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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: COMMISSION STAFF WORKING DOCUMENT
on the Application of the EU Charter of Fundamental Rights in 2012
Accompanying the document
Report from the Commission to the European Parliament, the Council, the
European Economic and Social Committee of the Regions
2012 Report on the application of the EU Charter of Fundamental Rights

Delegations will find attached Commission document SWD(2013) 172 final - Part 7.

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COMMISSION STAFF WORKING DOCUMENT

on the Application of the EU Charter of Fundamental Rights in 2012

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

2012 Report on the application of the EU Charter of Fundamental Rights

{COM(2013) 271 final}
{SWD(2013) 171 final}

4. Solidarity

Workers' right to information and consultation within the undertaking

The Commission's **European Consumer Agenda - Boosting confidence and growth** set out the principles for consumer policy in the years to come and identifies specific initiatives which aim at empowering consumers, boosting their trust and putting consumers at the heart of all EU policies.

Right of collective bargaining and action

Right of access to placement services

In line with the Single Market Act, the Commission presented two legislative proposals, one the enforcement of the **Posting of Workers Directive** , and one on the **exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services** (the so-called Monti II proposal). Twelve national

Protection in the event of unjustified dismissal

Parliaments adopted reasoned opinions expressing concerns related, among others, to the added value of the draft Monti II Regulation, the choice of its legal basis and EU competence to regulate this matter. Although the Commission was of the opinion that the principle of subsidiarity has not been breached, it recognised that its proposals were unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption. Consequently, it withdrew this proposal on 26 September 2012 hoping that this would facilitate a rapid negotiation of the other part of the package, namely the proposal for an Enforcement Directive.

Fair and just working conditions

Prohibition of child labour and protection of young people at work

Family and professional life

EU ruled on the compatibility of EU rules on nutrition and health claims made on foods (Regulation (EC) No 1924/2006) with the freedom to choose an occupation and the freedom to conduct a business (Articles 15(1) and 16 of the Charter).

Social security and social assistance

Health care

Access to services of general economic interest

Environmental protection

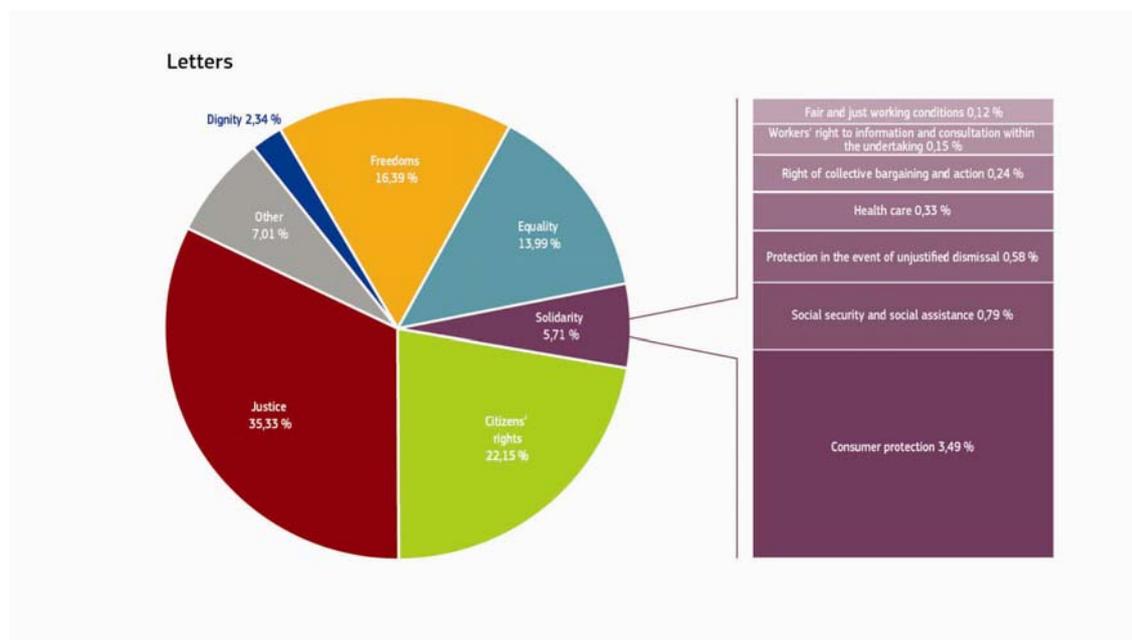
Consumer protection

Workers' right to information and consultation

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

The Commission is finalising a legislative proposal to lift the **exclusion of seafaring workers from the personal scope of application of a number of EU labour law directives** following consultation of the European social partners. The Commission's proposal would extend the scope of application of the Insolvency Directive⁸⁵, the Works Council Directive⁸⁶, the Information and Consultation Directive⁸⁷ and the Transfer of undertakings Directive⁸⁸ to seafaring workers.

The **Commission monitors the implementation of the legal framework on European Works Council** that helps to guarantee the effectiveness of employees' transnational information and consultation right and launched infringement procedures against Member States that did not adopt the required transposing measures within the determined deadline.



Right of collective bargaining and action

The Charter provides that workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. There is no specific EU law regulating the conditions and consequences of the exercise of these rights at national level⁸⁹. Member States remain, of course, bound by the provisions of the Charter, including the right to strike, in instances where they implement EU law.

⁸⁵ Directive 2008/94/EC, on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36 – 42.

⁸⁶ Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 122, 16.5.2009, p. 28 – 44.

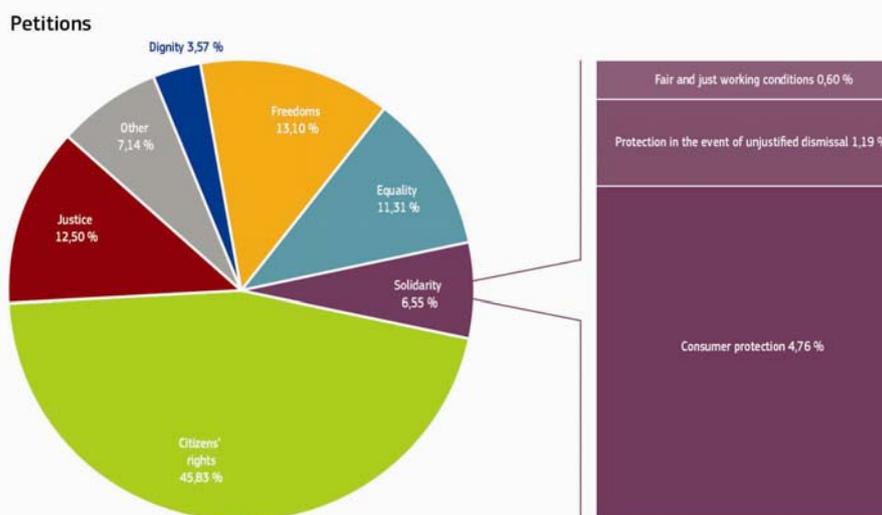
⁸⁷ Directive 2002/14/EC on the establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29 – 33.

⁸⁸ Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses of 12 March 2001, OJ L 82, 22.3.2001, p. 16 - 20

⁸⁹ Article 153(5) of the Treaty on the Functioning of the EU (TFEU) stipulates that it does not apply to the right to strike.

In line with the Single Market Act⁹⁰, the Commission presented on 21 March 2012 two legislative proposals; one on the enforcement of the **Posting of Workers Directive**⁹¹, and one on the exercise of the **right to take collective action**⁹² within the context of the freedom of establishment and the freedom to provide services (the so-called Monti II proposal). Both proposals were transmitted to the other EU institutions as well as to the national Parliaments of the Member States. The Council started discussions on them and the European Parliament organised a hearing on 18 September 2012. However, twelve national Parliaments adopted reasoned opinions⁹³ expressing concerns related, among others, to the added value of the draft Monti II Regulation, the choice of its legal basis and the EU competence to regulate this matter.

Although the Commission was of the view that the principle of subsidiarity has not been breached, it nevertheless recognised that its proposal for the Regulation was unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption. Consequently, it withdrew this proposal on 26 September 2012 hoping that this would facilitate a rapid negotiation of the other part of the package, namely the proposal for an Enforcement Directive.



Fair and just working conditions

The Charter guarantees that every worker has the right to working conditions which respect their health, safety and dignity. Every worker has the right to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. There is a substantial body of EU law in this area concerning, in particular, health and safety at work⁹⁴.

⁹⁰ Communication from the Commission: Single Market Act, Twelve levers to boost growth and strengthen confidence, Working together to create new growth", COM(2011) 206 final.

Available at: http://ec.europa.eu/internal_market/smact/docs/20110413-communication_en.pdf

⁹¹ Proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final.

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF>

⁹² Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0130:FIN:EN:PDF>

⁹³ On the basis of Protocol N° 2 to the EU Treaties on the application of the principles of subsidiarity and proportionality.

⁹⁴ The central piece is the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1-8, which lays down general principles on the protection of workers' health and safety. Several specific directives cover a number of specific risks, e.g. exposure of workers to biological and chemical agents at work, noise, work at the construction sites, manual handling of loads, etc. Another important piece of legislation covers working time and regulates issues such as minimum daily and weekly rest periods, breaks, maximum weekly working time, night work and annual leave.

The social partners at European level pursued their negotiations on the Working time Directive⁹⁵, with the aim of conducting a review⁹⁶. On 16 August 2012, the Commission agreed to extend time for their negotiations until 31 December 2012, following a joint request of the social partners indicating that their negotiations were making progress. The Commission has stated that, respectful of the social partners' autonomy, it will not put forward a legislative proposal of its own during the period foreseen under the Treaty for their negotiations. In December, the social partners informed the Commission about the failure of the negotiations.

Blacklisting of workers who are active in raising awareness of the health and safety risk

MEPs have raised concerns on the practice of some employers to blacklist workers who are active in raising awareness on health and safety risks. This practice is contrary to EU law, which provides that workers or workers' representatives with special responsibility for health and safety may not be placed at a disadvantage because they consult or raise issues with the employer regarding measures to mitigate hazards or to remove sources of danger⁹⁷. It is, in first instance, for Member States to ensure that this provision is fully effective and to ensure that violations are followed-up as appropriate by the competent authorities. The Commission may intervene, in its role as Guardian of the Treaty, when there is a breach in the transposition or in the implementation of EU Law by Member States.

Social security and social assistance

The Charter recognises citizens' entitlement to social security benefits and social services providing protection in cases of maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. Member States are free to determine the details of their social security systems, including which benefits shall be provided, the conditions of eligibility, how these benefits are calculated, as well as how much contribution should be paid. European rules ensure that the application of the different national legislations respects the basic principles of equality of treatment and non-discrimination. They guarantee that migrant EU workers are treated as are national workers and that the application of the different national legislations does not adversely affect them.

The **EU Directive on the status of third-country nationals** guarantees that long-term residents shall enjoy equal treatment with citizens of the Member State as regards social security, social assistance and social protection as defined by national law. Under Article 11 (4) of that Directive, "Member states may limit equal treatment in respect of social assistance and social protection to core benefits". In a case that concerned housing benefits for a third-country national who was a long-term resident⁹⁸, the **CJEU** observed that according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. The Court concluded that in so far as the housing benefit for low income tenants at issue fulfils the purpose set out in that provision of the Charter, it has to be considered as a "core benefit" within the meaning of Article 11(4) of the Directive and therefore it has to be granted also to third-country nationals who are long-term residents in a Member State. In carrying out such assessment, national courts should take into account the objective of that benefit, its amount, the conditions subject to which it is awarded and its place in the national system of social assistance.

The Commission defended the right of third-country national seasonal workers to equal treatment with nationals of the admitting Member State in respect of social security rights, as well as, fair treatment of intra-corporate transferees and their family members

⁹⁵ Report of the Commission: on implementation by Member States of Directive 2003/88/EC ('The Working Time Directive'), COM(2010) 802 final
Available at: <http://www.ec.europa.eu/social/BlobServlet?docId=6420&langId=en>

⁹⁶ The social partners enjoy autonomy in these negotiations. The duration of this process shall not exceed 9 months, but in accordance with Article 154 (4) TFEU, the period for these negotiations has been recently extended by the Commission until the end of 2012.

⁹⁷ Council Directive 89/391/EEC 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1.

⁹⁸ CJEU, Case C-571/10, *Kamberaj*, 24.04.2012

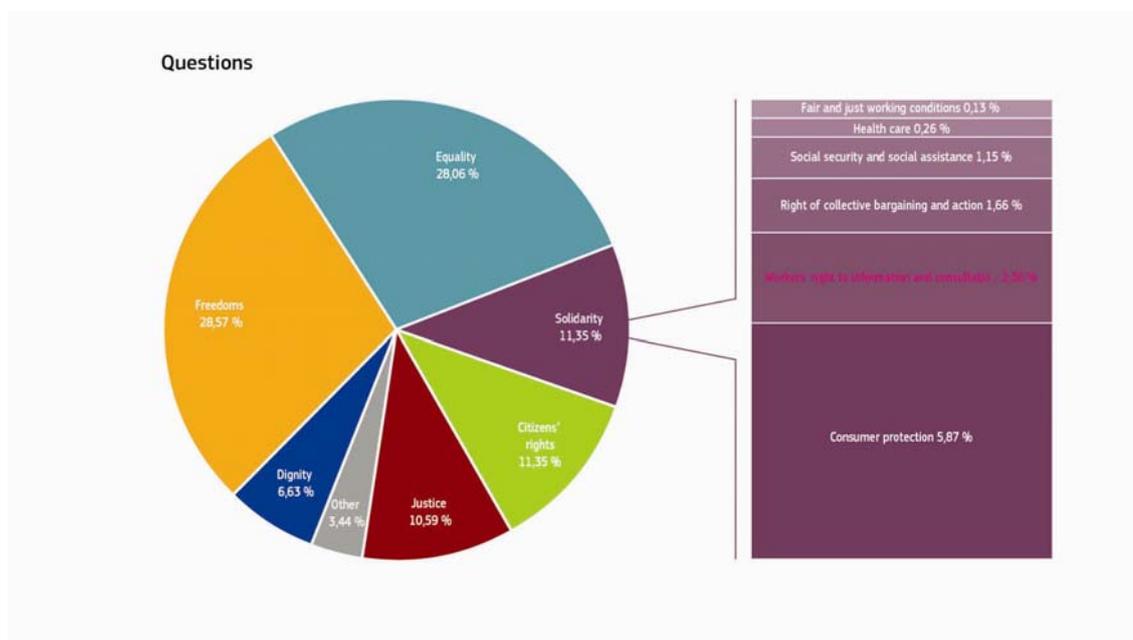
during negotiations on the reform of applicable EU rules. The Commission made the point that Member States cannot restrict third country nationals' entitlements to receiving social security benefits that are based on their own financial contributions as this would constitute a disproportionate limitation to the right to property, contrary to the Charter and the case-law of the European Court of Human rights⁹⁹. Further to this the amendments to the Commission proposals have been withdrawn.

The Commission published a policy paper that triggered a discussion on measures to prevent poverty and social exclusion in the old age, taking into account the need for gender sensitive solutions¹⁰⁰. In this context, the Commission also stressed the need to make occupational pensions transferable as not to punish those who are moving countries for professional reasons.

Health care

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

The CJEU ruled on the compatibility of **Regulation (EC) No 1924/2006 on nutrition and health claims made on foods with the freedom to choose an occupation and the freedom to conduct a business** (Articles 15(1) and 16 of the Charter of Fundamental Rights)¹⁰¹. The case concerned the ban placed by the German authorities on a wine that carried a health claim. The Court considered that the prohibition of such claims is warranted in the light of the requirement to ensure a high level of health protection in the definition and implementation of all the Union's policies and activities (Article 35 of the Charter). The CJEU considered that by highlighting only the easy digestion of the wine concerned, the claim at issue is likely to encourage its consumption and, ultimately, to increase the risks for consumers' health inherent in the immoderate consumption of any alcoholic beverage.



Environmental protection

The Charter provides for a high level of environmental protection. In line with this requirement the Commission in 2012 adopted a proposal for a new General EU Environmental Action Programme

⁹⁹ In its judgment of 16 September 1996 on the case 39/1995/545/631 (Gaygusuz), the European Court of Human Rights ruled that social security rights were property rights and that, accordingly, equality of treatment in social security is guaranteed by the European Convention for the Protection of Human Rights.

¹⁰⁰ White paper: an agenda for adequate, safe and sustainable pensions, COM(2012) 55 final.

Available at: <http://ec.europa.eu/social/BlobServlet?docId=7341&langId=en>

¹⁰¹ CJEU, Case C-544/10, *Deutsches Weintor eG v Land Rheinland-Pfalz*, 6.9.2012.

to 2020, "Living well, within the limits of our planet"^[1]. The proposed programme builds on the significant achievements of 40 years of EU environment policy, and draws on a number of recent strategic initiatives in the field of environment, including the Resource Efficiency Roadmap, the 2020 Biodiversity Strategy and the Low Carbon Economy Roadmap. It should secure the commitment of EU institutions, Member States, regional and local administrations and other stakeholders to a common agenda for environment policy action up to 2020.

While many EU Member States are struggling to cope with the economic crisis, the attendant need for structural reforms offers new opportunities for the EU to move rapidly onto a more sustainable path, while involving citizens more directly in environmental policy-making. The overall aim of the proposal is to ensure a high level of protection for the environment, notably by protecting and enhancing natural capital, encouraging more resource efficiency and accelerating the transition to the low-carbon economy, and safeguarding EU citizens from environmental causes of disease –all of which have a direct link to the way citizens interact with the environment in their everyday life. The aims of the Programme can be achieved by better implementation of existing environment legislation through efforts to ensure better provision of information on environment, improved inspections and access to justice. Full integration of environment into other policies in line with the objective of the Charter should also be achieved.

Consumer protection

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

The **Commission's "European Consumer Agenda - Boosting confidence and growth"**¹⁰², adopted on 22 May 2012 contains both principles for consumer policy in the years to come and a list of specific initiatives which aim at empowering consumers, boosting their trust and putting consumers at the heart of all EU policies in line with Article 38 of the Charter. The Consumer Agenda has four key objectives with an overall objective of creating a borderless Single Market for consumers and businesses:

- reinforcing consumer safety for goods, services and food, strengthening the regulatory framework and making market surveillance more efficient,
- enhancing knowledge through targeted consumer information and education as well as effective support to consumer organisations,
- improving enforcement and securing redress, by strengthening the role of consumer enforcement networks, and
- aligning rights and key policies to economic and societal change, inter alia by adapting consumer law to the digital age.

Following the adoption of Directive 2011/83/EU on consumer rights on 25 October 2011¹⁰³ which Member States have to transpose by 13 December 2013 and apply from 13 June 2014, the Commission, in 2012, started an active dialogue with Member States to help them in the transposition process. This new Directive will, in particular, strengthen consumers' rights when buying on the Internet. Consumers will have to be provided with essential information before they order goods or services online, including about the functionality and interoperability of digital content. The new Directive furthermore bans pre-ticked boxes when offering additional services, internet cost traps and charges of which the consumer was not informed in advance.

In particular in view of the forthcoming entry into force of the Consumer Rights Directive, one of the concrete tasks foreseen by the Consumer Agenda is the provision of guidelines regarding the application of **consumer information requirements in the digital area**. The purpose of guidelines will be to make the information obligations, which traders have vis-à-vis consumers, work effectively in practice and easily enforceable. In addition, this activity aims at

^[1] COM(2012) 710 final

¹⁰² Communication on a European Consumer Agenda - Boosting confidence and growth, COM(2012) 225 final. Available at: http://ec.europa.eu/consumers/strategy/docs/consumer_agenda_2012_en.pdf

¹⁰³ Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC, Directive 1999/44/EC 85/577/EEC and Directive 97/7/EC, OJ L 304, 22.11.2011, p.64 – 88.

achieving a better presentation of the key information on digital products, thus facilitating comparability of different offers.

Indeed, as shown by the available studies, the lack of, or the complexity and unclear/hidden character of information is a major source of problems for consumers when buying digital products. The 2012 "sweep" of websites selling digital products (games, music, video and e-books), which the national enforcement authorities conducted in coordination with the Commission also showed significant problems in this area - 76% of the tested websites showed infringements of consumer legislation. These infringements will be followed up by enforcement activities through the existing channels, such as the Consumer Protection Cooperation (CPC) network of the national consumer enforcement authorities. The ways to improve enforcement, both in cross border cases and in cases affecting a number of Member States and therefore of strong EU relevance will be the subject of the next Consumer Summit organised by the Commission on 18-19 March 2013

In parallel, the Commission worked actively to ensure the full and correct implementation of other existing consumer protection directives.

In relation to the Directive on timeshare¹⁰⁴, which was to be transposed by 23 February 2011, the Commission closed the last open infringement proceedings after all Member States notified full transposition. This new Directive, which replaced the previous Directive 94/47/EC, has considerably enhanced consumer protection in this area, particularly through more stringent rules related to the information the trader has to provide to the consumer both in the pre-contractual stages and in the contract and regarding the consumer's right of withdrawal.

In addition to two open infringement cases, a pre-infringement dialogue via EU Pilot was initiated with 24 Member States regarding the correctness of the transposition of Directive 2005/29/EC on unfair commercial practices. This Directive provides a high level of consumer protection and allows to curb a broad range of unfair business practices, such as providing untruthful information to consumers or using aggressive techniques to influence their choices. In March 2013, the European Commission published a Communication¹⁰⁵ and a Report on the application of the Directive¹⁰⁶, which outlined a series of actions to tackle misleading and aggressive commercial practices across the EU, such as fake 'free' offers, 'bait' advertising for products which cannot be supplied, and direct targeting of children.

Problems with faulty goods remained one of important concerns for consumers in 2012. This was reflected in a number of questions posed to the Commission on consumer rights under the Directive on consumer sales and associated guarantees 1999/44/EC. EU law provides that the seller is liable to the consumer for any lack of conformity which exists at the time the goods were delivered to the consumer (known as a 'legal guarantee'). A consumer who has bought a faulty product has the right to have it repaired or replaced free of charge within two years from the time of delivery. Any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery. In their correspondence, consumers in particular asked for clarifications about the burden of proof, guarantees for durable goods and after-sales services exceeding the duration of the legal guarantee.

An issue that received a particular attention in the context of the two above-mentioned Directives related to the practices of marketing by traders of paid-for warranties, which mislead the consumers as to their legal guarantee entitlement under the EU law. In light of a decision taken by a consumer enforcement authority in one Member State concerning the misleading practices of a major supplier of consumer electronics, the Commission urged the enforcers in other countries to also investigate the possible similar breaches on their territories. The Commission will continue to urge Member States to react strongly with regard to misleading practices in this area.

In 2012, several infringement proceedings were opened or continued by the Commission regarding the inadequate transposition and application of the directives on package travel,

¹⁰⁴ Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange, OJ L 33, 3.2.2009, p. 10 - 21,

¹⁰⁵ Communication on the application of Directive 2005/29/EC on Unfair Commercial Practices, COM(2013)138 final. Available at: http://ec.europa.eu/justice/consumer-marketing/files/ucpd_communication_en.pdf

¹⁰⁶ Report on the application of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, COM(2013) 139 final. Available at: http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_en.pdf

doorstep selling and unfair terms in consumer contracts. Directive 93/13/EEC on unfair terms in consumer contracts ensures that standard terms that cause a significant imbalance in terms of rights and obligations to the detriment of the consumer, are not binding on the latter. The Directive applies to all business-to-consumer contracts and was the subject of several preliminary rulings by the CJEU on the basis of requests from national courts. In particular, in a judgment of 15 March 2012 in Case C-453/10 the Court ruled that Directive 93/13/EEC on unfair terms in consumer contracts does not preclude a Member State from providing that a contract concluded with a consumer by a trader, which contains one or more unfair terms, is to be void as a whole where that will ensure better protection of the consumer. The Court also stated that indicating in a credit agreement an annual percentage rate of charge lower than the real rate must be regarded as 'misleading' within the meaning of Directive 2005/29/EC on Unfair Commercial Practices Directive in so far as it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. A number of other CJEU judgments dealt with the interpretation of Directive 97/7/EC on distance contracts, Directive 90/314/EEC on package travel and Directive 2005/29/EC on unfair commercial practices.

Supreme Administrative Court of Czech Republic¹⁰⁷

The Czech Supreme Administrative Court made reference to Article 38 of the Charter when interpreting EU legislation on television broadcasting activities, including the 2010 Audiovisual Media Services Directive. The case concerned the violation, by a Czech television broadcaster of the prohibition to broadcast TV commercials which are not clearly separate and therefore recognisable from any other parts of the programme, in order to avoid any confusion on the part of the viewer, and the alleged failure of the competent supervisory authority to notify the broadcaster of such breaches. In applying EU rules on television broadcasting activities, the Czech Court considered it essential to refer to Article 38 of the Charter, therefore affirming that the obligation to make TV commercial clearly distinguishable from other parts of the programme aims at ensuring a high level of consumer protection.

¹⁰⁷ Supreme Administrative Court of the Czech Republic (Nejvyšší správní soud České republiky), case 6 As 26/2010 – 66, FTV Prima v. Czech Council for Radio and TV Broadcasting, 17.03.2011