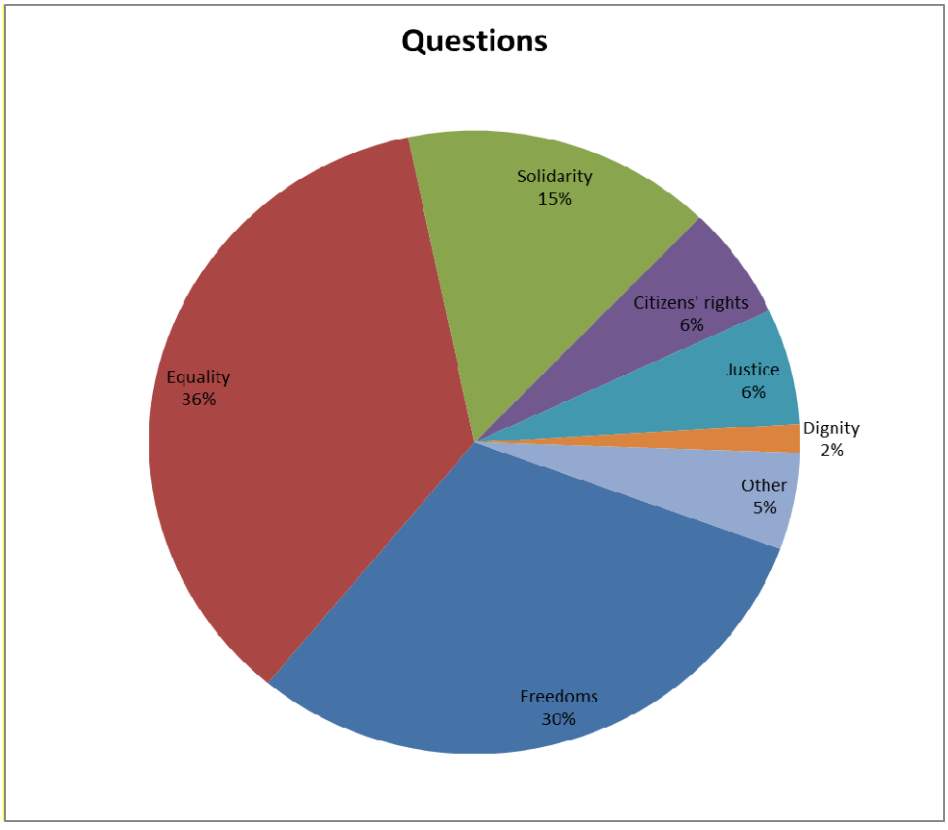
[24] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0286:FIN:EN:PDF.

[25] 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.

Furthermore, the **EU anti-trafficking website** launched by the European Commission serves as one-stop shop, containing all relevant information on EU policy and legislation, National Information Pages on all Member States, European Commission funded projects and publications by relevant stakeholders.[26]

Finally, the **EU Anti-Trafficking Day** was established by the European Commission in 2007, marked on 18 October every year, with the aim to raise awareness on trafficking in human beings and to increase the exchange of information and networking between the different actors working in the field of combating trafficking in human beings. For 2013, the Lithuanian Presidency and the European Commission organised a conference in Vilnius to mark the 7th EU Anti-Trafficking Day exploring the links between the Internet and combating Trafficking in Human Beings ("Cyberspace for Prevention, not Recruitment").

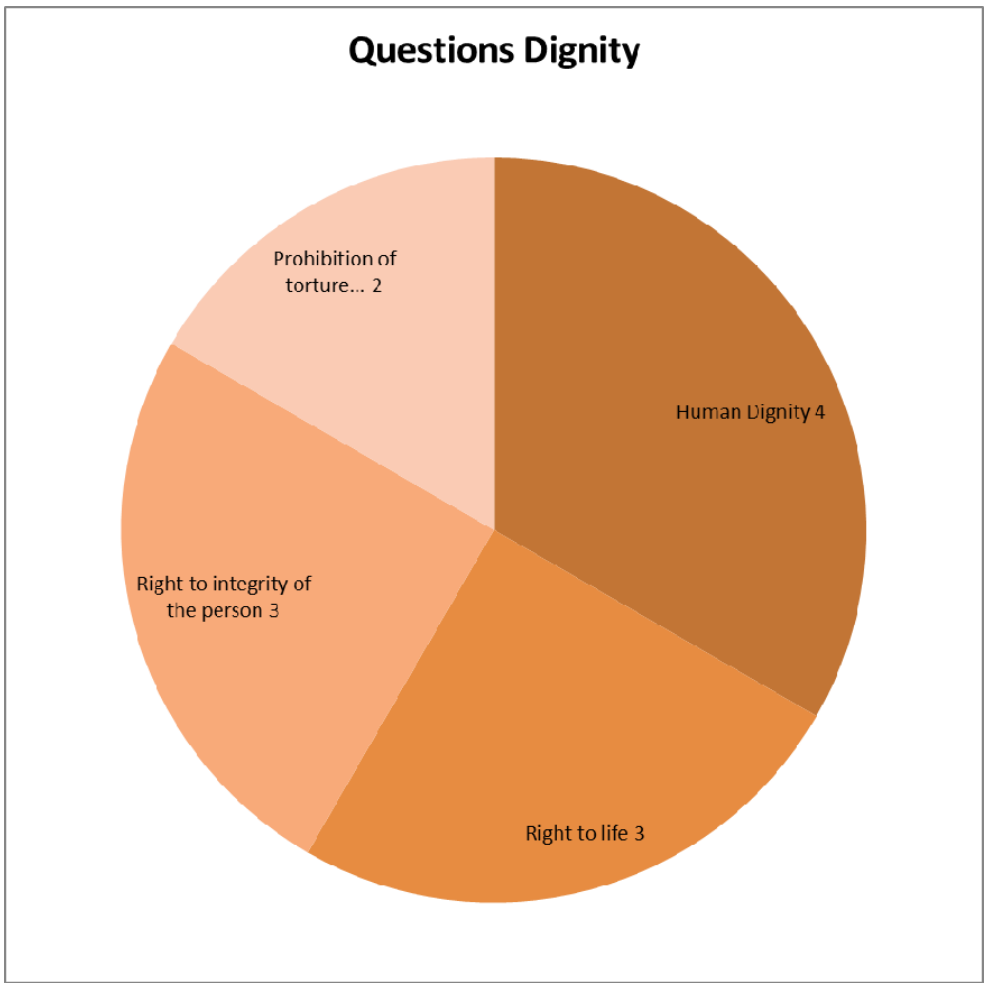
On 13 June 2013 the **Council** the published its **Revised Draft Conclusions** on an EU Framework for the Provision of Information on the Rights of Victims of Trafficking in Human Beings, wherein it invited Member States to promote the rights of victims, by rendering available the relevant information to them, among others on labour, social, victim and migrant rights that victims of trafficking in human beings have under EU law in their jurisdiction with special attention being given to child victims.[27] At the same time it asked the European Commission to support the Member States efforts and allocate the necessary budget funding projects to implement the rights of victims. [28]



[26] The link to the website is: http://ec.europa.eu/anti-trafficking . The European Commission is funding many projects on trafficking in human beings. Addressing human trafficking in Europe is a priority under the financing programme "Prevention of and Fight against Crime" – as part of the General Programme "Security and Safeguarding Liberties" – (2007-2013). A targeted call for projects was launched in the summer of 2013 with a deadline of 31 October.

[27] On the rights of the child, see below under Article 24.

[28] Available at: http://ec.europa.eu/anti-trafficking/entity.action?path=EU+Policy%2FRevised_Draft_Council_Conclusions .


Questions Dignity
Prohibition of torture... 2
Human Dignity 4
Right to integrity of the person 3
Right to life 3

2. Freedoms

Right to liberty and security

Respect for private and family life

Protection of personal data

Right to marry and right to found a family

Freedom of thought, conscience and religion

Freedom of expression and information

Freedom of assembly and of association

Freedom of the arts and sciences

Right to education

Freedom to choose an occupation and right to engage in work

Freedom to conduct a business

Right to property

Right to asylum

Protection in the event of removal, expulsion or extradition

As regards the reform of EU data protection law, the **Committee for Civil Liberties, Justice and Home Affairs** (LIBE) of the European Parliament **backed the European Commission's data protection proposal**

Following last year's revelations about **mass surveillance programmes** the European Commission set out actions that need to be taken to restore trust in data flows between the **EU and the US**. These include ensuring that safeguards apply to EU citizens in US surveillance programmes as well as concluding negotiations concerning a EU-US umbrella agreement on data protection in the law enforcement sector. The agreement should include enforceable rights of judicial redress for citizens on both sides of the Atlantic. The European Commission also made 13 recommendations to improve the functioning of the Safe Harbour scheme. Remedies should be identified by summer 2014. The European Commission will then review the functioning of the scheme based on the implementation of these 13 recommendations.

In the framework of the **Common Agricultural Policy** (CAP) and the Common Fisheries Policy (CFP) post 2013, the European Commission proposal on the **publication of information about beneficiaries of funds specific to these policy fields** reflect the attention given to the protection of individuals' rights to privacy as well as personal data.

On 10 September 2013, the European Parliament adopted its Resolutions on the European Commission proposals for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of **matrimonial property regimes** and for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of Registered Partnerships.

In order to address the growing number of calls for the European Commission to intervene with regard to **media freedom and pluralism**, an independent expert group presented 30 **recommendations addressed to the EU institutions, Member States and relevant stakeholders**. In public consultations on the report Member States and media organisations were reluctant to see increased European Commission intervention in media pluralism whereas citizen respondents on the other hand were largely in favour of intervention.

As already mentioned above one of the most important developments in this area is the strengthening of the **Common European Asylum System** by adoption of the revised Dublin Regulation, the Eurodac Regulation, Directives on the Reception Conditions and on the Asylum Procedures[29].

[29] **Dublin Regulation:** 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, OJ L 180, 29.6.2013, p.31. Article 33 of the Dublin regulation concerns "A mechanism for early warning, preparedness and crisis management"; **Reception Conditions Directive:** Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p.96; **Asylum Procedures Directive:** Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29.6.2013, p.60; **Eurodac Regulation:** Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180 29.6.2013, p.1. The **Asylum Qualification Directive** was already adopted in 2011: Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337, 20.12.2011, p.9.

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.

Legislation

This right as well as the right to protection of personal data of individuals (Article 8 of the Charter) naturally had to be considered and balanced against the taxpayer's right to be kept informed about the use made of public funds in the context of **beneficiaries of European agricultural funds**.[30] Thus, the proposals for the Common Agricultural Policy (CAP) post 2013, confirmed by the political agreement of June 2013,[31] which contained the European Commission proposal on the publication of information of CAP beneficiaries but on the other hand also reflects the attention given to the protection of individuals' rights to privacy as well as personal data. Provisions of general scope were added during the negotiation with the other two institutions. The main elements of the political agreement are:

- publication of the name of beneficiaries, with the exception of those receiving an amount of annual aid which does not exceed a certain threshold. The modalities for fixing the threshold are part of the new provisions and accommodate the principle of proportionality and non-discrimination;
- publication of details on the measures financed by the CAP funds under which the beneficiaries received the aid and also details on the obligations that the beneficiaries need to respect.

The first publication under the new rules should take place in 2015.

The proposed regulation on the European Maritime and Fisheries Fund (EMFF), which will replace the current European Fisheries Fund (EFF) and during the period of the next multiannual financial framework (2014-2020) finance measures in the field of fisheries and maritime policies, constitutes a further case in which the EU had to balance the rights to respect for private life (Article 7 of the Charter) and to the protection of personal data (Article 8 of the Charter and Article 16 TFEU) of beneficiaries of funds with the principle of transparency (Articles 1 TEU and 10 TEU and Article 15 TFEU). Taking into account the CJEU's judgment in *Schecke and Eifert v. Land Hessen*[32], the European Commission addressed the topic in its amended proposal for the EMFF regulation of April 2013[33]. The political agreement on the EMFF regulation reached by the EU legislators protects beneficiaries by foreseeing the publication of names of private persons only if such publication is in line with legislation of the respective Member State and by publishing detailed information on the financed operation, like a summary, key dates, and corresponding Union priorities.[34]

Furthermore, in order to protect the right to privacy in a balanced manner the European Commission ensured an effective **protection of professional legal privilege** within the EU's money laundering

---

[30] Following in partiuclar the CJEU case law: CJEU, Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR & Hartmut Eifert v. Land Hessen & Bundesanstalt für Landwirtschaft und Ernährung*, 10.11.2010

[31] See EU European Commission website on "The Common Agricultural Policy after 2013", available at: http://ec.europa.eu/agriculture/cap-post-2013/; see also: Amendment to the European Commission proposal COM(2011) 628 final/2 for a Regulation on the financing, management and monitoring of the common agricultural policy, COM(2012) 551 final, http://ec.europa.eu/agriculture/funding/regulation/amendment-com-2012-551_en.pdf .

[32] CJEU, Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR & Hartmut Eifert v. Land Hessen & Bundesanstalt für Landwirtschaft und Ernährung*, 10.11.2010.

[33] Amended proposal for a Regulation of the European Parliament and the Council on the European Maritime and Fisheries Fund [repealing Council Regulation (EC) No 1198/2006 and Council Regulation (EC) No 861/2006 and Council Regulation No XXX/2011 on integrated maritime policy], COM(2013) 245 final.

[34] Council of the European Union, Amended proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund repealing Council Regulation (EC) No 1198/2006 and Council Regulation (EC) No 861/2006 and Council Regulation No XXX/2011 on integrated maritime policy - Approval of the final compromise text, Interinstitutional File: 2011/0380 (COD), 6152/14 ADD 1 REV 1, Brussels, 10 February 2014.

legislation. The proposed Anti-Money Laundering Directive of February 2013 imposes an obligation to report suspicions of money laundering or terrorist financing to the authorities in a number of professional activities. However, considering the crucial importance of the right to defence in a democratic society, the proposed Directive obliges Member States not to apply the reporting obligation to lawyers under certain circumstances, for instance when it relates to information received in the course of ascertaining the legal position of a client or performing their task of defending or representing that client in, or concerning judicial proceedings[35]. Furthermore, the Member States have the possibility to set in place a system of first instance reporting to a self-regulatory body which constitutes further safeguards to uphold the protection of fundamental rights with view to reporting obligations applicable to lawyers.

Of particular relevance to the right to respect of family life, including the right to marry and to found a family according to Article 9 of the Charter and national laws are the on-going negotiations on the European Commission proposals on matrimonial property regimes[36] and on property regimes for registered partnerships[37]. No differentiation is introduced in the legislation on the basis of sexual orientation.[38] On 10 September 2013, the European Parliament adopted its Resolutions on the European Commission proposals for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[39] and for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of Registered Partnerships.[40] The Resolutions contained several amendments mentioning the Charter, such as

- inserting a reference to Article 20 of the Charter, which guarantees the equality before the law and to Article 23 on the equality between women and men[41] and
- stating that the competent authorities should not interpret the public policy exception in a way that is contrary to the Charter, and in particular Article 21 thereof, which prohibits all forms of discrimination.[42]

Policy

Furthermore, an increase in the number of **petitions** to the European Commission concerning the functioning of the **German Youth Welfare Offices *(Jugendämter)*** has to be mentioned in relation to the right to respect for family life. These petitions mainly concerned amongst others the following: alleged imposition of restrictions on access of non-German parents to their children; alleged discriminatory interventions of *Jugendämter* during the custody court proceedings e.g. favouring the German parent when *Jugendämter* officials provide evidence in court; alleged violation of the right to be heard by the *Jugendämter;* alleged incorrect implementation of the best interests of the child principle -*"Kindeswohl"* – which is allegedly used rather to protect the interests of the German state than the best interests of the children; alleged lack of complaint mechanisms and review procedures

[35] See CJEU, C-305/05, *Ordre des barreaux francophones et germanophones*, 26.6.2007.

[36] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM/2011/0126 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0126:en:NOT.

[37] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127/2. Available at: http://ec.europa.eu/justice/policies/civil/docs/com_2011_127_en.pdf.

[38] See also below under Article 21 non-discrimination, and more specifically under the heading 'Fight against homophiobia'.

[39] Draft European Parliament legislative resolution on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS)); available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0253&language=EN .

[40] European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)0127 – C7-0094/2011 – 2011/0060(CNS)) available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-337.

[41] Amendment 25 to Recital 32 of the Proposal on the Matrimonial Property Regimes; Amendment 29 to Recital 28 of the Proposal on the Property Consequences of Registered Partnerships.

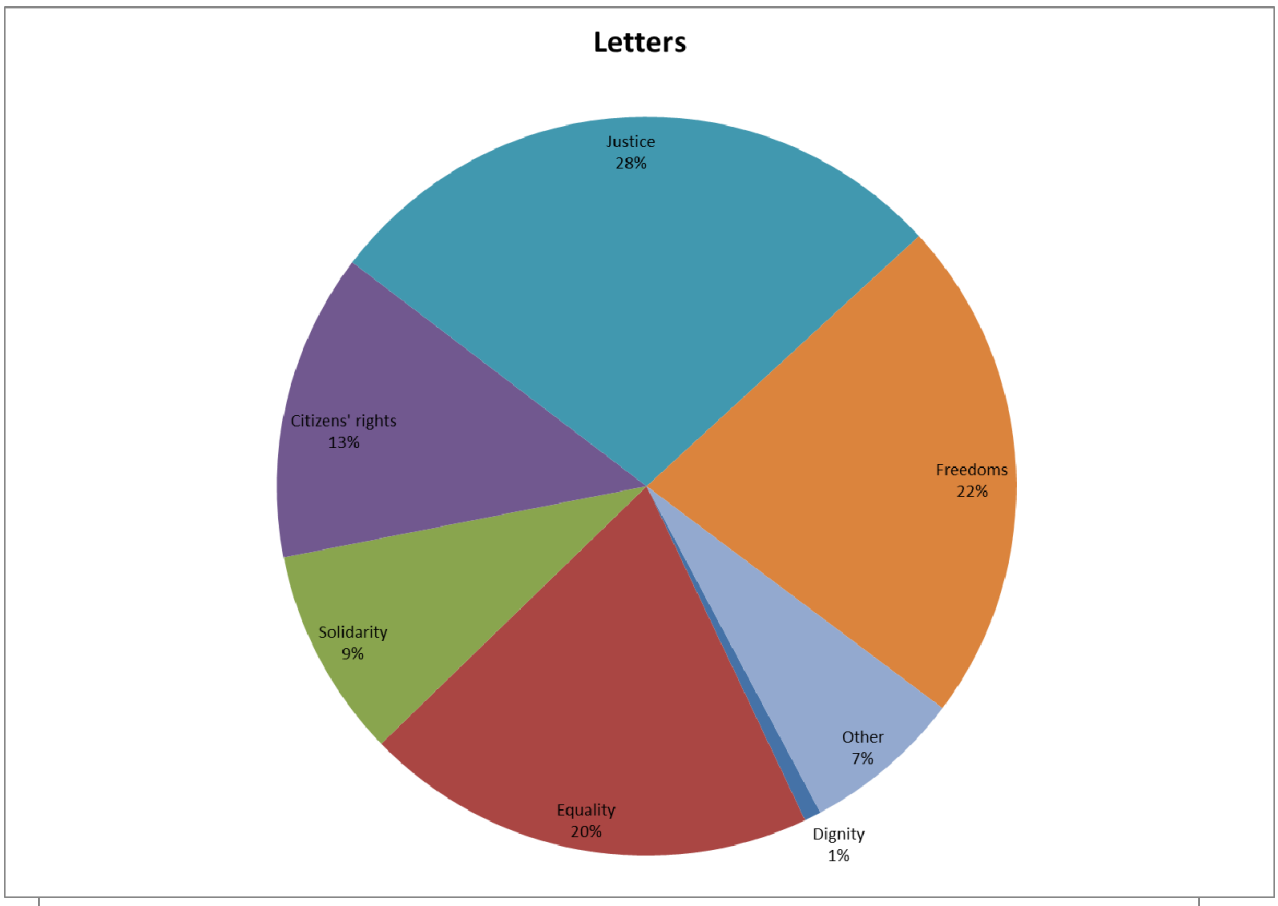
[42] Amendment 69 to Article 22 of the Proposal on the Matrimonial Property Regimes; Amendment 70 to Article 17 of the Proposal on the Property Consequences of Registered Partnerships.

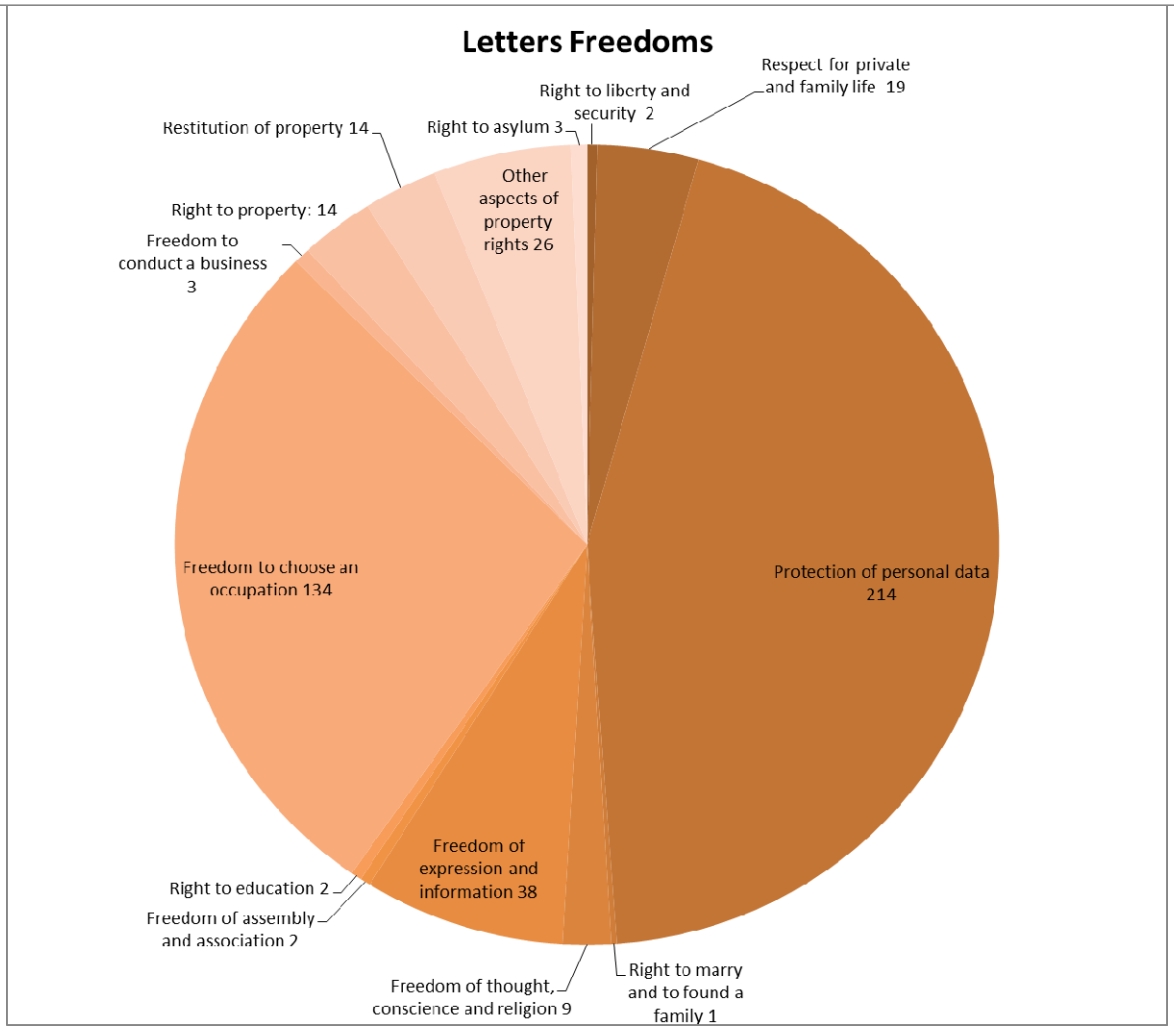
against the decisions of certain *Jugendämter*, or little awareness about these mechanisms. Vice President Reding has contacted the German authorities on these issues.

Case law

As regards case law the important ruling in ***Deutsche Bahn v European Commission***[43] on the right to private life by the General Court of 6 September 2013 has to be emphasised. Here the Court ruled that carrying out **inspections of undertakings or associations of undertakings on the basis of a European Commission decision** is not a violation of Article 7 of the Charter on respect for private and family life. It held that prior judicial authorisation of such inspections is not required, provided comprehensive judicial review is available after the inspection. By this ruling, the Court confirmed its established case law on the European Commission's powers of inspection of undertakings and associations of undertakings as laid down in Article 20 of Regulation 1/2003 (formerly Article 14 of Regulation No. 17). It pointed to the safeguards provided by Regulation 1/2003, namely the obligation to state the reasons on which an inspection decision is based, the need to act within certain limits when carrying out inspections (respect of right to privacy, Legal Professional Privilege, privilege against self-incrimination), the fact that the European Commission does not have the power to enforce its inspection powers by force, the fact that the European Commission must seek the assistance of national police or equivalent enforcement authorities to overcome assistance to an inspection, as well as the fact that the legality of the inspection decision may be challenged before the CJEU. It concluded that these safeguards had been duly respected in the case before it.

[43] Joined Cases T-289/11, T-290/11 and T-521/11, judgment of 6 September 2013, not yet reported.


Letters
Justice 28%
Freedoms 22%
Other 7%
Dignity 1%
Equality 20%
Solidarity 9%
Citizens' rights 13%


Letters Freedoms
Respect for private and family life 19
Right to liberty and security 2
Right to asylum 3
Restitution of property 14
Other aspects of property rights 26
Right to property: 14
Freedom to conduct a business 3
Freedom to choose an occupation 134
Protection of personal data 214
Freedom of expression and information 38
Right to education 2
Freedom of assembly and association 2
Freedom of thought, conscience and religion 9
Right to marry and to found a family 1

Article 8: Protection of personal data

The fundamental right of everyone to the protection of personal data is now explicitly recognised by Article 8 of the Charter. It is also explicitly stated in Article 16 of the Treaty on the Functioning of the European Union. This gives the EU new responsibilities to protect personal data in all areas of EU law, including police and judicial cooperation. In view of this year's revelations about **worldwide surveillance programmes** potentially monitoring citizens' communication it was imperative for the EU institutions to progress in their negotiations about a new data protection level. The revelations have shown how technological progress and globalisation have profoundly changed the way personal data is collected, accessed and used. In addition, the 28 EU Member States have implemented the 1995 EU Data Protection Directive[44] differently, resulting in divergences in enforcement.

Legislation/Policy

The European Commission has already proposed a **major reform of the EU's rules on the protection of personal data**.[45] The proposals include a policy Communication setting out the European Commission's objectives[46] and two legislative proposals: a Regulation setting out a general EU framework for personal data protection[47] and a Directive[48] on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities.

In October 2013 the **Committee for Civil Liberties, Justice and Home Affairs (LIBE)** of the European Parliament supported the European Commission's proposal. The aim of the reform is to put individuals back in control of their data by updating their rights , in order to fully respect Article 8 of the Charter. Explicit consent, the right to be forgotten, the right to data portability and the right to be informed of personal data breaches are important elements. They will help to close the growing rift between citizens and the companies with which they share their data, willingly or otherwise.

Recent revelations of **large-scale US intelligence collection programmes** have negatively affected the trust on which the transatlantic relationship is based. As Vice-President **Viviane Reding,** the EU's Justice Commissioner pointed out: "*Massive spying on our citizens, companies and leaders is unacceptable. Citizens on both sides of the Atlantic need to be reassured that their data is protected and companies need to know existing agreements are respected and enforced.*"[49] Following these deep concerns the European Commission in 2013 set out actions that need to be taken to restore trust in data flows

[44] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p.31.

[45] The European Commission's package also includes the following other documents: Report from the European Commission based on Article 29 (2) of the Council Framework Decision of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (including annex), COM (2012) 12 final,

Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0012:FIN:EN:PDF

Impact assessment (including annexes) accompanying the proposed Regulation and the proposed Directive, SEC (2012) 72 final, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:FR:PDF

Executive summary of the impact assessment, SEC (2012) 73 final, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2012:0073:FIN:FR:PDF

[46] Communication on 'Safeguarding Privacy in a Connected World – A European Data Protection Framework for the 21st Century', COM (2012) 09 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0009:en:NOT

[47] 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/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52012PC0011

[48] 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', COM (2012) 10 final. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012PC0010:en:NOT

[49] Press release IP/13/1166 of 27.11.2013, available at: http://europa.eu/rapid/press-release_IP-13-1166_en.htm .

between the EU and the US.[50] An EU-US working group was set up in July 2013 the findings of which were set out in a report of the EU Co-Chairs[51] . On this basis, the European Commission's response took the form of

- **a strategy paper (a Communication) on transatlantic data flows** setting out the challenges and risks following the revelations of US intelligence collection programmes, as well as the steps that need to be taken to address these concerns;
- **a report on the functioning of "Safe Harbour"** which regulates data transfers for commercial purposes between the EU and US.

In particular the European Commission called for actions in several areas, such as:

- **The EU data protection reform:** The data protection reform proposed by the European Commission in January 2012[52] provides key responses, in particular as as regards territorial scope, on international transfers, enforcement and sanctions, obligations and liabilities of data processors as well as with the establishment of comprehensive rules for the protection of personal data processed by competent authorities in the law enforcement sector in the Union.
- **Making Safe Harbour safer:** the European Commission made 13 recommendations to improve the functioning of the Safe Harbour scheme and after an analysis found the functioning of the scheme deficient in several respects. Remedies should be identified by summer 2014. The European Commission will then review the functioning of the scheme based on the implementation of these 13 recommendations.
- **Strengthening data protection safeguards in the law enforcement area:** the current negotiations on an "umbrella agreement" for transfers and processing of data in the context of police and judicial cooperation should be concluded swiftly. An agreement must guarantee a high level of protection for citizens who should benefit from the same rights on both sides of the Atlantic. Notably, EU citizens not resident in the US. should benefit from judicial redress mechanisms.
- **Using the existing Mutual Legal Assistance and Sectoral agreements to obtain data:** the US administration should commit to, as a general principle, making use of a legal framework like the mutual legal assistance and sectoral EU-US Agreements such as the Passenger Name Records Agreement and Terrorist Financing Tracking Programme whenever transfers of data are required for law enforcement purposes. Asking the companies directly should only be possible under clearly defined situations.
- **Addressing European concerns in the on-going US reform process**: US President Obama has announced a review of US national security authorities' activities. This process should also benefit EU citizens. The most important changes should be extending the safeguards available to US citizens to EU citizens not resident in the US, ensuring the necessity and proportionality of the programmes, increased transparency and better oversight.

In August 2013 the **Directive on attacks against information systems**[53] was adopted. It aims at dealing with the growing number of large-scale cyber-attacks against businesses and also government organisations. The Directive addresses the penalisation of illegal access, system interference and data interference, and as such its implementation (by September 2015) will strengthen the protection of personal data by reducing the ability of cybercriminals to abuse victims' rights without impunity. The Directive seeks to ensure full respect of the protection of personal data, the right to privacy, freedom of

[50] Press release IP/13/1166 of 27.11.2013, available at: http://europa.eu/rapid/press-release_IP-13-1166_en.htm .

[51] See MEMO/13/1059 27/11/2013 available at: http://europa.eu/rapid/press-release_MEMO-13-1059_en.htm.

[52] COM(2012) 10 final: Proposal for a Directive of the European Parliament and the Council 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, Brussels, 25.1.2012, and COM(2012) 11 final: Proposal for a Regulation of the European Parliament and 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).

[53] Directive 2013/40 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218, 14.8.2013, p. 8.

expression and information, the right to a fair trial, the presumption of innocence and the rights of the defence, as well as the principles of legality and proportionality of criminal offences and penalties.[54]

Furthermore, in January 2013 the **European Cybercrime Centre** ('EC3') has been created within Europol to help protect European citizens, in particular their personal data and privacy, against threats from cybercriminals. The EC3 pools expertise and information, supports criminal investigations and promotes EU-wide solutions, while raising awareness of cybercrime issues across the Union. In February, a **cyber-security strategy** was presented that outlines the EU's comprehensive vision on how best to prevent and respond to cyber disruptions and attacks. The European Commission and Catherine Ashton, the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, have jointly adopted this strategy alongside a directive proposed by the European Commission on network and information security (NIS). Specific actions are aimed at enhancing the cyber resilience of information systems, reducing cybercrime and strengthening the EU's international cyber-security policy and cyber defence.

The European Commission routinely checks its legislative proposals and the acts it adopts to ensure that they are compatible with the Charter (sometimes called "mainstreaming") such as in the following cases.

As a new major initiative in the field of EU border management, the European Commission in February 2013 adopted the ***Smart Borders*** **package**. The main objective of the initiative is two-fold - the proposed Regulation for the Entry Exit System shall secure by means of automated registration of external border crossings of the third country nationals and subsequent calculation thereof the enforcement of the rule on short stay of in the EU whilst the Regulation for the Registered Traveller Programme would contribute to better management of the increasing travel flows and simplify the external borders' crossing of frequent and pre-screened and pre-vetted third country travellers. Acknowledging the need to safeguard privacy and guarantee data protection, the European Commission has attached high importance to the principles of proportionality, necessity and purpose limitation as well as to fundamental rights. Accordingly, both proposals contain a specific chapter on rights of data subjects and supervision of data protection. Overall, a special attention has been paid to the rights of the data subject and data protection aspects and the supervision thereof. The proposals contain provisions on liability, rights of persons, remedies and supervision of the lawfulness of processing the data by both the national supervisory authorities as well as the European Data Protection Supervisor. In full transparency, a joint report of their activities will be sent to the European Parliament, the Council, the European Commission and the eu-LISA every two years.

On 11 December 2013, a new basic regulation on the **Common Fisheries Policy** (CFP) was adopted which entered into force on 1 January 2014.[55] It defines core elements of this policy, like its general and specific objectives, basic instruments, key actors, and procedures. The regulation covers the collection and management of various kinds of data, including biological, environmental, technical, and socio-economic data necessary for fisheries management. Such data can also include personal data, like information collected for fishing fleet registers, information on individual catches by vessel owners, and on positions of vessels. The regulation, establishes certain basic principles for the "collection, management and use of data", thereby requiring the EU institutions and the Member States to respect the rules on the protection of personal data, e.g. through safe storage and protection of collected data in computerised databases, and their public availability where appropriate, including at aggregated level, whilst ensuring confidentiality. [56]

The right to data protection was furthermore taken into account during **legislative procedures** in a number of policy areas, such as:

[54] Recitals 29 and 30 of Directive 2013/40.

[55] Regulation (EU) No 1380/2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28.12.2013, p. 22. It will enter into force on 1.1.2014.

[56] Article 25 of Regulation 1380/2013.

- the European Commission proposal for a Regulation on the financing, management and monitoring of the **common agricultural policy**, balancing the rights of beneficiaries of European agricultural funds to protection of personal data against the taxpayer's right to be kept informed about the use made of public funds[57],
- the adoption of the recast Eurodac Regulation in the field of asylum policy[58]
- the European Commission proposal for a regulation on the European Maritime and Fisheries Fund (EMFF), in which the right to protection of personal data of beneficiaries under the EMFF was balanced against the principle of transparency[59],
- a proposal for the revision of the third **anti-money laundering Directive** and Fund Transfer Regulation which purports to clarify the interaction between the AML rules and the protection of personal data by bringing clarification on how institutions need to apply anti-money laundering/terrorist financing requirements in a way which is compatible with a high level of protection of personal data.
- the European Commission's proposal to boost **Europol's** role as a law enforcement agency and a EU hub for information exchange which provides for a re-designed data processing structure entailing the strengthening of the rights of individuals affected by data processing and ensuring robust supervision of Europol's data processing by the European Data Protection Supervisor.
- a proposal for a Regulation setting up the **European Public Prosecutor's Office** (EPPO) to improve Union-wide prosecution of criminals who defraud EU taxpayers defines a very important number of rights of the data subjects and also ensures supervision of the Office by the European Data Protection Supervisor.
- the reform for the **European Union's Agency for criminal justice cooperation (Eurojust**) which provides for its supervision by the European Data Protection Supervisor and ensures that persons whose data are being processed can truly exercise their rights.

Finally, following privacy and data protection issues raised by MEPs in connection with the development of **Remotely Piloted Aircraft Systems (RPAS)** applications, the European Commission is currently considering the preparation of a supportive and enabling policy framework for the civilian use RPAS. The policy framework may include safety regulation and other relevant topics like security, privacy and data protection and therefore should ensure a balance of promoting the new technologies and industries involved and providing the highest levels of safety, security and privacy for citizens. With regard to data protection in particular, the European Commission is conducting a study to identify potential shortfalls in the current regulatory framework and ways to ensure drones comply with data protection rules and fundamental rights to privacy. The European Commission will also promote the adoption of relevant measures under national competence and ensure continuous monitoring of privacy and data protection issues.

International agreements

The modernisation of the Council of Europe's rules on data protection coincides with the comprehensive reform of the European Union's laws in this area. In order to respond to the rapid technological developments and globalisation trends that have brought new challenges for the protection of personal data, the Council of Europe has begun discussions on the modernisation of **Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108)**, which was the first legally binding international instrument in the field of data protection. In 2013 the European Commission was mandated by the Council to negotiate on this modernisation, in order to provide for a high level of protection of fundamental rights and freedoms with respect to processing of personal data, which reflects the EU's internal rules.

Furthermore as already pointed out above, the European Commission is currently negotiating an **"umbrella agreement" with the US** for transfers and processing of data in the context of police and

[57] Articles 111-114 of Regulation (EU) No 1306/2013 of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, OJ L 347, 20.12.2013, p. 549; see also section above: Right to respect for Private and family life**.**

[58] For further information see below section on the right to asylum Article 18.

[59] Ibid.

judicial cooperation. The aim is to guarantee a high level of protection for citizens who should benefit from the same rights on both sides of the Atlantic, in particular rights of judicial redress.

Case law

In **2013 the CJEU issued several rulings relevant to the protection of data**. Thus, on the case of *Worten/ACT*[60] it held in a preliminary ruling that the **recording of working time** is covered by the guarantees in EU law on personal data. However, this does not preclude any national legislation which requires an employer to make the record of working time available to the national authorities responsible for the monitoring of working conditions.

Further, in another preliminary ruling, the case of Case C-291/12 *Schwarz,*[61] the court held that including fingerprints in passports was lawful. Although the taking and storing of **fingerprints in (biometric) passports** constitutes a restriction of the rights to respect for private life (Article 7 of the Charter) and the right to protection of personal data (Article 8 of the Charter), such measures are nonetheless justified for the purpose of preventing any fraudulent use of passports. The Court added, with a clear reference to the case-law of the ECtHR (*S. and Marper*)[62], that the legislature must ensure that there are specific guarantees that the processing of such data will be effectively protected from misuse and abuse. In that respect, the Court noted that Article 4(3) of the Regulation on standards for security features and biometrics[63] explicitly states that fingerprints may be used only for verifying the authenticity of a passport and the identity of its holder. In addition, that regulation ensures protection against the risk of data including fingerprints being read by unauthorised persons. In that regard, Article 1(2) of that regulation makes it clear that such data are to be kept in a highly secure storage medium in the passport of the person concerned.

In a preliminary ruling, the CJEU in C-473/12 *IPI*[64] referred to its settled case-law stating that derogations and limitations in relation to the protection of personal data need to be applied only in so far as is strictly necessary in view of the fundamental right to privacy. Furthermore, the Court held that Member States have no obligation, but rather an option, to transpose into their national law one or more of the exceptions to the obligation to inform data subjects of the processing of their personal data as laid down in Article 13 (1) of Directive 95/46/EC. It also concluded that the activity of a private detective acting for a professional body in order to investigate breaches of ethics of a regulated profession - the profession of an estate agent in the case at hand - is covered by the exception in Article 13(1)(d) of Directive 95/46. The Court also observed that it is open to the Member States to take the view that those professional bodies and the private detectives acting for them have sufficient means, notwithstanding the application of Articles 10 and 11 of Directive 95/46/EC, of detecting the breaches of ethics at issue. Thus, it is not necessary for that exception to be implemented in order for those bodies to be able to carry out their duty of ensuring compliance with the rules.

In case C-486/12 *X*[65]*,* another prelimary ruling, the Court of Justice held that Article 12(a) of Directive 95/46/EC does not preclude the levying of fees in respect of the communication of personal data by a public authority. It has also clarified that in view of the importance of protecting privacy, emphasised in the case-law of the Court and enshrined in Article 8 of the Charter, the fees which may be levied under Article 12(a) may not be fixed at a level likely to constitute an obstacle to the exercise of the right of access guaranteed by that provision. Consequently, in order to ensure that fees levied when the right to access personal data is exercised are not excessive, the level of those fees must not exceed the cost of

[60] CJEU, Case C-342/12, *Worten v ACT,* 30.05.2013.

[61] CJEU, Case C-291/12, *Michael Schwarz v Stadt Bochum,* 17.10.2013.

[62] ECtHR, S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, 4.12.2008.

[63] Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ L 385, 29.12.2004, p. 1.

[64] Case C-473/12 – *IPI*, 7.11.2013,

[65] Case C-486/12 – X, 12.12.2013.

communicating such data. That upper limit does not prevent the Member States from fixing such fees at a lower level in order to ensure that all individuals retain an effective right to access such data.

In its judgment in T-214/11 *ClientEarth*[66] the General Court applied the case law of the Court of Justice of the EU (notably C-28/08 P *European Commission v Bavarian Lager*) and held that where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data, the provisions of Regulation 45/2001 become applicable in their entirety. The latter regulation has to be complied with by the European institutions when they receive an application for access to documents containing personal data. The Court went on to observe that that data may be transferred only if the applicant establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced, pursuant to Article 8(b) of Regulation No 45/2001. Where the recipient does not provide any express and legitimate justification or any convincing argument in order to demonstrate the necessity for that personal data to be transferred, the institution which has received the application is not able either to weigh up the various interests of the parties concerned or to verify that there is no reason to assume that the data subjects' legitimate interests might be prejudiced by the transfer of data and is therefore entitled to refuse the particular application for access.

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 practicing it, the right protects actions of conscience such as for example those of conscientious objectors.

Policy

Within Member States there are several issues concerning freedom of religion and belief, as well as the freedom of conscience that are currently being discussed by stakeholders.

Thus, in the context of the dialogue with churches, religious associations or communities and philosophical and non-confessional organisations (Article 17 TEU) the concerns raised relate in particular to issues of religious expression in the public space and the work place, such as ritual slaughter in view of animal welfare, home schooling with a view to conscientious objection, e.g. in Germany and Sweden and the debate on circumcision following a German court case.

These dialogue partners were consulted during the drafting process of the EEAS guidelines on freedom of religion and belief, adopted in June 2013.

While some of the above-mentioned issues do not fall within EU competence, a number of dialogue partners seem to feel that the issues relate to their fundamental rights of expressing their religion and belief and are of the strong opinion that given the Charter is part of the EU *acquis*, the EU should help to uphold them.

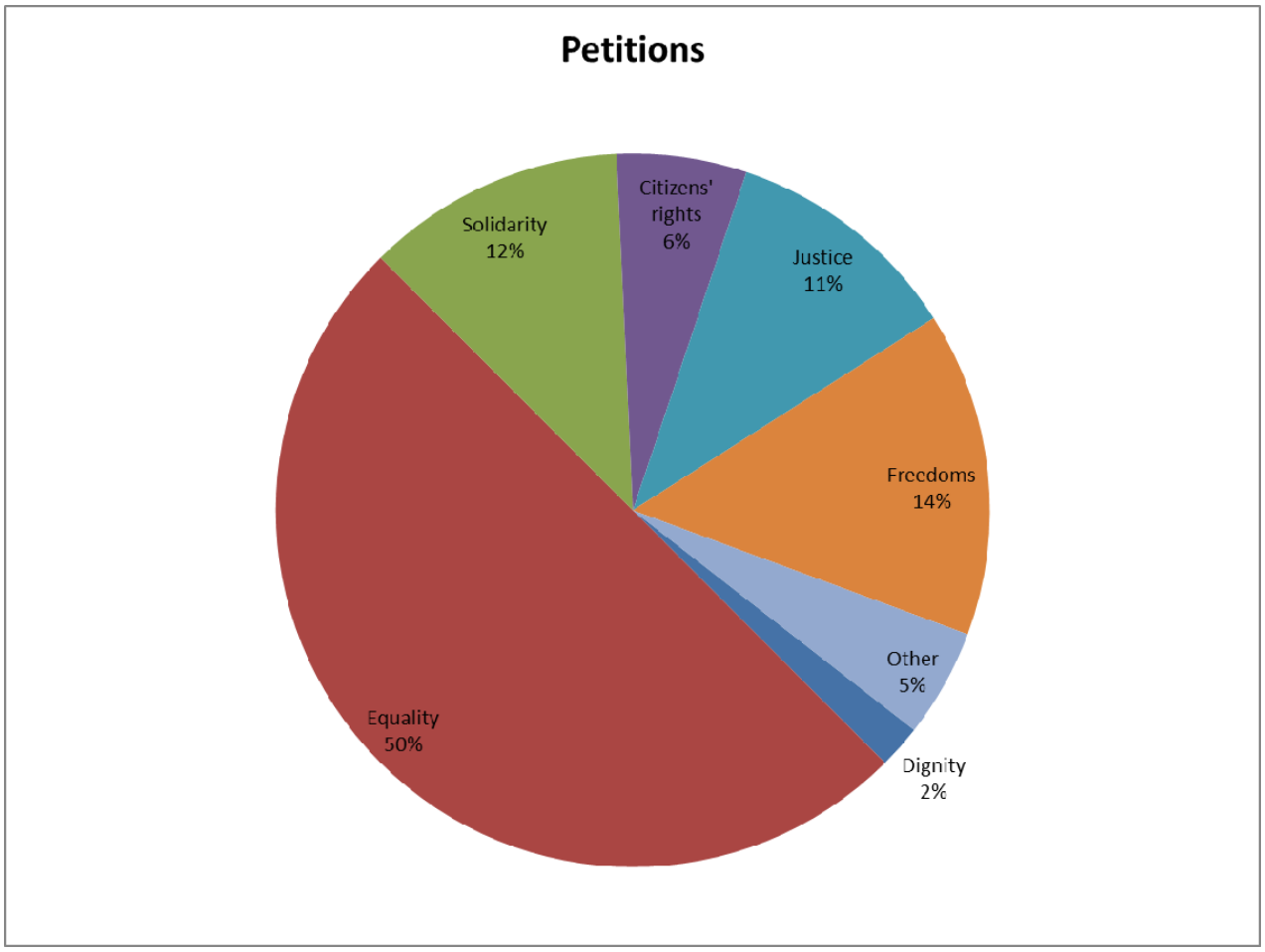
Ruling of the Federal Administrative Court of Germany[67]: limitation of the freedom of religion as an act of persecution

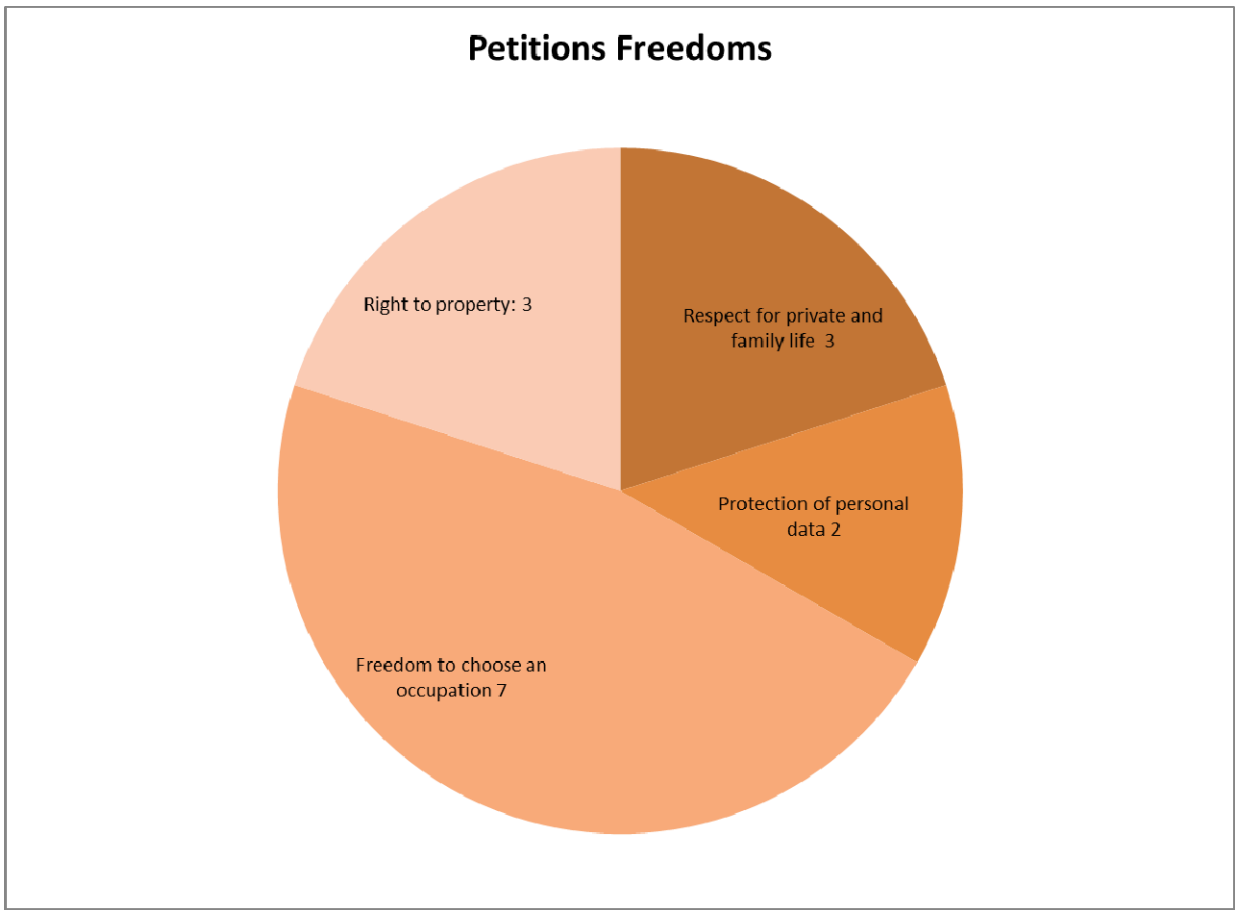
Applications of a Pakistani citizen for asylum in Germany had been dismissed. The applicant then claimed that EU Directive 2004/83/EG on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection (the asylum qualification directive) and the content of the protection granted had changed his legal situation: the extent of protection was broadened to cover also active proselytization, which was the primary reason for the persecution in Pakistan. Both the Stuttgart Administrative Court and the Mannheim Higher Administrative Court ruled that the applicant should be recognized as a refugee. The Federal Administrative Court

[66] Case T-214/11, *ClientEarth and PAN Europe v EFSA*, 13.09.2013, currently under appeal..

[67] Federal Administrative Court of Germany (Bundesverwaltungsgericht), case 10 C 23.12, 20.02.2013

repealed the judgment. It referred to the freedom of religion as enshrined in Article 10 (1) of the Charter and ruled that an interference with the right to freedom of religion comes within the scope of the asylum qualification directive, but only if the limitation of the freedom of religion is not provided by law as defined in Article 52 (1) of the Charter, and the limitation of this right is severe, affecting the person concerned remarkably. The Court concluded that the seriousness of the actions and sanctions that are taken or may be taken towards the person concerned determines whether a violation of the right guaranteed in Article 10 (1) of the Charter can be classified as an act of persecution as defined by Article 9 (1) of the asylum qualification directive. The Federal Administrative Court held that this was not case for the Pakistani citizen.





Article 11: Freedom of expression and information

The right to **freedom of expression** for everyone is guaranteed in Article 11 (1) of the Charter. This right includes 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 media.

Policy

In order to address the growing number of calls for the European Commission to intervene with regard to **media freedom and pluralism**, an independent expert group was tasked to explore challenges and make recommendations. In January 2013 this **High Level Group** on Media Freedom and Pluralism presented 30 recommendations addressed to the European Union institutions, Member States and relevant stakeholders. Subsequently, public consultations on the report were launched with a view to seek opinions of different stakeholders on the recommendations. Levels of support varied according to the topics, the type of respondent and their geographical origin. Generally, citizens showed more enthusiasm for stepping up activities by the European Union in support of media pluralism. Member States and media organisations were more reluctant[68].

Furthermore, the feedback from a specific consultation on independence of audio-visual regulators very strongly supported the need for EU legislative action to ensure independence of the national regulators and formalisation of cooperation between audio-visual regulators.

The importance of media freedom and pluralism was recognised in the Council Conclusions[69] in November 2013. The European Commission is working on the follow up to the invitations addressed to it by the Council.

[68] https://ec.europa.eu/digital-agenda/en/news/public-consultation-independent-report-hlg-media-freedom-and-pluralism-%E2%80%93-read-contributions.
[69] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/139725.pdf

Case law

The case C-283/11 *Sky Österreich v ORF*[70] concerned **compensation** available to holders of exclusive **broadcasting rights to events of high public interest** in those cases, where other broadcasters seek access to short extracts for news reporting purposes. The European Court of Justice found that the arrangement under review fairly balanced the competing interests of the holder of exclusive broadcasting rights against the general interests in receiving information and promoting pluralism of the media, as guaranteed by Article 11 of the Charter.

In a number of cases[71] concerning broadcasting of **events of major interest to society**, **namely football matches**, the Court found that Article 14 of the relevant Audio-visual Media Services Directive[72], appropriately restricted the right of property in the general interests of the freedom to receive information and ensuring wide public access to coverage of major events. Any necessity for the General Court to consider less invasive applications of that provision capable of attaining its objective (than the decisions having originally given rise to the proceedings before it), was held to exist only where the appellants had successfully established an excessive interference with their property rights.

The preliminary ruling in case C-234/12 *Sky Italia v AGCOM*[73] addressed the question of whether national rules laying down shorter **hourly advertising limits** for pay-TV broadcasters than those set for free-to-air broadcasters infringed the general principle of equality and the rules of the TFEU relating to the free movement of services. The Court held that the national legislature was able, without infringing the principle of equal treatment, to set such a rule. It is however for the referring court to assess whether that rule complies with the principle of proportionality.

Article 15: Freedom to choose an occupation and the 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

To promote this right a Directive modernising the Professional Qualifications Directive was adopted on 20 November 2013 and has entered into force on 17 January 2014.[74] The recast Directive must be implemented by Member States within two years after entry into force, by 18 January 2016. It allows EU qualified citizens to obtain the recognition of their qualifications in order to establish and provide services in another Member State.

Furthermore, the European Commission requested Italy to allow third country nationals who are **family members of EU citizens to access public employment** to promote the right to engage in work. As a result, Italy modified its legislation in accordance with EU law.

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.

Legislation

---

[70] CJEU, Case C-283/11 *Sky Österreich v ORF*, 22.01.2013.

[71] CJEU, Case C-201/11 P *UEFA v European Commission*, 18.07.20013 ; CJEU, Case C-204/11 P *FIFA v European Commission*, 18.07.2013; and CJEU, C-205/11 P *FIFA v European Commission*, 18.07.2013.

[72] Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 95, 15.4.2010, p. 1.

[73] CJEU, Case C-234/12 *Sky Italia v AGCOM*, 18.07.2013.

[74] 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.

To promote this freedom the European Commission had in 2012 made a proposal to modernise the current rules on **cross-border insolvency**.[75] During the negotiations, which have made real progress in 2013, the impact on minority creditors in terms of right to an effective remedy and right to property had been thoroughly considered. Thus the proposal is aimed at striking a fair balance between promoting the right to conduct a business on the one hand by and procedural rights of potential debtors on the other. The revision of the EU Insolvency Regulation will increase legal certainty, by providing clear rules to determine jurisdiction, and ensuring that when a debtor is faced with insolvency proceedings in several Member States, the courts handling the different proceedings work closely with one another. Information to creditors will be improved by obliging Member States to publish key decisions – about the opening of insolvency proceedings, for example, while strictly respecting the data protection rules.

Case law

In the case of *Schaible*[76] the European Court of Justice decided in a preliminary ruling that an obligation created individual electronic identification for sheep and goats did not infringe the right to conduct a business. Therefore, the relevant EU legislation establishing a system for the identification and registration of ovine and caprine animals was held to be valid. By adopting such identification measures which were intended to improve prevention of epizootic diseases, the legislature was held not to have infringed the freedom of animal keepers to conduct a business or the principle of equal treatment. In particular these measures were deemed proportional with view to their objective.

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

In November 2013, the European Commission submitted a proposal for **a Directive on the protection of undisclosed know-how and business information** (trade secrets) against their unlawful acquisition, use and disclosure[77]. This proposal, seeks to approximate national legislation to ensure that in case a trade secret is unlawfully acquired, used or disclosed by another person, the victim has access to a sufficient and comparable level of redress across the internal market. The European Commission paid special attention to fundamental rights in the preparation of the proposal, in particular the right to property, and also the right to the respect for private life (Article 7).[78]

Moreover, when preparing the proposal for a Directive of the European Parliament and of the Council on the return of **cultural objects unlawfully removed** from the territory of a Member State[79] , the right to property was taken into account accordingly.

The **European Account Preservation Order** strengthens the right to property and the procedural rights of potential debtors, such as the right to an effective remedy. In 2011 the European Commission had proposed a regulation on the subject. On 6 December 2013 the Council agreed on a general approach on the draft regulation creating a European Account Preservation Order.[80] The aim of the proposed regulation[81] is to facilitate cross-border debt recovery by creating a uniform European procedure

[75] COM(2012) 744 final, 12.12.2012.

[76] CJEU, Case C-101/12 *Herbert Schaible v Land Baden-Württemberg*, 17.10.2013.

[77] COM(2013)813 final.

[78] SWD(2013)471 final, Annex 21.

[79] COM(2013) 311; available at: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM(2013)0311 .

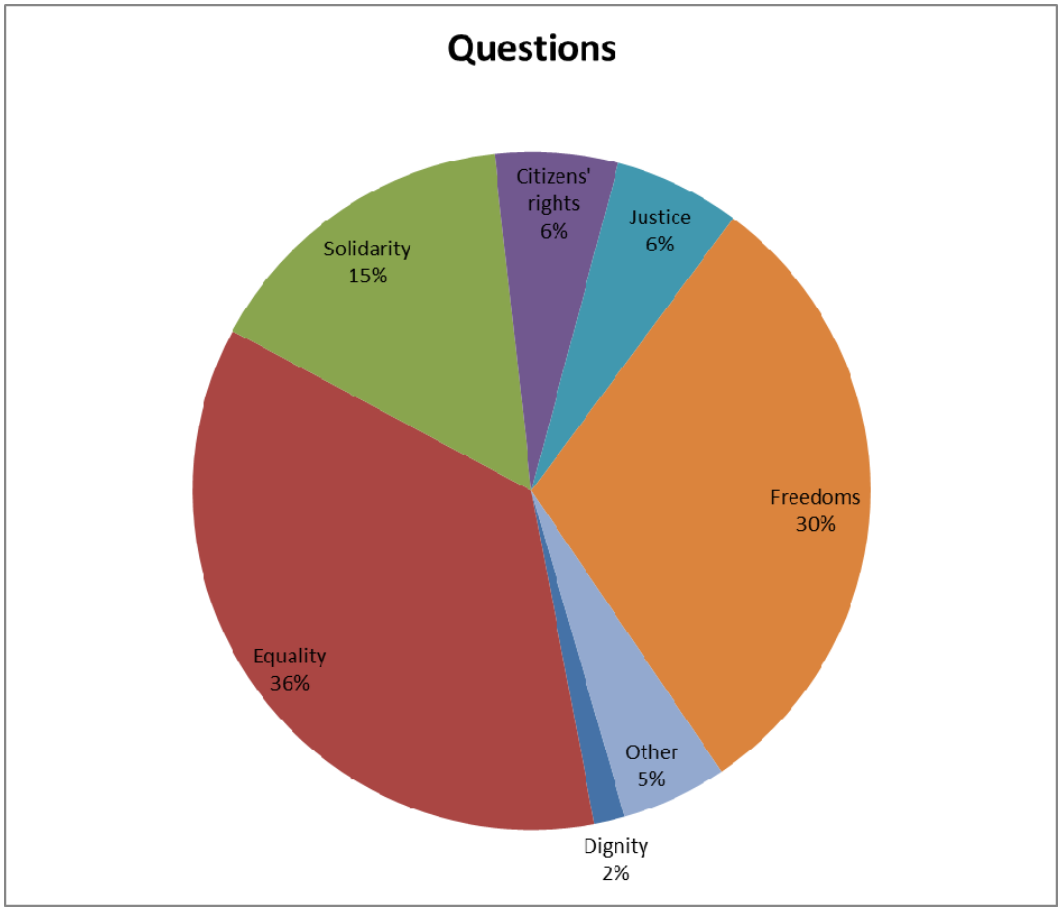
[80] See press release, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139938.pdf.

[81] 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.

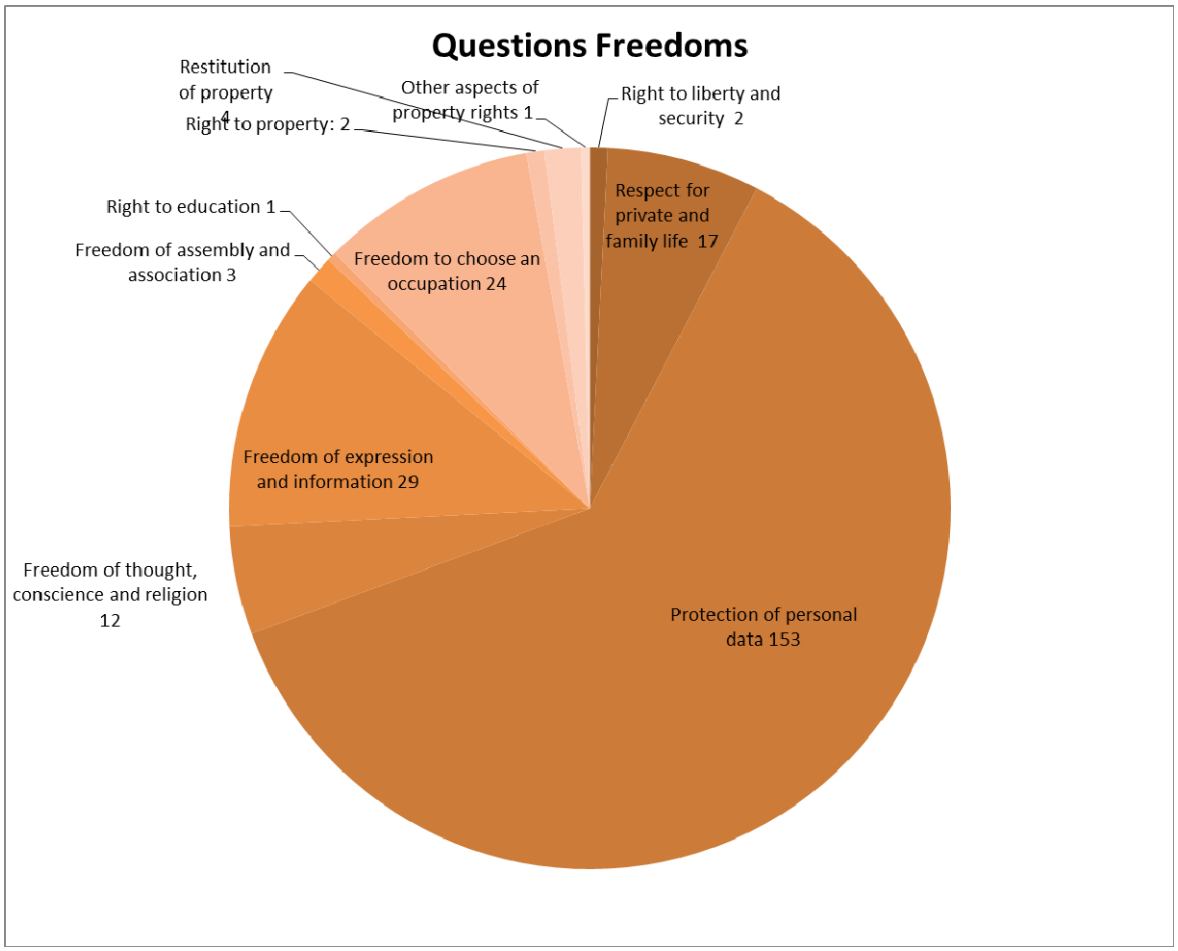
leading to the issue of a European Account Preservation order ("Preservation Order"). This European procedure will be available only to citizens and businesses residing in the participating Member States as an alternative to national procedures, but will not replace national procedures. It will apply 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.

UK catch quota

Vessel owners or organisations representing vessel owners have at times challenged the allocation of fishing opportunities by individual Member States before national courts. A case in point is *UK Association of Fish Producer Organisations v. Secretary of State for Environment, Food and Rural Affairs*, a case decided by a UK court in July 2013.[82] Importantly, the judgment concerned the redistribution of national UK catch quota and analysed in detail whether the decision by the English authorities on the re-distribution of quota was not only in conformity with national law, but did also respect fundamental rights and principles of EU law. It analysed, in particular, the right to property, the principle of legitimate expectations, and the principle and right to non-discrimination. The ruling explicitly referred to the Charter. The judge deciding the case concluded that the relevant English authority had acted in conformity with the latter and EU law in general. (see also below under Article 21 for an analysis of the case from the angle of the right to non-discrimination)



[82] UK Association of Fish Producer Organisations v. Secretary of State for Environment, Food and Rural Affairs, Case No: CO/4796/2012, [2013] EWHC 1959 (Admin). The case also touches on issues of discrimination, see below under the heading of Article 21.



Article 18: Right to asylum

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

Legislation

As already mentioned above one of the most important developments in this area is the establishment of a **Common European Asylum System** by adoption of the **recast Dublin Regulation** and the **Reception Conditions Directive**.[83] This was further supplemented by the adoption of the **Asylum Procedures Directive**.[84] The latter reinforces the guarantees safeguarding the fundamental right to asylum, in particular by strengthening the right to access to the asylum procedure, the right of asylum seekers to receive legal and procedural information free of charge already during the first instance procedure, it reinforces the provisions on the fundamental right to an effective remedy, including the rules on the provision of free legal assistance.

Following a European Commission proposal, the co-legislator adopted a recast **Eurodac Regulation**[85] , touching upon issues of asylum procedures and the right to data protection. The regulation extends

[83] See above section 1 on Dignity.

[84] Directive 2013/32 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60.

[85] Regulation No 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. OJ L 180, 29.6.2013, p. 1.

the scope permitting law enforcement access to the Eurodac database under strictly defined circumstances for the purposes of preventing, detecting or investigating serious crimes and terrorist offences. The use of Eurodac data for law enforcement purposes implies a change of purpose of access to the data processed and constitutes an "interference" with the right to data protection. As stipulated by Article 52 (1) of the Charter, any limitation to the right to the protection of personal data must be provided for by law, must respect the essence of the right, must be necessary to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others, and must be proportionate, i.e. appropriate for attaining the objective pursued and not going beyond what is necessary to achieve it.

The regulation provides for a more effective and less intrusive measure for competent law enforcement authorities to determine if another Member State holds data on an asylum seeker. Under current rules, Member States' law enforcement authorities have to contact bilaterally all other Member States participating in Eurodac to determine if another Member State holds data on an asylum seeker. The current rules are inefficient and require that law enforcement authorities access more personal data or data on more persons than is necessary to establish whether relevant information exists. Therefore, the regulation provides for effective safeguards that mitigate the limitation of the right to the protection of personal data.

There are currently a number of on-going **infringement procedures** concerning Member States that have not fully implemented the EU **asylum *acquis***: In 2013 the European Commission has launched infringement procedures against two Member States on the Reception Conditions Directive (Directive 2003/9), Asylum Procedures Directive (Directive 2005/85), the Asylum Qualification Driective (Directive 2004/83) and the Charter. The European Commission is currently considering launching further infringement procedures.

Asylum and immigration as the most relevant policy fields for references to the Charter in national case law

Out of the 69 national judgements analysed by FRA for the year 2013, the biggest group, namely 14 judgements, concerned the policy fields of immigration and asylum. This resembles the findings of last year's data collection: research into 240 national cases handed down in the recent years revealed that half of them dealt with asylum and immigration issues.

Case law

In the case *MA and Others v. Secretary of State for the Home Department*[86] the CJEU interpreted the relevant provision of the Dublin Regulation in such a way that it respects fundamental rights, in particular those guaranteed in Article 24 (2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, t**he child's best interests are to be a primary consideration**. In this specific case the CJEU interpreted the relevant provision to mean that where an unaccompanied minor with no member of his/her 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 minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.

In the case *Bundesrepublik Deutschland v Kaveh Puid*[87], the CJEU interpreted Article 3(2) of the Dublin Regulation and more precisely whether the duty of the Member States to exercise their right under the first sentence of Article 3(2) results in an enforceable personal right on the part of the asylum seeker to force a Member State to assume responsibility, in particular in light of Article 4 of the Charter. It ruled that where the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria set out in Chapter III of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for

[86] CJEU, Case C-648/11, *MA and others v. Secretary of State for the Home Department*, 06.06.2013.

[87] CJEU, Case C 4/11, *Bundesrepublik Deutschland v Kaveh Puid*, 14.11.2013. For more on the *Kaveh Puid* case from the angle of the applicability of the Charter, see the 2013 Report on the Application of the EU Charter of Fundamental Rights, under 2. Applicability of the Charter to the Member States.

determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, which is a matter for the referring court to verify, the Member State which is determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another Member State can be identified as responsible in accordance with one of those criteria or, if it cannot, under Article 13 of the Regulation. Conversely, in such a situation, a finding that it is impossible to transfer an asylum seeker to the Member State initially identified as responsible does not in itself mean that the Member State which is determining the Member State responsible is required itself, under Article 3(2) of Regulation No 343/2003, to examine the application for asylum.

In *Shamso Abdullahi v Bundesasylamt*[88], the CJEU ruled that Article 19(2) of Council Regulation (EC) No 343/2003 must be interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that regulation – namely, as the Member State of the first entry of the applicant for asylum into the European Union – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.

On 7 November 2013, the CJEU ruled on preliminary questions referred to it by the Dutch Council of State.[89] The applicants in the three joined cases brought an appeal against the decision of the Minister for Asylum and Immigration in which their request for a residence permit was declined. The applicants claimed that they feared persecution in their countries of origin on account of their homosexuality. The national court asked the CJEU (1) if Article 10(1)(d) of Directive 2004/83/EC on asylum qualification must be interpreted as meaning that homosexuals may be regarded as being members of a particular social group, (2) whether Article 9(1)(a) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution and (3) whether a distinction must be made between homosexual acts which fall within the scope of the directive and those which do not. The CJEU decided that the existence of criminal laws, which specifically target homosexuals, supports the finding that those persons form a particular social group which is perceived by the surrounding society as being different. Furthermore the CJEU ruled that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied, must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution. The CJEU then stated that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from the scope of Directive 2004/83/EC.

Already before this judgment of the CJEU was issued, the German Higher Administrative Court of Baden-Württemberg decided on a similar case[90]. It came to the same conclusion, stating that a homosexual belongs to a 'social group' for the purpose of the asylum qualification directive. It held that this sexual orientation is a part of a person's sphere of privacy which is protected under Article 8 ECHR and Article 7 of the Charter, both of which needed to be taken into account when interpreting the relevant EU directive and national law. Yet it held that in the particular case the country of origin did not practice a persecution of that group. Thus, it had to be decided on the basis of the individual circumstance of the case if the applicant in the concrete case would face persecution in his country of origin if he were to be returned there. This the court answered in the affirmative.

[88] CJEU, Case C 394/12, *Shamso Abdullahi v Bundesasylamt,* 10.12.2013

[89] CJEU, Joined Cases C-199/12, C-200/12 and C-201/12, X, Y, Z, 7.11.2013.

[90] Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), case A 9 S 1872/12, 07.03.2013.

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

The Charter in Article 19 **prohibits removal, expulsion or extradition** to a State where there is a serious risk that an individual would be subject to the death penalty, torture, or other inhuman or degrading treatment or punishment.

Legislation

Following the CJEU's annulment of Council Decision 2010/252/EU on surveillance of the sea external borders,[91] the European Commission presented a new Proposal for a **Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex[92].** As already indicated above,[93] This European Commission proposal provides that any measures taken during surveillance operations must be in full respect of fundamental rights and the principle of non-refoulement.

Laws that **criminalise 'irregular entry and/or stay'**, in different forms exist in the majority of Member States. Neither the Return Directive nor any other EU legal instrument prevent Member States from considering irregular entry and/or stay as a criminal offence under their national criminal law. However, several ECJ judgments have limited and constrained Member States' ability to keep returnees in prison as a consequence of this[94]. These rulings have resulted in a wide range of changes to national legislation in the countries examined and several Member States have recently changed their legislation as a consequence of this jurisprudence. The European Commission is following the situation closely and has already launched EU Pilot procedures against certain Member States.

International agreements

Ensuring respect for human rights – including those enshrined in the Charter and the 1951 Geneva Convention in the implementation of **EU Readmission Agreements (EURA) -** is considered of utmost importance by the European Commission, as outlined in its Communication to the European Parliament and the Council on the Evaluation of EU Readmission Agreements[95]. The Return Directive and the Asylum Procedures Directive contain clear safeguards on access to the asylum procedure and the protection of the *non-refoulement* principle, and EURAs cannot be applied in violation of these guarantees. Without questioning the applicability of the current EU *acquis* and other relevant international instruments (which must always be observed during the implementation of EURAs), the European Commission has proposed several flanking measures which would further ensure the full respect of human rights of returnees. In response to the Stockholm programme, the European Commission proposed 15 recommendations addressing the implementation and negotiation of EURAs as well as the further strengthening of human rights guarantees of readmitted persons.

As a result, the latest EURAs contain new provisions, in particular the **Agreement with Armenia** – which was signed on 19 April 2013 and entered into force on 1 January 2014 – and the **Agreement with Azerbaijan**, which was signed on 28 February 2014. A new article was added on 'fundamental principles', which ensures respect for the human rights of persons in the readmission procedure, and safeguards the treatment of persons in accordance with relevant international obligations after their readmission. This provision also stipulates the priority that voluntary return should enjoy over forced return. A suspension clause has been added to the final provisions of these agreement that, although formulated neutrally, would allow for unilateral suspension of the Agreement in case of a deterioration over a protracted period of the overall human rights situation in a third country. Finally,

[91] CJEU, Case C-355/10, *Parliament v Council*, 05.09.2012.

[92] Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0197:FIN:EN:PDF.

[93] See above section 1 on Dignity.

[94] CJEU, Case C-61/11, *El Dridi*, 28.4.2011 & Case C-329/11, *Achughbabian*, 6.12.2011. The Court had found that these rules preclude national law from imposing a prison term on an irregularly staying third-country national who does not comply with an order to leave the national territory. In a further case, the Court found that EU rules preclude national legislation imposing a prison sentence on an irregularly staying third-country national during the return procedure. However, the Court specified that such prison sentences could be applied to third-country nationals to whom the return procedure has been applied and staying irregularly with no justified grounds for non-return.

[95] COM(2011) 76 of 23 February 2011. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0076:FIN:EN:PDF .

the European Commission has together IOM and UNHCR developed a pilot project introducing a post-return monitoring mechanism in selected third countries (**Pakistan** and **Ukraine**), which has started operations to monitor the well-being of persons after being returned under an EURA (own nationals as well as third country nationals and stateless persons).

Case law

The CJEU in case *G and R*[96] expressly confirmed that the **rights of the defence** referred to in Article 41 (2) of the Charter (the right to be heard and the right to have access to the file) must be observed when taking decisions under the Return Directive even where this Directive does not expressly provide for such a procedural requirement. In this context the CJEU clarified that not every irregularity in the observation of the rights of the defence brings about the annulment of the decision.

Ruling of the Federal Administrative Court of Germany[97]

In this case an Afghan citizen applied for asylum in Germany, because he feared discrimination in his home country. The Federal Administrative Court decided that the national relevant law, providing that a foreigner must not be deported to a state in which he is facing threat of torture, inhumane or humiliating treatment or punishment, must be interpreted in line with EU Directive 2011/95/EU (the Asylum Qualification Directive), Article 3 of the ECHR and Article 19 of the Charter. The Federal Administrative Court repealed the judgment of the Mannheim Higher Administrative Court since it referred to the region of Kabul to determine whether there is an armed conflict at the destination of the applicant and did not refer to the native region of the applicant.

[96] CJEU, Case 383/13 *PPU (G and R)*, 10.09.2013.

[97] Federal Administrative Court of Germany (Bundesverwaltungsgericht), case 10 C 15.12, 31.01.2013.

3. Equality

Equality before the law

Non-discrimination

Cultural, religious and linguistic diversity

Equality between women and men

The rights of the child

The rights of the elderly

Integration of persons with disabilities

As in the previous years, the year 2013 witnessed a number of serious **incidents of racism and xenophobia** in the EU, including racist and xenophobic hate speech and violence against Roma and immigrants. The majority of Member States have provisions penalising incitement to racist and xenophobic violence and hatred, but these do not always seem to fully transpose the offences covered by the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

Data collected by the EU Fundamental Rights Agency (FRA) **on Jewish people's experiences and perceptions of hate crime** has revealed that one third of the respondents (33 %) experienced some form of anti-Semitic harassment in the five years before the survey, while one quarter (26 %) encountered such harassment in the 12 months before the survey, and that on average, minorities are victims of assault or threat more often than the majority population.

Regarding the **inclusion of the Roma**, the Council has adopted a recommendation on effective Roma integration measures in the Member States. It is the first ever EU-level legal instrument for Roma inclusion. It reinforces the EU Framework for national Roma integration strategies agreed by all Member States in 2011 and gives specific guidance to help Member States strengthen and accelerate their efforts in order to bridge the gaps between the Roma and the rest of the population.

Results of the FRA **LGBT survey** have provided valuable evidence of how LGBT persons in the EU and Croatia experience bias-motivated discrimination, violence and harassment in different areas of life, including employment, education, healthcare, housing and other services.

The European Commission launched an infringement procedure against **Finland** concerning inadequacies relating to the country's national equality body, which all Member States are required to set up under Directive 2000/43/EC (the Racial Equality Directive).

The European Commission has proposed a Directive on **procedural safeguards for children suspected or accused in criminal proceedings**, which is to ensure that children have mandatory access to a lawyer at all stages of criminal proceedings.

The Social Investment Package[98] and its accompanying **Recommendation on Investing in Children: breaking the cycle of disadvantage** calls on Member States to step up early, preventative social investments targeting children to ensure that children are given the best start in life and to make sure that children are not locked into a life of disadvantage. To support its implementation, the European Commission has also created a European Platform for investing in Children which collects and disseminates evidence- based good practices in such areas as or parental support, or early childhood education and care.

The European Commission engaged with all relevant stakeholders on how to **support integrated child protection systems through the implementation of the EU Agenda** during the 8th Forum on the Rights of the child. It has also set up an **informal Member State expert group** as a further step towards enhanced cooperation and dialogue with stakeholders.

In the joined cases *Ring and Skouboe Werg*, the CJEU interpreted Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in the light of Article 1 UN Convention on the Rights of Persons with Disabilities and adopted a **broad interpretation of the concept of disability** provided in the Directive.

In the *IBV* case, the CJEU held that the Charter and the principle of non-discrimination as enshrined in its Article 21 apply to a Belgian support scheme for renewable energy (biomass).

[98] Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020 COM(2013) 83 final Available at: http://ec.europa.eu/social/BlobServlet?docId=9761&langId=en .

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. In the area of employment and occupation, EU legislation prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation.

Legislation

The Irish Presidency continued the discussions in the Council working group on the European Commission's Proposal for an **Equal Treatment Directive, prohibiting discrimination on grounds of religion or belief, disability, age or sexual orientation also outside the area of employment and occupation**[99]. Its work focused on the scope of the Directive, providing a definition of the wording 'access to' in this context as opposed to the concept of 'eligibility' (as the setting of eligibility criteria in the area of education and social protection remains in exclusive Member State competence). The Presidency also worked on the definition of 'reasonable accommodation' for people with disabilities, discrimination 'by association', and preferential pricing for certain age groups. The aim is to improve the text at technical level, as long as no political compromise is in sight.

Negotiations for a Directive on improving the **gender balance among non-executive directors of companies listed on the stock exchange** are on-going[100]. On 20 November 2013 the European Parliament adopted its first reading report on the proposed Directive[101] by a vast majority of its members, confirming a broad consensus on the objective of increasing women's representation on corporate boards and largely endorsing the European Commission's approach to redressing the current imbalance.[102] The European Commission also adopted on 13 April 2013 a Proposal for a Directive amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups. This proposal would oblige companies to disclose their diversity policies for their administrative, management and supervisory bodies with regard to aspects such as age, gender, geographical diversity, educational and professional background. It only applies to large companies listed on the stock exchange. A political compromise was reached by the European Parliament and Council on 26 February and the Parliament will likely adopt the measure in April 2014.

The European Commission also ensures that its legislative proposals under negotiation in 2013, such as the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships comply with the principle of equal treatment of same sex couples.[103]

Furthermore, the European Commission continued monitoring the transposition and implementation of the **Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law**, which all Member States were obliged to transpose into their national legislation by 28 November 2010. By the end of 2013 all Member States had notified their national implementing measures to the European Commission. The European Commission finalised its

[99] 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

[100] A European Commission proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final, 14.11.2012.

[101] Document no A7-0340/2013.

[102] See also the 2013 Report on the Application of the EU Charter of Fundamental Rights under 3.2 Positive measures.

[103] For more details, see above under Article 7 Respect for private and family life.

assessment of the notifications and prepared a report on Member States' compliance with the Framework Decision, which was adopted on 27 January 2014, honouring International Holocaust Remembrance Day.

The report concludes that a number of Member States have not transposed fully and/or correctly all the provisions of the Framework Decision, namely in relation to the offences of denying, condoning and grossly trivialising certain crimes. The majority of Member States have provisions on incitement to racist and xenophobic violence and hatred but these do not always seem to fully transpose the offences covered by the Framework Decision. Some gaps have also been observed in relation to the racist and xenophobic motivation of crimes, the liability of legal persons and jurisdiction. The European Commission therefore considers that the full and correct legal transposition of the existing Framework Decision constitutes a first step towards effectively combating racism and xenophobia by means of criminal law in a coherent manner across the EU. Since infringement procedures for Framework Decisions are not possible before 1 December 2014, the European Commission will engage in bilateral dialogues with Member States during 2014 with a view to ensuring full and correct transposition of the Framework Decision, giving due consideration to the Charter.

The European Commission has also shown that it is strict and serious about the full and correct implementation of the provisions of Directive 2000/43/EC (the Racial Equality Directive) relating to equality bodies and that it pays importance to the well-functioning of these equality bodies. It has issued a reasoned opinion to **Finland** in the second stage of the infringement procedure concerning inadequacies relating to the country's national equality body, which all Member States are required to set up under Directive 2000/43/EC. EU anti-discrimination rules make it obligatory for Member States to establish a national equality body tasked with providing independent assistance in pursuing complaints to victims of discrimination, as well as monitoring and reporting on discrimination. National equality bodies are crucial, in particular for the proper enforcement of the Directive and to ensure protection for victims of discrimination. It is essential that the national equality bodies actually carry out all the tasks required by the Directive. The European Commission considers that Finnish law currently fails to designate any equality body responsible for addressing cases of racial or ethnic discrimination in employment. The European Commission is therefore calling on Finland to bring its rules in line with EU requirements to ensure victims of discrimination can receive proper assistance.

A case of **discrimination in relation to the disbursement of rural development payments**, can be found in the provisions of Polish legislation, stipulating that farming spouses should be given one single identification number, regardless of whether the spouses co-own and jointly run farm holdings or not. As a result of this, only the spouse who has been registered in the system can apply for direct payments and rural developments payments. The European Commission considered that the Polish legislation is not in line with Article 40(2) TFEU concerning the equal treatment of agricultural producers. In addition, it considered the legislation to be contrary to Article 21 of the Charter, and to every active agricultural producer's right to receive payments according to Regulation (EC) No 73/2009 and the rights for farmers to receive rural development subsidies according to Regulation (EC) No 1698/2005. The Polish authorities agreed to add a provision to the Act on the National Registration System, which will allow spouses owning a farm to be issued an identification number.

In November 2013, the European Commission has formally **closed the infringement procedures launched against Hungary** on 17 January 2012 over the country's forced early retirement of around 274 judges and public prosecutors[104]. This had been caused by a sudden reduction in the mandatory retirement age for these professions from 70 to 62. Following the European Commission's legal action, the CJEU upheld the European Commission's assessment[105] that the change was incompatible with Directive 2000/78/EC which prohibits discrimination at the workplace on grounds of age. Following calls by the European Commission for Hungary to comply with the judgment as soon as possible, the country took the necessary measures and adopted changes to its law. The European Commission is now satisfied that Hungary has brought its legislation in line with EU law. A new law adopted by the

[104] For more information about the infringement proceedings, see the European European Commission Press Release IP/12/24, 'European European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary', 17.01.2012, available at http://europa.eu/rapid/press-release_IP-12-24_en.htm.

[105] CJEU, C-286/12, *European European Commission v. Hungary*, 06.11.2012. See also MEMO/12/832.

Hungarian Parliament on 11 March 2013 lowers the retirement age for judges, prosecutors and notaries to 65 over a period of 10 years, rather than lowering it to 62 over one year, as before. This aligns it with the general retirement age of 65. The new law also provides for the right for all judges and prosecutors who had been forced to retire before to be reinstated in their posts, with no need to bring a case to court. Moreover, they will be compensated for remuneration lost during the period they were not working. The European Commission has closely monitored the correct implementation of the new legislation in practice.

Infringement procedures were initiated against **Italy** for **non-conformity with Directive 2006/54/EC** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Italian Law No 214 of 22 December 2011 implementing that directive establishes a different number of years of financial contributions after which men and women are entitled to an early retirement pension. Under Directive 2006/54/EC it is not allowed to set a different retirement age and different conditions for men and women in order to get an occupational pension. These infringement procedures against Italy are based on hundreds of individual complaints.

A letter of formal notice was sent to **Czech Republic** in a case concerning the **non-conformity of the Czech Employment Act with Directive 2000/78/EC** on Employment Equality, due to the prohibition on employment agencies from assigning disabled people to temporary work. The Directive provides that there shall be no discrimination on grounds of disability. The European Commission was of the opinion that the prohibition in the Czech law effectively excludes all disabled people from a sector of the labour market irrespective of the type of activity and the nature of the disability. Consequently, the Czech Employment Act was held to directly discriminate against disabled people and considered to be in breach of the Directive.

Policy

The European Commission has supported work to promote equal rights for all groups at risk of discrimination through its PROGRESS funding programme. PROGRESS is the EU's employment and social solidarity programme. With regard to Justice policies, PROGRESS covers both gender equality and tackling discrimination themes.[106]

Manifestations of intolerance, racism and xenophobia in the EU

The year 2013, as in the previous year, witnessed a number of serious incidents of **racism and xenophobia in the EU**, including racist and xenophobic hate speech and violence against Roma and immigrants.

The European Commission received a considerable amount of **parliamentary questions on racism, xenophobia and anti-Semitism**, which underlines the need for the Member States to step up their efforts to tackle these problems. The issues brought to the attention of the European Commission included, in particular, alleged xenophobic violence against ethnic minorities and immigrants, racism and xenophobia against certain minorities as well as the statements and actions of certain extremist political parties and organisations. In reply to these concerns, the European Commission reaffirmed its commitment to fight against racism and xenophobia by all means available under the Treaties and recalled the responsibility of the Member States' authorities to effectively implement the EU legislation prohibiting racist or xenophobic hate speech and hate crime based on a racist or xenophobic motivation.

This year's **Fundamental Rights conference**, organised by the FRA in cooperation with the Lithuanian Presidency gave participants the opportunity to look into the situation on the ground and to examine the effectiveness of existing legal and practical tools for fighting hate crime. The conference brought together around 400 participants from EU institutions and agencies, international organisations, national governments and parliaments, law enforcement, civil society and more. On 11 November

[106] More information on the PROGRESS funding programme can be found at http://ec.europa.eu/justice/grants/programmes/progress/index_en.htm.

2013, FRA brought together 30 participants at a stakeholder meeting to discuss ways forward in combating anti-Semitism in the EU following its 8 November publication of its report on Discrimination and hate crime against Jews in the EU Member States – experiences and perceptions of anti-Semitism. The European Commission actively participated in both events.

The 7th seminar between the European Commission and the State of Israel on the **Fight against Racism, Xenophobia and Anti-Semitism** was held in December 2013, together with the 6th meeting of the Expert Group on Framework Decision 2008/913/JHA. The FRA presented the results of its survey on discrimination and hate crime against Jews in certain EU Member States, which shows worrisome figures on anti-Semitic incidents as perceived and experienced by victims. The Member States were reminded of the crucial importance of the correct implementation and application of the Framework Decision. The Israeli delegation reported on the outcome of the 4th Global Forum on the fight against anti-Semitism that took place in Jerusalem in May 2013. The main discussion focused on online hate speech and anti-Semitism, and human rights and Holocaust remembrance training were also discussed.

The data collected by the EU Agency for Fundamental Rights shows that racism, discrimination, extremism and intolerance currently pose a great challenge for the EU:

The **survey on Jewish people's experiences and perceptions of hate crime** has revealed that one third of the respondents (33 %) experienced some form of anti-Semitic harassment in the five years before the survey, while one quarter (26 %) encountered such harassment in the 12 months before the survey. Almost half (46 %) of the respondents worry about becoming the victim of an anti-Semitic verbal insult or harassment in the 12 months following the survey, while one third (33 %) fear a physical attack in the same period. Close to one quarter (23 %) of the respondents said that they at least occasionally avoid visiting Jewish events or sites because they would not feel safe there, or on the way there, as a Jew. Over one quarter of all respondents (27 %) avoid certain places in their local area or neighbourhood at least occasionally because they would not feel safe there as a Jew. Over half of all survey respondents (57 %) heard or saw someone claiming that the Holocaust was a myth or that it had been exaggerated in the 12 months before the survey. Notwithstanding these figures, almost two thirds (64 %) of those who experienced physical violence or threats of violence did not report the most serious incident to the police or to any other organisation. Three quarters (76 %) of the respondents who experienced anti-Semitic harassment in the past five years did not report the most serious incident. More than four in five (82 %) of those who said that they felt discriminated against in the 12 months before the survey because they are Jewish did not report the most serious incident. About half of the respondents, are not aware of the legislation that protects Jewish people from discrimination[107].

The FRA has also examined **the responses of Greece and Hungary to racism, discrimination, extremism and intolerance** given the significant parliamentary presence of political parties standing for and promoting an extremist ideology that particularly targets irregular migrants (in Greece) and the Roma and Jews (in Hungary), and which are either themselves or have links to paramilitary organisations committing racially motivated acts of violence. These countries are also taken as case studies to demonstrate the need for more targeted and effective measures to combat these phenomena throughout the EU. According to the report, although the EU and its Member States already have strong legislation in place to fight racism, intolerance and extremism, greater efforts are needed to ensure effective implementation. In addition, more needs to be done, particularly at local level, to foster social cohesion and increase trust in the police and other law enforcement authorities[108].

The FRA assessed the impact of Framework Decision 2008/913/JHA on the rights of the victims of crimes motivated by hatred and prejudice, including racism and xenophobia. The Opinion illustrates how hate crime can vary from everyday acts committed by individuals on the street or on the Internet, to large-scale crimes carried out by extremist groups or totalitarian regimes[109].

[107] FRA, Jewish people's experience of discrimination and hate crime in European Union Member States, November 2013.

[108] FRA, Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary, December 2013.

[109] FRA Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime, October 2013.

EU Framework for National Roma Integration Strategies

Major progress has been achieved in 2013 on making the common EU approach in tackling the exclusion of Roma from our societies operational.

In June 2013, the European Commission **assessed progress** made in the Member States on the five preconditions for a successful implementation of national Roma integration strategies and measures. These conclusions[110] have allowed formalising the shift of the European and national paradigm towards the local level, where major bottlenecks regarding Roma integration are situated.

This shift was reflected at the second meeting (on 7-8th March 2013) of the **National Roma Contact Points** where prominent attention was paid to the EU funding and coordination mechanisms that may support local and regional authorities when meeting the challenge of Roma integration. The third meeting (on 30th September and 1st October 2013) included a full session on exchanges on possible solutions to the challenges met by local and regional authorities when dealing, on the one hand, with Roma coming from other EU Member States and settling on their territory and, on the other hand, with native Roma and travellers (who have not experienced intra-EU migration). Representatives from local and regional authorities participated in both meetings.

The conclusions from the European Commission's assessment of progress also allowed to identify a number of issues needing a stronger commitment from the Council in order to ensure that the strategies are operational and are well implemented, based on the European Commission's recommendations on effective Roma integration measures in the Member States[111].

The European Commission **strengthened its dialogue with civil society and the Roma themselves**, including at the highest decision-making levels (such as a meeting of Vice-President Reding and European Commissioner Andor with civil society representatives on 14th May 2013) and the Roma Platform on 26th June 2013 gave a prominent visibility and role to the Roma and their representatives.

Members of the European Parliament have maintained their strong involvement in the process. The European Commission has received several written questions all through the year concerning Roma integration and possible discrimination. The European Commission participated in the Hearing organised in the European Parliament on the EU Framework for national Roma integration strategies, but also in the debates regarding the possible adoption of a Motion on Gender aspects of the EU Framework for national Roma integration strategies.

On 9 December 2013, with the adoption of the Council recommendation on effective Roma integration measures in the Member States[112], all 28 EU Member States committed to implementing a set of recommendations, proposed by the European Commission, to step up the economic and social integration of Roma communities. The Council recommendation is the first ever EU-level legal instrument[113] for Roma inclusion and it gives specific guidance to help Member States strengthen and accelerate their efforts in order to bridge the gaps between the Roma and the rest of the population. It reinforces the EU Framework for national Roma integration strategies agreed by all Member States in 2011. Based on European Commission reports on the situation of the Roma over recent years, the Council recommendation focuses on the four areas where EU leaders signed up to common goals for Roma integration under the EU Framework for national Roma integration strategies: access to education[114], employment, healthcare and housing. To put in place targeted actions, it asks Member States to allocate not only EU but also national funds to Roma inclusion.

Fight against homophobia

[110] Steps forward in implementing national Roma integration strategies, COM (2013) 454 final, 26.06.2013.

[111] Proposal for a Council Recommendation on effective Roma integration measures in the Member States, COM(2013) 460, 26.06.2013.

[112] Council recommendation on effective Roma integration measures in the member states, Brussels, 9 and 10 December 2013, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/139979.pdf

[113] It should be noted, however, that a Council recommendation is not legally binding the Member States.

[114] Special attention is paid to the rights of Roma children, especially in the context of full and equal access to quality education of Roma children. In the part on substantive policy issues regarding access to education, COM(2013) 454 refers to a child's right to education as enshrined in Article 28 of the UN Convention on the Rights of the Child. The rights of the child are discussed below under Article 24.

In light of a lack of comparable data on the respect, protection and fulfilment of the fundamental rights of lesbian, gay, bisexual and transgender (LGBT) persons, the FRA launched in 2012 its EU online **survey of LGBT persons' experiences of discrimination, violence and harassment**, of which the results were published in May 2013[115]. The survey results provide valuable evidence of how LGBT persons in the EU and Croatia experience bias-motivated discrimination, violence and harassment in different areas of life, including employment, education, healthcare, housing and other services. The findings show that many hide their identity or avoid locations because of fear. Others experience discrimination and even violence for being LGBT. Most, however, do not report such incidents to the police or any other relevant authority. The report assisted the EU institutions and the Member States in identifying the fundamental rights challenges faced by LGBT people living in the EU and Croatia. Basing itself on the results of the survey, the European Commission brought together interested Member States to discuss existing best practices in those areas identified in the survey as most problematic and to discuss appropriate policy responses to address the needs of LGBT persons and ensure the protection of their fundamental rights.

The European Commission sponsored and provided policy support to the initiative of the French government to host the regional UN conference on LGBT rights for Europe, in March 2013. The event aimed at raising awareness at the highest level about the violations of fundamental rights of LGBT people, the need to fight discrimination and violence grounded in sexual orientation and the need to reinforce cooperation with civil society.

Questions were raised regarding the critical situation in Lithuania where the government **banned the Pride parade** in June 2013 and has tabled several legislative proposals which would impair the rights of LGBT persons. The European Commission is committed to combating homophobia and discrimination based on sexual orientation within the limits of the powers conferred on it by the Treaties.

Rights of persons belonging to minorities

The respect of the **rights of persons belonging to minorities** is one of the founding values of the EU and is explicitly mentioned in Article 2 of the Treaty on European Union. Articles 21 and 22 of the Charter prohibit discrimination based on membership of a national minority and provide for the respect by the Union of cultural, religious and linguistic diversity. However, the EU has no general powers as regards minorities, in particular, over matters concerning the definition of a national minority, the recognition of the status of minorities, their self-determination and autonomy, or the regime governing the use of regional or minority languages. It is therefore up to the Member States to use all legal instruments available to them in order to guarantee that fundamental rights of minorities living on their territories are effectively protected in accordance with their constitutional order and obligations under international law, including the relevant instruments of the Council of Europe. For instance, monitoring the application of the Framework Convention for the Protection of National Minorities[116] as well as of the European Charter for Regional or Minority Languages[117] by its States Parties, falls within the mandate of the Council of Europe.

At the same time, EU legislation addresses **certain difficulties affecting persons belonging to minorities**, such as discrimination and incitement to violence or hatred based on race or national or ethnic origin, via a number of programmes or legislative measures.[118] Directive 2000/43/EC establishes a binding legislative framework prohibiting discrimination based on grounds of racial or ethnic origin in the areas of employment and training, education, social protection (including social security and healthcare), social advantages and access to goods and services (including housing). This Directive has

[115] FRA, 'EU LGBT Survey: European Union lesbian, gay, bisexual and transgender survey - Results at a glance', May 2013, available at http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf

[116] Council of Europe Framework Convention for the Protection of National Minorities, Strasbourg, February 1995, available at http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_H(95)10_FCNM_ExplanReport_en.pdf.

[117] Council of Europe European Charter for Regional or Minority Languages, Strasbourg, November 1992, available at http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=148&CM=1&CL=ENG.

[118] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.

been transposed into the legal order of every Member State and the European Commission ensures proper implementation. In addition, the European Commission supports projects related to regional and minority languages through a variety of programmes, including in areas such as education and training, culture and youth support. In particular, the Lifelong Learning Programme finances projects to promote language learning and linguistic diversity, either through the different sub-programmes (Comenius, Erasmus, Leonardo da Vinci or Grundtvig) or through its transversal programme (key activity 2 'Languages').

Case law

In the case of homophobic statements by the patron of a football club[119], ruling out the recruitment of a footballer presented as being homosexual, the CJEU held that the rules on sanctions put in place in order to transpose the provisions of Directive 2000/78/EC on equal treatment in employment and occupation into the national law of a Member State must ensure real and effective legal protection of the rights deriving from it. The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect. A purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78/EC. Therefore the CJEU requested the referring court to ascertain the appropriateness of the sanction in the case at stake, which consisted in a simple warning only. The CJEU held that national rules are not in line with Directive 2000/78/EC if these national rules, in cases, where there is a finding of discrimination on grounds of sexual orientation within the meaning of Directive 2000/78/EC, allow to impose a warning only, without sanctioning the discrimination under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive.

In 2013, the CJEU has further developed its case law on the **prohibition of discrimination on the ground of age**. The fact that the CJEU in its case law on age discrimination explicitly refers to Article 21 of the Charter, which contains the prohibition of any discrimination on ground of age, is to be welcomed. In the case *HK Danmark v Experian A/S*[120], a request for a preliminary ruling from a Danish court on the interpretation of Council Directive 2000/78/EC, the question of the lawfulness of the occupational pension scheme operated by Experian was at stake. Experian had namely set up a pension scheme with different applicable rates according to different age categories, and argued that pension schemes are not covered by the prohibition of discrimination on the grounds of age, as laid down by the Danish Anti-Discrimination Law. The CJEU held, however, that these pension schemes are covered by the said legislation. It concluded that the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter and given specific expression by Directive 2000/78/EC, must be interpreted as allowing an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age, provided that the difference in treatment on grounds of age that arises therefrom is appropriate and necessary to achieve a legitimate aim, which it is for the national court to establish.

Another Danish age discrimination case *Toftgaard*[121], is a case on the refusal to grant availability pay to civil servants who have reached the age of 65 and are entitled to a pension. The Danish Law on Civil Servants foresees a system of "rådighedsløn" (availability pay), under which a civil servant may, as special protection in the event of dismissal on grounds of redundancy, retain his current salary for three years and continue to be credited for years of pensionable service, provided he remains available for assignment to another suitable post. Mr Toftgaard was not granted availability pay as he had reached the age of 65 and was entitled to a pension. The CJEU held that Directive 2000/78/EC must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy.

Not only the Danish retirement scheme was under scrutiny by the CJEU regarding its compliance with the Charter, but also the Czech retirement scheme, and more particularly the **early retirement**

[119] CJEU, C-81/12, *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*, 25.04.2013.

[120] CJEU, C-476/11, *HK Danmark v Experian A/S,* 26.09.2013 ('Kristensen').

[121] CJEU, C-546/11, *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet,* 26.09.2013 ('Toftgaard').

support in the agricultural sector. In the *Soukupova* case[122], a case referred to the CJEU by the Czech Supreme Administrative Court, the CJEU held that in implementing Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund ('EAGGF') Member States are required, pursuant to Article 51 (1) of the Charter, to respect the principles of equal treatment and non-discrimination, enshrined in Articles 20, 21 (1) and 23 of the Charter. Member States, when granting early retirement support in the agricultural sector, financed by the EAGGF, may not rely on the difference in treatment that they are authorized to retain when defining retirement age in the field of social security. On the contrary, in the context of early retirement support for elderly farmers, Member States are required to ensure equal treatment between women and man, and, thereto, to prohibit any discrimination on grounds of gender. In the present case, the difference in treatment by the Czech authorities, consisting in the determination, depending on the gender or number of children, of the age from which that support may no longer be claimed, could not be objectively justified and thus amounted to a violation of the Charter.[123]

In the case *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne*[124] of 26 September 2013, the Belgian Constitutional Court had submitted a reference for a preliminary ruling on whether the granting of a larger number of green certificates to cogeneration plants processing principally forms of biomass other than wood or wood waste is in compliance with the principle of equal treatment and non-discrimination as enshrined in Articles 20 and 21 of the Charter. The possibility for setting up national support schemes for cogeneration and electricity production from renewable energy sources is foreseen in Article 7 of Directive 2004/8 and Article 4 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. The question arising in this context is whether the setting up of a grant scheme which gives preferential treatment to cogeneration plants processing principally forms of biomass, to the detriment of those processing wood or wood waste is in line with the principle of non-discrimination. The novelty of the judgment was in the fact that the CJEU for the first time declared that Member States are implementing EU law in the sense of Article 51 (1) of the Charter when setting up and regulating these support schemes.

Regarding the outcome of the case, the CJEU held that, in the present state of European Union law, the principle of equal treatment and non-discrimination laid down in particular in Articles 20 and 21 of the Charter does not preclude the Member States from providing for an enhanced support measure capable of benefiting all cogeneration plants principally using biomass with the exclusion of cogeneration plants principally using wood and/or wood waste. The CJEU stressed the broad margin of discretion allowed to the Member States by Directives 2001/77 and 2004/8 for the adoption and implementation of support schemes intended to promote cogeneration and electricity production from renewable energy sources.

Rulings on age discrimination in France and Germany

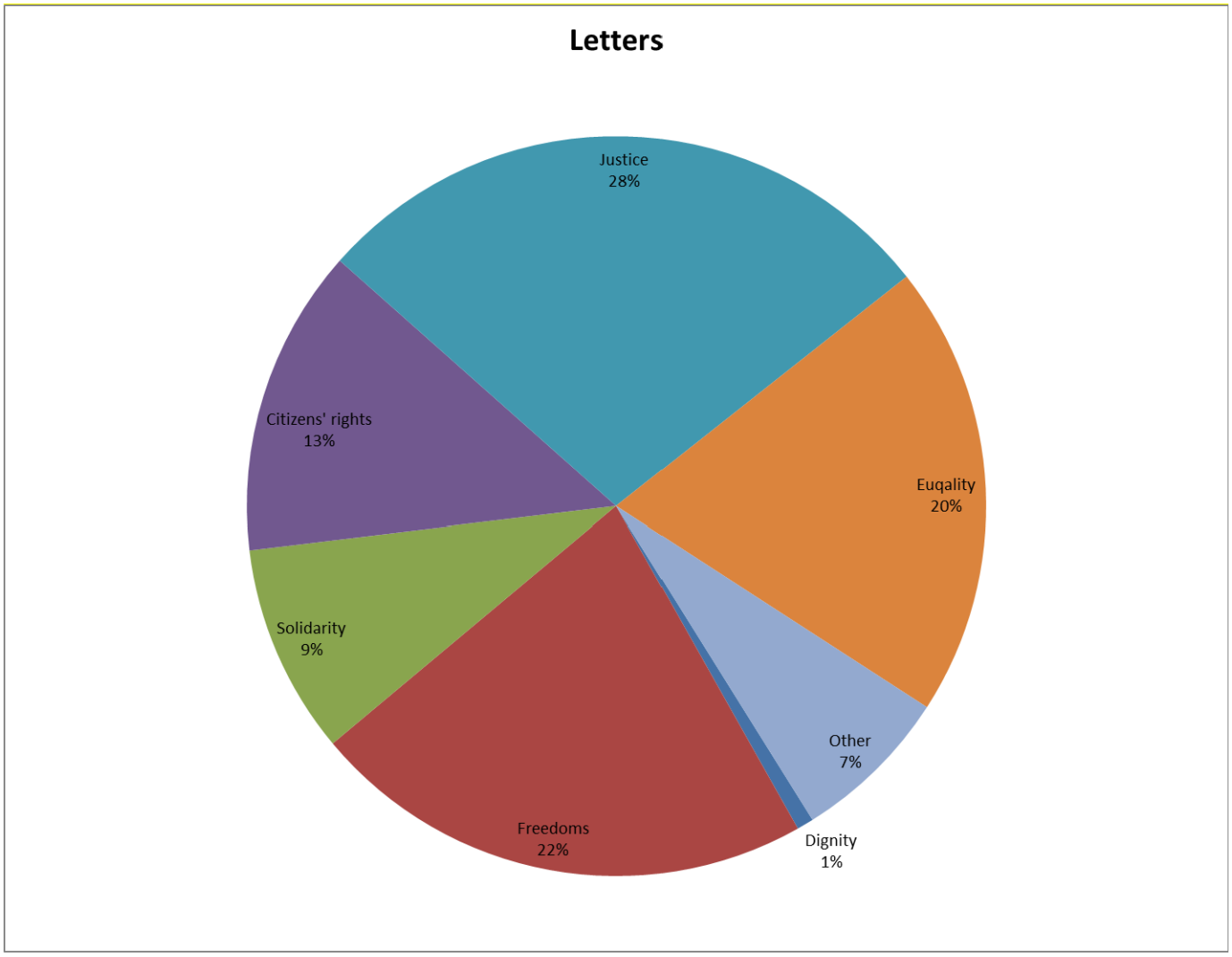
In France[125] and Germany[126] cases were brought to court regarding discrimination on the basis of age. The French case concerned a national law which provides that an agent of national electricity and gas industries from 65 to 67 years old can be retired at the initiative of the employer. The German case concerned a state regulation on authorized inspectors and official experts providing for an absolute age limit of 70 years. In both cases the national courts

[122] CJEU, C-401/11, *Blanka Soukupová v Ministerstvo zemědělství*, 11.04.2013.

[123] See also the 2013 Report on the Application of the EU Charter of Fundamental Rights under 2. Applicability of the Charter to the Member States.

[124] CJEU, C-195/12, *Industrie du bois de Vielsalm & Cie (IBV) SA v Région wallonne*, 26.09.2013.

[125] High Administrative Court of France (Conseil d'Etat), case N° 352393 ECLI FR CESSR 2013 352393.20130313, *Mrs A v the State of France*, 13.3.2013.

[126] Hessian Higher Administrative Court (Hessischer Verwaltungsgerichtshof, 7. Senat), case 7 C 897/13.N, 7.8.2013.

decided that the age limit constituted age discrimination according to Article 21 of the Charter, however, the infringement was justified under Article 52 of the Charter. Article 52 states that fundamental rights can only be limited if this is provided for by law with respect to the essence of those rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The French High Administrative Court decided that the limitation was justified because the age limit is necessary to promote access to employment through better distribution between generations. The German Higher Administrative Court decided that the infringement was justified because of public security.